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Legislative Services Section,
Office of Legislative Drafting,
Attorney-General's Department

Federal Court Amendment Rules 1998 (No. 3)

Statutory Rules 1998 No. h

323

We, Judges of the Federal Court of Australia, make the following rules of court under the *Federal Court of Australia Act 1976*.

Dated h 1998.

1 December

M.E.J. BLACK C.J.
 J.F. GALLOP J.
 M.R. WILCOX J.
 P.R.A. GRAY J.
 J.C.S. BURCHETT J.
 J.A. MILES J.
 D.M. RYAN J.
 J.W. von DOUSSA J.
 M.F. O'LOUGHLIN J.
 D.F. O'CONNOR J.
 T.J. HIGGINS J.
 P.C. HEEREY J.
 D.P. DRUMMOND J.
 R.E. COOPER J.

C.J.S.M. CARR J.
M.F. MOORE J.
C.M. BRANSON J.
J.H. MATHEWS J.
K.E. LINDGREN J.
B.J.M. TAMBERLIN J.
R. SACKVILLE J.
P.D. FINN J.
R.A. SUNDBERG J.
S.R. MARSHALL J.
A.M. NORTH J.
R.N. MADGWICK J.
J.R. MANSFIELD J.
A.H. GOLDBERG J.
A.R. EMMETT J.
R.A. FINKELSTEIN J.
M.S. WEINBERG J.
J.A. DOWSETT J.
L.S. KATZ J.
P.G. HELY J.
Judges of the Federal
Court of Australia

W.G. SODEN
Registrar



Federal Court Amendment Rules 1998 (No. 3)¹

Statutory Rules 1998 No. *h*²

made under the

Federal Court of Australia Act 1976

323

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1998, *h*

Federal Court Amendment Rules 1998 (No. 3)

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Rule 1

1 Name of rules

These rules are the *Federal Court Amendment Rules 1998 (No. 3)*.

2 Commencement

These rules commence on gazettal.

3 Amendment of Federal Court Rules

Schedule 1 amends the Federal Court Rules.

Schedule 1 Amendments of Federal Court Rules

(rule 3)

[1] Order 1, rule 4, definition of *Judge*

omit

Chief Judge)

insert

Chief Justice)

[2] Order 2, rules 1 and 2

omit

Chief Judge

insert

Chief Justice

[3] Order 25, subrule 8 (3)

omit each mention of

Chief Judge

insert

Chief Justice

[4] Order 25, subrule 8 (4)

omit

Chief Judge

insert

Chief Justice

[5] After Order 34

insert

Order 34A Evidence of expert witnesses**1 Application**

This order does not apply to a question or matter to be tried before a jury.

2 Definitions

In this order:

expert witness means a person who is called, or is to be called, by a party to give opinion evidence, based on the person's specialised knowledge, based on the person's training, study or experience.

3 Evidence by expert witnesses

- (1) This rule applies if 2 or more parties to a proceeding call, or intend to call, expert witnesses to give opinion evidence about the same, or a similar, question.
- (2) The Court or a Judge may, on its own initiative or at the request of a party, direct:
 - (a) that the expert witnesses confer; or

-
- (b) that the expert witnesses produce for use by the Court a document identifying:
 - (i) the matters and issues about which their opinions are in agreement; and
 - (ii) the matters and issues about which their opinions differ; or
 - (c) that:
 - (i) the expert witnesses give evidence at trial after all or certain factual evidence relevant to the question has been led; and
 - (ii) each party intending to call 1 or more expert witnesses close that party's case in relation to the question, subject only to adducing the evidence of the expert witnesses later in the trial; or
 - (d) that, after all or certain factual evidence has been led, each expert witness file and serve an affidavit or statement indicating:
 - (i) whether the expert witness adheres to any opinion earlier given; or
 - (ii) whether, in the light of factual evidence led at trial, the expert witness wishes to modify any opinion earlier given; or
 - (e) that:
 - (i) each expert witness be sworn one immediately after another; and
 - (ii) when giving evidence, an expert witness occupy a position in the courtroom (not necessarily in the witness box) that is appropriate to the giving of evidence; or
 - (f) that each expert witness give an oral exposition of his or her opinion, or opinions, on the question; or
 - (g) that each expert witness give his or her opinion about the opinion, or opinions, given by another expert witness; or
 - (h) that the expert witnesses be cross-examined in a certain manner or sequence; or

- (i) that cross-examination, or re-examination, of the expert witnesses be conducted:
 - (i) by completing the cross-examination or re-examination of an expert witness before starting the cross-examination or re-examination of another; or
 - (ii) by putting to each expert witness, in turn, each question relevant to one subject or issue at a time, until the cross-examination or re-examination of all the witnesses is completed.

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

substitute

- (a) the District Registry where the document is filed;
and
- (b) the serial number of the proceeding.

