



Australian Capital Territory

Supreme Court Rules¹ (Amendment)

Subordinate Law No. 20 of 1993²

We, Judges of the Supreme Court, make the following Rules of Court under section 36 of the *Supreme Court Act 1933*.

Dated 27 April 1993.

JEFFREY MILES
Chief Justice

J F GALLOP
Judge

T J HIGGINS
Judge

A G TOWILL
Registrar

Commencement

1. These Rules commence on the day on which they are notified in the *Gazette*.

Principal Rules

2. In these Rules, “Principal Rules” means the Supreme Court Rules.

Substitution

3. The heading to Division 1 of Order 39 of the Principal Rules is omitted and the following heading substituted:

“Division 1—General”.

Substitution

4. The heading to Division 2 of Order 39 of the Principal Rules is omitted and the following heading substituted:

“Division 2—Orders for inspection of documents held by third parties”.

Repeal

5. Rules 4, 5 and 6 of Order 39 of the Principal Rules are repealed.

Substitution

6. Rules 7 to 24 (inclusive) of Order 39 of the Principal Rules are repealed and the following Divisions substituted:

“Division 3—Taking evidence otherwise than at trial—examination of witnesses within Australia

Application

“7. (1) This Division applies to an examination for the purposes of civil proceedings—

- (a) if the examination is to be conducted within the Territory—where it is ordered under paragraph 57 (a) of the Act; or
- (b) if the examination is to be conducted outside the Territory, but within Australia—where it is ordered under paragraph 57 (a) of the Act or under Part XIIA of the *Evidence Act 1971*.

“(2) This Division applies to an examination for the purposes of criminal proceedings where it is—

- (a) to be conducted outside the Territory, but within Australia; and
- (b) ordered under Part XIIA of the *Evidence Act 1971*.

Application to Magistrates Court proceedings

“8. An order under Part XIIA of the *Evidence Act 1971* for an examination in relation to proceedings in the Magistrates Court shall only be made where the Court is satisfied that it would not be in the interests of

justice for an order for examination to be made by the Magistrates Court under section 201 of the *Magistrates Court (Civil Jurisdiction) Act 1982*.

When order for examination may be made

“9. An order for examination may be made at any stage of the relevant proceeding.

Application for order

“10. (1) An application for an order for examination may be made by any party to the relevant proceeding.

“(2) An application may be made—

- (a) if the proceeding is in the Court—by notice of motion; or
- (b) if the proceeding is in the Magistrates Court—by summons.

“(3) All other parties to the proceeding shall be made respondent to the notice of motion or the summons, as the case may be.

“(4) Evidence in support of an application shall be given by affidavit.

“(5) Where an order is applied for under paragraph 57 (a) of the Act, in determining whether to make the order, the Court shall have regard to the matters referred to in subsection 85C (2) of the *Evidence Act 1971* as if the application were for an order under subsection 85C (1) of the last-mentioned Act.

“(6) In determining whether to make an order for examination, in addition to the matters referred to in subsection 85C (2) of the *Evidence Act 1971*, the Court shall have regard to whether the proposed examiner is suitable.

Appointment of examiner

“11. (1) Any of the following persons may be appointed as an examiner:

- (a) a Judge;
- (b) the Master;
- (c) an officer of the Court;
- (d) any other person considered by the Court to be suitable.

“(2) A Judge, the Master or an officer of the Court shall only be appointed with the concurrence of the Chief Justice.

Forms of order

“12. (1) An order for the examination of a person within the Territory shall be made in accordance with Form 38 in the First Schedule.

“(2) An order for the examination of a person outside the Territory but within Australia shall be made in accordance with Form 39 in the First Schedule.

Documents for examiner

“13. (1) The party obtaining an order for examination shall give the examiner copies of the documents in the proceeding that are necessary to inform the examiner of the questions to which the examination is to relate.

“(2) If the documents in the proceeding are not sufficient to inform the examiner of the questions, the Court shall state the questions in the order or in a later order.

Appointment for examination

“14. (1) The examiner shall appoint a place and time for an examination unless the Court orders otherwise.

“(2) The appointed time shall be as soon as practicable after the making of the order, having regard to the convenience of the person to be examined and to the circumstances of the examination.

