

Part 28—Alternative dispute resolution

Division 28.1—General

28.01 General

Parties must, and the Court will, consider options for alternative dispute resolution, including mediation, as early as is reasonably practicable. If appropriate, the Court will help implement those options.

28.02 Orders that may be sought

- (1) A party may apply to the Court for an order that:
 - (a) the proceeding or part of the proceeding be referred to an arbitrator, mediator, or some suitable person for resolution by an ADR process; and
 - (b) the proceeding be adjourned or stayed; and
 - (c) the arbitrator, mediator, or person appointed to conduct an ADR process report to the Court on progress in the arbitration, mediation or ADR process.
- (2) In this Part:

suitable person means a person who has been appointed under paragraph 28.02(1)(a).

Note 1: *ADR process* is defined in the Dictionary.

Note 2: The Court may refer a proceeding to an arbitration, a mediation or an ADR process of its own motion—see section 53A of the Act. The Court can only refer a proceeding to arbitration with the consent of the parties—see section 53A(1A) of the Act.

28.03 Arbitration, mediation and ADR process

If the Court orders that a proceeding, part of a proceeding or matter arising in a proceeding be referred to an arbitrator, mediator or suitable person, the arbitration, mediation or the ADR process must be carried out in accordance with this Part.

Note: The Court may make further orders including an order for the time within which the mediation must start and finish.

28.04 Court may terminate mediation or ADR process

A party may apply to the Court for an order:

- (a) terminating a mediation or ADR process; or
- (b) terminating the appointment of a mediator or suitable person.

28.05 Parties may refer proceeding to mediation, arbitration or ADR process

- (1) Nothing in this Division prevents the parties to a proceeding referring the proceeding to:
 - (a) an arbitrator, in accordance with an arbitration agreement for arbitration; or
 - (b) a mediator for mediation; or
 - (c) a person to conduct an ADR process.
- (2) However, if the parties refer the proceeding under subrule (1), the applicant must, within 14 days of the referral, apply to the Court for directions as to the future management and conduct of the proceeding.

Rules 28.06–28.10 left blank

Division 28.2—Arbitration

28.11 Appointment of arbitrator

- (1) If the Court makes an order referring a proceeding, or part of a proceeding, to arbitration, a party may apply to the Court for any of the following orders:
 - (a) nominating a person as arbitrator;
 - (b) specifying the manner in which the arbitration is to be conducted;
 - (c) specifying the time by which the arbitration is to be completed;
 - (d) specifying how the arbitrator's fees and expenses are to be paid;
 - (e) specifying how the arbitrator's report on the proceeding, part of the proceeding or any matter arising out of the proceeding is to be reported to the Court.

Note: An order referring a proceeding to an arbitrator may be made only with the consent of the parties—see section 53A of the Act.

- (2) A nomination under paragraph (1)(a) must be accompanied by the arbitrator's written consent to the appointment.

28.12 Applications by interlocutory application

The following applications must be made by interlocutory application in the proceeding in which the order was made referring the proceeding to arbitration:

- (a) an application by an arbitrator under section 53AA of the Act; or
- (b) an application by a party under section 53AB(2) of the Act.

28.13 Applications for registration

- (1) If a proceeding has been referred to arbitration under rule 28.02 and an award has been made, a party to the arbitration may apply to the Court for an order that the arbitrator's award be registered.
- (2) The application must be made by interlocutory application in the proceeding in which the order was made referring the proceeding to arbitration.
- (3) The application must be accompanied by:
 - (a) a copy of the award; and
 - (b) an affidavit stating:
 - (i) the extent to which the award has not been complied with, at the date the application is made; and
 - (ii) the usual or last-known place of residence or business of the person against whom it is sought to enforce the award or, if the person is a company, the last-known registered office of the company.
- (4) If an order is made under subrule (1), the award:
 - (a) has the force and effect of an order of the Court; and
 - (b) accrues interest calculated in accordance with rule 39.06.
- (5) The application may be made without notice.

Note: *Without notice* is defined in the Dictionary.

