

## **Federal Court Amendment Rules 1998 (No. 3) 1998 No. 323**

### EXPLANATORY STATEMENT

Statutory Rule 1998 No. 323

Federal Court Amendment Rules 1998 (No. 3)

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 sub-section 59(4) of the *Federal Court of Australia Act 1976*, 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.

#### RULE 1 - Name of rules

This rule provides that these rules are called the Federal Court Amendment Rules 1998 (No. 3).

#### RULE 2 - Commencement

This rule provides that these rules commence on gazettal.

#### RULE 3 - Amendment of Federal Court Rules.

This rule provides that the Federal Court Rules are amended as set out in Schedule 1 below.

#### SCHEDULE 1 - Amendments of Federal Court Rules

##### [1] ORDER 1, rule 4, definition of Judge

This amendment omits the term "Chief Judge" from Order 1, rule 4 of the Federal Court Rules and inserts the words "Chief Justice". The Federal Court of Australia Act 1976 was amended by the *Workplace Relations and Other Legislation Amendment Act 1996*, removing references to "Chief Judge" and replacing them with "Chief Justice". The Federal Court Rules are amended in the Federal Court Amendment Rules 1998 (No. 3) to ensure consistency with the *Federal Court of Australia Act*.

##### [2] ORDER 2, rules 1 and 2

This amendment omits the term "Chief Judge" from this rule, and inserts the words "Chief Justice", to ensure consistency with the *Federal Court of Australia Act*.

##### [3] ORDER 25, subrule 8(3)

This amendment omits the term "Chief Judge" from this rule, and inserts the words "Chief Justice" to ensure consistency with the *Federal Court of Australia Act*.

[4] ORDER 25, subrule 8(4)

This amendment omits the term "Chief Judge" from this rule, and inserts, the words "Chief Justice" to ensure consistency with the *Federal Court of Australia Act*.

[5] ORDER 34A - Evidence of expert witnesses

This new Order 34A provides for the practice colloquially named "hot tub", where experts give their evidence on the same or similar questions at the same stage in a bearing, and are able to comment on the evidence of other experts on the relevant questions.

1 Application

This subrule specifies that Order 34A does not apply to a question or matter to be tried before a jury.

2 Definitions

This subrule defines expert witness in a manner that accords with s 79 of the *Evidence Act 1995*.

3 Evidence by expert witnesses

(1) This subrule outlines the procedure by which expert witnesses shall give evidence if two or more parties to a proceeding call or intend to call expert witnesses about the same, or a similar question.

(2) This subrule sets out the directions the Court or a Judge may make in its own initiative or at the request of a party, regarding the giving of such evidence by expert witnesses:

- a) that the expert witnesses confer;
- b) that the expert witnesses produce a document identifying agreement and differences in opinion.
- c) that expert witnesses give evidence after all or certain factual evidence relevant to that question has been led, and that a party close their case in relation to that question;
- d) that each expert witness file and serve an affidavit or statement indicating any modification of any earlier opinion;
- e) that each expert witness be sworn immediately after another, and that the witnesses give evidence in an appropriate position in the courtroom, not necessarily in the witness box;
- f) that each expert witness give an oral exposition of his or her opinion on the question;
- g) that each expert witness give an opinion about the opinion of another expert witness;
- h) that the expert witnesses be examined in a certain manner or sequence; and
- i) that cross-examination or re-examination of the expert

witnesses he conducted in a certain manner.

[6] ORDER 41, paragraphs 1 (1)(a), (b), and (c)

This rule amends Order 41, paragraph 1, to remove a reference *to* the Divisions of the Court on any court document. The *Federal Court of Australia Act* was amended by the *Workplace Relations and Other Legislation Amendment Act 1996*, removing references to Divisions of the Court.

[7] ORDER 41, subrule 2(2)

This amendment omits the term "Chief Judge" from. this rule, and inserts the words "Chief Justice" to ensure consistency with the *Federal Court of Australia Act*.

[8] ORDER 46, subrules 2(2) and (4)

This amendment omits the term "Chief Judge" from this rule. and inserts the words "Chief Justice" to ensure consistency with the *Federal Court of Australia Act*.

[9] ORDER 51A, subrule 1(2)

This amendment omits the term "Chief Judge" from this rule, and inserts the word "Chief Justice" to ensure consistency with the *Federal Court of Australia Act*.

[10] ORDER 52, subrule 30(5)

This amendment omits the term "Chief Judge" from this rule, and inserts the words "Chief Justice" to ensure consistency with the *Federal Court of Australia Act*.

