

# Federal Court Amendment Rules 2004 (No. 4) 2004 No. 281

## EXPLANATORY STATEMENT

### Statutory Rule 2004 No. 281

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

### Federal Court Amendment Rules 2004 (No. 4)

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*, 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 2004 (No. 4)*.

#### **RULE 2 - Commencement**

This rule provides that these rules commence as follows:

- Rules 1 to 3 and Schedule 1 - on gazettal;
- Schedule 2 - on the commencement of item 1 of Schedule 1 to the *Law and Justice Legislation Amendment Act 2004* (which is expected to be 27 November 2004).

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

This rule provides that the Federal Court Rules are amended as set out in Schedule 1 and Schedule 2.

### **SCHEDULE 1**

#### **Cross-claims and third party claims**

[1] Order 5, heading

This amendment replaces the heading for Order 5 with a new heading that includes a note referring to Order 35A, which deals with the procedure on default.

The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

[2] Order 5, subrule 12 (3)

This amendment replaces Order 5 subrule 12 (3) with a new subrule 12 (3). The amendment is consequential to the amendment to Order 10 rule 7, which is set out at item [6] below.

[3] Order 5, rules 13 and 14

This amendment omits Order 5 rules 13 and 14. The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

**Directions hearing**

[4] Order 10, heading

This amendment replaces the heading for Order 10 with a new heading that includes a note referring to Order 35A, which deals with the procedure on default. The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

[5] Order 10, rule 3

This amendment replaces subrules 3 (1) , (2) and (3) with a new rule that provides that, if the Court thinks fit and the parties agree, the Court may hear and determine the proceeding on a directions hearing. The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

[6] Order 10, rules 7 and 8

This amendment omits Order 10 rules 7 and 8. The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

**Progress of pleadings**

[7] Order 11, Division 2, heading

This amendment replaces the heading for Division 2 of Order 11 with a new heading that includes a note referring to Order 35A, which deals with the procedure on default.

The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

[8] Order 11, rule 19

This amendment replaces the words `rules 20 to 23' with the words `rules 20 to 22'. The amendment is consequential to the omission of rule 23 as set out at item [9] below.

[9] Order 11, rule 23

Order 11 rule 23 is omitted. The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

**Discovery**

[10] Order 15, subrule 2 (2)

This amendment replaces the text before paragraph 2 (2) (a) with new text which provides that, unless the Court or a Judge orders otherwise, a party must give discovery by serving:

- a list of documents required to be disclosed; and

- an affidavit verifying the list.

This amendment removes the requirement that these documents must be filed in the Court.

[11] Order 15, Division 3, heading

This amendment replaces the heading for Division 3 of Order 15 with a new heading that includes a note referring to Order 35A, which deals with the procedure on default. The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

[12] Order 15, rule 16

Order 15 rule 16 is omitted. The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

**Interrogatories**

[13] Order 16, subrule 8 (2)

This amendment replaces subrule 8 (2) with a new subrule 8 (2). The amendment is consequential to the omission of Order 16 rule 9, as set out at item [14] below.

The amendment also inserts a note referring to Order 35A. The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

[14] Order 16, rule 9

Order 16 rule 9 is omitted. The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

**Setting down**

[15] Order 30, heading

This amendment replaces the heading for Order 30 with a new heading that includes a note referring to Order 35A, which deals with the procedure on default.

The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

[16] Order 30, rule 5

Order 30 rule 5 is omitted. The amendment is consequential to the insertion of Order 35A pursuant to item [17] below.

**Order or judgment on default**

[17] After Order 35

This amendment inserts a new Order 35A which deals with the Court's powers to make orders or give judgment if a party is in default. The new Order 35A brings together the various rules dealing with orders and judgments in default that exist in the current Rules.

Rule 1 contains definitions of `applicant', `claim' and `respondent' for the purposes of Order 35A.

Subrule 2 (1) provides that, for the purposes of Order 35A, an applicant is in default if the applicant:

- (a) fails to comply with an order of the Court in the proceeding; or
- (b) fails to attend a directions hearing; or
- (c) fails to file and serve a pleading as required by Order 11; or
- (d) fails to serve a list of documents or an affidavit or other document, or does not produce a document as required by Order 15; or
- (e) fails to do any act required to be done by these Rules; or
- (f) fails to prosecute the proceeding with due diligence.

