

EXPLANATORY STATEMENT

Select Legislative Instrument 2006 No. 203

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

Federal Court Amendment Rules 2006 (No. 2)

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:

- amending a number of the definitions in Order 1 rule 4;
- amending the provisions for electronic filing in Order 1 rules 5A and 5AC;
- replacing Order 8 with a new Order 8 that updates the rules in relation to the service of court documents outside Australia;
- replacing Order 33 subrule 11 (3) with new subrules 11 (3) and 11 (3A) which deal with the giving of evidence or the production of documents that may be the subject of privilege;
- replacing Order 46 rule 7A with a new rule 7A which deals with whether certain documents should be accepted for filing;
- amending Order 51 rule 2 to include a reference to the Attorney-General of the Australian Capital Territory;

- replacing Order 52 paragraph 2AA (a) with a new paragraph 2AA (a) which deals with the exercise of appellate jurisdiction by a single Judge under subsection 25 (2) of the Federal Court of Australia Act;
- amending Order 52B to include references to new provisions of the *Taxation Administration Act 1953* (Cth) inserted by the *Tax Laws Amendments (Improvements to Self Assessment) Act (No 2) 2005* (Cth);
- inserting a new paragraph 15 (2) (da) in Order 53 which refers to paragraph 44 (8) (b) of the *Administrative Appeals Tribunal Act 1975*;
- amending various rules in Order 80 which deal with the referral of litigants to legal practitioners for advice and assistance;
- replacing forms 14A, 14B, 14C, 37, 38, 39 and 55A;
- updating the scale of solicitor's costs set out in Schedule 2.

The Amendment Rules have been the subject of consultation with the Law Council of Australia. The Attorney-General's Department and the Department of Foreign Affairs and Trade were consulted in relation to the amendments to Order 8.

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

The Rules commence on the day after they are registered.

Federal Court Amendment Rules 2006 (No 2)

RULE 1 Name of rules

This rule provides that the Rules are to be cited as the *Federal Court Amendment Rules 2006 (No 2)*.

RULE 2 Commencement

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

RULE 3 Amendment of Federal Court Rules

Schedule 1 amends the Federal Court Rules.

SCHEDULE 1

[1] Order 1, rule 4, definitions of *convention* and *convention country*

This amendment omits the definitions of “convention” and “convention country” in Order 1 rule 4. The definitions are no longer necessary given the amendment to Order 8 in item [5] below and the amendment to form 38 in item [19] below.

[2] Order 1, rule 4, definition of *document exchange box*

This amendment replaces the definitions of *document exchange* and *document exchange box*. The effect of the amendment is to remove the need for the Registrar to approve a document exchange for the purposes of the Rules.

[3] Order 1, subrule 5A (2), note

Order 1 subrule 5A (2) sets out certain restrictions on the size of documents that may be sent to a Registry by facsimile transmission or electronic communication for the purpose of being filed or lodged. The note after subrule 5A (2) states that the Court cannot accept an electronic communication that is more than 2 megabytes in size. The effect of the amendment is to replace the reference in the note to “2 megabytes” with a reference to “5 megabytes”. It reflects the capacity of the Court’s computer security firewall to accept larger documents.

[4] Order 1, subrule 5AC (4)

This amendment replaces Order 1 subrule 5AC (4) with a new subrule 5AC (4). The new subrule makes it clear that, where a document in an existing proceeding is to be sent by electronic communication, it must be sent to the Registry that is the proper place for the

proceeding. The amendment is intended to prevent a person from sending a document to a Registry that is not the proper place.

[5] Order 8

This amendment replaces Order 8 with a new Order 8 that sets out the rules for the service of court documents outside Australia.

Order 8 rule 1 defines certain terms for the purposes of the Order.

Order 8 rule 2 lists the kinds of proceedings in which originating process may be served on a person in a foreign country. A proceeding must consist of, or include, any one or more of the kinds of proceeding mentioned in the table in rule 2.

Order 8 subrule 3 (1) provides that service of originating process on a person in a foreign country is effective for the purpose of a proceeding only if:

- the Court has given leave under subrule 3 (2) before the application is served; or
- the Court confirms the service under subrule 3 (5); or
- the person served waives any objection to the service by entering an appearance in the proceeding.

