

Explanatory Statement

Court Procedures Amendment Rules 2008 (No 1) Subordinate Law SL2008 - 25

Issued by the Authority of the Rule-Making Committee

Introduction

Under section 7 of the *Court Procedures Act 2004*, the Rule-Making Committee is given power to make rules for the practice and procedure of ACT Courts and prescribed tribunals and their registries and under section 8 to prescribe forms for the same purpose.

The Advisory Committee, commonly termed the Joint Rules Advisory Committee (JRAC), consisting of members of both courts (both judicial officers and registrars), representatives of the profession and the department, parliamentary counsel and a secretary, is required by section 11 to consider and advise the Rule-Making Committee on proposals for making rules and prescribing forms.

As Members will be aware, JRAC continues to implement a policy of making amendments to the Court Procedures every 6 months unless circumstances specifically require more urgent amendment.

The proposals before the Committee constitute proposals that have been suggested by judicial officers, members of JRAC and members of the profession for amendment of the Rules over the last 6 months or so.

To assist members, the following comments are made on the proposed rules.

Court Procedures Amendment Rules 2008 (No 1)

- Rule 1 - The short title is in conventional and uncontroversial terms.
- Rule 2 - As is customary, the Rules will commence at the beginning of the relevant 6-month period, here 1 July 2008.
- Rule 3 - Specifies the principal legislation these Rules amend, namely the Court Procedures Rules 2006.
- Rule 4 - This Rule is intended to ameliorate what was seen to be an avoidable additional cost occasioned by the important provisions of rules 75 and 76 which provide an important part of case management and registry file management by striking out proceedings in which no steps have been taken for a year. This provides a simple mechanism (based on order 64 rule 9 of

the 1937 Rules) for a party to show that a proceeding remains active despite the absence of such a step.

- Rule 5 - This Rule represents a re-draft of Rule 513 in response to suggestions that the present rule may be unclear about precisely what costs are payable following amendment. Despite some discussion, JRAC considered that the term “costs thrown away” was sufficiently clear in meaning to comply with one of the objectives in drafting the rules, namely to render them into plain English.
- Rule 6 - The present rule 1617 has been suggested to be ambiguous as to whether it requires interest on the whole of the judgment sum for as long as any part of it remains unpaid. While it is unlikely that a court would so construe it, this Rule puts beyond doubt that the interest is only payable on so much of the judgment debt as remains outstanding.
- Rule 7 - This Rule amends rule 1617(4) so as to apply the same approach to the payment of interest on unpaid costs as the amendment made by Rule 6 makes to the payment of interest on unpaid judgment debts.
- Rule 8 - This Rule substitutes a note to Rule 1700 to recognise the change made by Rule 9 (below).
- Rule 9 - JRAC has further considered the not uncommon situation where costs are reserved after an interlocutory application in the proceedings has been heard and determined but are not brought to the Court’s attention at the final hearing and not dealt with in the final orders then made. Currently rule 1721 provides that such costs are not included in the costs of the action or proceeding unless the court otherwise orders. This has spawned a steady flow of post-judgment applications for costs. This Rule reverses that situation, to provide that such costs become part of the costs of the proceedings unless the court otherwise orders.

This should also encourage parties who are not successful – or might expect they may not be successful – at trial to be vigilant about attending to such costs and bringing them specifically to the attention of the court where costs are considered.

- Rule 10 - This Rule resolves the issue of how to prevent a party in whose favour costs are payable receiving an unjustifiable double benefit from the GST legislation by having GST paid (as is required under rule 1722(2)) and then gaining the benefit of an input tax credit for that GST payment as well.

- Rule 11 - The Essential Services Consumer Council is to be renamed the Energy and Water Consumer Council by the Justice and Community Safety Legislation Amendment Bill 2008 currently before the Legislative Assembly presented on 6 March 2008 and expected to be passed in the June sittings, but there is a possibility that it may not be debated until August. The change of names appears unlikely to be controversial. Further, the registration process that rule 2016 enables is hardly ever used. This Rule amends the heading to rule 2016 to effect this change.
- Rule 12 - This Rule follows the amendment made by Rule 11 (above) and amends the name of the Council in rule 2016(2).
- Rule 13 - No sales of real estate under a judgment debt have, until recently, been effected since the making of the Court Procedures Rules 2006. As expected, the first such sales have raised some issues of a technical nature about the existing rules. In particular, the rules currently do not provide for a notice to be given to an enforcement debtor of the order for sale until the enforcement officer publishes an advertisement of the auction. This is an oversight for the policy of the rules is to give as much notice as is reasonable of enforcement action to encourage settlement before enforcement action is required. This Rule provides that such notice is to be given to an enforcement debtor as soon as an enforcement creditor requests the property to be seized and sold. It also provides that such notice amounts to a seizure to prevent unscrupulous enforcement debtors taking advantage of the notice to dispose of the property before seizure (which currently occurs when publication of the auction advertisement occurs).
- Rule 14 - This Rule effects further refinement of the enforcement process as a consequence of the amendment proposed by Rule 15 (above).
- Rule 15 - Another refinement required in the enforcement process for the sale of land under enforcement proceedings has been in the appointment of a real estate agent to conduct the auction. An examination of the making of such appointments showed that they are likely to be costly and administratively burdensome if made for each individual sale as proposed in the current rules. The solution given effect to by this Rule is to allow the Sheriff to establish a panel of such agents and then to choose an agent from the panel for each individual sale.
- Rule 16 - This Rule inserts a requirement, common in most civil procedure rules, that where an order requires a person to whom it is addressed to do or refrain from some action upon pain of contempt or sequestration, this consequence of non-

