

Federal Court Rules (Amendment) 1998 No. 224

Explanatory Statement

Statutory Rules 1998 No. 224

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

AMENDMENT OF THE RULES OF THE FEDERAL COURT OF AUSTRALIA

Section 59 of the *Federal Court of Australia Act 1976* permits the Judges of the Court (of whom there are forty-eight (48) including the Chief Justice) or a majority of them, to make Rules of Court not inconsistent with the Act providing for the practice and procedure to be followed in the Court and in Registries of the Court and in relation to all matters incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court. Under subsection 59(4) of the Federal Court 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 - Commencement

These rules commence on gazettal.

Rule 2 - Amendment

This rule amends the Federal Court of Australia Rules as set out in these amending rules.

Rule 3 - Order 1 rule 6

This rule amends Order 1 rule 6 of the Federal Court Rules by deleting from. sub-rule 6(1) the words "for the Division of the Court and" and the words "and Division". *The Federal Court of Australia Act 1976* was amended by the *Workplace Relation and Other Legislation Amendment Act 1996* to delete references to Divisions within the Court. This amendment is associated with the removal of the Divisions from the Court.

Rule 4 - Order 11 rule 1A

This ruling inserts a new rule 1A in Order 11. The purpose of the rule is to require the person who prepares a pleading in a proceeding in the Federal Court to identify themselves and to include a statement that they prepared the pleading.

Rule 5 - Order 30 rule 4

The Federal Court of Australia Regulations were amended by Statutory Rule 189 of 1996 mid the reference to Regulation 2A is a reference to the fee then known as the hearing fee under the Federal Court of Australia Regulations. The fee was payable at the time the matter was set down for hearing, as contemplated by Order 30 rule 4. Statutory Rule 189 of 1996 inserted a new regulation to AA which prescribed fees payable at the time a proceeding is set down for hearing and called a setting down fee. Accordingly the reference in Order 30 rule 4 to Regulation 2A should be replaced by a reference to Regulation 2AA. This rule has that effect. Similar rule amendments are made in respect of Order 52 rule 29 and Order 53 rule 18 later in these rules.

Rule 6 - Order 32 rule 4A

This rule inserts a new Order 32 rule 4A. The purpose of the rule is to give the Court or a Judge power at any time before or during a trial to make directions limiting the time for questioning of witnesses, the number of witnesses that a party may call, the time for making oral submissions, the time for a party to present the parties case or the time to hear a trial.

Rule 7 - Order 48 rule 4

Sub-division B of division 3 of part viA of the *Workplace Relations Act* 1996 deals with applications to the Australian Industrial Relations Commission for relief in respect of termination of employment. Section 170CF provides a process of conciliation in respect of applications to the AIRC under section 170CE. Once the process of conciliation has occurred an applicant may elect to commence proceedings in the Federal Court in the circumstances outlined in subsections (3), (4) or (5) of section 170CFA. Section 170CF contemplates the issuing of a certificate by the AIRC regarding the conciliation process. The purpose of this rule is to amend Order 48 rule 4 to require the applicant in a proceeding alleging unlawful termination of employment to attach to the application a certificate regarding the failure or likely failure of conciliation issued by the Australian Industrial, Relations Commission under subsection 170CF (2) of the Workplace Relations Act.

Rule 8 - Order 48 rule 12

"The purpose of this rule is to amend Order 48 rule 12(1) to delete the words "each party" and substitute the words "each other party (if any)". The purpose of this amendment is to make it clear that service of an application and supporting documentation contemplated by rule 12 need only take place prior to the directions hearing if there is another or other parties to the proceeding.

Rule 9 - Order 52 rule 29

The amendment to Order 52 rule 29 is to the same effect as the amendment to Order 30 rule 4 referred to in Rule 5 above.

Rule 10 - Order 52 rule 40

This rule omits Order 52 rule 40 and substitutes a new rule 40.

