

## **EXPLANATORY STATEMENT**

Subordinate Law No. 44 of 1995

Issued by the Authority of the Judges  
of the Supreme Court of the Australian Capital Territory

### **SUPREME COURT RULES (AMENDMENT)**

The resident Judges of the Court (of whom there are three, including the Chief Justice) or any two of the resident Judges, may make Rules of Court for regulating the practice and procedure of the Court pursuant to section 36 of the Supreme Court Act 1933.

The amending rules relate primarily to matters arising under the Evidence and Procedure (New Zealand) Act 1994 ('the Act'), which itself envisages the making of rules of court to give effect to the Act (section 48). The Act governs a scheme for the service of subpoenas in Australia and New Zealand and covers videoconferencing and telephone evidence in Australian and New Zealand proceedings.

The amending rules are modelled on Federal Court Rules so far as is practicable, to ensure consistency of practice and procedure where the provisions of the Act are to be invoked.

#### **Clause 1 : Commencement**

This clause provides that these Rules commence on the day on which they are notified in the Gazette.

#### **Clause 2 : Principal Rules**

This clause defines "Principal Rules" in these Rules to mean the Supreme Court Rules.

#### **Clause 3 : Repeal**

This clause repeals rule 20 of Order 38, rule 3 of Order 39 and rules 2, 3 and 5 of Order 70 of the Principal Rules. These rules have been superseded by the provisions of the Evidence Act 1995 (Cwlth).

**Clause 4 : Affirmations**

This clause makes a minor amendment to the form of affirmation described in sub-rule 11(2) of Order 70.

**Clause 5 : Insertion**

New Part 11C (Orders 80C to 80H) of the Supreme Court Rules is introduced by this clause. This Part deals with matters arising under the Evidence and Procedure (New Zealand) Act 1994 (Cwlt). The Evidence Amendment Act 1994 (New Zealand) provides a reciprocal scheme which operates in New Zealand.

**Order 80C - Interpretation**

This Order contains definitions and provides that in Part 11C, 'the Act' means the Evidence and Procedure (New Zealand) Act 1994 (Cwlt); indicates that expressions in Part 11C and the Act have the same meaning and that a reference in Part 11C to a form by number is a reference to the form so numbered in Schedule 13B.

**Order 80D - Service of subpoena in New Zealand**

Order 80D provides the procedure for bringing an application for leave to serve a subpoena in New Zealand from a Territory court.

**Order 80D, rule 1 - Application for leave to serve**

This rule provides that an application for leave to serve a Supreme Court subpoena must be made by motion in the Supreme Court proceedings. An application for leave to serve a subpoena issued by the Magistrates Court must be made by originating motion in the Supreme Court.

**Order 80D, rule 2 - Supporting affidavit**

An application for leave to serve a subpoena issued out of a Territory Court in New Zealand must be supported by an affidavit annexing a copy of the subpoena and stating the things specified in this rule. Much of the information required is required by the Act and is necessary for the Court to form a view on whether leave should be granted.

**Order 80D, rule 3 - Ex parte hearing**

An application for leave to serve a subpoena is to be heard ex parte (that is, in the presence of the applicant alone).

**Order 80D, rule 4 - Undertaking about expenses**

The Court may require an applicant for leave to serve a subpoena to undertake to meet the expenses of non-parties to the proceedings in complying with a subpoena.

**Order 80D, rule 5 - Leave to search, etc**

No document relating to an application for leave to serve a subpoena may be searched, inspected or copied without leave of the Court.

**Order 80E - Failure to comply with subpoena**

If there is a failure to comply with a subpoena served in New Zealand, section 16 of the Act provides that the Court may issue a certificate requesting that the New Zealand High Court exercise its powers in relation to non-compliance with the subpoena.

**Order 80E, rule 1 - Issue of certificate**

This rule provides for the issue of such a certificate and specifies the relevant form of certificate (Schedule 13B, Form 1) and further provides that the certificate is to be issued under the seal of the Court.

**Order 80E, rule 2 - Application for issue of certificate**

An application for a section 16 certificate may be made orally or by motion in the proceedings in which the subpoena was issued and must be accompanied by a draft certificate.

**Order 80E, rule 3 - Supporting affidavit**

An application for a section 16 certificate must be accompanied by an affidavit setting out the matters specified.

**Order 80F - Setting aside subpoena**

A person in New Zealand served with an Australian subpoena may wish to apply to have that subpoena set aside. Section 13 of the Act provides that such an application must be made to the Court that gave leave for the subpoena to be served in New Zealand.

**Order 80F, rule 1 - Application to set aside**

This rule provides that an application to set aside a subpoena is to be made by affidavit setting out the relevant facts and grounds. Formal requirements for the affidavit are prescribed and if an affidavit is filed by fax, the Registrar must acknowledge receipt.

**Order 80F, rule 2 - Copy of affidavit to party**

The Registrar must serve a copy of the affidavit on the party who obtained leave to serve the subpoena in New Zealand.

**Order 80F, rule 3 - Determination of application**

The application to set aside a subpoena is to be determined at a time and place and in a manner directed by the Court.

**Order 80F, rule 4 - Objection to no hearing**

Under section 14 of the Act, an application to set aside a subpoena may be determined without a hearing unless there is an objection. A form is prescribed (Schedule 13B, Form 2) by which either the person served with the subpoena, or the party issuing the subpoena, may object to the determination of the application to set aside the subpoena without a hearing. A time limit is also prescribed.

**Order 80F, rule 5 - Hearing by video link or telephone**

Section 14 of the Act also provides that a hearing to set aside a subpoena may be conducted by video or telephone link. Schedule 13B, Form 3 is prescribed to enable an applicant to request that the hearing be by video link or telephone.

**Order 80G - Evidence by Video link or telephone**

Parts 4 and 5 of the Evidence and Procedure (New Zealand) Act provide for the use of telephone or video links in Australian and New Zealand proceedings.

**Order 80G, rule 1 - Application for direction**

An application for evidence to be taken by video or telephone links from New Zealand, may be made orally or by motion.

**Order 80G, rule 2 - Supporting affidavit**

An application for the taking of evidence by telephone or video link must be supported by an affidavit. The rule sets out the information to be provided to the Court in that affidavit.

**Order 80G, rule 3 - Relevant considerations**

The Court may take matters such as cost and convenience to witnesses and parties into account in deciding whether to grant an application for hearing of evidence by video or telephone.

**Order 80G, rule 4 - Directions**

If the Court decides to hear evidence by video or telephone link, this rule provides that the Registrar may be directed to organise the link. The Court may make directions in respect of the place for the taking of evidence, any assistance required from the New Zealand High Court in introducing and swearing witnesses and other matters of practical importance.

**Order 80H - Fax Copies**

This order deals with fax copies of documents used as evidence in a proceeding. There is a requirement that if a fax is not of durable quality, a copy of that document must be filed in the Registry.

**Clause 6 - Insertion**

This clause inserts new Schedule 13B which includes the forms referred to in Part 77C.

**Form 1** - This is a "Certificate of Non-compliance with subpoena" and may be issued by the Court under section 16 of the Act, if there is non-compliance with a subpoena issued by the Supreme Court.

**Form 2** - This is the form of "Objection to determination of application for subpoena to be set aside without hearing" and is the form to be filed if a person objects under section 14 of the Act to an application to set aside a subpoena being determined without a hearing.

**Form 3** - This is the form of "Request for hearing by video link or telephone". This is a form under which an applicant may request an application to set aside a subpoena be heard by video link or telephone.