

EXPLANATORY STATEMENT

Select Legislative Instrument 2005 No. 183

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

Federal Court Amendment Rules 2005 (No. 1)

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 subsection 59 (4) of the *Federal Court of Australia Act 1976*, the *Legislative Instruments Act 2003* (other than sections 5, 6, 7, 10, 11 and 16 of that Act) applies in relation to rules of court made by the Court under the *Federal Court of Australia Act 1976* or another Act:

- (a) as if a reference to a legislative instrument were a reference to a rule of court; and
- (b) as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Judges of the Court; and
- (c) subject to such further modifications or adaptations as are provided for in regulations made under section 59A of the *Federal Court of Australia Act 1976*.

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

The Judges have agreed to amend the Federal Court Rules to:

- support a new system for processing documents lodged with the Court through its electronic filing system;
- make it clear that any application made to the Court in its appellate jurisdiction which may be heard and determined by a single Judge will be heard and determined by a single Judge unless the Chief Justice directs otherwise or the application is made in a proceeding that has already been assigned to a Full Court;
- provide that, if leave to appeal has been granted, the Full Court hearing the appeal may revoke the leave to appeal (wholly or in part), impose conditions on the leave to appeal or vary any conditions of the leave to appeal;
- provide that a respondent to an appeal under section 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act') must file any cross-appeal within the time limits prescribed by subsection 44 (2A) of the AAT Act;
- exempt proceedings under the *Admiralty Act 1988* (Cth) from the operation of Order 62 rule 36A, which provides for the reduction in the amount of costs (including disbursements) that might be recovered in certain proceedings;
- provide that the time for making an objection to a costs estimate pursuant to Order 62 paragraph 46 (3) (c), or for refusing a provisionally taxed bill of costs and requiring a full taxation pursuant to Order 62 paragraph 46 (4) (c), will be 21 days from the date on which the notice of the estimate or the photocopy of the provisionally taxed bill (as the case may be) is issued by the taxing officer;

- provide that a taxing officer has power to make a costs order against a party in respect of a part or all of the taxation process notwithstanding that the party is successful in obtaining a variation of at least 15 per cent of the estimate of taxed costs or of the amount provisionally taxed in that party's favour;
- provide that, where a party has filed a notice of objection to a costs estimate and withdraws the objection before the taxation or provisional taxation is finalised, the amount of the estimate is the amount for which a certificate of taxation may issue and the party who filed the notice of objection shall bear the costs of taxation of all parties from the date of service of the notice of objection to the date of notification of the withdrawal;
- replace Orders 69 and 69A and the associated forms with new Orders 69 and 69A and forms to more accurately reflect the legislative regime for Trans-Tasman proceedings under Part IIIA of the *Federal Court of Australia Act 1976* (Cth) and the *Evidence and Procedure (New Zealand) Act 1994* (Cth);
- amend the amount of costs prescribed by item 24 of Schedule 2 to the Rules.

The amendments have been the subject of consultation with the Law Council of Australia.

Details of the Rules are in **Attachment 1**.

The Rules commence on the day after they are registered.

Federal Court Amendment Rules 2005 (No. 1)**RULE 1 Name of rules**

This rule provides that the Rules are to be cited as the *Federal Court Amendment Rules 2005 (No 1)*.

RULE 2 Commencement

This rule provides that these Rules commence on the day after they are registered.

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**Filing and lodging by electronic communication**

[1] Order 1, subrule 5AC (5)

Order 1 rule 5AC deals with the filing and lodging of a document by electronic communication. Subrule 5AC (5) sets out how a document that is lodged electronically (“an electronic document”) is to be processed by the Registry.

The amendment replaces the existing subrule 5AC (5) with a new subrule 5AC (5) and subrule 5AC (5A). The effect of the new subrule 5AC (5) is to provide that, if an electronic document is required by the Rules to be signed or stamped, and is accepted at the Registry, the Registrar must:

- (a) if the document must, under the Rules, be endorsed with a date for a hearing – insert a notice of filing and hearing in accordance with form 173 as the first page of the document;
- (b) for any other document – insert a notice of filing in accordance with form 174 as the first page of the document.

