

# **Federal Court Amendment Rules 1999 (No. 6) 1999 No. 295**

## **EXPLANATORY STATEMENT**

### **Statutory Rule 1999 No. 295**

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

Federal Court Amendment Rules 1999 (No. 6)

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 the rules are the Federal Court Amendment Rules 1999 (No. 6).

#### **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.

### **SCHEDULE 1 - Amendments**

#### **Service outside the jurisdiction**

[1] Order 8, rule 11

Order 8 deals with the service of judicial documents outside the Commonwealth of Australia.

Order 8 rule 11 has been amended to allow into evidence certificates as to service or attempted service or non-service made by an authorised employee (being an employee of the Commonwealth or the Australian Trade Commission authorised for the purpose of paragraph 3(c) or (d) of the Consular Fees Act 1955) in the country concerned. The amendment was adopted in light of proposed changes to section 45(2)(c) of the Federal Court of Australia Act 1976 (Cth) which will allow officers authorised under section 3(c) or (d) of the Consular Fees Act 1955 to witness the swearing of affidavits.

Order 8 rule 11 was also amended so that British consular authorities are no longer able to make certificates as to service or attempted service or non-service of judicial documents in an overseas country.

## Discovery

[2] Order 15, rule 2

Order 15 sets out the rules for the discovery and inspection of documents. Discovery is the process where a party requires another party to file and serve a list of documents relating to matters in question in the proceeding. As the rule did not prescribe the types of documents that must be discovered, this was determined in accordance with the general law unless the Court ordered otherwise. Under the general law, a party giving discovery must provide documents which contain information which, although not necessarily evidence, may directly or indirectly enable the party requiring discovery to advance its case or damage that of its adversary. The Court could make orders limiting the documents or classes of documents to be discovered.

The amendment replaces Order 15 rule 2 with a new rule 2. The new rule sets out the types of documents that must be discovered unless the Court orders otherwise. The aim of the rule is to limit the documents that must be discovered to those which are directly relevant to the proceedings.

Order 15 subrule 2(1) provides that a party required to give discovery must do so within the time specified in the notice of discovery (not being less than 14 days after service of the notice on the party) or within such time as the Court or a Judge directs.

Order 15 subrule 2(2) provides that a party must give discovery by filing and serving a list of documents that must be disclosed and an affidavit verifying the list.

Order 15 subrule 2(3) sets out the documents that must be disclosed. These are any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given:

- (a) documents on which the party relies;
- (b) documents that adversely affect the party's own case;
- (c) documents that adversely affect another party's case;
- (d) documents that support another party's case; and
- (e) documents that the parties are required by a relevant practice direction to disclose.

In addition, Order 15 subrule 2(3) preserves the power of the Court to make orders under Order 15 rule 3 limiting the documents or classes of documents to be discovered. It also preserves Order 15 rule 7, which provides that a party may not, without the leave of the Court, claim privilege from production of any document on the ground that it relates solely to and does not tend to impeach his or her own case and does not relate to or tend to support the case of any opposing party.

Order 15 subrule 2(4) provides that a document need not be disclosed if the party giving discovery reasonably believes that the document is already in the possession, custody or control of the person seeking discovery.

Order 15 subrule 2(5) sets out the matters which a party may take into account when making a reasonable search for the documents set out in subrule (3). These matters are:

- (a) the nature and complexity of the proceedings; and

- (b) the number of documents involved; and
- (c) the ease and cost of retrieving a document; and
- (d) the significance of any document likely to be found; and
- (e) any other relevant matter.

Order 15 subrule 2(6) provides that the list of documents must include a statement of any categories or classes of documents which the party giving discovery did not search for and the reason why no search was made.

[3] Order 15, subrule 6(1)

Order 15 rule 6 sets out the form and content of the list of documents required by or under Order 15. The amendment to subrule 6(1) provides that the list must conform with Form 22 unless the Court otherwise orders.

### **Vexatious litigants**

[4] Order 21, rule 1

Order 21 rule 1 provided that the Court may make orders against a person (called the vexatious litigant) who institutes vexatious proceedings in the Court. The orders could only be made upon the application of the Attorney-General or Solicitor-General of the Commonwealth or of a State or Territory, or upon the application of the Registrar of the Court. In addition, the rule only applied to a person who had habitually and persistently instituted, without reasonable excuse, proceedings in the Court.

