

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 191

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

Federal Court Amendment Rules 2010 (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 by:

1. amending Orders 1, 10, 32, 46, 52, 53, 62 and 72, inserting a new Order 32A, amending Schedule 3 and making consequential changes in light of the amendments made to the *Federal Court of Australia Act 1976* (the Act) by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (the Reforms Act);
2. omitting Order 1 subrule 5AC (5A) so that subpoenas lodged electronically are dealt with in the same manner as other court documents lodged electronically;
3. amending Order 8 paragraph 3 (2) (c) to clarify that an applicant need establish a prima facie case for only one of the grounds of relief mentioned in an application for the purpose of obtaining leave to serve the application outside Australia;
4. amending Order 13 rules 2 and 3 to clarify certain rules dealing with the amendment of court documents and pleadings;

5. amending Order 35 subrule 7 (2) to make it clear that the Court may set aside an order that an application in the appellate jurisdiction be dismissed for failure of the applicant to attend a hearing relating to the application;
6. amending Order 37 rule 9 and Schedule 1 to prescribe a form for a warrant of committal in relation to a contempt and a form for a warrant of committal for an offence;
7. amending Order 63 rules 2 and 3 and subrule 5 (2) to provide that a single account is to be used by the Court for the Litigants' Fund;
8. amending the prescribed form for an application to commence a proceeding (Form 5) to remove the words 'The statement is not taken to be part of the pleading' and to require an applicant to include details of any Act upon which the relief claimed may depend;
9. amending Form 129 to correct a typographical error;
10. omitting Order 35 rule 7A and replacing Order 35 rule 8 to adopt the harmonised rules on interest rates on judgment as recommended by the Council of the Chief Justices' Discount and Interest Rate Harmonisation Committee.

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

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

The amendment mentioned in item 10 above will commence on 5 July 2010. All of the other amendments will commence on the day after they are registered on the Federal Register of Legislative Instruments.

Federal Court Amendment Rules 2010 (No. 1)

RULE 1 Name of rules

This rule provides that the Rules are to be cited as the *Federal Court Amendment Rules 2010 (No. 1)*.

RULE 2 Commencement

This rule provides that these Rules commence as follows:

- Rules 1 to 3 and Schedule 1 – on the day after they are registered; and
- Schedule 2 – on 5 July 2010.

RULE 3 Amendment of Federal Court Rules

Schedules 1 and 2 amend the Federal Court Rules.

SCHEDULE 1

[1] Order 1, rule 4, definitions of *legal practitioner* and *solicitor*

Order 1 rule 4 sets out the meaning of various terms used in the Federal Court Rules.

This amendment omits the definition of '*legal practitioner*' as it is no longer necessary given the amendment to section 4 of the *Federal Court of Australia Act 1976* (the Act) by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (the Reforms Act). This amendment inserts into the Act a definition of '*lawyer*' that includes '*legal practitioner*'. Other amendments to the Rules that are consequential upon this change to the Act are set out in item [37] below.

This amendment also omits the definition of '*solicitor*'. The definition is no longer necessary given the repeal of the *Legal Practice Act 1996* (Vic).

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

Order 1 rule 5AC provides for the filing and lodging of documents by electronic means.

Paragraphs 5AC (5) (a) and (b) provide that the Registrar must insert a notice of filing and hearing (Form 173) or a notice of filing (Form 174) in a document that is lodged electronically. Subrule 5AC (5A) provides that paragraphs 5AC (5) (a) and (b) do not apply in relation to subpoenas.

This amendment omits subrule 5AC (5A). This means that a notice in accordance with Form 173 will be inserted as the first page of each subpoena lodged electronically. That is, the details of the time, date and place which would usually be inserted in the body of

the subpoena will be set out in the Form 173 notice. This will streamline the processing of subpoenas lodged electronically by removing the need for the lodging party and/or the registry to edit and resubmit documents solely for the purpose of including a 'return date'.

[3] Order 8, paragraph 3 (2) (c), except the note

Order 8 deals with the service of judicial and other documents outside Australia. Subrule 3 (2) provides that the Court may give leave to a party to serve an originating process on a person in a foreign country in accordance with a convention or the law of the foreign country on such terms and conditions as it considers appropriate. Paragraph 3 (2) (c) provides that the Court will not give leave unless satisfied that the person seeking leave has a prima facie case for the relief claimed by the person in the proceeding.

This amendment replaces paragraph 3 (2) (c), with a new paragraph 3 (2) (c) which provides, inter alia, that the Court must be satisfied that the person seeking leave has a prima facie case for all or any of the relief claimed by that person in the proceeding. The amendment makes it clear that, when the relief as claimed in the application is expressed by reference to statutory provisions or in the alternative, it is not necessary for there to be a prima facie case for all of the relief claimed.