compliance should be stated in a notice or the order to be served on that person.

- Rule 17 - This Rule effects a further amendment necessitated by the name change of the Essential Services Consumer Council to the Energy and Water Consumer Council.
- Rule 18 - A careful process for the inspection of subpoenaed documents is in place in both courts. JRAC recommends that this be streamlined by allowing a defined meaning to be included in the rules for the usual order in relation to this process. This Rule permits the registrar (on behalf of the court) to make the usual order or make another order for inspection of those documents.
- Rule 19 - This Rule defines what the usual order is for inspection of subpoenaed documents. It harmonises the practices between the two courts, where a different period previously pertained.
- Rule 20 - Schedule 5.2 lists the jurisdiction exercisable by the Registrar under the *Corporations Act 2001* (Cth). This Rule amends that Schedule to comply with amendments proposed by the Corporations Rules Harmonisation Committee of the Council of Chief Justices following the enactment of the *Corporations Amendment (Insolvency) Act 2007* (Cth). The powers are self-explanatory from the description in the fourth column.
- Rules 21–28 These Rules similarly amend Schedule 5.2 for the reasons set out in relation to Rule 19. The powers can be seen from the description of them in the fourth column.
- Rule 29 - The Sixth Schedule contains the Supreme Court’s Corporations Rules. These are harmonised rules uniform through Australia. The amendments proposed by this Rule and Rules 30 to 57, have been prepared by the Corporations Rules Harmonisation Committee of the Council of Chief Justices following the enactment of the *Corporations Amendment (Insolvency) Act 2007* (Cth). This Rule inserts a new note to rule 1.4 to recognise the definition of “ASIC” in s 9 of the *Corporations Act 2001* (Cth).
- Rules 30-36 These Rules make minor amendments to the Corporations Rules to recognise the definition referred to in Rule 29 and other matters.
- Rule 37 - This Rule substitutes the requirements for the affidavit in support of an application for the remuneration of as receiver to comply with the amendments to s 425 of the *Corporations Act 2001* (Cth) made by the *Corporations Amendment (Insolvency) Act 2007* (Cth).

- Rule 38 - This Rule inserts new rules to provide for the procedure to be made by the new application provided for by new s 449E of the *Corporations Act 2001* (Cth) as amended by the *Corporations Amendment (Insolvency) Act 2007* (Cth) for an administrator to apply for determination of his or her remuneration and for a review of that remuneration.
- Rules 39-47 These Rules effect amendments to drafting and occasioned by changes in terminology effected by the *Corporations Amendment (Insolvency) Act 2007* (Cth).
- Rule 48 - This Rule makes provisions in relation to an application by a liquidator for remuneration for the position where there is no committee of inspection.
- Rule 49 - This Rule substitutes the requirements for the affidavit in support of an application for the remuneration of a liquidator to comply with the amendments to s 473 of the *Corporations Act 2001* (Cth) made by the *Corporations Amendment (Insolvency) Act 2007* (Cth).
- Rule 50 - This Rule inserts a new rule to provide for the application for a review of a liquidator's remuneration under both s 473 (existing) and 503 (new) of the *Corporations Act 2001* (Cth) as provided for by the amendment effected by the *Corporations Amendment (Insolvency) Act 2007* (Cth).
- Rules 51-53 These Rules effect amendments to drafting and occasioned by changes to terminology effected by the *Corporations Amendment (Insolvency) Act 2007* (Cth).
- Rule 54 - This Rule inserts a provision for the issue of a warrant for the arrest of a person when a company is or is about to be wound up in insolvency and the person is likely to abscond without paying money due to the company, being examined about the affairs of the company or complying with a Court order or in connection with the winding up or who has concealed or removed property of the Company to delay it being accessed by the liquidator or destroyed, concealed or removed books of the Company.
- Rules 55-57 These Rules effect amendments to drafting and occasioned by change to terminology effected by the *Corporations Amendment (Insolvency) Act 2007* (Cth).