28.14 Applications for order in terms of an award

- (1) A party may apply to the Court for an order in the terms of the award if:
 - (a) the matter has not been referred to the arbitrator by the Court; but

- (b) the matter is a matter in which the Court has original jurisdiction.
- (2) A party who wants to make an application under subrule (1) must file an originating application, in accordance with Form 50.
- (3) The application must be accompanied by:
 - (a) a copy of the arbitration agreement; and
 - (b) a copy of the award; and
 - (c) an affidavit stating:
 - (i) the material facts demonstrating why the Court has original jurisdiction in the matter that is the subject of the award; and
 - (ii) the extent to which the award has not been complied with, at the date the application is made; and
 - (iii) the usual or last-known place of residence or business of the person against whom it is sought to enforce the award or, if the person is a company, the last-known registered office of the company.
- (4) The application may be made without notice.

Note: *Without notice* is defined in the Dictionary.

Rules 28.15–28.20 left blank

Division 28.3—Mediation

28.21 Nomination of mediator

If an order referring a proceeding to mediation does not nominate a mediator, a Registrar will, as soon as practicable after an order for a mediation is made:

- (a) nominate a Registrar or some other person as the mediator; and
- (b) give the parties written notice of:
 - (i) the name and address of the mediator; and
 - (ii) the time, date and place of mediation; and
 - (iii) any further documents that any of the parties must give to the mediator for the purposes of the mediation.

Note: In fixing the time and date for the mediation, the Registrar will:

- (a) consult with the parties; and
- (b) have regard to any order of the Court fixing the time within which the mediation must be started or completed, or both.

28.22 Conduct of mediation

A mediation must be conducted in accordance with any orders made by the Court.

28.23 Report if only part of proceeding to be mediated

If part only of a proceeding is the subject of a mediation order, the mediator may, on the conclusion of the mediation, report to the Court in terms agreed between the parties.

28.24 Termination of mediation—mediator initiated

If the mediator considers that a mediation should not continue, the mediator must:

- (a) terminate the mediation; and
- (b) report to the Court on the outcome of the mediation.

28.25 Agreement at mediation

If the parties reach an agreement at a mediation, the parties may file consent orders in accordance with rule 39.11.

Rules 28.26–28.30 left blank

Division 28.4—ADR process

28.31 Nomination of person to conduct ADR process

If an order referring a proceeding to an ADR process does not nominate a suitable person, a Registrar will, as soon as practicable after the order is made for an ADR process:

- (a) nominate a Registrar or some other person to conduct the ADR process; and
- (b) give the parties written notice of:
 - (i) the name and address of that person; and
 - (ii) the time, date and place of the ADR process; and
 - (iii) any further documents that any of the parties must give to the person for the purpose of the ADR process.

Note 1: *Suitable person* is defined in rule 28.02(2).

Note 2: In fixing the time and date for the ADR process, the Registrar will:

- (a) consult with the parties; and
- (b) have regard to any order of the Court fixing the time within which the ADR must be started or completed, or both.

28.32 Conduct of ADR process

An ADR process must be conducted in accordance with any orders made by the Court.

28.33 Report if only part of proceeding to be subject of ADR process

If part only of a proceeding is the subject of an ADR process order, the person conducting the ADR process may, on the conclusion of the ADR process, report to the Court in terms agreed between the parties.

28.34 Termination of ADR process

If the person conducting the ADR process considers that the ADR process should not continue, the person must, subject to any order of the Court:

- (a) terminate the ADR process; and
- (b) report to the Court on the outcome of the ADR process.

28.35 Agreement at ADR process

If the parties reach an agreement at an ADR process, the parties may file consent orders in accordance with rule 39.11

Rules 28.36–28.40 left blank

Division 28.5—International arbitration

28.41 Definitions for Division 28.5

- (1) In this Division:

International Arbitration Act means the *International Arbitration Act 1974*.

Model Law means the UNCITRAL Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006, the English text of which is set out in Schedule 2 to the International Arbitration Act.

party to an arbitral proceeding means a party to an arbitral proceeding to which the International Arbitration Act applies.

- (2) Unless the contrary intention appears, expressions used in this Division have the same meaning as in the International Arbitration Act.

28.42 Application of Division

A party to an arbitral proceeding must comply with:

- (a) this Division; and
- (b) any other Rules that are relevant and consistent with this Division.

28.43 Application for stay of arbitration

- (1) A party to an arbitration agreement who wants an order under section 7 of the International Arbitration Act to stay the whole or part of a proceeding must file an originating application, in accordance with Form 51.
- (2) The originating application must be accompanied by:
 - (a) a copy of the arbitration agreement; and
 - (b) an affidavit stating the material facts on which the claim for relief is based.

