



New South Wales

Uniform Civil Procedure Rules (Amendment No 9) 2006

under the

Civil Procedure Act 2005

The Uniform Rules Committee made the following rules of court under the *Civil Procedure Act 2005* on 5 June 2006.

Jennifer Atkinson
Secretary of the Rules Committee

Explanatory note

The object of these Rules is to make further provision with respect to various matters, including:

- (a) the adoption of uniform rules, prepared under the auspices of the Australian Council of Chief Justices, in relation to freezing orders and search orders, and
- (b) the removal of documents that have been produced at court pursuant to a subpoena, and
- (c) the retention of documents that have been made available for inspection pursuant to an order for discovery, and
- (d) the annexing of documents to affidavits of service, and
- (e) the powers of the Sheriff with respect to the sale of land pursuant to a writ of execution.

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Rule 1 Uniform Civil Procedure Rules (Amendment No 9) 2006

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1 Name of Rules

These Rules are the *Uniform Civil Procedure Rules (Amendment No 9) 2006*.

2 Amendment of Uniform Civil Procedure Rules 2005

The *Uniform Civil Procedure Rules 2005* are amended as set out in Schedule 1.

Schedule 1 Amendments

(Rule 2)

[1] Rule 1.3 References to barristers and solicitors

Insert at the end of rule 1.3 (after the note):

- (2) For the purposes of rule 33.9 (9), a reference to a solicitor for a party includes a reference to:
 - (a) a solicitor acting as agent for the solicitor for a party, and
 - (b) any other solicitor belonging to the same firm or organisation (whether as partner or employee) as the solicitor for a party or the solicitor acting as agent for the solicitor for a party.
- (3) For the purposes of rule 33.9 (10):
 - (a) a reference to a solicitor who removes a document or thing from the office of the registrar includes a reference to a solicitor who directs a person referred to in paragraph (b) to remove a document or thing from the office of the registrar, and
 - (b) a reference to the personal custody of the solicitor includes a reference to the personal custody of:
 - (i) any other solicitor belonging (whether as partner or employee) to the same firm or organisation as that solicitor, or any other person employed by that firm or organisation, and
 - (ii) any other solicitor acting as agent for that solicitor, and
 - (iii) any other solicitor belonging (whether as partner or employee) to the same firm or organisation as a solicitor acting as agent for that solicitor, or any other person employed by that firm or organisation, and
 - (iv) if the registrar has approved a firm or organisation to provide photocopying services in respect of documents, any employee of a firm or organisation so approved.

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[2] Rule 4.4 Signing documents

Omit “a commercial agent or subagent (within the meaning of the *Commercial Agents and Private Inquiry Agents Act 1963*)” from rule 4.4 (3) (a).

Insert instead “a commercial agent with respect to debt collection (within the meaning of the *Commercial Agents and Private Inquiry Agents Act 2004*)”.

[3] Rule 7.1 By whom proceedings may be commenced and carried on

Omit “a commercial agent or subagent (within the meaning of the *Commercial Agents and Private Inquiry Agents Act 1963*)” from rule 7.1 (5) (a).

Insert instead “a commercial agent with respect to debt collection (within the meaning of the *Commercial Agents and Private Inquiry Agents Act 2004*)”.

[4] Rule 14.38 Defences of comment or honest opinion

Omit “interest, and” from rule 14.38 (3) (b). Insert instead “interest.”.

[5] Rule 14.38 (3) (c)

Omit the paragraph.

[6] Rule 21.5 Documents to be made available

Omit rule 21.5 (1). Insert instead:

- (1) Subject to the requirements of any Act or law, Party B must ensure that the documents described in Part 1 of the list of documents (other than privileged documents):
 - (a) are physically kept and arranged in a way that makes the documents readily accessible and capable of convenient inspection by party A, and
 - (b) are identified in a way that enables particular documents to be readily retrieved,from the time the list of documents is served on party A until the time the trial of the proceedings is completed.

[7] Part 25, Division 1, heading

Insert before rule 25.1:

Division 1 General

[8] Rule 25.1 Application

Insert at the end of the rule:

- (2) Divisions 2 and 3, but not this Division, also apply to proceedings in the Dust Diseases Tribunal.

[9] Rule 25.2 Order in urgent case before commencement of proceedings

Omit rule 25.2 (1) (c). Insert instead:

- (c) it may grant any injunctive relief, including relief in the nature of a freezing order under Division 2 (Mareva relief) or a search order under Division 3 (an Anton Piller order),

[10] Part 25, Divisions 2 and 3

Insert after rule 25.9:

Division 2 Freezing orders

Note. The provisions of this Division comprise uniform rules developed under the auspices of the Australian Council of Chief Justices.

