

Federal Court Amendment Rules 1998 (No. 2) 1998 No. 297

EXPLANATORY STATEMENT

Statutory Rule 1998 No. 297

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

Federal Court Amendment Rules 1998 (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.

Sub-section 59(4) of the *Federal Court of Australia Act 1976*, states that sections 48, 48A, 48B, 49 and 50 of the *Acts Interpretation Act 1901* which relate to the making of regulations, apply to these Rules of Court as if references to the regulations in those sections were references to Rules of Court.

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

The amendments made to the *Native Title Act 1993* by the *Native Title Amendment Act 1998*, have significantly changed the role of the Court in relation to Native Title matters. In particular, all Native Title applications from 30 September 1998 will be filed in the Federal Court rather than the National Native Title Tribunal. All applications filed with the Tribunal before 30 September 1998 will, from that date, be taken to have been made to the Federal Court.

New Order 78

Old Order 78 is replaced by new Order 78 because of the amendments to the Native Title Act mentioned immediately above, the enhanced jurisdiction of the Court and provisions in the amended Native Title Act concerning the way in which the Federal Court is to operate.

Where appropriate, and for the purpose of assisting parties before the Court and the general public to have a better and a clearer understanding of Order 78, Notes and examples regarding relevant sections of the Native Title Act and the rules are set out in Order 78.

An outline of the rules is set out below. See Division 1 of the Rules for the definition of terms used in this statement.

RULE 1 - Name of rules

This rule provides that the rules are the *Federal Court Amendment Rules 1998 (No. 2)*.

RULE 2 - Commencement

This rule provides that these rules commenced on 30 September 1998.

RULE 3 - Amendment

This rule provides that the Federal Court Rules are amended as set out in these Rules.

RULE 4 - Order 78

This Rule omits the existing Order 78, and inserts the new Order 78 providing rules to account for the Court's jurisdiction under the recent amendments made to the Native Title Act by the *Native Title Amendment Act 1998*.

RULE 5 - Schedule

5.1 This subrule omits Form 137, "Notification of Directions Hearing", as it is no longer relevant now applications are to be made or deemed to have been made in the Federal Court.

5.2 This subrule amends Form 138, "Summons to appear before assessor", as it is now referred to in subrule 39(4) in the new Order 78, not subrule 16(5).

5.3 This subrule amends Form 141, "Notice of Appeal from the National Native Title Tribunal", as it is now referred to in subrule 24(1) and 25(2) in the new Order 78, not subrule 23(1) and 24(2).

SCHEDULE

ORDER 78- NATIVE TITLE PROCEEDINGS

Division 1 - Introductory

Rule 1 - Interpretation for Order 78

Subrule 1 provides definitions for a number of terms used in Order 78.

main application

This paragraph provides that an application made under section 61 (that is, a native title determination application, a revised native title determination application or a compensation application) is referred to in Order 78 as a main application, to avoid confusion between different types of applications.

Native Title Act and Old Native Title Act

These paragraphs provide that in Order 78, the *Native Title Act 1993* prior to amendment by the *Native Title Amendment Act 1998* (ie. before 30 September 1998) is referred to as the Old Native Title Act, and the *Native Title Act 1993* on and after that date is referred to as the Native Title Act.

Registrar

This paragraph sets out the definition of 'Registrar' before and after 30 September 1998. In the Native Title Act, the Native Title Registrar is referred to simply as the 'Registrar', while in these Rules 'Registrar' refers to the Registrar of the Federal Court.

Subrule 2 provides that when a reference is made in Order 78 to the Native Title Registrar or the NNTT, this includes a reference to a State or Territory body that is an equivalent body under section 207B of the Native Title Act.

Rule 2 - Expressions used in the Native Title Act

This rule provides that unless otherwise stated, an expression used in Order 78 will have the same meaning as it has in the Native Title Act. A number of definitions used in Order 78 are found in section 253, 'Other definitions', of the Native Title Act.

Rule 3 - Application of Order 78

This rule provides that Order 78 shall apply to Native Title proceedings, and that other Rules of Court also apply where relevant and not inconsistent with Order 78. Subrule 3(3) also identifies that Order 78 applies to a recognised State/Territory body when power is delegated by the Native Title Registrar to that body under section 191 of the Native Title Act.