[4] Order 10, subparagraph 1 (2) (a) (xx)

Order 10 deals with directions hearings. Paragraph 1 (2) (a) provides a list of orders the Court may make. Subparagraph 1 (2) (a) (xx) states that the Court may make orders with respect to the use of assisted dispute resolution (including mediation) to assist in the conduct and resolution of all or part of the proceeding.

This amendment replaces the words 'assisted dispute resolution (including mediation)' with the words 'mediation, arbitration or an alternative dispute resolution process' to reflect the amendments to sections 4 and 53A of the Act made by the Reforms Act which have given the Court power to refer all or part of a proceeding to an 'alternative dispute resolution process' in addition to the current power to refer all or part of a proceeding to mediation or arbitration.

[5] Order 10, paragraph 1 (2) (d)

Paragraph 1 (2) (d) provides that the Court may make an order that no more than a specified number of expert witnesses may be called.

This amendment amends the paragraph by inserting a reference to paragraph 37P (3) (c) of the Act. Paragraph 37P (3) (c) was inserted by the Reforms Act and states that the Court may give a direction limiting the number of witnesses that may be called to give evidence.

[6] Order 10, paragraph 1 (2) (g)

Paragraph 1 (2) (g) provides, inter alia, that at a directions hearing the Court may make an order under Order 72 that a proceeding, part of a proceeding or a matter arising out of a proceeding be referred to a mediator or arbitrator.

This amendment replaces paragraph 1 (2) (g) with a new paragraph 1 (2) (g) which provides that at a directions hearing the Court may make an order under section 53A of the Act that a proceeding, a part of the proceeding or a matter arising out of a proceeding be referred to a mediator, arbitrator or a person suitable to conduct an alternative dispute resolution process. The amendment is consequential upon the amendment to section 53A by the Reforms Act.

[7] Order 13, subrule 2 (2)

Order 13 deals with the amendment of documents in a proceeding. Subrule 2 (2) provides that all necessary amendments shall be made for the purpose of determining the real questions raised by or otherwise depending on the proceeding, or of correcting any defect or error in any proceeding, or of avoiding multiplicity of proceedings.

The Federal Court has held that, once the stated condition has been satisfied, subrule 2 (2) leaves no scope for a discretionary refusal of an application to amend. This situation is inconsistent with modern notions of case management as discussed in the High Court's decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14.

This amendment omits subrule 2 (2). The amendment means the limitation on the Court's discretion to refuse an amendment to a document is removed. This discretion will be exercised having regard to the overarching purpose set out in section 37M of the Act.

[8] Order 13, subrules 3 (1) and (2)

Order 13 deals with the amendment of documents in a proceeding. Subrule 3 (1) provides that a party may, without leave, amend any pleading once at any time before the pleadings are closed. Subrule 3 (2) provides that a party may further amend any pleading before the pleadings are closed and without the leave of the Court if the party obtains the consent of all other parties.

This amendment replaces subrules 3 (1) and (2) with a new subrule 3 (1) which provides that a party may, without leave, amend any pleading filed by the party unless the time for pleadings has closed or the party has previously amended the pleading.

The amendment prevents a party from seeking to amend pleadings 'as of right' notwithstanding that various amendments have already been made with the leave of the Court or the consent of the other parties.

[9] Order 32, after paragraph 4A (1) (b)

[10] Order 32, rule 4A, at the foot

Order 32 subrule 4A (a) provides that the Court may make directions limiting:

- (a) the time for examining, cross-examining or re-examining a witness; or
- (b) the number of witnesses (including expert witnesses) that a party may call; or
- (c) the time for making any oral submissions; or
- (d) the time for a party to present the party's case; or
- (e) the time to hear the trial.

The amendment in item [9] inserts a new paragraph 4A (1) (ba) stating that the Court may make a direction limiting the number of documents that may be tendered in evidence.

The amendment in item [10] inserts a note at the foot of rule 4A which refers to the powers of the Court under section 37P of the Act to give directions about practice and procedure in a civil proceeding.

These amendments are consequential upon the amendment by the Reforms Act which inserted a new section 37P in the Act.

[11] After Order 32

This amendment inserts a new Order 32A that sets out the rules for dealing with applications and matters in the original jurisdiction without an oral hearing.

Order 32A is consequential upon the amendments made to the Act by the Reforms Act which altered subsections 20 (4) and (6) and inserted a new section 20A.