[7] Order 41, subrule 2 (2)

omit

Chief Judge

insert

Chief Justice

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

omit

Chief Judge

insert

Chief Justice

[9] **Order 51A, subrule 1 (2)**

omit

Chief Judge

insert

Chief Justice

[10] **Order 52, subrule 30 (5)**

omit

Chief Judge

insert

Chief Justice

[11] **Order 58, paragraph 14 (1) (b)**

omit

exclusive licensee;

insert

exclusive licensee or otherwise;

[12] **Order 71, heading**

substitute

**Order 71 Corporations Law and
Australian Securities and
Investments Commission
Law**

[13] Order 71, subrule 2 (1), definition of *ASC Law**substitute*

ASIC Law has the meaning given by section 1D of the *Australian Securities and Investments Commission Act 1989*.

[14] Order 71, subrule 2 (1), definition of *Commission**after*

Securities

insert

and Investments

[15] Order 71, rule 3, heading*substitute*

**Application of Orders to proceedings under the
Corporations Law or the ASIC Law**

**[16] Order 71, subrules 3 (1) and (2), 4 (1) and (3) and 5 (1)
and (2)***omit*

ASC

insert

ASIC

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

omit

ASC

insert

ASIC

[18] Order 71, Division 17, heading

substitute

**Division 17 Australian Securities and
Investments Commission Law**

[19] Order 71, rule 105, heading

substitute

**Reference of question of law arising at a hearing
of the Commission to the Court (ASIC Law, s 61)**

[20] Order 71, rule 106, heading

substitute

Proceedings under section 70 of the ASIC Law

[21] Order 71, subrule 106 (1)

omit

ASC

insert

ASIC

[22] Order 71, rule 107, heading*substitute*

**Reference of question of law arising at a hearing
of the Corporations and Securities Panel to the
Court (ASIC Law, s 196)**

[23] Order 71, rule 108, heading*substitute*

Proceedings under section 201 of the ASIC Law

[24] Order 71, subrule 108 (1)*omit*

ASC

insert

ASIC

[25] Order 71, rule 109, heading*substitute*

Proceedings under section 219 of the ASIC Law

[26] Order 71, subrule 109 (1)*omit*

ASC

insert

ASIC

[27] After order 79

insert

Order 80 Court appointed referral for legal assistance**1 Interpretation**

- (1) In the interpretation of this order, preference must be given to a construction that will promote, and be consistent with, the purpose in subrule (2) and the statements in subrules (3) and (4).
- (2) The purpose of this order is to facilitate, where it is in the interests of the administration of justice, the provision of legal assistance to litigants who are otherwise unable to obtain assistance.
- (3) The provision of legal assistance under this order is not intended to be a substitute for legal aid.
- (4) A referral under this order is not an indication that the Court has formed an opinion on the merits of a litigant's case.
- (5) Nothing in this order requires the Court to make a referral, or to consider a litigant's case for referral, under this order.

2 Definitions

In this order:

legal practitioner means a person who is entitled to practise in a federal court as a barrister or solicitor under the *Judiciary Act 1903*.

litigant, in a proceeding, means a person who is a party to the proceeding or who has been served with an originating process, summons or subpoena in the proceeding.

Pro Bono Panel means the list of legal practitioners mentioned in rule 3.

scheme means the scheme for the provision of legal assistance to litigants under this order.

3 Pro Bono Panel

The Registrar may maintain, in each District Registry, a list of persons:

- (a) who are legal practitioners in the State or Territory where the District Registry is located; and
- (b) who have agreed to participate in the scheme.

4 Referral to a legal practitioner

- (1) The Court or a Judge may, if it is in the interests of the administration of justice, refer a litigant to the Registrar for referral to a legal practitioner on the Pro Bono Panel for legal assistance.
- (2) For subrule (1), the Court or Judge may take into account:
 - (a) the means of the litigant; and
 - (b) the capacity of the litigant to obtain legal assistance outside the scheme; and
 - (c) the nature and complexity of the proceeding; and
 - (d) any other matter that the Court, or Judge, considers appropriate.
- (3) A referral to the Registrar is effected by the issue of a Referral Certificate in accordance with Form 161 in relation to the litigant.
- (4) If a Referral Certificate has been issued, the Registrar must attempt to arrange for the legal assistance mentioned in the certificate to be provided to the litigant by a legal practitioner on the Pro Bono Panel.
- (5) However, the Registrar may refer a litigant to a particular legal practitioner only if the practitioner has agreed to accept the referral.

5 Kind of assistance

A referral may be made for the following kinds of assistance:

- (a) advice in relation to the proceeding;
- (b) representation on direction, interlocutory or final hearing or mediation;
- (c) drafting or settling of documents to be filed or used in the proceeding;
- (d) representation generally in the conduct of the proceeding or of part of the proceeding.

6 Provision of assistance by legal practitioner

Subject to rule 7, if a legal practitioner agrees to accept a referral, the practitioner must provide assistance to the litigant in accordance with the referral.

7 Cessation of assistance

- (1) A legal practitioner who has agreed to accept a referral may cease to provide legal assistance to the litigant only:
 - (a) in the circumstances set out in any practice rules governing professional conduct that apply to the legal practitioner; or
 - (b) with the written agreement of the litigant; or
 - (c) with the leave of the Registrar.
- (2) If a legal practitioner ceases to provide legal assistance to a litigant, the practitioner must inform the Registrar in writing within 7 days.

