

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2008 No. 244**

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

#### **Federal Court Amendment Rules 2008 (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 Order 21 rule 5 to provide that an application by a person who is subject to an order under Order 21 subrule 1(1) or rule 2 (which deal with vexatious litigants) may be determined by the Court without an oral hearing;
- amending Order 27 (which deals with subpoenas) by inserting a new rule 3A and amending subrule 6(4) and Form 41 to allow a party who has issued a subpoena to notify the addressee of a later date or time as the date or time for attendance or for production or both;
- inserting a new Order 35 rule 7A to prescribe a rate of pre-judgment interest for the purposes of section 51A of the *Federal Court of Australia Act 1976*;
- amending Order 41 subrule 2(3) and inserting a new Order 41 subrule 2(3A) to provide that a document may be printed single-sided or double-sided;
- amending the rules in Order 52 and Order 53 dealing with the requirements for primary and supplementary appeal papers;

- amending Order 62 subrule 43(4) to correct a cross-reference to Order 62 rule 41;
- inserting a Note at the foot of Order 63 subrule 5(2) to refer to Practice Note No 28 which deals with investment accounts established by the Court;
- amending Forms 55A, 55B and 141 to remove the requirement that the members of the Tribunal which made the decision the subject of the appeal be named;
- amending Schedule 2 to adjust the quantum of prescribed costs.

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

The amendments to Order 27 and Form 41 give effect to a recommendation by the Chief Justices' Harmonised Subpoena Rules Monitoring Committee. The amendment to Schedule 2 gives effect to recommendations made in the first report of the Joint Costs Advisory Committee.

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

The amendment to Schedule 2 commences on 1 January 2009. The other amendments commence on the day after the Rules are registered.

**Federal Court Amendment Rules 2008 (No. 2)**

**RULE 1          Name of rules**

This rule provides that the Rules are to be cited as the *Federal Court Amendment Rules 2008 (No. 2)*.

**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 1 January 2009.

**RULE 3          Amendment of Federal Court Rules**

Schedules 1 and 2 amend the Federal Court Rules.

**SCHEDULE 1**

[1]      Order 21, rule 5

Order 21 rule 5 provides that where the Court has made an order under Order 21 rule 1 or rule 2 against any person, the Court shall only give leave to institute or continue any proceeding where the Court is satisfied that the proceedings is not an abuse of process and that there is prima facie ground for the proceedings.

This amendment renumbers rule 5 as subrule 5 (1) and inserts a new subrule 5 (2). The effect of this amendment is to permit an application for leave pursuant to this rule to be determined by the Court without an oral hearing.

[2]      Order 27, after rule 3

[3]      Order 27, subrule 6 (4)

Order 27 deals with subpoenas. Order 27 is amended in light of a recommendation by the Council of Chief Justices' Harmonised Subpoena Rules Monitoring Committee to provide for the alteration of the date for attendance or production specified in a subpoena and make consequential changes to the rules concerning compliance for subpoenas.

The amendment in item [2] inserts a new rule 3A to allow the party who issued a subpoena to change the date or time for attendance or production that is specified in the subpoena to a later date or time. The new subrule 3A (1) provides that the issuing party may give notice to the addressee of a date or time later than the date or time specified in a subpoena as the date or time for attendance or for production or for both.

The new subrule 3A (2) provides that where notice is given under subrule (1), the subpoena has effect as if the later date or time notified appeared in the subpoena.

Subrule 6 (4) provides for compliance with a subpoena to produce documents or things. The amendment in item [3] substitutes a new subrule 6 (4) as a consequence of the changes made in item [2] above. The new subrule 6 (4) includes references to the situation where the addressee receives notice from the issuing party of a later date or time.

[4] Order 35, after rule 7

Order 35 deals with judgments and orders.

This amendment inserts a new rule 7A to prescribe a pre-judgment rate of interest for the purposes of section 51A of the *Federal Court of Australia Act 1976*. The prescribed pre-judgment interest rate is to be based on the cash rate set by the Reserve Bank of Australia from time to time during the period between the date when the cause of action arose and the date as of which the judgment is entered plus 4 per cent, unless the Court orders otherwise.

