

EXPLANATORY STATEMENT

Subordinate Law No. 20 of 1993

Issued by the Authority of the Judges
of the Supreme Court

AMENDMENT OF THE SUPREME COURT RULES

The amendments to Order 39 of the Rules relate to the taking of evidence otherwise than at trial, both within and outside Australia, in respect of proceedings within the Australian Capital Territory as well as to the taking of evidence within Australia on behalf of interstate and foreign courts and tribunals.

The amendments clarify the procedures to be followed in each of the above circumstances and reflect the comments made by Chief Justice Miles in Henderson v. Primmer 68ACTR 9 as to the appropriate circumstances in which the Court should order a commission or letters of request to be issued.

The substantive amendments are conveniently divided into the following three Divisions:

1. Division 3 - Taking evidence otherwise than at trial - examination of witnesses within Australia

This Division applies to an examination for the purposes of civil proceedings if the examination is to be conducted within the Territory where the examination is ordered under paragraph 57(a) of the Supreme Court Act 1933 or if the examination is to be conducted outside the Territory, but within Australia where it is ordered under paragraph 57(a) of the Supreme Court Act 1933 or under Part XIIA of the Evidence Act 1971. This Division also applies to an examination for the purposes of criminal proceedings where the examination is to be conducted outside the Territory, but within Australia, and the examination ordered under Part XIIA of the Evidence Act 1971.

An order under Part XIIA of the Evidence Act 1971 for an examination of witnesses outside the Territory, but within Australia, in relation to proceedings in the Magistrates Court is only to be made where it would not be in the interests of justice for an order for examination to be made by the Magistrates Court under S.201 of the Magistrates Court (Civil Jurisdiction) Act 1982.

The Division also provides for the following: when an order for examination may be made, application for an order for examination, who may be appointed as an examiner, forms

of order, documents to be provided to the examiner, appointment for examination, conduct of an examination, objections by a person being examined, recording of depositions, authentication and filing of depositions, special report to the Court, default of witness and conduct money.

2. Division 4 - Taking evidence otherwise than at trial - outside Australia

This Division applies to an order for an examination, or for the sending of a letter of request, in relation to the taking of evidence outside Australia for the purposes of civil or criminal proceedings - under subsection 7V(1) of the Evidence Act 1905 (Cwlth) or for the purposes of civil proceedings under section 57 of the Supreme Court Act 1933.

This Division also provides for the following: when an order under the Division may be made, application for an order, forms of order, letters of request, failure to pay expenses, procedure (similar to that detailed in Division 3) for taking evidence by examination or under a letter of request.

3. Division 5 - Taking evidence for interstate and foreign courts and tribunals

This Division applies to an order for the taking of evidence for an interstate or foreign court or tribunal under Part XIIB of the Evidence Act 1971, and to an examination conducted pursuant to such an order. The Division applies subject to the terms of the relevant letter of request, any direction by the Court consistent with the letter of request and any applicable convention.

The Division also provides for the following: application for an order, form of order, appointment of examiner, attendance at examination by applicant, procedure for taking evidence (similar to that detailed in Division 3), retention of exhibits, certificate of order and depositions and privilege of witnesses.

The remaining amendments relating to Order 39 and the First Schedule amendments are consequential upon the above substantive amendments.

The amendment to Order 66, Rule 11 (Rule 12) is consistent with the Rules amendments contained in Subordinate Law No. 34 of 1992 (dated 14 December 1992) which was overlooked when the "global" amendments were made in those earlier Rules. The purpose of the earlier Rules was to do away with the distinction in the Rules between a Judge sitting in open court and a Judge sitting in Chambers.