[11] ORDER 58, paragraph 14(1)(b)

This rule inserts removes the words "exclusive licensee" from paragraph 14(1)(b), and inserts the words "exclusive licensee or otherwise". This is to ensure that this rule corresponds with the wording of m 139(1) of the Patent Act 1990.

[12] ORDER 71, heading

This amendment is to take account of the provisions of the *Financial Sector Reform (Amendments and Consequential Provisions) Act 1998*. This *Act* amended what was known as the *Australian Securities Commission Act 1989*, to insert the words "and Investments" after the words "Securities". Therefore the Act is now known as the *Australian Securities and Investments Commission Act 1989*, and all references arc now to the Australian Securities and Investments Commission. To take account of this change in the Federal Court Rules, Order 71 is now to be headed "Corporations Law and Australian Securities and Investments Commission Law".

[13] ORDER 71, subrule 2(1), definition of ASC Law

This amendment is to take account of the change of name of the Australian Securities Commission (ASC) to the Australian Securities and Investments Commission (ASIC), by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[14] ORDER 71, subrule 2(1), definition of Commission

This amendment adds the words "and Investments" after the words "Securities" in the definition of "Commission" in the rules because of amendments to the Financial Sector Reform (*Amendments and Consequential Provisions*) Act.

[15] ORDER 71, rule 3, heading

This amendment omits the words "ASC Law" and inserts the words "ASIC Law" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act 1998*.

[16] ORDER 71, subrules 3(1) and (2),4(1) and (3) and 5(1) and (2)

This amendment omits the word "ASC" and inserts the word "ASIC" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[17] ORDER 71, paragraphs 6(2)(b) and 7(1)(b)

This amendment omits the word "ASC" and inserts the word "ASIC" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[18] *ORDER 11*, Division 17, heading

This amendment is to insert in the heading after "Securities" the words "and Investments", to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[19] ORDER 71, rule 105, heading

This amendment omits the words "ASC Law" and inserts the words "ASIC Law" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[20] ORDER 71, rule 106, heading

This amendment omits the words "ASC Law" and inserts the words "ASIC Law" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[21] ORDER 71, subrule 106(1)

This amendment omits the word "ASC" and inserts the word "ASIC" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[22] ORDER 71, rule 107, heading This amendment omits the words "ASC Law" and inserts the words "ASIC Law" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[23] ORDER 71, rule 108, heading

This amendment omits the words "ASC Law" and inserts the words "ASIC Law" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[24] ORDER 71, rule 108(1)

This amendment omits the word "ASC" and inserts the word "ASIC" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[25] ORDER 71, rule 109, heading

This amendment omits the words "ASC Law" and inserts the words "ASIC Law" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[26] ORDER 71, subrule 109(1)

This amendment omits the word "ASC" and inserts the word "ASIC" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[27] ORDER 80, Court appointed referral for legal assistance

#### 1 Interpretation

(1) This subrule identifies that the construction of Order 80 should be one which will promote and be consistent with the purpose of the Order as outlined in subrule 2 and the statements in subrules 3 and 4.

(2) This subrule identifies that the purpose of Order 80 is to facilitate the provision of legal assistance to litigants who are otherwise unable to obtain assistance, where it is in the interests of the administration of justice.

(3) This subrule contains a statement that the provision of legal assistance under Order 80 is not intended to be a substitute for legal aid.

(4) This subrule identifies that a referral under this order is no indication that the Court has formed an opinion on the merits of a litigant's case.

(5) This subrule identifies that nothing in Order 80 requires the Court to make a referral or to consider a referral under this Order.

#### 2 Definitions

This rule defines the terms "legal practitioner", "litigant", "Pro Bono Panel" and "scheme", terms used in Order 80 and having a specific meaning for the purposes of this Order.

#### 3 Pro Bono Panel

This rule provides that the Registrar may maintain a list of persons in each District Registry who have agreed to participate in the scheme as provided by Order 80.

#### 4 Referral to a legal practitioner

(1) This subrule provides for the Court or a Judge, if it is in the interests of the administration of justice, to refer a litigant to the Registrar for referral to a legal practitioner on the Pro Bono Panel.

(2) This subrule provides that the Court or Judge may take into account for the purposes of subrule 1, the means of the litigant the capacity of the litigant to obtain other forms of legal assistance, the nature and complexity of the proceeding and any other matter considered by the Court or Judge to be appropriate.

(3) This subrule provides that a referral certificate to the Registrar must be in accordance with Form 161.