Paragraphs (c), (d) and (e) in the new subrule 5AC (5) are the same as paragraphs (a), (b) and (c) in the current subrule and deal with the copying and return of the filed document to its sender.

The notices referred to in paragraphs (a) and (b) of the new subrule 5AC (5) will help streamline the processing of electronic documents. At present, the Court uses an “Electronic Stamper” program to process documents filed in accordance with rule 5AC. The Electronic Stamper is used by registry staff to ‘paste’ one or more ‘stamps’ (which include information such as file number, dates and addresses etc) on the relevant page of the electronic document. A new program, using the notices prescribed in the new subrule 5AC (5), will automate the application of most of these stamps to the electronic document.

The new subrule 5AC (5A) provides that the notices prescribed by the new paragraphs 5AC (5) (a) and (b) do not apply in relation to a subpoena. Subpoenas are

almost always addressed to third parties who do not have an interest in, and may have little or no knowledge of, the litigation. Accordingly, the notices will not be used in relation to subpoenas so as to avoid any risk of confusion. Other arrangements will be made for the processing and issuing of subpoenas lodged by electronic communication.

Documents

[2] Order 41, after rule 7

This amendment inserts a new Order 41 rule 8.

Order 41 rule 8 provides that, where a document has been filed electronically and a notice has been inserted as the first page of the document in accordance with Order 1 paragraph 5AC (5) (a) or (b), the notice is deemed to be part of the document for the purposes of the Act and these Rules (including any rules concerning service of the document).

The amendment ensures that the use of the notices prescribed by the new Order 1 paragraphs 5AC (5) (a) and (b) is consistent with the ‘sealing and signing’ requirements for court documents under section 37 of the *Federal Court of Australia Act 1976* (Cth) and the Federal Court Rules. In particular, Order 41 rule 8 ensures that:

- the Registrar’s signature applied electronically to the notice satisfies paragraph 37 (1) (b) of the Act; and
- the information that is usually inserted by the registry in the ‘Notice of Hearing’ section of a prescribed form may be provided in the notice.

Appeals – exercise of appellate jurisdiction by a single Judge

[3] Order 52, after rule 2, before Division 1

The amendment inserts a new Order 52 rule 2AA.

Subsection 25 (2) of the *Federal Court of Australia Act 1976* (Cth) provides for certain interlocutory applications in the appellate jurisdiction to be heard and determined by a single Judge or by a Full Court. The new rule 2AA makes it clear that such an interlocutory application will be determined by a single judge unless the Chief Justice directs otherwise or the application is made in a proceeding that has already been assigned to a Full Court.

Leave to appeal from interlocutory judgments of the Court

[4] Order 52, subrule 10 (2)

The amendment replaces Order 52 subrule 10 (2) with a new subrule 10 (2).

The effect of the amendment is to remove any suggestion that the applicant for leave to appeal is entitled to choose whether the application for leave to appeal is to be heard and determined by a single Judge or by a Full Court. Pursuant to the new Order 52 rule 2AA (see item [3] above), an application for leave to appeal will be determined by a single judge unless the Chief Justice directs otherwise or the application is made in a proceeding that has already been assigned to a Full Court.

[5] Order 52, after rule 10

The amendment inserts a new rule 10A which provides, inter alia, that if leave to appeal has been granted the Full Court hearing the appeal may:

- revoke the leave to appeal, wholly or in part;
- impose conditions on the leave to appeal; or
- vary any conditions of the leave to appeal.

Administrative Appeals Tribunal Act 1975 – Notice of cross-appeal

[6] Order 53, subrule 13 (1)

Order 53 deals with appeals under section 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act') from decisions of the Administrative Appeals Tribunal.

Order 53 subrule 13 (1) provides, inter alia, that a respondent who desires to appeal from a decision, or a part of a decision, from which the applicant has appealed must file a notice of cross-appeal within 21 days of the service upon the respondent of the notice of appeal.

The amendment replaces subrule 13 (1) with a new subrule which ensures that the time within which a notice of cross-appeal must be filed is consistent with the time limits prescribed by subsection 44 (2A) of the AAT Act .