Rule 4 - Cultural or customary concerns

This rule provides that the Court may at any time in a proceeding before the Court, give directions and orders it considers appropriate to take account of the cultural or customary concerns of a party in a proceeding. In this regard, the Court may seek such information it considers appropriate from any party to the proceeding, to assist in its determination of orders to be made. The rule encompasses the cultural or customary concerns that the Court may consider, subject to the limitations set out in subsection 82(2) of the Native Title Act.

An example of such cultural or customary concerns which the Court may make a ruling on is set out under the Rule, namely "a ruling on the naming of recently deceased people".

Division 2 -Applications

Subdivision 1 -Applications made before 30 September 1998

Rule 5 - Applications taken to be made to the Court

This rule provides that the Registrar must, as soon as reasonably practical on or after 30 September 1998, fix a directions hearing in each matter taken to have been made to the Court as a consequence of the commencement of the *Native Title Amendment Act 1998*. The rule also provides that the Court may give directions and make orders it considers appropriate in relation to these applications.

A note to this rule assists parties with regard to applications made before 30 September 1998 and the consequences thereof by reference to Part 3 of Schedule 5 to the *Native Title Amendment Act 1998*.

Subdivision 2 -Applications made on or after 30 September 1998

Rule 6 - Main application (native title and compensation)

This rule provides that an applicant must file 2 copies of a main application including maps and other documents. The Registrar will then transfer one copy of this material to the Native Title Registrar as soon as reasonably practical after the application is filed. The rule also provides that the application must be signed, and accompanying affidavits sworn or affirmed by each person named in the application as an applicant. The Registrar must fix a directions hearing in the matter. The rule also provides that the Court may give directions and make orders it considers appropriate in relation to the application.

There are two notes to this rule, the purposes of which are to advise parties of prescribed forms under the *Native Title (Federal Court) Regulations* as to section 61 applications and also that Form 1 may be used for amending a claimant application and Forms 2 and 4 for amending non-claimant applications and compensation applications respectively.

Rule 7 - Form of amendment of main application

This rule relates to applications to amend a main application. The rule provides for the filing of two copies of the application together with maps and other accompanying documentation. As in rule 6, the rule states that as soon as practicable after filing of the application, the Registrar is to forward to the Native Title Registrar one copy of the application and accompanying documentation. Subrule 7(3) provides that the Court may give directions and make orders it considers appropriate in relation to these applications.

There are two notes to this rule the purposes of which are to assist people with regard to applications to amend and to replace an applicant, by directing them to appropriate sections of the Native Title Act.

Rule 8 - Joinder of parties to main application

Subrule 8(1) provides that this rule applies to persons who want to be a party to a main application. Subrule 8(2) sets out that if the three month period mentioned in paragraph 66(10)(c) of the Native Title Act has not ended, then a person may notify the Court in writing, stating their intention. The *Native Title (Federal Court) Regulations 1998* prescribe Form 5 as a form which may be used for such notice. Subrule 8(3) states that at the end of this three month period the Registrar must compile a list of parties to distribute to the applicant and to any other party as the Court directs and in a manner that the Court directs.

Subrule 8(4) provides that if the three month period has ended, the person seeking to be joined must seek the leave of the Court by applying to the Court. Subsection 84(5) of the Native Title Act provides that the Court may join any person as a party to a proceeding if the Court is satisfied that their interests may be affected by a determination in the proceedings. Subrule 8(5) requires notice to be given by the person seeking leave to be joined to the applicant and other parties as the Court directs. Subrule 8(6) provides, that notice that a person has been joined must be given to the applicant and to any other party that the Court directs, and in a manner that the Court directs.

The note to the rule advises parties that pursuant to subsection 84(5) of the Native Title Act the Court may at any time join a party if the Court is satisfied that their interest may be affected by a determination.

Rule 9 - Withdrawal of a party

This rule provides that a person may withdraw from a proceeding before the first hearing of the proceeding without the leave of the Court, and at any other time the party must apply to the Court for leave to withdraw.

The note to this rule assists parties with regard to withdrawal from proceedings by referring them to subsection 84(6) of the Native Title Act. The note also mentions section 66B of the Act with reference to replacing an applicant with regard to a claimant application.

Rule 10 - Applications other than main applications

This rule provides for the making of applications to the Court other than main applications. Subrule 10(2) provides that such applications will be made using the appropriate Court form, with amendments as required by the nature of the application, and accompanied by an affidavit setting out the grounds in support of the application. The note after subrule 10(2) sets out a list of applications where no form is prescribed.