28.44 Enforcing foreign award

- (1) A person who wants to enforce a foreign award under section 8(3) of the International Arbitration Act must file an originating application, in accordance with Form 52.
- (2) The originating application must be accompanied by:
 - (a) the documents mentioned in section 9 of the International Arbitration Act; and
 - (b) an affidavit stating:
 - (i) the extent to which the foreign award has not been complied with, at the date the application is made; and
 - (ii) the usual or last-known place of residence or business of the person against whom it is sought to enforce the foreign award or, if the person is a company, the last-known registered office of the company.
- (3) The application may be made without notice to any person.

Note: **Without notice** is defined in the Dictionary.

28.45 Application for relief under Model Law

- (1) A party who wants relief under article 11(3), 11(4), 13(3), 14, 16(3), 17H(3), 17I, 17J, 27 or 34 of the Model Law must file an originating application, in accordance with Form 53.
- (2) The application must be accompanied by an affidavit stating the material facts on which the claim for relief is based.

28.46 Subpoenas for Division 28.5

- (1) A party to an arbitral proceeding who wants the Court to issue a subpoena under section 23(3) of the International Arbitration Act (the *issuing party*) must file an application, in accordance with Form 54.
- (2) The application must be accompanied by:
 - (a) a draft subpoena, in accordance with subrule (3); and
 - (b) an affidavit stating the following:
 - (i) the parties to the arbitral proceeding;
 - (ii) the name of the arbitrator conducting the arbitral proceeding;
 - (iii) the place where the arbitral proceeding is being conducted;
 - (iv) the nature of the arbitral proceeding;
 - (v) the terms of the permission given by the arbitral tribunal for the application;
 - (vi) the conduct money (if appropriate) to be paid to the addressee;
 - (vii) the witness expenses payable to the addressee.
- (3) For paragraph (2)(a), the draft subpoena must be in accordance with:
 - (a) for a subpoena to attend for examination before an arbitral tribunal—Form 55A; or
 - (b) for a subpoena to produce to the arbitral tribunal the documents mentioned in the subpoena—Form 55B; or
 - (c) for a subpoena to attend for examination and produce documents—Form 55C.
- (4) The Court may:
 - (a) fix an amount that represents the reasonable loss and expense the addressee will incur in complying with the subpoena; and
 - (b) direct that the amount be paid by the issuing party to the addressee before or after the addressee complies with the subpoena.
- (5) An amount fixed under subrule (4) is in addition to any conduct money or witness expenses payable under paragraph (2)(b).

28.47 Application under section 23A of International Arbitration Act

- (1) A party to an arbitral proceeding who wants an order under section 23A(3) of the International Arbitration Act must file:
 - (a) if a proceeding has not been started in relation to the arbitral proceeding—an originating application, in accordance with Form 56; or
 - (b) if a proceeding has been started in relation to the arbitral proceeding—an interlocutory application in that proceeding.
- (2) An application under subrule (1) must be accompanied by an affidavit stating the following:
 - (a) the person against whom the order is sought;
 - (b) the order sought;
 - (c) the ground under section 23A(1) relied on;
 - (d) the terms of the permission given by the arbitral tribunal for the application;
 - (e) the material facts relied on for the making of the order.

28.48 Application under section 23F or 23G of International Arbitration Act

- (1) A party to an arbitral proceeding who wants an order under section 23F or 23G of the International Arbitration Act must file:

- (a) if a proceeding has not been started in relation to the arbitral proceeding—an originating application, in accordance with Form 57;
 - (b) if a proceeding has been started in relation to the arbitral proceeding—an interlocutory application in that proceeding.
- (2) An application under subrule (1) must be accompanied by an affidavit stating the following:
- (a) the person against whom the order is sought;
 - (b) the order sought;
 - (c) the material facts relied on for the making of the order;
 - (d) either:
 - (i) if the application is made under section 23F—the terms of the order of the arbitral tribunal allowing disclosure of the information and the date the order was made; or
 - (ii) if the application is made under section 23G:
 - (A) the date the arbitral tribunal’s mandate was terminated; and
 - (B) the terms of the request made to the arbitral tribunal for disclosure of the confidential information and the date the request was made; and
 - (C) the terms of the arbitral tribunal’s refusal to make the order and the date the refusal was made.