8 Application for leave

- (1) An application by a legal practitioner to the Registrar for leave to cease to provide legal assistance must be in writing and must briefly state the reasons for the application.

- (2) A copy of the application for leave must be served on the litigant.
- (3) An application for leave may be heard by the Registrar in chambers and may be heard *ex parte*.
- (4) In deciding whether to grant leave under this rule, the Registrar must consider:
 - (a) whether the legal practitioner would be likely to be able to cease to provide legal assistance to the litigant under any practice rules governing professional conduct that apply to the practitioner; and
 - (b) any conflict of interest that the legal practitioner may have; and
 - (c) whether there is a substantial disagreement between the legal practitioner and the litigant in relation to the conduct of the litigation; and
 - (d) any view of the legal practitioner:
 - (i) that the litigant's case is not well founded in fact or law; or
 - (ii) that the litigant's prosecution of the litigation is an abuse of process; and
 - (e) whether the legal practitioner lacks the time to provide adequate legal assistance to the litigant because of other professional commitments; and
 - (f) whether the litigant has refused or failed to pay any disbursements requested under rule 10; and
 - (g) any other matter that the Registrar considers relevant.
- (5) An application for leave under this rule and any related correspondence:
 - (a) is confidential; and
 - (b) is not part of the proceeding in relation to which the referral was made; and
 - (c) does not form part of the Court file in relation to that proceeding.

9 Professional fees

- (1) Subject to rule 10, a legal practitioner who provides legal assistance to a litigant under the scheme must not seek or recover any professional fees or disbursements for the legal assistance.
- (2) However, if an order for costs is made in favour of a litigant who is assisted under the scheme, the legal practitioner who has provided the legal assistance is entitled to recover the amount of fees and disbursements that another party is required to pay under the order.

10 Disbursements

A legal practitioner who provides legal assistance to a litigant under the scheme may request the litigant to pay any disbursements reasonably incurred, or reasonably to be incurred, by the legal practitioner on behalf of the litigant in connection with the legal assistance.

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

omit each mention of

Australian Securities Commission

insert

Australian Securities and Investments Commission

[29] Schedule 1, Form 128

omit

ASC

insert

ASIC

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

- (ii) the name of each person by whom, and each person to whom, the representation was made; and
- (iii) in a civil proceeding — the address of each person mentioned in subparagraph (ii).

Note On the application of a party in a criminal proceeding, the court may make an order, on the terms it considers appropriate, directing the notifying party to disclose the address of a person named in a notice of previous representation.

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

- (ii) the name of each person who saw, heard or otherwise perceived the conduct; and
- (iii) in a civil proceeding — the address of each person mentioned in subparagraph (ii).)

Note On the application of a party in a criminal proceeding, the court may make an order, on the terms it considers appropriate, directing the notifying party to disclose the address of a person named in a notice referred to in subsection 97 (1) of the *Evidence Act 1995*.

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

- (ii) the name of each person who saw, heard or otherwise perceived each event; and
- (iii) in a civil proceeding — the address of each person mentioned in subparagraph (ii).)

Note On the application of a party in a criminal proceeding, the court may make an order, on the terms it considers appropriate, directing the notifying party to disclose the address of a person named in a notice referred to in subsection 98 (1) of the *Evidence Act 1995*.

[33] Schedule 1, after Form 160

insert

Form 161 Referral certificate

(order 80, subrule 4 (3))

I, (*insert name*) , Associate to the Honourable Justice (*insert name*) , certify that on (*insert date*) his/her Honour has determined, pursuant to Order 80 subrule 4 (1), that it is in the interests of the administration of justice that the following litigant be referred for legal assistance under Order 80.

Name of litigant referred:

Proceeding number:

Proceeding title:

Nature of legal assistance for which referral made (eg to obtain advice, to appear at the hearing of the matter listed on a particular date; see O 80 r 5):

Date:

(Signature of associate)

[34] Schedule 3, Part 2, column 2, heading*substitute***Provision of the
ASIC Law****Notes**

1. These rules amend Statutory Rules 1979 No. 140, as amended by 1980 No. 87; 1982 Nos. 217 and 408; 1983 No. 264; 1984 Nos. 9 and 258; 1985 Nos. 16, 97, 168 and 227; 1986 Nos. 61, 157 and 324; 1987 Nos. 73, 174 and 197; 1988 Nos. 14, 54, 144, 217 and 306; 1989 Nos. 50, 253 and 318; 1990 Nos. 72, 102, 276, 319, 414 and 453; 1991 Nos. 70, 249, 395 and 461; 1992 Nos. 43, 44, 86, 87, 186, 330, 421 and 453; 1993 No. 40, 45, 137, 225 and 290; 1994 Nos. 63, 130, 224, 279, 332 and 463; 1995 Nos. 31, 46, 239 and 449; 1996 Nos. 29 and 308; 1997 Nos. 82, 87, 143, 174, 204, 277 and 425; 1998 Nos. 224 and 297.
2. Made by a majority of Judges of the Federal Court of Australia on
 \wedge 1998, and notified in the *Commonwealth of Australia*
Gazette on \wedge 1998

1 December
7 December