(4) This subrule provides that the Registrar must attempt to arrange legal assistance by a legal practitioner on the Pro Bono Panel if a referral certificate has been issued.

(5) This subrule provides that the Registrar may only refer a litigant to a legal practitioner who has agreed to accept the referral.

## 5 Kind of assistance

This rule sets out the types of assistance for which a referral may be made; advice relating to the proceeding, representation at a hearing, drafting or settling of documents, or representation generally in a proceeding.

## 6 Provision of assistance by a legal practitioner

This rule provides that a legal practitioner must provide assistance to the litigant in accordance with the referral, if they have agreed to accept the referral. This rule is subject to rule 7.

## 7 Cessation of assistance

This rule sets out the circumstances in which a legal practitioner who has agreed to accept a referral may cease to provide legal assistance under the scheme, including ceasing to act with the leave of the Registrar. The rule requires notice to be given to the Registrar within seven days of such cessation.

## 8 Application for leave

This rule outlines the procedure for an application for leave to cease providing legal assistance to the Registrar. The application must be in writing, must briefly state the reasons for the application, must be served on the litigant and may be heard ex parte. Subrule 4 outlines the factors the Registrar must consider when deciding whether to grant leave under this rule. These factors are:

- (a) whether any practice rules governing professional conduct apply,
- (b) whether any conflict of interest may exist for the legal practitioner,
- (c) whether there is any substantial disagreement between the legal practitioner and the litigant,
- (d) any view of the legal practitioner that the litigant's case is not well-founded in fact or law, or that the litigation is an abuse of process,
- (e) whether the practitioner lacks the time to provide adequate assistance;

- (f) whether the litigant has refused or failed to pay disbursements requested under rule 10; and
- (g) any other relevant matter.

Subrule 5 specifies that an application for leave under this rule is confidential, does not form part of the proceeding under which the referral was made and

will not form part of the Court file.

## 9 Professional fees

This rule provides that, subject to rule 10, a legal practitioner must not seek or recover any professional fees or disbursements for legal assistance under

Order 80, but does allow for the recovery of disbursement, and fees if an order for costs is made in favour of the litigant who has received such assistance

under the scheme.

## 10 Disbursements

This rule provides that a legal practitioner may request the litigant to pay disbursements reasonably incurred or reasonably to be incurred by a practitioner in connection with the legal assistance.

[28] Schedule 1, forms 93C, 127 and 128

This amendment omits each mention of the "Australian Securities Commission" and inserts the words "Australian Securities and Investments Commission", to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.

[29] Schedule 1, Form 128

This amendment omits the word "ASC" and inserts the word "ASIC" to account for the amendments made by the *Financial Sector Reform (Amendments, and Consequential Provisions) Act*.

[30] Schedule 1, Form 144, subparagraph 2(b)(ii)

This amendment is to take account of amendments made to the Evidence Regulations by the Evidence Regulations (Amendment) 1998, No. 17.

Regulation 5, relating to the hearsay rule, *is* amended by the Evidence Regulations (Amendment) 1998 by amending the information that is to be contained in a notice of previous representation. For the purpose of the Federal Court, such a notice is to be in Form 144, and therefore this form has been changed accordingly.

[31] Schedule 1, Form 146, subparagraph 2(b)(ii)

Regulation 6 of the Evidence Regulations, relating to the tendency rule, is amended by the Evidence Regulations (Amendment) 1998 by amending the information that is to be contained in a notice of intention to adduce tendency evidence. For the purpose of the Federal Court, such a notice is to be in Form 146, and therefore this form has been changed accordingly.

[32] Schedule 1, Form 147, subparagraph 2(b)(ii)

Regulation 6 of the Evidence Regulations, relating to the coincidence rule is amended by the Evidence Regulations (Amendment) 1998 by amending the information that is to be contained in a notice of intention to adduce coincidence evidence. For the purpose of the Federal Court, such a notice is to be in Form 147, and therefore this form has been changed accordingly.

[33] Schedule 1, Form 161, Referral certificate

This is the certificate mentioned in Order 80, subrule 4(3). The certificate is to be completed by the Associate of the Judge who has referred the litigant to the Registrar for referral to the pro bono panel. The referral certificate requires certain information to be completed including the name of the litigant referred, the proceeding in which the referral was made, and the nature of the legal assistance for which the referral was made.

[34] Schedule 3, part 2, column 2, heading

This amendment is to change the reference from "ASC law" to "ASIC law" to account for the amendments made by the *Financial Sector Reform (Amendments and Consequential Provisions) Act*.