In *Eastman v The Queen* (1997) 72 FCR 190 at 195 Burchett J raised a question regarding the desirability of amendment of Order 52 rule 40. Prior to this amendment the rule empowered only "the Court hearing an appeal against conviction or sentence" to make an order requiring production of the prisoner or an order in relation to the continuing custody of the prisoner. The effect of this amendment is to give the power to make an order requiring production of the prisoner or an order in relation to the continuing custody of the prisoner to "the Court or a judge". This brings the rule into line with other rules such as Order 52 rule 35(3).

Rule 11 Order 53 rule 6

This rule deletes the word "personally" in Order 53 rule 6(2).

Rule 12 - Order 53 rule 18

This rule amends Order 53 rule 18 in the same manner in which Order 30 rule 4 has been amended by rule 5 above.

Rule 13 - Order 62 rule 4

Order 62 rule 4(2)(c) provides for an order that a party is entitled to a specified gross sum instead of taxed costs. In practice an order for a specified gross sum is rarely sought in the first instance. More commonly an order for tax costs is made at or near when judgment is delivered, and only when the magnitude of the task of taxation becomes apparent is an order for a gross sum sought. There has been some doubt as to whether once an order for costs has been entered the Court has power to set aside or vary it. The effect of this amendment is that the Court will be able to make an order that a specified gross sum be paid instead of tax costs even where an order for costs to be paid to a person has previously been made and entered.

Rule 14 - Order 71 rule 48

This rule amends sub-rule 48(1) to reflect the classes of persons entitled to apply to the Court for a company to be wound up, and, in particular, to reflect the right of a director to so apply.

Rule 15 - Order 77 rule 19

Order 77 rule 19(3) requires an applicant for a sequestration order in bankruptcy proceedings to search in the National Personal Insolvency Index for the information provided in that sub-rule prior to the hearing date for the petition.

Technology appears to have overtaken the sub-rule. The National Personal Insolvency index is maintained by information brokers who carry out a search of the NPII on behalf of the person making an enquiry. Accordingly the sub-rule has been amended to allow for the swearing of an affidavit by a person who caused a search to be made of the NPII, even if they did not personally undertake the search.

Rule 16 - Order 78 rule 9

Order 78 rule 9 refers to public notice of any hearing before the Court in native title proceedings being in any of the forms of notification set out in clause 5 of the Native Title (Notices) Determination No 1 of 1993. This Determination ceased to have effect as it was not tabled in both Houses of Parliament within the required time. The purpose of this amendment is to delete the reference to that Determination and require the notice to be in a form that the Court or a judge considers appropriate.

Rule 17 - Order 80 Constitutional Convention (Election) Rules

The Constitutional Convention (Election) Rules were made by the judges of the Court on 18 December 1997 and notified in the Gazette on 23 December 1997 (SR 425 of 1997). The Constitutional Convention election was held in December 1997 and the results were declared in January 1998. There are no continuing matters pursuant to the election. The Constitutional Convention (Election) Rules are no longer required and are omitted from the Court's Rules by this rule.

Rule 18 - First Schedule

Form 5 - This amendment omits the word "final" from section v item 1 and substitutes "interlocutory". This corrects a typographical error.

Form 44A - This amendment omits "hearing fee" from the form and substitutes "setting down fee" and is related to the amendment to Order 30 rule 4 explained in rule 5 above.

Form 44A - This amendment omits "regulation 2A" (twice occurring) and substitutes "regulation 2AA". This amendment *is* related to the amendment to Order 30 rule 4 discussed in rule 5 above.

Form 55A - This amendment inserts a note in the form explaining the provisions of Order 53 rule 6(2) which requires the applicant to serve a copy of a notice of appeal from the Administrative Appeals Tribunal on all other parties to the proceedings before the Tribunal and on the Registrar of the Tribunal within seven days after filing the notice of appeal in the Court. This amendment is intended to assist both the parties and the Administrative Appeals Tribunal.

Forms 161 and 162 These forms are to be omitted along with Order 80 Constitutional Convention (Election) Rules.

Rule 19 - Second Schedule

This rule omits the second schedule - costs allowable in respect of work done and services performed and substitutes a new schedule.