Order 8 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, on such terms and conditions as it considers appropriate, if the Court is satisfied that:

- the Court has jurisdiction in the proceeding; and
- the proceeding is of a kind mentioned in the table in rule 2; and
- the person seeking leave has a prima facie case for the relief claimed by the person in the proceeding.

Order 8 subrule 3 (3) provides that the evidence on an application for leave under subrule 3 (2) must include:

- the name of the foreign country where service is to occur or likely to occur;
- the proposed method of service;
- a statement that the proposed method of service is permitted by either an applicable convention or the law of the foreign country.

Order 8 subrule 3 (4) provides that nothing in rule 3 prevents the Court from giving leave to a person to give notice, outside Australia, of a proceeding in the Court on the basis that giving the notice takes the place of serving the originating process in the proceeding.

Order 8 subrule 3 (5) provides that, if an originating process was served on a person outside Australia without the leave of the Court, the Court may, by order, confirm the service if the Court is satisfied that:

- the factors listed in subrule 3 (2) apply to the proceeding; and
- the service was permitted by an applicable convention or the laws of the foreign country; and

- the failure to apply for leave is sufficiently explained.

Order 8 subrule 4 (1) provides that the Court may give leave to a party to serve a document issued by the Court (other than an originating process) on a person in a foreign country in accordance with a convention or the law of a foreign country, on such terms and conditions as it considers appropriate.

Order 8 subrule 4 (2) provides that the evidence on an application for leave under subrule 4 (1) must include:

- the name of the foreign country where service is to occur or likely to occur;
- the proposed method of service;
- a statement that the proposed method of service is permitted by either an applicable convention or the law of the foreign country.

Order 8 subrule 4 (3) provides that, if a document (other than an originating process) was served on a person in a foreign country without leave of the Court, the Court may confirm the service if the Court is satisfied that:

- service was permitted by an applicable convention or the law of the foreign country; and
- the failure to apply for leave is sufficiently explained.

Order 8 rule 5 provides that the other Orders of the Federal Court Rules apply to service of a document on a person in a foreign country in the same way as they apply to service on a person in Australia, so far as they are:

- relevant and not inconsistent with Order 8; and
- not inconsistent with the applicable convention or law of the foreign country.

Order 8 rule 6 provides that a document that is to be served on a person in a foreign country need not be served personally if it is served in accordance with the law of the foreign country.

Pursuant to Order 8 subrule 7 (1), Order 8 rule 7 applies if an official certificate or declaration (whether made on oath or otherwise) is sent to the Court by the government of a foreign country stating that attempts to serve a person in the foreign country, in accordance with a convention or through the diplomatic channel, have not been successful.

Order 8 subrule 7 (2) provides that, a person seeking service may apply to the Court for an order setting out the steps to be taken for the purpose of bringing the document to the notice of the person to be served.

Order 8 subrule 7 (3) provides that, if the Court makes an order under subrule 7 (2), the Court may order that a document is taken to have been served when a specified event happens or on the expiry of a specified time.

Order 8 subrule 8 (1) provides that an official certificate or declaration (whether made on oath or otherwise) stating that service has been effected on a person in a foreign country,

either personally or in another way in accordance with the law of the foreign country, is sufficient proof of the service of the document.

Order 8 subrule 8 (2) provides that the certificate or declaration, if filed, is taken to be a record of the service of the document and has effect as if it were an affidavit of service.

Pursuant to Order 8 subrule 9 (1), Order 8 rule 9 applies if a person has been given leave to serve a document on a person in a foreign country through the diplomatic channel or by transmission to a foreign government in accordance with a convention (the 'relevant convention').

Order 8 subrule 9 (2) provides that the person given leave must lodge in the District Registry:

- a request for service in accordance with Form 14A; and
- a request for transmission in accordance with Form 14B; and
- a written undertaking by the person, or the person's legal practitioner, to pay to the Registrar the amount of the expenses incurred by the Court in giving effect to the person's request; and
- 2 copies (or as many as may be required by the relevant convention) of each document to be served; and
- if necessary, a translation into an official language of the foreign country (including a statement by the translator attesting to the accuracy of the translation) of the request for transmission and each document to be served.