Subrule 10(3) requires that an application must be signed and an accompanying affidavit sworn or affirmed by each person named in the application as an applicant. Subrule 10(4) states that unless the Court otherwise directs such an application must be served on the applicant to the main application and on the Commonwealth and each State or Territory having jurisdiction over the area to which the main application relates. Subrules 10(5) to (9) provides a method of collecting names and joining as parties people who are affected by any such application. Subrule 10(10) provides that nothing in this rule affects the right of a person to be joined to a proceeding, or for the Court to order that a person be joined as a party to a proceeding.

Rule 11 - Application to strike out main application

This rule outlines procedure for notification and conduct of an application to strike out a main application under section 84C of the Native Title Act. This section applies to main applications made before and after 30 September 1998. Subrule 11(2) requires a copy of the application to be served on the applicant to the main application, and any other party as the Court directs. Subrule 11(3) provides that the Registrar must, as soon as reasonably practicable after the application is filed, give a copy of the application and accompanying documents to the Native Title Registrar, and fix a directions hearing relating to the strike out application.

The note to this rule assists parties by reference to the appropriate item in Schedule 5 to the *Native Title Amendment Act 1998*. The note goes on to state that the Court must consider such an application for strike out before proceeding with the main application.

Rule 12 - Application for review of decision not to accept claim for registration

This rule provides that an application for review of a decision of the Native Title Registrar not to accept a claim for registration must be filed within 42 days of notification of the decision under subsection 190D(1) of the Native Title Act.

Rule 13 - Application to remove details of agreement from the Register of Indigenous Land Use Agreements

This rule sets out information required by Court in an affidavit for the purpose of dealing with an application to remove the details of an agreement from the Register of Indigenous Land Use Agreements under subsection 199C(2) of the Native Title Act.

Rule 14 - Application for order about return of, or access to, records

This rule provides that a person affected by non compliance of an order made under section 203FC of the Native Title Act regarding the return of, or access to records, must lodge an application with the Court within 42 days from when the directions take effect, or, if the directions nominate a day for completion of compliance with the directions, then 42 days from that day.

Rule 15 - Application for payment of amount held in trust

This rule provides that in an application for a direction as to payment of a trust amount under section 52 of the Native Title Act, the applicant must name any person they believe has an interest in the Court's direction as a respondent to the application.

The note to the rule sets out various relevant sections of the Native Title Act to assist parties with regard to applications to the Court for payment of trust money.

Division 3 - Reference to Court of questions of fact or law

Rule 16 - Question to be special case

This rule provides that the reference to the Court by the National Native Title Tribunal (NNTT), of a question of fact or law under section 136D of the Native Title Act, or a question of law under subsection 145(1) of that Act, must be in the form of a special case. That special case must be set out in the manner described in subrule 16(2). Subrule 16(3) provides that the Court may draw from the documents provided in subrule 16(2), any inference which might have been drawn from them if proved at trial.

Rule 17 - Special case to be prepared

This rule provides that the special case referred to in rule 16 unless the Court otherwise directs, be settled by the relevant presiding member of the National Native Title Tribunal and transmitted by the NNTT to the Registrar with the number of copies set out in the rule.

Rule 18 - Setting down for hearing

This rule provides that in the proceedings relating to the special case referred to in rule 16, the Registrar must set a date for a directions hearing and notify the NNTT and each party of that date.

Rule 19 - Party having carriage of the proceeding

This rule provides that the party having carriage of the special case referred to in rule 16 is the party who requested the referral, or if the question is referred by the NNTT of its own motion, then the party appointed by the NNTT.

Rule 20 - Court's discretion

This rule provides that nothing in Division 3 of Order 78 affects the general power of the Court to exercise its discretion in relation to cases stated and questions reserved.

Division 4 - Mediation

Rule 21 - Cessation of mediation

This rule relates to an application under subsection 86C(2) of the Native Title Act that mediation cease. Subrule 21(2) provides that the Court may not make an order to cease mediation unless it has requested and considered a report provided by the NNTT. Subrule 21(3) provides that if the NNTT fails to provide a report within one month, or other period allowed by the Court, then the Court may proceed to consider the application without the report.

The note preceding this rule is for the purpose of drawing to the attention of parties those sections of the Native Title Act, namely sections 86A, 86B and 86C which allows the Court to refer applications and proceedings, in whole or in part to the NNTT for mediation, to decide which cases should be mediated and the grounds for the Court ordering cessation of mediation.