[5] Order 35, rule 8, heading

Order 35 rule 8 deals with interest on judgment. This amendment alters the heading of the rule by inserting the words ‘on judgment’ behind the word ‘Interest’.

The effect of this amendment is to clarify that Order 35 rule 8 deals with interest after judgment is delivered.

[6] Order 41, subrule 2 (3)

Order 41 rule 2 deals with documents prepared by a party for use in the Court. This amendment replaces subrule 2 (3) with new subrules 2 (3) and (3A).

The effect of the amendment is to allow for double-sided documents to be filed in the Court.

The current subrule 2 (3) provides that documents may have writing on only one side of the paper with a margin of not less than 25 millimetres on the left hand side. The new subrule 2 (3) provides that the writing on a document may be on one side or both sides of the paper but not partly on one side and partly on both sides. A Note at the foot of the subrule states that the Court or a Judge may direct that one-sided documents be provided to the Court.

Subrule 2 (3A) provides that the document must have a margin of at least 25 millimetres on the left hand side of each page containing writing.

[7] Order 52, rule 26, table

Order 52 deals with appeals. Order 52 rule 26 provides that the appeal papers must consist of the documents mentioned in the table.

The amendment replaces the table in rule 26. The effect of the amendment is to renumber Part B as Part C and Part C as Part B, and to add the following documents:

- in Part A - a copy of the sealed orders giving leave to appeal or an extension of time to file the appeal (if any);
- in Part B - a list of all exhibits in the order in which the exhibits were lettered or numbered as exhibits in the court below;
- in Part B - a list of all documents received into evidence;
- in Part B - a certificate of correctness relating to Part B;
- in Part C - a list identifying all witnesses who gave oral evidence, the date(s) on which the witnesses gave evidence and transcript page numbers on which evidence-in-chief, cross-examination (if any) and evidence in reply (if any) commenced;
- in Part C - a list of the pages of transcript that are not reproduced;
- in Part C - a certificate of correctness relating to Part C.

[8] Order 52, rule 27

Order 52 rule 27 deals with the filing and service of the draft index of each Part of the appeal papers. It also requires an appellant to file and serve a chronological list of all documents received in evidence that the appellant proposes to reproduce in the appeal papers.

The amendment replaces rule 27 with a new rule 27. The effect of the amendment is to remove the need to file and serve the chronological list of documents as this list is now included in Part B of the appeal papers.

[9] Order 52, subrules 28B (3) to (5)

Order 52 rule 28B deals with the preparation of appeal papers. Subrules 28B (3) to 28B (5) provide for the pagination of Parts A, B and C.

This amendment replaces subrule 28B (3) with a new subrule 28B (3) which provides that the numbering for each part is to follow on from the previous part and is not to include the title page or the index to each Part. Part A is to commence with the number 1, Part B with the number immediately after the number of the last page in Part A and Part C with the number immediately after the number of the last page in Part B.

The amendment replaces subrule 28B (4) with a new subrule 28B (4) which provides that in Part C of the appeal papers the transcript of oral evidence and any additional transcript must be numbered in accordance with the official transcript page numbers.

The amendment replaces subrule 28B (5) with a new subrule 28B (5) which provides that, where any Part of the appeal papers consists of more than one volume, the page numbering must continue consecutively from one volume to the next.

[10] Order 52, paragraph 28C (1) (a)

Order 52 subrule 28C (1) provides for the filing of the appeal papers. Paragraph 28C (1) (a) states that an appellant must file a copy of the appeal papers with a certificate, signed by each party or the party's legal representative, stating that the Part of the appeal papers has been examined and is correct.

This amendment makes it clear that a separate certificate must be completed for each Part.

[11] Order 53, rule 15A, table

[12] Order 53, subrules 15B (3) to (5)

[13] Order 53, paragraph 16 (1) (a)

Order 53 deals with appeals from the Administrative Appeals Tribunal.

Order 53 rule 15A provides that the appeal papers must consist of the documents mentioned in the table in rule 15A. Order 53 rule 15B provides for the preparation of the appeal papers and Order 53 rule 16 with the filing of the appeal papers.