Order 8 rule 10 applies if:

- a person files an undertaking under paragraph 9 (c) in relation to request for service on a person in a foreign country in accordance with a convention or through the diplomatic channel; and
- the person does not, within 14 days after being sent an account for expenses incurred in relation to the request, pay to the Registrar the amount of the expenses.

Order 8 subrule 10 (2) provides that, on application by the Registrar, the Court may:

- order the person to pay the amount of the expenses to the Registrar; and
- stay the proceeding, so far as it concerns the whole or any part of a claim for relief by the person, until the whole amount of any expenses is paid.

[6] Order 33, subrule 11 (3)

This amendment replaces the Order 33 subrule 11 (3) with new subrules 11 (3) and 11 (3A).

The new subrule 11 (3) makes it clear that subrule 11 (1) applies only if an order is made for production to the Court or any officer of the Court, or any examiner, or other person authorised to receive evidence, on a trial or hearing or other occasion on which evidence is being adduced. Subrule 11 (1) provides that where the Court, by subpoena or otherwise, orders any person to produce any document or thing, and any person makes and substantiates sufficient lawful objection to production on grounds of privilege, the

Court shall not compel production of that document or thing except production to the Court for the purpose of ruling on the objection.

New subrule 11 (3A) makes it clear that subrule 11 (2) applies only if a question is put to a person in the course of examination before the Court or any officer of the Court, or any examiner, or other person authorised to receive evidence, on a trial or hearing or other occasion on which evidence is being adduced. Subrule 11 (2) provides that where a question is put to a person in the course of examination, and any person makes and substantiates sufficient lawful objection on grounds of privilege to the question being answered, the Court shall not compel an answer to the question.

[7] Order 46, rule 7A

This amendment replaces Order 46 rule 7A with a new rule 7A.

Subrule 7A (1) provides that a registrar may refuse to accept or issue a document (including any document which is, or if issued will become, an originating document) if the document appears to the Registrar on its face to be an abuse of process of the Court or to be frivolous or vexatious.

The new subrule 7A (2) provides that a Registrar may seek the direction of a Judge who may direct the Registrar that a document (including any document which is, or if issued will become, an originating document) is to be accepted or issued or is not to be accepted or issued, or is not to be accepted or issued without the leave of a Judge. A Registrar may seek such a direction irrespective of whether the document appears on its face to be an abuse of process of the Court or to be frivolous or vexatious. There may be circumstances where it is appropriate for a Judge to direct that a document not be accepted or issued having regard to the circumstances of the case or any other relevant matters.

[8] Order 51, rule 2

Order 51 rule 2 deals with the filing and service on the Attorney-General of each State and Territory of a notice of a constitutional matter pursuant to section 78B of the *Judiciary Act 1903*. The amendment inserts an express reference to the Attorney-General of the Australian Capital Territory.

[9] Order 52, paragraph 2AA (a)

This amendment replaces Order 52 paragraph 2AA (a) with a new paragraph 2AA (a). The new paragraph 2AA (a) 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 Judge directs that the application be heard and determined by a Full Court.

[10] Order 52B, subrule 1 (2)

This amendment replaces Order 52B subrule 1 (2) with a new subrule 1 (2) which provides that expressions used in Order 52B that are defined for the purposes of Part IVC

of the *Taxation Administration Act 1953* (Cth) or Division 359 in Schedule 1 to that Act have the same meaning in the Order as they have in that Part or Division.

The amendment is consequential upon the amendments to the Taxation Administration Act made by the *Tax Laws Amendments (Improvements to Self Assessment) Act (No 2) 2005*.

[11] Order 52B, subparagraph 5A (a) (v)

This amendment replaces Order 52B subparagraph 5A (a) (v) with a new subparagraph 5A (a) (v) which provides that the Commissioner must file a copy of any documents given to the Commissioner by the applicant in support of an application under section 359-10 of Schedule 1 to the Taxation Administration Act, or any documents containing information given by the applicant to the Commissioner under section 357-105 or 357-115 of Schedule 1 to that Act.