Division 5 - Appeals from decisions or determinations of NNTT

Rule 22 - Definition for Division 5

This rule provides for a definition of "NNTT proceeding" for the purpose of Division 5 of Order 78.

Rule 23 - Application of Division

This rule states that Division 5 of Order 78 applies to an appeal to the Court from a decision or determination of the NNTT under subsection 169(1) (which relates to a question of law relating to a right to negotiate application) or subsection 169(2) (which relates to a question of law relating to registration of an indigenous land use agreement) of the Native Title Act.

Rule 24 - Instituting an appeal

Subrule 24(1) provides that an appeal to the Court from a decision or determination of the NNTT must be instituted by filing a notice of appeal in Form 141, in the District Registry in the State or Territory where the NNTT proceeding was heard. Subrule 24(2) provides that the person instituting the appeal is, for the purposes of the appeal, the applicant. Subrule 24(3) provides that every other party to the NNTT proceeding must be named as a respondent.

The note to the rule advises parties of the time within which such an appeal must be instituted pursuant to subsection 169(4) of the Native Title Act, namely 28 days or such other time as the Court may allow.

Rule 25 - Extension of time to appeal

This rule provides that an applicant may apply for an extension of time in which to institute an appeal to the Court from a decision or determination of the NNTT. Subrule 25(2) provides that such an application for an extension of time must be made by completing the relevant section of Form 141, and that the form be accompanied by an affidavit setting out the grounds for seeking such an extension of time.

Rule 26 - Serving notice of appeal

This rule requires the applicant to an appeal to the Court from a decision or determination of the NNTT, to serve a copy of the notice of appeal and supporting affidavit on each respondent (identified in subrule 24(3)), within 7 days of filing the notice or within any further period allowed by the Court.

Rule 27 - Duties of Registrar after notice of appeal is filed

This rule sets out the duties of the Registrar if a notice of appeal to the Court from a decision or determination of the NNTT is filed, including the fixing of a time for a directions hearing.

Rule 28 - Directions hearing

This rule sets out issues that the Court must consider at the directions hearing fixed by the Registrar pursuant to rule 27.

Rule 29 - Notification of hearing appeal

This rule requires the Registrar, after the directions hearing, to notify the applicant and each other party to an appeal to the Court from a decision or determination of the NNTT, of the time, date and place for the hearing of the appeal.

Rule 30 - Reference to Chief Justice for direction

This rule allows a Judge or the Registrar to refer an appeal to the Court from a decision or determination of the NNTT, to the Chief Justice for a direction as to whether the appeal should be heard by a single Judge or a Full Court.

Division 6 - Evidence

Rule 31 - Evidentiary matters generally

This rule provides that, in relation to a proceeding under the Order, the Federal Court Rules generally and the rules of evidence apply, and that the Court may make any order it considers appropriate relating to evidentiary matters. Subrule 31(3) sets out some of the types of orders the Court may make in relation to native title proceedings.

Rule 32 - Evidence of a cultural or customary subject

This rule allows for the arrangements necessary for the taking of evidence presented in a way that the Court does not traditionally take evidence, for example by way of singing, dancing or story telling. The rule states that where a party intends to present this type of evidence, it must inform the Court within a reasonable time of where, when and in what form the evidence is to be given and whether there are issues relating to confidentiality and secrecy to the whole or any part of the evidence.

Rule 33 - Documents referring to certain material

This rule provides for the treatment of documents containing information of a confidential or secret nature because of culture or custom, and provides a way that this information can be presented to the Court without prejudicing its confidentiality.

Rule 34 - Evidence given in consultation with others

This rule acknowledges that there may be circumstances in which it may be appropriate for evidence to be given by a number of witnesses at once, or for a witness to consult with other persons before answering a question in examination or cross examination. The rule allows the Court to receive such evidence, and provides that the names of people consulted during the giving of such evidence may at the direction of the Court be recorded in the transcript.

Rule 35 - Evidence given not in normal course

This rule allows evidence to be taken at a time and in a manner, other than in the normal course, that the Court directs, including during mediation.

Rule 36 - Evidence that may disclose certain information, contrary to a Court order

This rule applies where a person wishes to adduce evidence or inspect a document in a proceeding that is the subject of an order or direction by another court or tribunal, relating to the culture, genealogy, customs or traditions of Aboriginal peoples or Torres Strait Islanders. The rule provides that the party wishing to adduce the evidence or inspect the document must notify the tribunal or court, and people that may be affected by the use of the information. Subrule 36(4) states that in the rule, a reference to court or tribunal includes the Aboriginal Land Commissioner and other bodies with jurisdiction.

