

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 392

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

Federal Court Amendment Rules 2009 (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*, 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. inserting a new Order 68 to provide rules for proceedings under the *International Arbitration Act 1974*; and
2. inserting a new Order 72A to provide rules for the referral of all or part of a matter to a referee.

The amendments are consequential upon the enactment of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* which commenced on 7 December 2009.

The amendments have been the subject of consultation with the Law Council of Australia. The amendments concerning proceedings under the *International Arbitration Act* were also the subject of consultation with the Australian Centre for International Commercial Arbitration.

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

The amendments will commence on the day after they are registered on the Federal Register of Legislative Instruments.

Federal Court Amendment Rules 2009 (No. 4)

RULE 1 Name of rules

This rule provides that the Rules are to be cited as the *Federal Court Amendment Rules 2009 (No. 4)*.

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] After Order 67

This amendment inserts a new Order 68 to provide rules for proceedings under the *International Arbitration Act 1974*.

The amendment is consequential upon amendments to the *International Arbitration Act 1974* that were made by the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009*.

Rule 1 sets out the meaning of various terms used in Order 68, including the *International Arbitration Act* and *Model Law*. Subrule 1 (2) provides that, unless the contrary intention appears, expressions used in this Order have the same meaning in this Order as they have in the *International Arbitration Act*.

Rule 2 provides, inter alia, that each party to a proceeding to which the *International Arbitration Act* applies must comply with this Order and any other of the Rules that are relevant and consistent with Order 68.

Rule 3 sets out the rules for the enforcement of a foreign arbitration agreement. It provides that an application for an order under section 7 of the *International Arbitration Act* to stay the whole or part of a proceeding must be made by filing a motion on notice in accordance with Form 27. The application must be accompanied by a copy of the arbitration agreement and an affidavit stating the material facts on which the claim for relief is based. A Note to this rule advises that the term *Arbitration agreement* is defined in subsection 3 (1) of the *International Arbitration Act*.

Rule 4 provides that a party seeking leave under subsection 8 (3) of the *International Arbitration Act* to enforce a foreign award must file an application in accordance with

Form 5. A Note to this subrule advises that the term *Foreign award* is defined in subsection 3 (1) of the *International Arbitration Act*. The application must be accompanied by the documents mentioned in section 9 of the *International Arbitration Act* and an affidavit stating the extent to which the foreign award has not been complied with at the date the application is made and the usual or last known place of residence or business of the person against whom the order is sought to enforce the foreign award or, if it is a corporation, its last known registered address.

Rule 5 provides that a party seeking relief under articles 11 (3), 11 (4), 13 (3), 14, 16 (3) or 34 (3) of the Model Law must file an application in accordance with Form 5. The application must be accompanied by an affidavit stating the material facts on which the claim for relief is based.

Rule 6 provides that a party seeking leave under subsection 35 (4) of the *International Arbitration Act* to enforce an award must file an application in accordance with Form 5. The application must be accompanied by an affidavit stating the extent to which the award has not been complied with at the date the application is made and the usual or last known place of residence or business of the person against whom the order is sought to enforce the foreign award or, if it is a corporation, its last known registered address. The application may be made without notice to any person.

Rule 7 provides that a party to a proceeding to which the Order applies who wants to rely on a document that is not in English must provide a certified English translation of the document to the Court and any other party to the proceeding. A Note to this rule advises that section 9 of the *International Arbitration Act* also deals with the translation of awards and arbitration agreements in proceedings to which Part II of the *International Arbitration Act* applies.

[2] After Order 72

This amendment inserts a new Order 72A to provide rules in relation to the referral of questions in a proceeding to a referee.

The amendment is consequential upon the enactment of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* which inserted a new section 54A into the *Federal Court of Australia Act*. Section 54A provides that, subject to these Rules, the Court may by order refer a proceeding in the Court or one or more questions arising in a proceeding in the Court to a referee for inquiry and report in accordance with the Rules. A referral may be made at any stage of a proceeding. If a report of a referee is provided to the Court, the Court may deal with the report as it thinks fit.

Subrule 1 (1) provides that at any stage of a proceeding, the Court may make an order under section 54A of the Act referring any of the following matters to 1 or more referees for inquiry and report:

- (a) a proceeding in the Court; and
- (b) 1 or more questions or issues arising in a proceeding, whether of fact or law or both and whether raised by pleadings, agreement of parties or otherwise.