The amendment is consequential upon the amendments to the Taxation Administration Act made by the *Tax Laws Amendments (Improvements to Self Assessment) Act (No 2) 2005*.

[12] Order 53, after paragraph 15 (2) (d)

This amendment inserts new paragraph 15 (2) (da) after Order 53 paragraph 15 (2) (d). It provides that the Court or Judge may give directions, for paragraph 44 (8) (b) of the *Administrative Appeals Tribunal Act 1975*, as to the giving of further evidence. Paragraph 44 (8) (b) of the Administration Appeals Tribunal Act provides that, for the purposes of making findings of fact on an appeal, the Federal Court may receive further evidence.

[13] Order 80, subrule 4 (1)

Order 80 subrule 4 (1) provides that the Court or a Judge may refer a litigant to the Registrar for referral to a legal practitioner on the Pro Bono Panel established under Order 80 rule 3 for legal assistance.

This amendment replaces the word “assistance” with the phrase “assistance in relation to a proceeding before the Court”.

[14] Order 80, after rule 4

This amendment inserts a new rule 4A after Order 80 rule 4. The rule provides that the Registrar may seek the direction of the Court or a Judge in relation to a referral made under rule 4.

[15] Order 80, after rule 6

This amendment inserts a new rule 6A after Order 80 rule 6. The rule provides that, unless the Court or a Judge otherwise directs, a Referral Certificate issued under Order 80 subrule 4 (3) ceases to have effect if:

- the Referral Certificate is not accepted by a legal practitioner within 28 days of the referral; or
- a legal practitioner has provided the legal assistance mentioned in the referral; or
- a legal practitioner has ceased to provide legal assistance under rule 7; or
- the proceeding the referral related to is finalised or transferred to another court.

[16] Schedule 1, Form 14A

This amendment replaces Form 14A with a new Form 14A to be used for a request to the Court for service in a foreign country. It is consequential upon the amendments to Order 8 referred to in item [5] above.

[17] Schedule 1, Form 14B

This amendment replaces Form 14B with a new Form 14B to be used for a request for transmission of notice to a foreign government. It is consequential upon the amendments to Order 8 referred to in item [5] above.

[18] Schedule 1, Form 14C

This rule omits Form 14C. It is consequential upon the amendments to Order 8 referred to in item [5] above.

[19] Schedule 1, Forms 37 to 39

This amendment replaces forms 37 to 39 with new forms 37 to 39.

Form 37 is the prescribed form for an order for examination under Order 24. The new form corrects an error in the reference to the rule prescribing the form.

Form 38 is the prescribed form for an order appointing an examiner under Order 24. The new form replaces the reference to ‘a convention’ with a reference to ‘a convention, agreement, arrangement, or treaty to which the Crown in right of the Commonwealth or, where appropriate, in right of a State, and a country other than Australia are parties, about legal proceedings in civil matters’. The amendment is consequential upon the amendment to Order 1 rule 4 referred to in item [1] above. The new form also corrects an error in the reference to the rule prescribing the form.

Form 39 is the prescribed form for an order that a letter of request be sent to the judicial authority of a foreign country. The new form corrects an error in the reference to the rule prescribing the form.

[20] Schedule 1, Form 55A

Form 55A is the prescribed form for a notice of appeal under Order 53, Order 53B and Order 59.

The amendment replaces form 55A with a new form 55A. The effect of the amendment is to insert a new paragraph number 5 that may be used in appeals under section 44 of the *Administrative Appeals Tribunal Act 1975*. Paragraph 5 allows an applicant to specify any findings of fact that the applicant wishes the Court to make under paragraph 44 (8) (b) of the *Administrative Appeals Tribunal Act*.

[21] 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 replaces Schedule 2 with a new Schedule 2 and has the effect of increasing the amount for each item in the Schedule by 6 per cent. The amendment has been made pending the replacement of the Federal Court Advisory Committee with a new body that will advise on increases to prescribed costs in the High Court, Federal Court, Family Court and Federal Magistrates Court. The last increase to the items in Schedule 2 was on 23 December 2004.