

1994—No. 558

**SUPREME COURT RULES (AMENDMENT No. 288)
1994—RULE**

NEW SOUTH WALES



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1. These rules are made by the Rule Committee on 17 October 1994.

2. The Supreme Court Rules 1970 are amended as follows:

(a) Part 1 rule 3

After the matter relating to Part 72B, insert:

PART 72C—MEDIATION AND NEUTRAL EVALUATION

(b) After Part 72B insert:

PART 72C—MEDIATION AND NEUTRAL EVALUATION

Directions

1. The Court may give directions for regulating and prescribing the practice and procedure to be followed in a mediation or neutral evaluation, including the preparation and service of documents.

Agreement for referral

2. On the first occasion when proceedings are before the Court for directions, each party who has an address for service in the proceedings shall state:

- (a) whether the party consents to referral of a matter arising in the proceedings for mediation or neutral evaluation;
- (b) whether the parties agree as to who is to be the mediator or evaluator; and
- (c) whether the parties agree as to the proportions in which the costs of mediation or neutral evaluation shall be borne, and the terms of their agreement.

Appointments and directions by mediator or evaluator

3. A person to whom a matter is referred for mediation or neutral evaluation:

- (a) shall, within 7 days of being notified of the referral, in writing appoint a time for the mediation or neutral evaluation;
- (b) may appoint a preliminary meeting of the parties; and
- (c) may give directions relating to preparations for and conduct of the mediation or neutral evaluation.

Completion of referral

4. The parties and the mediator or evaluator shall conduct the referral with the object, so far as practicable, of completing the referral within 28 days.

Neutral evaluation session procedure

5. (1) Unless the evaluator otherwise directs:

- (a) a neutral evaluation session shall be attended:
 - (i) subject to subparagraph (ii), by each party or, where a party is a company, by the officer of the company having responsibility for the conduct of the proceedings; or
 - (ii) if the conduct of the proceedings by a party is controlled by an insurer—by the officer of the insurer having responsibility for the conduct of the proceedings;
- (b) a party must be accompanied by that party's counsel or solicitor at a neutral evaluation session;
- (c) the evaluator, after hearing the parties, shall express the evaluator's views on:
 - (i) the degree of probability of each party succeeding in the proceedings;
 - (ii) the damages or other remedy likely to be awarded to each party, and shall express a view on the range of damages if it is appropriate to do so; and
 - (iii) any reduction in damages that should be made due to contributory negligence of the plaintiff.

(2) The evaluator's views may be expressed conditionally (e.g. "if X is accepted then A but if Y is accepted then B").

Mediation session procedure

6. Unless the mediator otherwise directs:
 - (a) a mediation session shall be attended:
 - (i) subject to subparagraph (ii), by each party or, where a party is a company, by an officer of the company having authority to settle the proceedings; or
 - (ii) if the conduct of the proceedings by a party is controlled by an insurer—by an officer of the insurer having authority to settle the proceedings; and
 - (b) a party may be accompanied by that party's counsel or solicitor at a mediation session.

Notification of conclusion of mediation or neutral evaluation

7. The mediator or evaluator shall, within 7 days of the conclusion of the mediation or neutral evaluation, advise the Court of the fact that the mediation or neutral evaluation has been concluded but not of the details thereof.

(c) SCHEDULE E Part 1

After the matter relating to Part 72B, insert:

In Column 1: In Column 2: In Column 3:

"Part 72C

Rule 2

Directions

..."

(d) SCHEDULE E Part 2

After paragraph 35 insert:

36. Order under section 110K of the Act (which allows the Court to refer a matter for mediation or neutral evaluation).

3. The amendments contained in paragraph 2 shall take effect on the day that the Courts Legislation (Mediation and Evaluation) Amendment Act 1994 commences.

4. The Supreme Court Rules 1970 are further amended as follows:

(a) SCHEDULE F Forms 46 and 46A

(i) From Note (6) in each form omit "Being" and ":" and insert instead "being" and respectively.

(ii) After Note (6) in each form insert:

(7) if there is a dispute over the amount of your reasonable expenses, you may apply to the Court for a decision on what is reasonable.

(b) SCHEDULE F Form 47

(i) From Note (1) omit “and”.

(ii) From Note (3) omit “Being” and “.” and insert instead “being” and “;” respectively.

(iii) After Note (3) insert:

(4) if there is a dispute over the amount of your reasonable expenses, you may apply to the Court for a decision on what is reasonable.

(c) SCHEDULE F Form 48

(i) From Note (7) omit “Being” and “.” and insert instead “being” and “;” respectively.

(ii) After Note (7) insert:

(8) if there is a dispute over the amount of your reasonable expenses, you may apply to the Court for a decision on what is reasonable.