“(3) Notice of the appointment for examination shall be given—

- (a) by the examiner to the party obtaining the order; and
- (b) at least 3 days before the day appointed for the examination—by the party obtaining the order to each other party to the proceeding, and to the person to be examined.

Conduct of examination

“15. (1) Subject to this Division, an examination shall be conducted in accordance with the procedure of the Court.

“(2) Each party to the relevant proceeding and each party’s counsel and solicitor may attend the examination.

“(3) The person examined may be cross-examined and re-examined unless the Court orders otherwise.

“(4) The examination, cross-examination and re-examination of a person before an examiner shall be conducted in like manner as at a trial unless the Court orders otherwise.

“(5) The examiner may put any question to the person being examined as to—

- (a) the meaning of an answer made by the person; or
- (b) any matter arising in the course of the examination.

“(6) The examiner may adjourn the examination from time to time or from place to place.

Examination of additional persons

“16. (1) An examiner may examine a person additional to the person named or described in the order for examination where each party to the proceeding consents in writing.

“(2) The examiner shall annex to the deposition of the person additionally examined the consent of each party to the proceeding.

Objections

“17. Where a person being examined objects to answering a question or to producing a document or thing—

- (a) the question, the ground for the objection, the opinion of the examiner and any answer given shall be set out in the deposition of the person being examined (or in a statement attached to the deposition);
- (b) on motion by the person objecting or by any party, the Court may decide the validity of the ground for the objection; and
- (c) if the Court decides the ground for the objection to be invalid, the Court may order the person objecting to pay the costs occasioned by the objection.

Recording of depositions

“18. (1) The deposition of a person being examined shall be recorded by means of—

- (a) writing or shorthand;
- (b) stenotype machine;
- (c) sound-recording apparatus; or
- (d) in accordance with the directions of the Court or the examiner—any audio-visual method, including video-taping.

“(2) A deposition shall record the statement of the person being examined as accurately as possible.

“(3) The examiner may direct that the words of any question and the answer to the question be recorded in the deposition.

“(4) Subject to this Division, a deposition need not record every question and answer in the examination.

Authentication and filing

“19. (1) Where a deposition is recorded in writing (other than shorthand)—

- (a) it shall be read by or to the person examined, as directed by the examiner; and
- (b) the person examined may endorse it as a true record of the examination.

“(2) Where a deposition is recorded by shorthand or by any means other than writing—

- (a) a transcript shall be prepared of the deposition;
- (b) the transcriber shall certify that the transcript is correct; and
- (c) the person examined may endorse the transcript as a true record of the examination.

“(3) The examiner shall endorse the written record or transcript of a deposition with a note—

- (a) stating that the record or transcript is a true record of the examination;
- (b) specifying the time occupied by the examination; and
- (c) specifying the fees received by the examiner for the examination.

“(4) The examiner shall send to the Registrar—

- (a) the original record of the deposition;
- (b) any transcript of that record; and
- (c) any exhibits obtained in the course of the examination.

“(5) The Registrar shall deal with anything sent to him or her under subrule (4) as the Court directs.

Special report

“20. (1) The examiner may make a special report to the Court about—

- (a) an examination;
- (b) the absence of a person from an examination; or

(c) the conduct of a person at an examination.

“(2) In consideration of the report, the Court may direct such proceedings to be taken, or make such order, as it thinks fit.

Default of witness

“21. (1) Where a person required by subpoena to be examined refuses—

- (a) to be sworn, or to make an affirmation, for the purposes of the examination;
- (b) to answer a lawful question; or
- (c) to produce a document or thing;

upon the request of a party to the proceeding, the examiner shall sign and give to the party a certificate of that refusal.

“(2) Following the filing of the certificate, on a motion by any party, the Court may—

- (a) order the person to be sworn or to make an affirmation, to answer the question or to produce the document or thing, as the case may be; and
- (b) order the person to pay any costs occasioned by the refusal.

Conduct money

“22. A person examined before an examiner is entitled to payment for expenses and loss of time as if he or she were attending the Court as a witness in a trial.