Subrule 1 (2) provides that a referee, if referred a matter under section 54A of the Act, must give the referee's opinion on the matter in a report, unless the Court orders otherwise.

Subrule 1 (3) provides that the Court may set a time, when making the referring order or after making the order, for a referee to give an opinion and, if a time has been set, the referee must provide the opinion within the set time.

Rule 2 provides that the Court may appoint any appropriate person as either a referee or a senior referee, and that the Court must appoint a person as a senior referee if it appoints more than 1 referee to conduct an inquiry into a matter referred under section 54A of the Act.

Subrule 3 (1) provides that the decision of the senior referee is to prevail if the Court appoints 2 referees and the 2 referees cannot agree upon a decision to be made during an inquiry. Subrule 3 (2) provides that if the Court appoints 3 or more referees the decision of the majority is to prevail in relation to a decision to be made during an inquiry or, if there is no majority, the decision of the senior referee is to prevail.

Rule 4 provides that if the Court makes an order under section 54A of the Act, it may at any time:

- authorise a referee to inquire into and report on any facts relevant to the inquiry; or
- direct a referee to conduct a further inquiry into a referred matter or a supplementary inquiry into a related matter and provide a further report; or
- give any instruction the Court thinks fit about the conduct of the inquiry or about the content of the report, including an instruction about the conduct of an experiment or test for the purpose of the inquiry or report.

Rule 5 provides that the Court may make directions about the remuneration of a referee, including a direction that a party give security for the remuneration. This rule does not affect the powers of the Court as to costs.

Rule 6 provides that the Court may make directions, for the purpose of an order under section 54A, for the provision of services of officers of the Court or court room facilities and other facilities.

Subrule 7 (1) provides that the Court may make directions with respect to the conduct of an inquiry by a referee. Subrule 7 (2) provides that, subject to a direction made by the Court under subrule (1) or paragraph 4 (c), a referee may conduct the inquiry in any way the referee thinks fit and is not bound in the inquiry by the rules of evidence but may inform himself or herself in any way the referee thinks fit.

Subrule 7 (3) provides that evidence before a referee in an inquiry may be given orally or in writing and must, if the Court requires, be given on oath or by affirmation or by affidavit.

Subrule 7 (4) provides that a referee may administer an oath or affirmation to a witness giving evidence in an inquiry.

Subrule 7 (5) provides that the Court may order that a referee is authorised to take evidence in an inquiry for the purpose of a subpoena issued under Order 27.

Subrule 7 (6) provides that each party to an inquiry must give to each referee conducting the inquiry, and to all other parties to the inquiry, a brief statement of the findings of fact and law contended by the party by the conclusion of evidence for the inquiry or, if another period of time has been fixed by the referee, within the time fixed.

Subrule 7 (7) provides that a party to an inquiry must do all things required of the party by the referee so that the referee can form a just opinion about the matter and not wilfully do, or cause to be done, any act to delay or prevent the referee forming an opinion.

Rule 8 provides that the Court may, on application by a party to an inquiry, or by the referee conducting the inquiry, give directions about any matter arising during an inquiry.

Rule 9 provides that the Court may, on application by a party to an inquiry or a referee conducting an inquiry, set aside or vary an order made under section 54A of the Act.

Subrule 10 (1) provides that a referee must, unless the Court orders otherwise, give a written report to the Court about the matter referred to the referee by an order under section 54A of the Act that has annexed to it the statements given by the parties under subrule 7 (6) and sets out the referee's opinion on the matter and the reasons for the opinion. Subrule 10 (2) requires that the referee must give the report mentioned in subrule (1) within any period fixed by the Court. Subrule 10 (3) provides that the Court will send the report to the parties on receipt of the report.

Paragraph 11 (1) (a) provides that after a report has been given to the Court under rule 10, the Court may on a question of fact or law, or both, do any of the following:

- adopt, vary or reject the report in whole or in part;
- require an explanation by way of a further report by the referee;
- remit on any ground, for further consideration by the referee, the whole or any part of the matter that was referred to the referee for inquiry and report;
- decide any matter on the evidence taken before the referee, with or without additional evidence.

Paragraph 11 (1) (b) provides that after a report has been given to the Court under rule 10, the Court may give any judgment or order in relation to the question it thinks fit.

Subrule 11 (2) provides that evidence given in an inquiry may not be adduced before the Court except with the leave of the Court.