5. The amendments contained in paragraph 4 shall have effect in respect of subpoenas issued after 1 January 1995.

6. The Supreme Court Rules 1970 are further amended as follows:

(a) Part 38 rule 6

Omit the rule and insert instead:

Filing affidavits

6. (1) An affidavit may not be used without the leave of the Court unless it has been filed.

(2) Subject to subrule (3), an affidavit for use in proceedings in the Court shall be filed in the registry.

(3) An affidavit may be filed in Court when the proceedings are before the Court:

(a) in the circumstances referred to in subrule (4) (b); or

(b) with the leave of the Court.

(4) An affidavit for use in proceedings to be listed for any purpose on a known date before the Court in Sydney:

(a) where practicable, shall be filed in the registry not less than 2 days before that date, clearly endorsed at the top of the left hand margin of the front page to the effect “BEFORE THE COURT ON [DATE]”; or

- (b) otherwise—shall not be filed in the registry less than 2 days before that date and may be filed in Court when the proceedings are before the Court on that date.
- (b) SCHEDULE F Forms 20B, 49,78,79,88, 105A, 106A, 127, 129, 141, 148, 154E and 154K.

At the end of each form insert:

[Where applicable, include the note required by Part 38 rule 6 (4) (a)]

7. The amendments contained in paragraph 6 shall have effect on 1 January 1995.

8. The Supreme Court Rules 1970 are further amended as follows:

- (a) Part 1 rule 3

After the matter relating to Part 80A Division 6, insert:

DIVISION 6A—*Remuneration of Receiver, Administrator and Special Manager*—rr. 13A—13C

- (b) Part 80A

After rule 13 insert:

DIVISION 6A—*Remuneration of Receiver, Administrator and Special Manager*

Remuneration of receiver (s. 425 (1))

13A. (1) The summons or notice of the motion, by which application is made by a receiver for an order fixing his or her remuneration under section 425 (1), must not be filed until the expiration of 21 days after the applicant has served notice in Form 154I of his or her intention to apply for the order, together with a copy of the affidavit on which the applicant intends to rely, on:

- (a) the person who appointed the receiver;
- (b) any other creditor holding security over all or any of the same property;
- (c) any liquidator or provisional liquidator of the subject corporation;
- (d) any administrator of the subject corporation;
- (e) any administrator of a deed of company arrangement executed by the subject corporation; and

(f) if there is no person of the kinds referred to in (c), (d) and (e):

- (i) each of the 5 largest unsecured creditors of the subject corporation; and
- (ii) each member of the subject corporation whose shareholding represents at least 10 per cent of the issued capital.

(2) Any creditor or contributory or any of the persons referred to in paragraphs (c), (d) and (e) of subrule (1) may within 21 days after service of the last of the notices required by subrule (1) deliver to the applicant a notice of objection to the remuneration claimed, stating the grounds of objection.

(3) Where the applicant files with the summons or notice of motion an affidavit made after the expiration of the lastmentioned period of 21 days:

- (a) proving service of the notices required by subrule (1) (b); and
- (b) stating that he or she has received no notice of objection to the remuneration claimed,

and the summons or notice of motion is endorsed with a request that the application be determined or dealt with by the Court in the absence of the public and without any attendance by or on behalf of the applicant, the application may be so dealt with by the Court.

(4) The summons or notice of motion must be served on any creditor or contributory or other person who has given notice of objection under subrule (2).

(5) The evidence in support of the application must include an affidavit stating:

- (a) the nature of the work carried out by the applicant together with a summary of receipts and payments for the relevant period; and
- (b) if at the time of the application the applicant remains the receiver, any matters delaying the completion of the receivership.

Remuneration of administrator (s. 449E (1))

13B. (1) The summons or notice of the motion, by which application is made for an order fixing an administrator's remuneration under section 449E (1), must not be filed until the expiration of

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- (a) 28 days after the date when a meeting of creditors referred to in section 449E (1) was last held; and
- (b) 21 days after the applicant has served notice in Form 154I of his or her intention to apply for the order, together with a copy of the affidavit on which the applicant intends to rely, on:
 - (i) each creditor who was present in person or by proxy at the meeting of creditors;
 - (ii) each member of any committee of inspection; and
 - (iii) each member of the subject corporation whose shareholding represents at least 10 per cent of the issued capital.

(2) Any creditor or contributory may within 21 days after service of the last of the notices required by subrule (1) deliver to the applicant a notice of objection to the remuneration claimed, stating the grounds of objection.

(3) Where the applicant files with the summons or notice of motion an affidavit made after the expiration of the lastmentioned period of 21 days:

- (a) proving service of the notices required by subrule (1) (b); and
- (b) stating that he or she has received no notice of objection to the remuneration claimed,

and the summons or notice of motion is endorsed with a request that the application be determined or dealt with by the Court in the absence of the public and without any attendance by or on behalf of the applicant, the application may be so dealt with by the Court.