Order 32A rule 1 provides that the Court or a Judge may deal with an application mentioned in subsection 20 (3) of the Act or a matter mentioned in subsection 20 (5) of the Act without an oral hearing.

Rule 2 sets out the procedure for dealing with an application or matter without an oral hearing. Subrule 2 (1) states that a party who wants the Court or a Judge to deal with an application or civil matter without an oral hearing under subsection 20A (2) of the Act or rule 1 must file a notice to this effect and serve it on each other party to the application or matter. Subrule 2 (2) states that if a party objects to the Court or a Judge dealing with an application or civil matter without an oral hearing, the party must file a notice to this effect and serve a copy of the notice on each other party to the application or matter.

Rule 3 sets out the provisions for a summary of argument. Subrule 3 (1) states that, if the Court or a Judge makes an order under subsection 20A (2) of the Act or rule 1, each party to the application or matter must file a summary of argument and serve a copy of the summary on each other party within the time specified in the order.

Subrule 3 (2) deals with the form and content of the summary of argument mentioned in subrule 3 (1).

[12] Order 35, subrule 7 (2)

Order 35 rule 7 deals with the circumstances in which the Court may vary or set aside a judgment or order.

Subrule 7 (2) provides that the Court, where it is not exercising its appellate or related jurisdiction under Division 2 of Part III of the Act, may if it thinks fit vary or set aside a judgment or order after the order has been entered where:

- (a) the order has been made in the absence of a party, whether or not the absent party is in default of appearance or otherwise in default and whether or not the absent party had notice of the motion for the order;
- (b) the order was obtained by fraud;
- (c) the order is interlocutory;
- (d) the order is an injunction or for the appointment of a receiver;
- (e) the order does not reflect the intention of the Court; or
- (f) the party in whose favour the order was made consents.

The amendment changes subrule 7 (2) by removing the qualification that a judgment or order cannot be varied or set aside under subrule 7 (2) if the judgment or order was made by the Court exercising its appellate or related jurisdiction under Division 2 of Part III of the Act.

[13] Order 37, rule 9

Order 37 rule 9 provides, inter alia, that a person must not be committed except by or under an order of the Court, in accordance with Form 49, stating why the person is being committed.

The prescribed Form 49 deals only with cases where the person is being committed for a contempt of court. Difficulties have arisen where the committal is in relation to an offence. A new Form 49A has been prescribed for such cases.

This amendment replaces rule 9 with a new rule 9 which provides that, if the Court makes an order that a person be committed, a Judge may issue a warrant for committal:

- (a) if the order is made in relation to a contempt of court - in accordance with Form 49;
or
- (b) in any other case - in accordance with Form 49A.

[14] Order 46, after paragraph 7AA (b)

Order 46 rule 7AA prescribes the powers of the Court that the Court or a Judge may, pursuant to section 35A (1) of the Act, direct a Registrar to exercise.

This amendment inserts a new paragraph 7AA (ba) which allows the Court or a Judge to direct a registrar to exercise the power of the Court under subsection 20A (2) of the Act to deal with a matter without an oral hearing if the requirements of paragraphs (a) to (c)

of that subsection are met, if the application was made *ex parte* or the parties to the matter consent to the Court dealing with the matter without an oral hearing.

The amendment is consequential upon the amendment to the Act by the Reforms Act that inserted a new subsection 20A.

[15] Order 46, paragraph 7AA (d)

Order 46 paragraph 7AA (d) provides, inter alia, that the Court or a Judge may, pursuant to section 35A (1) of the Act, direct a Registrar to exercise the power of the Court under section 53A of the Act to make an order referring a proceeding to mediation or arbitration, if the parties consent to the referral.

This amendment replaces paragraph 7AA (d) with a new paragraph (d) which refers to the power of the Court under section 53A of the Act to make an order referring a proceeding, a part of a proceeding or any matter arising out of a proceeding:

- (i) to an arbitrator for arbitration; or
- (ii) to a mediator for mediation; or
- (iii) to a suitable person for resolution by an alternative dispute resolution process.

The amendment is consequential upon the amendment to section 53A of the Act by the Reforms Act.

[16] Order 52, rule 2AA

Order 52 rule 2AA provides, inter alia, that an application mentioned in subsection 25 (2) of the Act must be heard and determined by a single Judge unless:

- (a) a Judge directs that the application be heard and determined by a Full Court; or
- (b) the application is made in a proceeding that has already been assigned to a Full Court, and the Full Court considers it is appropriate for it to hear and determine the application.

Subsection 25 (2) deals with applications for leave to appeal, for an extension of time within which to institute an appeal, for leave to amend the grounds of an appeal and to stay an order for a Full Court.