Rule 37 - Inspection

This rule provides for the making of orders relating to inspections of any place. The Court can request detailed information about the practical arrangements of the inspection. Subrule 37(2) sets out, without limiting, topics about which the Court may choose to make orders.

Rule 38 - Powers of Judicial Registrars

Subrule 38(1) delegates powers to Judicial Registrars, as provided for in subsection 18AB(2A) of the *Federal Court of Australia Act 1976*. Subrule 38(2) states that the delegation is in addition to the powers so delegated under Order 79.

The note to the rules assists parties with regard to the subrule 38(1) delegation by referring them to subsections 18AB(2B) and (2C) of the *Federal Court of Australia Act 1976*.

Rule 39 - Taking evidence

This rule provides that an assessor may take evidence from a party to a proceeding. Section 83 of the Native Title Act allows the Chief Justice to direct an assessor to assist the Court in relation to a proceeding, subject to the control and direction of the Court.

Subrules 39(2), (3), (4) and (5) sets out the procedure for a summons to be issued ordering a person to appear before an assessor to give evidence or produce documents.

Rule 40 - Conflict of interest

This rule provides that if an assessor becomes aware that they have or may have a conflict of interest within the meaning of subsection 37L(3) of the *Federal Court of Australia Act 1976* in relation to a proceeding, they must immediately notify the persons set out in paragraph 40(1)(a) to (d) as relevant. Subrules 40(2) and 40(3) sets out how notification is to be given.

Division 8 - Other

Rule 41 - Change of address for service

This rule sets out that a party to a proceeding must inform the Court of any change in address for service or of contact details, within 14 days of any such change.

Rule 42 - Appointment of agent

Subrule 42(1) provides that when an agent is appointed by a person in relation to a proceeding under subsection 84B(1) of the Native Title Act, the party must advise the Court in writing of the appointment, together with the agent's name, contact details and address for service, within 14 days of the appointment. Subrule 42(2) further requires the party who appointed the agent to notify the Court, in writing, of any change in the agent's details within 14 days of that change.

Rule 43 - Notice

This rule sets out how notice should be given under the Native Title Act, the Rules of Court or when ordered by the Court. Subrule 43(1) requires notice to be in the form determined by the Commonwealth Minister, or in any other form that the Court considers appropriate. Subrule 43(2) states that notice must be given by ordinary prepaid post, or in a way the Court considers appropriate. Subrule 43(3) relates to directions the Court may give to the applicant or Registrar as to the public notice of hearings.

Rule 44 - Native Title Registrar application to Court for order as to notice

This rule provides for the making of an application by the Native Title Registrar to the Court for an order as to notice under subsections 66(7) and 66A(3) of the Native Title Act. Subrule 44(1) provides that the Court may make orders as to who should be given notice, and how that notice is to be given. Subrule 44(2) provides that the Court may direct the Native Title Registrar to give additional notice as the Court considers appropriate. Subrule 44(3) states that the Registrar must enter and seal the orders, and forward them to the Native Title Registrar.

Rule 45 - Overlapping applications

This rule provides for dealing with two or more applications that may cover the same geographical area. Subrule 45(1) requires any party to an application who knows of another application that covers the same area to immediately notify the Court. Subrule 45(2) provides for the convening of a directions hearing of all the relevant applications at the same time. Subrule 45(3) states that the Court may give directions and make orders it consider appropriate to determine the future conduct of all the proceedings.

Rule 46 - Court may order adjournment for the purpose of agreement between parties

This rule sets out that the Court may make orders regarding adjournments, for the purpose of parties coming to agreement regarding certain matters, as set out in section 86F of the Native Title Act. Subrule 46(2) notes that negotiations for which an adjournment may be allowed may extend to non-native title matters. Subrule 46(3) provides for the Court to order that an adjournment end for the reasons set out in the subrule. Subrule 46(4) states that the Court's general power in relation to mediation is not limited by rule 46.

Rule 47 - Agreements regarding the practical outcomes of a native title determination

This rule provides that before the Court makes a final determination as to native title that it may, on its own initiative, or at the request of a party, direct the parties to confer. The aim and the purpose of such a direction is to assist the parties to reach agreement about the management of any aspect of the rights and interests the subject of the final determination.