(4) The summons or notice of motion must be served on any creditor or contributory who has given notice of objection under subrule (2).

(5) The evidence in support of the application must include an affidavit stating:

- (a) the nature of the work carried out by the applicant together with a summary of receipts and payments for the relevant period; and
- (b) if at the time of the application the applicant remains the administrator, any matters delaying the completion of the administration.

Remuneration of special manager (s. 484 (2))

13C. (1) The summons or notice of the motion, by which application is made by a special manager for an order fixing his or her remuneration under section 484 (2), must not be filed until the expiration of 21 days after the applicant has served notice in Form 154I of his or her intention to apply for the order, together with a copy of the affidavit on which the applicant intends to rely, on:

- (a) the liquidator;
- (b) each member of any committee of inspection, or if there is no committee of inspection, each of the 5 largest creditors of the subject corporation; and
- (c) each member of the subject corporation whose shareholding represents at least 10 per cent of the issued capital.

(2) The liquidator or any creditor or contributory may within 21 days after service of the last of the notices required by subrule (1) deliver to the applicant a notice of objection to the remuneration claimed, stating the grounds of objection.

(3) Where the applicant files with the summons or notice of motion an affidavit made after the expiration of the lastmentioned period of 21 days:

- (a) proving service of the notices required by subrule (1) (b); and
- (b) stating that he or she has received no notice of objection to the remuneration claimed,

and the summons or notice of motion is endorsed with a request that the application be determined or dealt with by the Court in the absence of the public and without any attendance by or on behalf of the applicant, the application may be so dealt with by the Court.

(4) The summons or notice of motion must be served on the liquidator or any creditor or contributory who has given notice of objection under subrule (2).

(5) The evidence in support of the application must include an affidavit stating:

- (a) the nature of the work carried out by the applicant together with a summary of receipts and payments for the relevant period; and
- (b) if at the time of the application the applicant remains the special manager, any matters delaying the completion of the special management.

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(c) SCHEDULE F Form 154I

Omit the form and insert instead:

Form 154I

P. 80A, rr. 13A (1), 13B (1) (b), 13C (1), 22 (2), 23 (2) (b).

(No heading or title)

NOTICE OF INTENTION OF LIQUIDATOR (*or*
 PROVISIONAL LIQUIDATOR *or* RECEIVER *or*
 ADMINISTRATOR *or* SPECIAL MANAGER) TO APPLY
 FOR DETERMINATION OF REMUNERATION

(Name of Company in capitals)

A.C.N. (*specify Australian Company Number of Company*)

To: (*name and address of person to whom notice is given*)

I, (*name and address*), the liquidator (*or* provisional liquidator or receiver or administrator or special manager) of the abovenamed Company, will, not earlier than 21 days after service on you of this notice and the accompanying affidavit, seek a determination by the Court of my remuneration.

If you object to my application, you should, within 21 days after service of this notice, serve on me a notice of objection stating the grounds of objection to the remuneration claimed. You will then be entitled to receive notice of the time and place of hearing of the application.

Dated (*date*)

(signature)

liquidator (*or* provisional liquidator or receiver *or* administrator *or* special manager)

(Form 4 does not apply)

(d) SCHEDULE F Index of forms

Omit the matter relating to Form 154I and insert instead:

154I. Notice of intention of liquidator (*or* provisional liquidator *or* receiver *or* administrator *or* special manager) to apply for determination of remuneration (*P. 80A, rr. 13A (1), 13B (1) (b), 13C (1), 22 (2), 23 (2) (b)*).

9. The amendments contained in paragraph 8 shall take effect on 1 January 1995.

EXPLANATORY NOTE

(This note does not form part of the rules)

1. The object of the amendments contained in paragraph 2 is to prescribe the practice and procedure to be adopted in relation to mediations and neutral evaluations arising out of proceedings in the Court.
2. The object of the amendment contained in paragraph 4 is to add to forms of subpoenas in civil matters a note to the recipient that, if there is a dispute over the amount of the recipient's reasonable expenses, the recipient may apply to the Court for a decision on what is reasonable.

3. The object of the amendment contained in paragraph 6 is to require:
 - (a) an affidavit to be filed before use except with leave of the Court;
 - (b) an affidavit to be filed in the registry, except with the leave of the Court or as mentioned in (c); and
 - (c) an affidavit, for use in proceedings to be listed for any purpose on a known date in Sydney:
 - (i) to be filed where practicable in the registry 2 days before that date with that date endorsed on it; or
 - (ii) otherwise—to not be filed in registry less than 2 days before that date and to allow it to be filed in Court when the proceedings are before the Court on that date.

4. The object of the amendment contained in paragraph 8 is to prescribe the procedure to be adopted by a receiver, administrator or special manager of a corporation when applying to have his or her remuneration fixed by the Court.

M. A. Blay,
Secretary of the Rule Committee