This amendment omits Order 52 rule 2AA as it is no longer necessary given an amendment to subsection 25 (2) of the Act by the Reforms Act. Subsection 25 (2) now provides that applications of the kind mentioned above must be heard and determined by a single Judge unless a Judge directs that the application be heard and determined by a Full Court, or the application is made in a proceeding that has already been assigned to a Full Court and the Full Court considers it is appropriate for it hear and determine the application.

[17] Order 52, subrule 10 (1), at the foot

Order 52 subrule 10 (1) states that an application for leave to appeal from an interlocutory judgment of the Court may be made orally to the Judge who has pronounced the judgment at the time of its pronouncement.

This amendment inserts at the foot of Order 52 subrule 10 (1) a note referring to subsections 24 (1AA) and (1C) of the Act. Subsection 24 (1AA) specifies certain judgments from which no appeal lies. Subsection 24 (1C) specifies certain interlocutory judgments from which an appeal lies as of right. Subsections 24 (1AA) and (1C) of the Act were inserted by the Reforms Act.

[18] Order 52, rule 31

Order 52 rule 31 provides that the Court may make a direction that parties to an appeal prepare written submissions.

This amendment omits Order 52 rule 31 as it is no longer necessary in light of paragraph 37P (3) (d) of the Act which provides that the Court or a Judge may make directions for submissions to be made in writing. Section 37P was inserted into the Act by the Reforms Act.

[19] Order 52, subrule 32 (2)

Order 52 subrule 32 (2) provides that, upon being served with a notice of a direction under rule 31, each party must prepare written submissions.

This amendment omits Order 52 subrule 32 (2). It is consequential upon the amendment mentioned in item [18] above.

[20] Order 52, subrule 33 (1)

[21] Order 53, rule 16A

Order 52 subrule 33 (1) provides that each party required to prepare written submissions shall, not more than 10 days after service of a notice under rule 30 or 31, file the written submissions and lodge with the Registrar the number of copies of the written submissions directed by the Registrar.

Order 53 rule 16A provides that the provisions of Order 52 rules 30, 31, 32, 33 and 34 shall apply mutatis mutandis to an appeal under the Order.

These amendments omit each reference to rule 31 from Order 52 subrule 33 (1) and Order 53 rule 16A. The amendments are consequential upon the amendment mentioned in item [18] above.

[22] Order 62, subrule 9 (1), at the foot

Order 62 subrule 9 deals with the liability of a lawyer for costs.

This amendment inserts at the foot of Order 62 subrule 9 (1) a note stating that a lawyer acting for a party in a civil proceeding must take account of the party's duty to conduct the proceeding consistently with the overarching purpose described in section 37M of the Act, and assist the party to comply with that duty. When deciding whether to award costs, a Court or a Judge must take into account any failure by the lawyer to comply with this obligation – see subsection 37N (4) of the Act.

This amendment is consequential upon the insertion of sections 37M and 37N into the Act by the Reforms Act.

[23] Order 63, rule 2, definition of *Litigants' Fund*

[24] Order 63, rule 3

Order 63 deals with the administration of money paid into court. Order 63 rule 2 sets out the meanings of the terms used in this Order. Order 63 rule 3 sets out the requirements for the Litigants' Fund.

The amendment in item [23] omits the words 'for a District Registry' in the definition of '*Litigants' Fund*' set out in Order 63 rule 2. It is consequential upon the amendment to Order 63 rule 3.

This amendment in item [24] replaces Order 63 rule 3 with a new rule 3. The effect of the amendment means that instead of having a bank account entitled 'Federal Court of Australia Litigants' Fund' in each District Registry, the Court will have a single bank account for this purpose.

[25] Order 63, subrule 5 (2), note

This amendment replaces the reference to 'Practice Note 28' in the note at the foot of Order 63 subrule 5 (2) with a reference to 'Practice Note CM 10'. The amendment is consequential upon changes to the numbering of the practice notes that were made in September 2009.

[26] Order 72, rule 1

[27] Order 72, rule 4

[28] Order 72, rule 5, heading

[29] Order 72, subrule 5 (1)

[30] Order 72, subrule 5 (3)

[31] Order 72, rule 8, heading

[32] Order 72, after Division 3

Order 72 deals with mediation and arbitration.

These amendments are consequential upon the amendments made to sections 4 and 53A of the Act by the Reforms Act as mentioned in item [4] above.