25.10 Interpretation (cf Federal Court Rules Order 25A, rule 1)

In this Division:

ancillary order has the meaning given by rule 25.12.

another court includes a court outside New South Wales, whether inside or outside Australia.

applicant means a person who applies for a freezing order or an ancillary order.

freezing order has the meaning given by rule 25.11.

respondent means a person against whom a freezing order or an ancillary order is sought or made.

Note 1. The definition of *judgment* in the *Federal Court Rules* is not included above. The word is defined in section 3 of the *Civil Procedure Act 2005* for the purposes of that Act and these rules.

Note 2. In any notice of motion for a freezing order, a party should be referred to by the appropriate expression prescribed by rule 18.3.

25.11 Freezing order (cf Federal Court Rules Order 25A, rule 2)

- (1) The court may make an order (a *freezing order*), upon or without notice to a respondent, for the purpose of preventing the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied.
- (2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.

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25.12 **Ancillary order** (cf Federal Court Rules Order 25A, rule 3)

- (1) The court may make an order (an *ancillary order*) ancillary to a freezing order or prospective freezing order as the court considers appropriate.
- (2) Without limiting the generality of subrule (1), an ancillary order may be made for either or both of the following purposes:
 - (a) eliciting information relating to assets relevant to the freezing order or prospective freezing order,
 - (b) determining whether the freezing order should be made.

25.13 **Respondent need not be party to proceeding** (cf Federal Court Rules Order 25A, rule 4)

The court may make a freezing order or an ancillary order against a respondent even if the respondent is not a party to a proceeding in which substantive relief is sought against the respondent.

25.14 **Order against judgment debtor or prospective judgment debtor or third party** (cf Federal Court Rules Order 25A, rule 5)

- (1) This rule applies if:
 - (a) judgment has been given in favour of an applicant by:
 - (i) the court, or
 - (ii) in the case of a judgment to which subrule (2) applies—another court, or
 - (b) an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in:
 - (i) the court, or
 - (ii) in the case of a cause of action to which subrule (3) applies—another court.
- (2) This subrule applies to a judgment if there is a sufficient prospect that the judgment will be registered in or enforced by the court.
- (3) This subrule applies to a cause of action if:
 - (a) there is a sufficient prospect that the other court will give judgment in favour of the applicant, and
 - (b) there is a sufficient prospect that the judgment will be registered in or enforced by the court.

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- (4) The court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because any of the following might occur:
- (a) the judgment debtor, prospective judgment debtor or another person absconds,
 - (b) the assets of the judgment debtor, prospective judgment debtor or another person are:
 - (i) removed from Australia or from a place inside or outside Australia, or
 - (ii) disposed of, dealt with or diminished in value.
- (5) The court may make a freezing order or an ancillary order or both against a person other than a judgment debtor or prospective judgment debtor (a *third party*) if the court is satisfied, having regard to all the circumstances, that:
- (a) there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because:
 - (i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor, or
 - (ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor, or
 - (b) a process in the court is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, under which process the third party may be obliged to disgorge assets or contribute toward satisfying the judgment or prospective judgment.
- (6) Nothing in this rule affects the power of the court to make a freezing order or ancillary order if the court considers it is in the interests of justice to do so.

25.15 Jurisdiction (cf Federal Court Rules Order 25A, rule 6)

Nothing in this Division diminishes the inherent, implied or statutory jurisdiction of the court to make a freezing order or ancillary order.

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25.16 Service outside Australia of application for freezing order or ancillary order (cf Federal Court Rules Order 25A, rule 7)

An application for a freezing order or an ancillary order may be served on a person who is outside Australia (whether or not the person is domiciled or resident in Australia) if any of the assets to which the order relates are within the jurisdiction of the court.

25.17 Costs (cf Federal Court Rules Order 25A, rule 8)

- (1) The court may make any order as to costs as it considers appropriate in relation to an order made under this Division.
- (2) Without limiting the generality of subrule (1), an order as to costs includes an order as to the costs of any person affected by a freezing order or ancillary order.

Division 3 Search orders

Note. The provisions of this Division comprise uniform rules developed under the auspices of the Australian Council of Chief Justices.

25.18 Interpretation (cf Federal Court Rules Order 25B, rule 1)

In this Division:

applicant means an applicant for a search order.

described includes described generally whether by reference to a class or otherwise.

premises includes a vehicle or vessel of any kind.

respondent means a person against whom a search order is sought or made.

search order has the meaning given by rule 25.19.

Note. In any notice of motion for a search order, a party should be referred to by the appropriate expression prescribed by rule 18.3.

