

EXPLANATORY STATEMENT

COURT PROCEDURES AMENDMENT RULES 2008 (NO 3)

SUBORDINATE LAW SL2008–50

Issued by the Authority of the Rule-Making Committee

Overview

The Rule-Making Committee established under section 7 of the *Court Procedures Act 2004* and currently comprising the Chief Justice, the President of the Court of Appeal, Justice Refshauge, the Chief Magistrate and Magistrate Burns, or any 3 or more Committee members, 1 of whom must be the Chief Justice and another of whom must be either the Chief Magistrate or Magistrate Burns, may make rules in relation to the practice and procedures of ACT Courts, prescribed tribunals and their registries under that section and under section 8 of that Act may approve forms for that purpose.

The Court Procedures Rules 2006 were made on 15 June 2006 and commenced in the ACT Supreme Court on 1 July 2006 and in the ACT Magistrates Court on 1 January 2007. From the first commencement of the rules, the Courts and the Joint Rules Advisory Committee established under section 10 of the *Court Procedures Act 2004* have maintained a continuous review of the rules and consulted over amendments proposed to them. This process has resulted in the *Court Procedures Amendment Rules 2008 (No 3)* which are to commence on 1 January 2009.

In addition, the Council of Chief Justices has established a series of committees to promote the harmonisation of rules in superior courts throughout Australia. Justice Refshauge represents the ACT Supreme Court on these committees. One such committee has already harmonised rules under the *Corporations Act 2001 (Cth)* and continues to monitor amendments to legislation to ensure the rules remain up-to-date.

The Court Procedures Amendment Rules 2008 (No 3) make the following amendments. They

- correct a note to rule 1701(2) which should have been corrected when rule 1721 was amended;
- provide for a standard sum for costs payable on the winding up of a company;
- make rules to give effect to changes in committals effected by the *Crimes Legislation Amendment Act 2008* (ACT) by providing times for taking certain steps;
- permit the Master to deal with consent orders and interlocutory matters under the *Legal Profession Act 2006* (ACT);
- amend the subpoena provisions to regularise the common and sensible practice of allowing the scheduling of witnesses at hearings;
- update the costs claimable in proceedings for debts or liquidated demands;
- make rules to give effect to the *Cross-Border Insolvency Act 2008* (Cth).

At the same time, certain forms have been approved to give effect to some of these changes.

Notes of the Rules

Rules 1, 2 and 3

Clauses 1, 2 and 3 are formal and technical clauses. Clause 1 names the rules. Clause 2 stipulates the commencement day, namely 1 January 2009, except for rule 6 which commences on the date the *Crimes Legislation Amendment Act 2008* (ACT) commences. Clause 3 specifies the rules which these rules amend.

Rule 4 - The Court Procedures Amendment Rules 2008 (No 1) amended rule 1721 to provide that reserved costs are automatically included in the costs of proceedings unless the court otherwise orders thus reversing the previous position which had caused numerous post-judgment applications. It also amended a note to rule 1700. It has been pointed out that the note to rule

1701(2) was in the same terms and is now incorrect. Accordingly this rule amends the note to rule 1701(2) in the same way, as is appropriate.

- Rule 5 - The Joint Rules Advisory Committee received a submission suggesting that it would be helpful to members of the profession were a “default” or standard sum to be specified for the costs of a winding up application rather like the “default” costs of a default judgment (see Schedule 3 to the Rules). A number of files in the Registry of completed and discontinued winding up applications were inspected and a fee for such work of \$3,400 was recommended which the Committee accepted. This rule establishes the framework for that fee.

The rule as proposed permits the prescribed costs to be the costs awarded and payable on a winding up, (or on dismissal of an application for a winding up if appropriate) without the need for an assessment of costs, but permits a party to seek a greater amount of costs if it wishes to do so.

- Rule 6 - The *Crimes Legislation Amendment Act 2008* (ACT) has made a number of amendments to the *Magistrates Court Act 1938* (ACT) to provide for, inter alia, a reform of committal hearings, principally to mandate “paper committals”.

The committal reforms required rules to be made to provide time limits for the service of relevant documents and this rule provides these time periods as 28 days. This time was agreed after consultation with the profession.

- Rule 7 - The Rules currently provide both the provision set out in this rule (which remains) as well as a prohibition preventing the Master from exercising any of the powers of the court under the *Legal Profession Act 2006*. This has prevented the Master from entering judgments or orders by consent, dealing with interlocutory applications and the like. These are clearly powers that the Master should exercise and which will encourage efficient and inexpensive disposal of such litigation.

This rule omits that latter provision, thereby allowing the Master to exercise such a power. Naturally, it would not have the effect of permitting the

Master to hear and determine matters of admission or disciplinary proceedings under the *Legal Profession Act 2006*, where a Full Court is required (s 11 of the *Supreme Court Act 1933*).

Rules 8 & 9 - The current rules relating to subpoenas and the forms were unclear about whether a party issuing a subpoena could effectively give the addressee notice to attend at a date and time later than that specified in the subpoena. This obviously is a useful mechanism to avoid the need for all witnesses to attend at the first day of a trial, thus helping to run the trial more efficiently and minimising the inconvenience to witnesses. These amendments make provision for the issuing party to state a time and date other than that on the subpoena but still bind the addressee to attend at that other time and date.

Rule 10 - This rule inserts a new Schedule 3 which updates the amount of prescribed costs claimable in proceedings for debt or liquidated demand. This was overlooked when the scale of solicitors' costs was updated effectively from 1 July 2008. It also inserts the prescribed costs on winding up as foreshadowed in rule 5 above.

Rule 11 to 17 - The Commonwealth enacted the *Cross-Border Insolvency Act 2008* to give effect to the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law. This law permits domestic courts to give assistance to courts of a foreign jurisdiction in insolvency matters where there is an international element or the need to enforce foreign proceedings, including the distribution of a debtor's assets to an appropriate official, to recognise foreign judgments and then to seek relief.

The Council of Chief Justices' Committee on the Corporations Rules, convened by Justice Lindgren of the Federal Court of Australia, has prepared these rules – The Corporations Rules are uniform throughout Australia and these rules are in the uniform terms with appropriate (and permitted) local modifications.