Subrule 2 (2) provides that, for the purposes of Order 35A, a respondent is in default if the respondent has not satisfied the applicant's claim and:

- (a) the time for the respondent to enter an appearance has expired and the respondent has failed to enter an appearance; or
- (b) the time for the respondent to file a defence has expired and the respondent has failed to file a defence; or
- (c) the respondent fails to attend a directions hearing; or
- (d) the respondent fails to comply with an order of the Court in the proceeding;
- (e) the respondent fails to file and serve a pleading as required by Order 11; or
- (f) the respondent fails to serve a list of documents or an affidavit or other document, or does not produce a document as required by Order 15; or
- (g) the respondent fails to do any act required to be done by these Rules; or
- (h) the respondent fails to defend the proceeding with due diligence.

Subrule 3 (1) provides that, if an applicant is in default, the Court may order that:

- (a) the proceedings be stayed or dismissed as to the whole or any part of the relief claimed by the applicant; or
- (b) a step in the proceeding be taken within the time limited in the order; or
- (c) the proceeding be stayed or dismissed, as to the whole or any part of the relief claimed by the applicant, if the applicant does not take a step ordered by the Court in the proceeding in the time limited in the order.

Subrule 3 (2) provides that, if a respondent is in default, the Court may:

- (a) order that a step in the proceeding be taken within the time limited in the order; or
- (b) if the claim against the respondent is for a debt or liquidated damages - grant leave to the applicant to enter judgment against the respondent for the debt or liquidated damages and, if appropriate:

Ø costs:

§ in a sum fixed by the court, or

§ to be taxed; and

Ø interest; or

(c) if the proceeding was commenced by an application supported by a statement of claim or the Court has ordered that the proceeding continue on pleadings - give judgment against the respondent for the relief that:

Ø the applicant appears entitled to on the statement of claim; and

Ø the Court is satisfied it has power to grant; or

(d) give judgment or make any other order against the respondent; or

(e) make an order specified in paragraph (b), (c) or (d) to take effect if the respondent does not take a step ordered by the Court in the proceeding in the time limited in the order.

Paragraph 3 (2) (c) is a new rule that has been used in State and Territory Supreme Courts for many years. It provides for default judgment to be entered against a respondent, in a proceeding commenced by an application supported by a statement f

claim or in which the Court has ordered that the proceeding continue on the pleadings, for such relief as:

- the applicant appears to be entitled to on that statement of claim; and
- the Court is satisfied it has power to grant.

The relief that may be granted under the rule is not limited to a judgment for a debt of liquidated damages.

Subrule 3 (3) provides that, if the applicant has been granted leave to enter judgment against the respondent for a debt or liquidated damages, and the applicant has filed in the Registry:

(a) an affidavit or affidavits, proving:

(i) service of the application claiming judgment for the debt or liquidated damages; and

(ii) that the respondent is in default; and

(b) an affidavit in respect of the debt or liquidated damages in accordance with Form 46C;

the Registrar must enter judgment for the debt or liquidated damages, costs and interest against the respondent as specified in the grant of leave, without giving notice, or further notice, to the respondent.

Subrule 3 (4) provides that, unless the Court otherwise orders, if a respondent to a cross-claim is in default, a judgment (including a judgment by default or by consent) or decision (including a decision by consent), on any claim, question or issue in the proceeding on the originating process, or any other cross-claim in the proceeding, is binding as between the cross-claimant and the respondent to the cross-claim so far as the judgment or decision is relevant to any claim, question or issue in the proceeding on the cross-claim.

Subrule 3 (5) provides that the Court may make an order of the kind mentioned in subrule (1), (2) or (4), or any other order, or may give such directions, and specify such consequences for non-compliance with the order, as the Court thinks just.

Order 35A includes a note referring to the Court's power under Order 35 rule 7 to set aside or vary an order made under Order 35A.

Rule 4 provides that Order 35A does not limit the power of the Court to punish for contempt.

### **Appeals - absence of party**

#### [18] Order 52, paragraph 38A (1) (c)

This amendment omits Order 52 paragraph 38A (1) (c) to ensure that subrule 38A (1) is consistent with the provisions of subsection 25 (2B) of the Federal Court of Australia Act as amended by the *Law and Justice Legislation Amendment Act 2004* (Cth).

#### [19] Order 52, subrule 38A (2)

This amendment replaces subrule 38A (2) with a new subrule 38A (2) to ensure that subrule 38A (2) is consistent with the provisions of subsection 25 (2B) of the Federal Court of Australia Act as amended by the *Law and Justice Legislation Amendment Act 2004* (Cth).

A note referring to subsection 25 (2B) of the Federal Court of Australia Act is inserted.

### **Appeals against appealable objection decisions made under the Taxation Administration Act 1953 - commencement of appeals**

#### [20] Order 52B, subparagraph 4 (3) (b) (ii)

This amendment replaces the word 'Act.' with the words 'Act; and'. The amendment is consequential to the amendment of Order 52B subrule 4, which is set out at item [21] below.