25.19 Search order (cf Federal Court Rules Order 25B, rule 2)

The court may make an order (a *search order*), in any proceeding or in anticipation of any proceeding in the court, with or without notice to the respondent, for the purpose of securing or preserving evidence and requiring a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence which is or may be relevant to an issue in the proceeding or anticipated proceeding.

25.20 Requirements for grant of search order (cf Federal Court Rules Order 25B, rule 3)

The court may make a search order if the court is satisfied that:

- (a) an applicant seeking the order has a strong prima facie case on an accrued cause of action, and
- (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made, and
- (c) there is sufficient evidence in relation to a respondent that:
 - (i) the respondent possesses important evidentiary material, and
 - (ii) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.

25.21 Jurisdiction (cf Federal Court Rules Order 25B, rule 4)

Nothing in this Division diminishes the inherent, implied or statutory jurisdiction of the court to make a search order.

25.22 Terms of search order (cf Federal Court Rules Order 25B, rule 5)

- (1) A search order may direct each person who is named or described in the order:
 - (a) to permit, or arrange to permit, such other persons as are named or described in the order:
 - (i) to enter premises specified in the order, and
 - (ii) to take any steps that are in accordance with the terms of the order, and
 - (b) to provide, or arrange to provide, such other persons named or described in the order with any information, thing or service described in the order, and
 - (c) to allow such other persons named or described in the order to take and retain in their custody any thing described in the order, and
 - (d) not to disclose any information about the order, for up to 3 days after the date on which the order was served, except for the purposes of obtaining legal advice or legal representation, and
 - (e) to do or refrain from doing any act as the court considers appropriate.

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- (2) Without limiting the generality of subrule (1) (a) (ii), the steps that may be taken in relation to a thing specified in a search order include:
 - (a) searching for, inspecting or removing the thing, and
 - (b) making or obtaining a record of the thing or any information it may contain.
- (3) A search order may contain such other provisions as the court considers appropriate.
- (4) In subrule (2):
record includes a copy, photograph, film or sample.

25.23 Independent solicitors (cf Federal Court Rules Order 25B, rule 6)

- (1) If the court makes a search order, the court must appoint one or more solicitors, each of whom is independent of the applicant's solicitors (the *independent solicitors*), to supervise the execution of the order, and to do such other things in relation to the order as the court considers appropriate.
- (2) The court may appoint an independent solicitor to supervise execution of the order at any one or more premises, and a different independent solicitor or solicitors to supervise execution of the order at other premises, with each independent solicitor having power to do such other things in relation to the order as the court considers appropriate.

25.24 Costs (cf Federal Court Rules Order 25B, rule 7)

- (1) The court may make any order as to costs that it considers appropriate in relation to an order made under this Division.
- (2) Without limiting the generality of subrule (1), an order as to costs includes an order as to the costs of any person affected by a search order.

[11] Part 33, heading

Insert after the Part heading:

Note. The provisions of this Part comprise uniform rules developed under the auspices of the Australian Council of Chief Justices.

[12] Rule 33.9 Inspection of, and dealing with, documents and things produced otherwise than on attendance

Insert after rule 33.9 (9):

Note. See rule 1.3 (2) with respect to the meaning of the reference to a solicitor for a party.

[13] Rule 33.9 (10)

Insert after rule 33.9 (10):

Note. See rule 1.3 (3) with respect to the meaning of the reference to a solicitor who removes a document or thing from the office of the registrar and the reference to the personal custody of the solicitor.

[14] Rule 35.3 Persons who may make affidavit

Omit “a commercial agent or subagent (within the meaning of the *Commercial Agents and Private Inquiry Agents Act 1963*)” from rule 35.3 (2) (a).

Insert instead “a commercial agent with respect to debt collection (within the meaning of the *Commercial Agents and Private Inquiry Agents Act 2004*)”.

[15] Rule 35.8 Affidavit of service not to annex copies of filed documents

Insert “unless the document has not been filed” after “document” where lastly occurring in rule 35.8 (1).

[16] Rule 39.8 Auctioneer

Insert “SCR Part 45, rule 6;” before “DCR Part 35, rule 3A;” in the heading to the rule.

[17] Rule 39.8 (1)

Omit “is reasonable to do so”.

Insert instead “appears to the Sheriff that it is reasonable to sell the property”.

[18] Rule 39.8 (2A)

Insert after rule 39.8 (2):

- (2A) If, after the appointment of the auctioneer, it appears to the Sheriff that it is not reasonable to proceed with the sale, the Sheriff may direct that the property be withdrawn from sale.