The amendments to Order 72:

- replace rule 1 with a new rule 1 that defines ‘*suitable person*’ as meaning a person appointed under rule 10 to conduct an alternative dispute resolution process (see item [26]);
- insert a new rule 1A which provides, inter alia, that the mediation, arbitration or alternative dispute resolution process to which a proceeding, part of a proceeding or matter arising out of a proceeding is referred must be conducted in accordance with Order 72 unless the Court or a Judge orders otherwise (see item [26]);
- replace rule 4 with a new rule 4 which deals with the adjournment of a proceeding referred to mediation, arbitration or alternative dispute resolution process (see item [27]);
- replace the heading for rule 5, the effect of which is to include a reference to ‘alternative dispute resolution process’ (see item [28]);
- replace subrule 5 (1), the effect of which is to include references to ‘alternative dispute resolution process’ and ‘suitable person’ (see item [29]);
- replace subrule 5 (3), the effect of which is to include references to ‘alternative dispute resolution process’ and ‘suitable person’ (see item [30]);
- replace the heading for rule 8, the effect of which is to remove the reference to adjournment (see item [31]);
- insert a new Division 4 entitled ‘Alternative dispute resolution process’ which sets out the procedure for nominating a suitable person (rule 10), conducting an alternative dispute resolution process (rule 11) and terminating an alternative dispute resolution process (rule 12) (see item [32]).

[33] Schedule 1, form 5

Form 5 is the prescribed form for an application.

This amendment replaces Form 5 with a new Form 5. The effect of the amendment is to remove the words: ‘The statement is not taken to be part of the pleading’ from the second sentence in the opening paragraph and to provide space for the applicant to identify ‘the Act’ and provision upon which the relief claimed may depend.

This amendment ensures that the form more accurately reflects the requirements of the Rules.

[34] Schedule 1, form 49

Form 49 is the prescribed form for warrant for committal.

This amendment replaces Form 49 with a new Form 49 entitled ‘Warrant for committal for contempt’.

This amendment also inserts a new Form 49A entitled ‘Warrant for committal’.

These amendments are consequential upon the amendment to Order 37 rule 9 mentioned in item [13] above.

[35] Schedule 1, form 129, paragraph 4

Form 129 is the prescribed form for an application under Part IVA of the Act.

Paragraph 4 of this form is amended to correct a minor typographical error.

[36] Schedule 3, Part 3.3, after item 24

Schedule 3 sets out the powers of the Court that may be exercised by a Registrar pursuant to a direction by the Court or a Judge under section 35A (1) (h) of the Act.

Schedule 3 is amended by inserting the following items:

- item 24A – which refers to the power of the Court under subsection 37N (3) to require a party’s lawyer to give the party an estimate of the likely duration of the proceeding or part of the proceeding and of the likely amount of costs that party will have to pay in connection with the proceeding or part of the proceeding.
- item 24B – which refers to the power of the Court under subsection 37P (2) to give directions about the practice and procedure to be followed in relation to the proceeding or any part of the proceeding.
- item 24C – which refers to the power of the Court under subsection 37N (3) to make such order or direction as is appropriate when a party fails to comply with a direction about the practice and procedure to be followed in relation to the proceeding or any part of the proceeding.
- item 24D – which refers to the power of the Court under subsection 43 (3) to do any of the things mentioned in paragraphs 43 (3) (a) to (g) in relation to costs of or in connection with an application heard by a Registrar.

This amendment is consequential upon the amendments made to the Act by the Reforms Act.

[37] Further amendments

This item lists the orders and forms and items in Schedule 3 that are amended to replace each mention of ‘legal practitioner’, ‘legal practitioners’ and ‘legal practitioner’s’ with ‘lawyer’, ‘lawyers’, ‘lawyer’s’ respectively and each mention of ‘practitioner’ with ‘lawyer’.

These amendments are consequential upon the amendment mentioned in item [1] above.

The version number of each form mentioned in the table is also amended.

SCHEDULE 2

[1] Order 35, rule 7A

[2] Order 35, rule 8

Order 35 rules 7A and 8 deal with pre-judgment and post-judgment interest respectively.

This amendment in item [1] omits rule 7A. Given the terms of section 51A of the Act, guidance on the rate of pre-judgment interest is more appropriately set out in a practice note issued by the Chief Justice of the Court.

This amendment in item [2] replaces rule 8 with a new rule 8 which provides that the prescribed interest rate at which interest is payable under paragraph 52 (2) (a) of the Act is, in respect of the period from 1 January to 30 June in any year, the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced and, in respect of the period from 1 July to 31 December in any year, is the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced.

A note is included at the foot of rule 8 referring to subsection of 52 (2) of the Act.

These amendments are consistent with recommendations by the Council of Chief Justices' Discount and Interest Rate Harmonisation Committee.