#### [21] Order 52B, after paragraph 4 (3) (b)

This amendment inserts a new paragraph 4 (3) (c) which provides that an appeal against an appealable objection decision made under the *Taxation Administration Act 1953* (Cth) must be filed in the Registry of the Court in the State or Territory in which:

- the office of the Australian Taxation Office shown on the written notice of the appealable objection decision served on the applicant is located; or
- if the applicant is a natural person - the applicant ordinarily resides; or
- if the applicant is a corporation - the applicant has its head office or carries on a significant part of its business.

#### [22] Order 52B, subrule 4 (4)

This amendment replaces the words 'in that State or Territory' with the words 'in the State or Territory in which the application was filed'. The amendment is consequential to the amendment of Order 52B subrule 4, which is set out at item [21] above.

### **Appeal from a decision of the Commissioner - cross-appeals and notices of contention**

#### [23] Order 58, subrule 5A (3)

This amendment replaces the text before paragraph 5A (3) (a) with new text which provides that, if a respondent to an appeal from a decision of the Commissioner wishes to contend that the Commissioner's decision should be supported and, if appropriate, affirmed on a ground other than that relied on by the Commissioner, but does not seek a reversal or variation of the Commissioner's decision, the respondent need not give a notice of cross-appeal but must:

- file in the Registry a notice of contention; and
- serve on the applicant and on the Commissioner a copy of the notice of contention; and
- give notice to the applicant and to the Commissioner of the record of evidence and documents before the Commissioner that are relevant to the contention.

### **Human rights proceedings - commencement of proceeding**

#### [24] Order 81, paragraph 5 (2) (a)

This amendment substitutes paragraph 5 (2) (a) with a new paragraph 5 (2) (a) which provides that an application under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) must be accompanied by a claim in accordance with Form 167. The effect of the amendment is to remove the requirement that an application under the Human Rights and Equal Opportunity Commission Act be accompanied by an affidavit in support of the application.

#### [25] Order 81, subrule 7 (2)

Subrule 7 (2) is omitted. The effect of the amendment is to remove the requirement that a defence to an application under the Human Rights and Equal Opportunity Commission Act be accompanied by an affidavit in support of the grounds of defence.

### **Transfer of proceedings to the Federal Magistrates Court**

#### [26] Order 82, subrule 5 (2)

This amendment inserts the words 'for transfer' after the word 'application' to make it clear that the heading of the notice of motion seeking a transfer of a matter to the Federal Magistrates Court must refer to the Act under which the application for transfer is made.

### **Amendments to Schedule 1 to the Federal Court Rules**

#### [27] Schedule 1, Form 15A

Form 15A is omitted. The amendment is consequential to the insertion of Order 35A (pursuant to item [17] above) and the new Form 46C (pursuant to item [28] below).

#### [28] Schedule 1, after Form 46B

This amendment inserts a new Form 46C Affidavit in Respect of Debt or Liquidated Damages. The amendment is consequential to the insertion of Order 35A pursuant to item [17] above.

#### [29] Schedule 1, Forms 167 and 168

This amendment substitutes Forms 167 and 168 with new Forms 167 and 168.

The amendment is consequential to the amendments to Order 81 paragraph 5 (2) (a) and Order 81 subrule 7 (2) set out at items [24] and [25] respectively, above.

### **Amendments to Schedule 2 to the Federal Court Rules**

## [30] 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 has the effect of increasing the amount for each item in the Schedule by 5 per cent. The increase will be taken into account when the Judges consider any recommendation that might be made in due course by the Federal Costs Advisory Committee as to the amounts in the Schedule.

### **SCHEDULE 2**

#### **Aboriginal and Torres Strait Islander Commission Act 1989 - election petitions**

##### [1] Order 70, subrule 2 (5)

Subrule 2 (5) currently provides that upon filing an election petition, the petitioner must deposit with the Registrar the sum of \$100 as security for costs to be repaid or otherwise disposed of in accordance with the provisions of Schedule 4 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) ('ATSIC Act') and pay a filing fee of \$25.

This amendment replaces subrule 2 (5) with a new subrule 2 (5) which provides that, on filing an election petition, the petitioner must deposit with the Registrar the amount of \$100 as security for costs to be repaid or otherwise disposed of in accordance with Schedule 4 of the ATSIC Act.

The effect of the amendment is to omit the requirement that a petitioner pay a filing fee of \$25. This is consequential to an amendment to the ATSIC Act by the *Law and Justice Legislation Amendment Act 2004* (Cth) which removes the requirement that the Rules of Court prescribe the filing fee. The fee will now be prescribed by the Federal Court of Australia Regulations.