Reduction of costs otherwise allowable

[7] Order 62, subrule 36A (3)

Order 62 rule 36A provides for a reduction in the amount of costs (including disbursements) that might be recovered in certain proceedings.

Order 62 subrule 36A (3) currently provides, inter alia, that the rule does not apply to proceedings commenced before 21 September 1987. As there are no matters commenced before 21 September 1987 that are still current in the Court this subrule is no longer necessary.

The amendment replaces subrule 36A (3) with a new subrule to the effect that rule 36A does not apply to a proceeding under the *Admiralty Act 1988* (Cth). The new subrule acknowledges the special circumstances touching the Admiralty jurisdiction, particularly in cases where the amount of the claim may be relatively small but the complexity of the issues makes it necessary to litigate in the Court.

Costs – Assessment procedures

[8] Order 62, paragraph 46 (3) (c)

Under Order 62 subrule 46 (3), a taxing officer may, in the absence of the parties and without making any determination on the individual items in a bill of costs, make an estimate of the approximate total for which, if the bill were to be taxed, the certificate of taxation would be likely to issue. Each party is sent a written notification of the estimate.

Pursuant to the existing paragraph 46 (3) (c), a party has 14 days from receipt of notice of the estimate to file and serve an objection to the estimate. There are concerns that use of the phrase ‘receipt of notice’ in Order 62 paragraph 46 (3) (c) has the potential to cause uncertainty as to when the time for making an objection to an estimate should begin to run.

The amendment removes that uncertainty by replacing paragraph 46 (3) (c) with new paragraphs (c), (ca) and (cb). The new paragraph (c) provides that the a party may, within 21 days after the date of issue of a notice of estimate, file and serve a notice of objection to the estimate. That is, the time begins from the date on which the notice is issued. Paragraph (ca) provides that if there is no notice of objection then the amount of the estimate is deemed to be the amount for which a certificate of taxation may be issued. Paragraph (cb) provides, inter alia, that a party may apply to the Court to set aside a certificate of taxation if the party did not receive notice of the estimate.

[9] Order 62, paragraph 46 (4) (c)

Under Order 62 subrule 46 (4), a taxing officer may, in the absence of the parties, provisionally tax a bill of costs. Each party is sent a photocopy of the provisionally taxed bill. Pursuant to the existing paragraph 46 (4) (c), a party has 21 days from receipt of the photocopy to file and serve a notice requiring a full taxation. There are concerns that use of the phrase ‘receipt of a photocopy’ in Order 62 paragraph 46 (4) (c) has the potential to cause uncertainty as to when the time for seeking a full taxation should begin to run.

The amendment removes that uncertainty by replacing paragraph 46 (4) (c) with new paragraphs (c), (ca) and (cb). The new paragraph (c) provides that the a party may, within 21 days after the date of issue of the photocopy of the provisionally taxed bill, file and serve a notice requiring a full taxation. That is, the time begins from the date on which the photocopy is issued. Paragraph (ca) provides that if there is no notice requiring a full taxation then the amount at which the bill was provisionally taxed is deemed to be the amount for which a certificate of taxation may be issued. Paragraph (cb) provides, inter alia, that a party may apply to the Court to set aside a certificate of taxation if the party did not receive a photocopy of the provisionally taxed bill.

[10] Order 62, subrule 46 (4A)

Order 62 subrule 46 (4A) currently provides, inter alia, that if a notice of objection is filed under paragraph 46 (3) (c), or a notice requiring a full taxation is filed under paragraph 46 (4) (c), the party filing the notice shall bear the costs of taxation of all parties from the date of filing the notice unless, on taxation, there is obtained in that party’s favour a variation of at least 15 per cent of the estimate of taxed costs or of the amount provisionally taxed.

However, there are circumstances where it may not be appropriate for a party to have the benefit of subrule 46 (4A), such as where the party has refused an offer of compromise or the party’s conduct has led to the other parties incurring unnecessary costs.

The amend addresses this concern by replacing subrule 46 (4A) with new subrules (4A), (4B) and (4C).