The amendment substitutes a new rule 1 which extends the Court's ability to deal with vexatious litigants by allowing the Court to make orders on its own motion, and to have regard to any vexatious proceeding instituted in the Court or any other Australian court.

### **Ex parte applications prior to the commencement of proceedings**

[5] & [6] Order 25, rule 1

Order 25 rule 1 allowed the Court to make certain orders prior to the commencement of a proceeding. The rule has been amended by inserting a new subrule 1(2) which provides that a person making an application for such orders must give an undertaking to the Court to file an originating process commencing a proceeding in respect of the subject matter of the application within 14 days of determination of the application.

### **Time limits on service of subpoenas**

[7] Order 27, after subrule 8(4)

This amendment inserts a new subrule 8(4A) which provides that, where a subpoena requires attendance or production or both on a specified date, the subpoena may not be served later than 5 days before the date unless the Court otherwise orders. The aim of the amendment is to preventing subpoenas from being served too close to their return dates.

### **Court appointed expert assistants**

[8] Order 34B

This amendment inserts a new Order 34B which permits the Court, with the agreement of the parties, to appoint an expert to sit with the Court where necessary and to advise it on specified issues. The aim of the new rule is to establish a mechanism whereby the Court can obtain expert assistance with the parties' consent.

Order 34B rule 1 provides that the order does not apply to questions or matters which are to be tried by a jury.

Order 34B subrule 2(1) allows the Court or a Judge to appoint an expert as an expert assistant to assist the Court on any issue of fact or opinion identified by the Court or Judge in the proceeding. The appointment may be made at any stage of the proceeding but must be with the consent of the parties. An expert assistant can not assist the Court with any issue involving a question of law.

Order 34B subrule 2(2) provides that a person who has given, or who is going to give, evidence for a party in the proceeding can not be appointed as an expert assistant in the proceeding.

Order 34B subrule 2(3) defines "expert" as a person who has specialised knowledge based on his or her training, study or experience.

Order 34B subrule 3(1) provides that an expert assistant must give the Court a written report and must deal only with the issues identified by the Court or Judge.

Order 34B subrule 3(2) allows the Court or a Judge, with the parties' consent, to direct an expert assistant to make other comments in the report.

Order 34B subrule 3(3) requires the expert assistant to state in the report each issue identified by the Court or Judge, and to give a copy of the report to each party.

Order 34B subrule 3(4) provides that each party must have a reasonable opportunity to comment on the report. The Court may also allow a party to adduce evidence, or further evidence, in relation to an issue identified in the report. However, an expert assistant can not be examined or cross-examined by a party.

Order 34B subrule 3(5) prevents a party from communicating, directly or indirectly, with an expert assistant about any issue to be reported on, without the leave of the Court or a Judge.

Order 34B subrule 3(6) provides that an expert assistant must not give evidence in the proceeding.

Order 34B rule 4 provides that the Court may make an order for the payment of an amount for the reasonable remuneration and expenses of the expert assistant, including an order that the amount be paid by two or more parties jointly.

### **Amendments to forms in Schedule 1 to the Court's rules**

[9] Schedule 1, Form 22

Form 22 is the List of Documents that must be filed by a person giving discovery under Order 15. The amendment alters Form 22 so that the documents that must be listed in it are consistent with the new Order 15 subrule 2(3).

[10] Schedule 1, Form 131

The amendment simplifies the process whereby a person may opt-out of a grouped proceeding under Part IVA of the Federal Court of Australia Act 1976 (Cth). Under the amendment, a person who completes a Form 131 "Notice of Opting Out by Group Member" need only lodge it with the Court. The amendment means that a copy of the Form no longer needs to be sent to the solicitor for the Applicant and the solicitor for the Respondent. The parties to the proceedings and their representatives can check with the Court to determine what notices have been received.

### **Amendment to Schedule 2 to the Court's rules**

[11] Schedule 2

Schedule 2 sets out the costs that solicitors are allowed in respect of work done and services performed in Federal Court proceedings. The amendment gives effect to the 15th Report of the Federal Costs Advisory Committee which recommended that the allowable costs be increased by 4 per cent.