28.49 Recognition of award

- (1) A party to an arbitral proceeding who wants to enforce an award under section 35(4) of the International Arbitration Act must file an originating application, in accordance with Form 58.

Note: *Award* is defined in section 31(1) of the International Arbitration Act.

- (2) The application must be accompanied by an affidavit stating:
- (a) the extent to which the award has not been complied with, at the date the application is made; and
 - (b) the usual or last-known place of residence or business of the person against whom it is sought to enforce the award or, if the person is a company, the last-known registered office of the company.
- (3) The application may be made without notice.

Note: *Without notice* is defined in the Dictionary.

28.50 Documents not in English language

A party to a proceeding to which this Division applies who wants to rely on a document that is not in the English language must provide a certified English translation of the document to the Court and to any other party to the proceeding.

Note: 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.

Rules 28.51–28.60 left blank

Division 28.6—Referral by Court to referee

28.61 Order of referral

- (1) A party may apply to the Court for an order under section 54A of the Act referring any of the following matters to one or more referees for inquiry and report:
 - (a) a proceeding in the Court;
 - (b) one 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.
- (2) A referee to whom a matter has been referred under section 54A of the Act must give, in a report, the referee's opinion on the matter.
- (3) If the Court sets a time for a referee to give an opinion, the referee must provide the opinion within the set time.

Note: The Court may make directions about the remuneration of the referee.

28.62 Appointment of referees

The Court may appoint a person the Court considers appropriate as:

- (a) a referee; or
- (b) a senior referee.

28.63 Two or more referees

- (1) The decision of the senior referee is to prevail if:
 - (a) the Court appoints 2 referees; and
 - (b) the 2 referees cannot agree on a decision to be made during an inquiry.
- (2) If the Court appoints 3 or more referees:
 - (a) the decision of the majority prevails in relation to a decision to be made during the inquiry; or
 - (b) if there is no majority—the decision of the senior referee prevails.

28.64 Security for remuneration

A party may apply to the Court for an order that another party give security for a referee's remuneration.

28.65 Conduct of inquiry

- (1) A party may apply to the Court, before or after an inquiry has started:
 - (a) for directions about:
 - (i) how the inquiry should be conducted; or
 - (ii) any matter arising in the inquiry; or
 - (b) to authorise the referee to take evidence for the purpose of a subpoena issued under Division 24.2.
- (2) A referee must conduct an inquiry in accordance with any directions made by the Court.
- (3) However, if the Court has not made any directions about how the inquiry should be conducted, the referee may conduct the inquiry in any way the referee thinks fit.
- (4) A referee is not bound in the inquiry by the rules of evidence but may be informed in any way that the referee thinks fit.
- (5) Evidence before a referee in an inquiry:
 - (a) may be given orally or in writing; and
 - (b) must, if the Court requires, be given:

- (i) on oath or by affirmation; or
 - (ii) by affidavit.
- (6) A referee may administer an oath or affirmation to a witness giving evidence in an inquiry.
- (7) Each party to an inquiry must, before the time fixed by the referee conducting the inquiry, give a brief statement of the findings of fact and law contended by the party to:
 - (a) the referee; and
 - (b) any other party to the inquiry.
- (8) A party to an inquiry must:
 - (a) do all things required of the party by the referee to enable the referee to form an opinion about the matter; and
 - (b) not wilfully do, or cause to be done, any act to delay or prevent the referee forming an opinion.

28.66 Report

A referee must give to the Court a written report about the matter referred to the referee that:

- (a) has attached to it the statements given by the parties under rule 28.65(7); and
- (b) sets out the referee's opinion on the matter; and
- (c) sets out the referee's reasons for the opinion.

Note: The Court will send the report to the parties on receipt of the report.

28.67 Proceeding on report

- (1) After a report has been given to the Court, a party may, on application, ask the Court to do any of the following:
 - (a) adopt, vary or reject the report, in the whole or in part;
 - (b) require an explanation by way of a further report by the referee;
 - (c) 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;
 - (d) decide any matter on the evidence taken before the referee, with or without additional evidence;
 - (e) give judgment or make an order in relation to the proceeding or question.
- (2) A party must not adduce in the Court evidence given in an inquiry.