The new subrule (4A) is in similar terms to the existing subrule but makes it subject to any order made under the new subrule (4B). Subrule (4B) provides that the taxing officer may order that the costs of all or part of the taxation from the date of filing the notice be paid by a party, including a party who has obtained in that party's favour a variation of at least 15 per cent of the estimate of taxed costs or of the amount provisionally taxed. Subrule (4C) provides that, in considering whether to make an order under subrule (4B), the taxing officer may have regard to any relevant matter including:

- any offer of compromise as to costs;
- any conduct by a party that added to the duration or cost of the taxation.

[11] Order 62, subrule 46 (6A)

Order 62 subrule 46 (6A) currently provides that if:

- (a) the party who filed the notice of objection withdraws the notice of objection before the taxation or provisional taxation is completed; or
- (b) 21 days have passed after notification by the Registrar to the parties of a completed taxation or provisional taxation under this rule and no party has objected to that taxation;

the Registrar, having regard to the liability of any party to pay the costs of the taxation under this rule, must:

- (c) determine how the amount paid under paragraph (3) (d) as security for the costs of taxation is to be distributed or refunded to the parties; and
- (d) direct that payment be made out of Court accordingly.

The amendment replaces subrule 46 (6A) with new subrules (6A) and (6B). The main purpose of the amendment is to provide that when a notice of objection to an estimate is withdrawn before the taxation or provisional taxation is completed:

- the amount of the estimate of costs is the amount for which a certificate of taxation may be issued; and
- the party who withdraws the notice of objection must bear the costs of taxation of all parties from the date of service of the notice of objection to the date of notification of the withdrawal.

The new subrule 46 (6A) provides that if a party who filed a notice of objection withdraws the notice of objection before the taxation or provisional taxation is completed:

- (a) the amount of the estimate is the amount for which a certificate of taxation may issue;
- (b) the party who filed the notice of objection shall bear the costs of taxation of all parties from the date of service of the notice of objection to the date of notification of the withdrawal; and
- (c) the Registrar, having regard to the liability of any party to pay the costs of the taxation under this rule, must:
 - (i) determine how the amount paid under paragraph (3) (d) as security for the costs of taxation is to be distributed or refunded to the parties; and
 - (ii) direct that payment be made out of Court accordingly.

The new subrule 46 (6B) provides that if 21 days have passed after notification by the Registrar to the parties of a completed taxation or provisional taxation under this rule and no party has objected to that taxation, the Registrar, having regard to the liability of any party to pay the costs of the taxation under this rule, must:

- (i) determine how the amount paid under paragraph (3) (d) as security for the costs of taxation is to be distributed or refunded to the parties; and
- (ii) direct that payment be made out of Court accordingly.

Trans-Tasman Market Proceedings Rules and Trans-Tasman Proceedings Rules

[12] Orders 69 and 69A

Order 69 sets out the rules of Court in relation to proceedings mentioned in Part IIIA of the *Federal Court of Australia Act 1976* (Cth), which deals with proceedings brought under certain provisions of the *Trade Practices Act 1974* (Cth) for misuse of Trans-Tasman market power. Part IIIA provides for the exercise in New Zealand of jurisdiction by the Federal Court, the exercise in Australia of jurisdiction by the High Court of New Zealand, the taking of evidence by the Federal Court for the High Court of New Zealand, the enforcement of judgments of the High Court of New Zealand in Australia, and related matters. Order 69 was inserted in the Rules in 1990

Order 69A sets out the rules of Court in relation to proceedings to which the *Evidence and Procedure (New Zealand) Act 1994* (Cth) applies. Order 69A was inserted in the Rules in 1995.

The amendment replaces Orders 69 and 69A with new Orders 69 and 69A. The new Orders reflect the legislative regime as it now operates under Part IIIA of the *Federal Court of Australia Act 1976* (Cth) and the *Evidence and Procedure (New Zealand) Act 1994* (Cth).

The new Order 69 continues to deal with proceedings mentioned in Part IIIA of the *Federal Court of Australia Act 1976* (Cth). The Order contains rules in relation to the conduct of Trans-Tasman market proceedings and the registration in the Federal Court of judgments of the High Court of New Zealand. It does not contain the rules on subpoenas that were set out in the old Order 69. Subpoenas in Part IIIA proceedings are covered by the *Evidence and Procedure (New Zealand) Act 1994* (Cth) and Order 69A.

