

Explanatory Statement

Court Procedures Amendment Rules 2008 (No 2) Subordinate Law SL2008 - 44

Issued by the Authority of the Rule-Making Committee

The Rule-Making Committee may make rules in relation to the practice and procedure of ACT courts and their registries pursuant to section 7 of the *Court Procedures Act 2004* and under section 8 to approve forms for the same purpose.

The Court Procedures Rules 2006 commenced in the ACT Supreme Court on 1 July 2006 and in the ACT Magistrates Court on 1 January 2007. From the time of commencement of the rules on 1 July 2006, the Courts and the Joint Rules Advisory Committee have conducted a continuous and consultative review of the rules. This process has resulted in the attached *Court Procedures Amendment Rules 2008 (No 2)* which is to commence on 1 October 2008.

New rules have been introduced to provide for:

- (1) **A procedure for registration of judgments of other Australian courts under the *Service and Execution of Process Act 1992 (Cth)* (“the SEP Act”).** This amendment has been required because rule 2015 requires a sealed copy of an order for the payment of money (“an enforceable money order”) to be served prior to the commencement of enforcement proceedings. This is specifically designed to encourage payment of money due under an enforceable money order without the need for actual enforcement. It was a mechanism supported by the profession and representatives of debtor assistance agencies.

There is, however, no such order following registration of a judgment of another Australian court under the SEP Act and so the amendments have been prepared to provide for a certificate to be issued by the Registry and this to be then taken to be such an order (see amendment 5). The opportunity was taken to provide helpful regulation of the procedure for registration of the judgment (see amendment 4).

As an administrative act, the Registrar should be given power to issue the certificate and this has also been included (see amendments 6 and 7).

A new form of Certificate of registration of enforceable order, for this purpose is included in the Approved Forms (see Form 2.85).

- (2) **A new provision for notices to produce.** This was originally omitted from the *Court Procedures Rules 2006* on the basis that a party could have a subpoena issued. The profession has subsequently made robust representations urging that the provision for a notice to produce be re-introduced, it having

been in the 1938 Rules. After detailed consideration, JRAC agreed that there was utility in such a provision (see amendment 8).

The provision established a notice which may be served on a party to produce a document or documents at the hearing of a matter. It regulates the time of service and the sanctions for non-compliance. It also gives the court express power to sanction those who issue such notices unnecessarily.

A new form of Notice to produce is now included in the Approved Forms (see Form 6.20).

- (3) **Costs.** It has become customary to consider an increase in the scale of costs for legal work set out in the Fourth Schedule every year. This year the recommended increase of 6.23%, save for two items, namely the cost per copy of photocopying or printing attachments over 100 copies, which have not been increased for many years. This has been the subject of a detailed submission from the Law Society of the ACT which JRAC considered was justified.

In order to comply with traditional practice, the amendment (see amendments 9 and 10) is specified to apply to work done on or after 1 July 2008. This may be said to conflict with s 76 of the *Legislation Act 2001* which prohibits a subordinate instrument from providing for certain provisions (called prejudicial provisions) from commencing retrospectively unless the enabling Act expressly displaces that section. The *Court Procedures Act 2004* does not do this. The commencement of the scale may not be regarded as prejudicial in the terms of the *Legislation Act 2001*, though this is only arguable. The risk of the provisions has been modified, however, as the rule has been modified (see proposed rule 4.12(3)) so as not to apply to work which was included in an assessment of costs completed before the rule comes into effect.

It is considered desirable to proceed in this way in order to keep faith with the legal profession.