The amendments replace the table in rule 15A and amend the rules concerning the page numbering and certification of the appeal papers. The amendments are in similar terms to those mentioned in items [7], [9] and [10] above.

[14] Order 62, subrule 43 (4)

Order 62 rule 43 deals with the reconsideration of costs by a taxing officer. Subrule 43 (4) provides that the taxing officer may deal with the costs of the objections to the decision being reconsidered in any manner allowed under Order 62 subrule 41 (7). The reference should be to Order 62 subrule 41 (9), which provides that the taxing officer has a discretion to tax costs of a notice of objection to any item in a bill and of any other objections and add them, or a part of them, to or deduct them, or a part of them, from any sum payable by or to a party to the taxation or to fix a lump sum in respect of the costs of the notice or other objection and add to it, or deduct from it, any sum payable by or to a party to the taxation.

The amendment replaces the reference to subrule 41 (7) with a reference to subrule 41 (9).

[15] Order 63, subrule 5 (2), at the foot

Order 63 deals with the administration of money paid into Court. Order 63 rule 5 states that the Court or a Judge may, at any time, order that money paid, or to be paid, into

Court, be paid, credited or applied in a manner other than by payment into the Litigants' Fund. The Court may order, for example, that the Registrar deposit the money in an investment (or interest bearing) account.

This amendment inserts a note at the foot of the rule. The note refers to Practice Note No 28 which describes the types of investments that might be made by the Registrar in light of the *Financial Management and Accountability Act 1997*.

[16] Order 78, paragraph 25 (2) (a)

Order 78 deals with the proceedings under the *Native Title Act 1993*. Order 78 subrule 25 (2) provides that an application for extension of time to institute an appeal from a decision or determination of the National Native Title Tribunal must be made by completing the relevant section of Form 141 and filing an affidavit in support.

Paragraph 25 (2) (a) is amended by replacing the phrase 'by completing' with 'in accordance with'. The amendment is consequential upon the changes to Form 141 set out in item [25] below. The amendment to Form 141 removes the requirement to include in the form the reasons for seeking an extension of the period in which to appeal. The reasons are provided in the affidavit that is to accompany the form when applying for an extension of time to appeal.

[17] Schedule 1, Form 41, Part A

[18] Schedule 1, Form 41, Part B

[19] Schedule 1, Form 41, Part C

[20] Schedule 1, Form 41, Part C

[21] Schedule 1, Form 41, note 5

Form 41 is the prescribed form for a subpoena pursuant to Order 27 subrule 3 (1).

The amendments make changes to Parts A, B and C and note 5 of the form that are consequential upon the amendments to Order 27 set out in items [2] and [3] above. The amendments are in relation to any change by the party who issues a subpoena to the time or date of compliance with the subpoena.

[22] Schedule 1, Form 55A

[23] Schedule 1, Form 55A, clause 1

[24] Schedule 1, Form 55B, clause 1

Form 55A is the prescribed form of Notice of Appeal from a Tribunal. Form 55B is the prescribed form for an Application for Extension of Time to File and Serve a Notice of Appeal from a Tribunal.

This amendment removes the requirement to specify the names of the members constituting the Tribunal which made the decision that is the subject of the appeal or application for extension of time to appeal.

[25] Schedule 1, Form 141

Form 141 is the prescribed form for a Notice of Appeal from National Native Title Tribunal and includes provision for an application for extension of time in which to appeal.

The amendment replaces Form 141 with a new Form 141. The effect of the amendment is to:

- remove the requirement to specify the names of the members constituting the Tribunal which made the decision that is the subject of the appeal;
- make it clear that, in accordance with subsections 169(1) and (2) of the *Native Title Act 1993*, an appeal to the Court from the Tribunal may only be on a question of law; and
- omit the need for an applicant for an extension of time in which to appeal to set out the reasons for seeking the extension – this information is to be included in the affidavit that must accompany the application pursuant to Order 78 rule 25.

**SCHEDULE 2**

[1] Schedule 2

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

This amendment replaces Schedule 2 with a new Schedule 2 and has the effect of increasing the amount for each item in the Schedule.

The increase has been determined having regard to the recommendation made by the Joint Costs Advisory Committee in its First Report on Legal Practitioners' Costs (September 2008).