The new Order 69A continues to deal with proceedings to which the *Evidence and Procedure (New Zealand) Act 1994* (Cth) applies. The Order contains rules in relation to

- the service of an Australian subpoena in New Zealand;
- setting aside an Australian subpoena served in New Zealand;
- complying with an Australian subpoena served in New Zealand;
- failure to comply with an Australian subpoena served in New Zealand;
- enforcement in Australia of orders made by a New Zealand court;
- use of video links or telephones in Australian proceedings.

Amendments to Schedule 1 to the Federal Court Rules

[13] Schedule 1, Forms 66 to 72B

This amendment replaces forms 66 to 72B with new forms 69A, 69AB and 69AC. The amendment is consequential upon the new Orders 69 and Order 69A (see item [12] above).

Forms 66, 68, 69, 70, 71 and 72 are prescribed forms in relation to an Australian proceeding as defined in the *Trade Practices Act 1974* (Cth). These forms deal with subpoenas (forms 66, 68 and 69), the Certificate of Non-Compliance with Subpoena (form 70), Request for Issue of Warrant for Arrest of Person in Contravention of Court Order (form 71) and Request for an Order for Costs Occasioned by a Contravention of a Court Order (form 72). These forms are no longer necessary as the matters that they address are now dealt with in the *Evidence and Procedure (New Zealand) Act 1994* (Cth) and the new Order 69A.

Forms 66A, 68A and 69A are the prescribed forms of subpoena for proceedings to which the *Evidence and Procedure (New Zealand) Act 1994* (Cth) applies. These forms have been consolidated into the new Form 69A.

Form 67 is the prescribed form for the Statement of Rights of Person Named in Subpoena. This Statement has been incorporated in the new Form 69A.

Form 70A is the prescribed form for a Certificate of Non-Compliance with Subpoena in a proceeding to which the *Evidence and Procedure (New Zealand) Act 1994* (Cth) applies. It is replaced by the new form 69AB.

Form 71A is the prescribed form for a Request for Punishment of Person Contravening Order in a proceeding to which the *Evidence and Procedure (New Zealand) Act 1994* (Cth) applies. It is replaced by the new form 69AC.

Form 72A is the prescribed form for an Objection to Determination Without Hearing in a proceeding to which the *Evidence and Procedure (New Zealand) Act 1994* (Cth) applies. The form was prescribed by the old Order 69A subrule 7 (7) which has not been retained in the new Order 69A. Accordingly, there is no need to retain the form.

Form 72B is the prescribed form for a Request for Hearing by Video Link or Telephone in a proceeding to which the *Evidence and Procedure (New Zealand) Act 1994* (Cth) applies. It is replaced by the new form 69AD.

[14] Schedule 1, after Form 169

This amendment inserts the following forms:

- Form 170 Application for Registration of a New Zealand Judgment under the Federal Court of Australia Act 1976 – this form is inserted consequential upon the new Order 69 subrule 11 (1) (see item [12] above);
- Form 171 Order for Registration of New Zealand Money Judgment – this form is inserted consequential upon the new Order 69 subrule 11 (7) (see item [12] above);
- Form 172 Order for Registration of New Zealand Non-money Judgment – this form is inserted consequential upon the new Order 69 subrule 11 (1) (see item [12] above);
- Form 173 Notice of Filing and Hearing – this form is inserted consequential upon the new Order 1 subrule 5AC (5) (see item [1] above);
- Form 174 Notice of Filing – this form is inserted consequential upon the new Order 1 subrule 5AC (5) (see item [1] above).

Amendment to Schedule 2 to the Federal Court Rules

[15] Schedule 2, item 24

Schedule 2 sets out the costs that solicitors are allowed in respect of work done and services performed in Federal Court proceedings.

This amendment changes the amount for item 24 of the Schedule to \$64. It corrects an error in the change to item 24 of the Schedule 2 that was made by Federal Court Amendment Rules 2004 (No. 5).