“Division 4—Taking evidence otherwise than at trial—outside Australia

Application of Division

“23. (1) 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—

- (a) for the purposes of civil or criminal proceedings—under subsection 7V (1) of the *Evidence Act 1905* of the Commonwealth; or
- (b) for the purposes of civil proceedings—under section 57 of the *Supreme Court Act 1933*.

When order may be made

“24. An order to which this Division applies may be made at any stage of the relevant proceeding.

Application for order

“24A. (1) An application for an order to which this Division applies may be made by any party to the proceeding.

“(2) The application may be made—

- (a) if the proceeding is in the Court—by notice of motion; or
- (b) if the proceeding is in the Magistrates Court—by summons.

“(3) All other parties to the proceeding shall be made respondent to the notice of motion or the summons, as the case may be.

“(4) Evidence in support of the application shall be given by affidavit.

“(5) Where an order is applied for under section 57 of the Act, in determining whether to make the order, the Court shall have regard to the matters referred to in subsection 7V (2) of the *Evidence Act 1905* of the Commonwealth as if the application were for an order under subsection 7V (2) of the last-mentioned Act.

“(6) In determining whether to make an order, in addition to the matters referred to in subsection 7V (2) of the *Evidence Act 1905* of the Commonwealth, the Court shall have regard to—

- (a) whether the proposed examiner or foreign tribunal is suitable; and
- (b) in the case of an application for an order for the issue of a letter of request to the judicial authorities of a foreign country—
 - (i) whether a convention exists to which Australia and the country are parties dealing with the examination of witnesses in that country; and
 - (ii) the content of any such convention.

Forms of order

“24B. (1) An order for the examination of a person outside Australia shall be made in accordance with Form 39 in the First Schedule.

“(2) An order for the sending of a letter of request to the judicial authorities of a foreign country shall be made in accordance with Form 40 in the First Schedule.

Letters of request

“24C. (1) Upon the making of an order for the sending of a letter of request to the judicial authorities of a foreign country, the party obtaining the order shall—

- (a) lodge with the Registrar—
 - (i) a form of the appropriate letter of request;
 - (ii) any interrogatories and cross-interrogatories to accompany the letter of request; and
 - (iii) if necessary—a translation of the documents referred to in subparagraphs (i) and (ii) into the official language of the foreign country; and
- (b) file in Court—
 - (i) a copy of each of the documents referred to in paragraph (a); and
 - (ii) an undertaking in accordance with Form 41 in the First Schedule to pay any reasonable expenses incurred by the Territory, the Commonwealth, or both, upon due notification from the Registrar.

“(2) A translation lodged under subparagraph (1) (a) shall be endorsed with a note by the translator stating—

- (a) the full name and address and the relevant qualifications of the translator; and
- (b) that the translation is correct.

Order for payment of expenses—r. 24C (1) (b) (ii)

“24D. This rule applies where a party—

- (a) has given an undertaking under subparagraph 24C (1) (b) (ii) to pay any reasonable expenses incurred by the Territory, the Commonwealth, or both, upon due notification from the Registrar; and
- (b) does not, within 7 days after being notified of the amount of expenses incurred, pay that amount to the Registrar.

“(2) Where this rule applies, on application by the Registrar, the Court may—

- (a) order the party to pay that amount;

- (b) if the party is plaintiff—stay the proceeding in so far as it concerns any claim for relief by that party, or any part of such claim; and
- (c) if the party is defendant—make such order as it thinks fit, including an order that until payment the defendant be taken not to have filed an appearance or be not permitted to use in evidence any deposition of a witness obtained pursuant to the letter of request.

Procedure for taking evidence by examination—application of Division 3 rules

“24E. (1) Rules 13 to 20 (inclusive), and rule 22, apply as far as practicable, with necessary changes, to an examination to which this Division applies.

“(2) Where an examination to which this Division applies is ordered under paragraph 57 (a) of the *Supreme Court Act 1933*, subsection 7V (3) of the *Evidence Act 1905* of the Commonwealth applies as if the examination were ordered under subsection (1) of the last-mentioned Act.

“(3) The rules referred to in subrule (1) apply subject to any directions which may be given by the Court under subsection 7V (3) of the *Evidence Act 1905* of the Commonwealth.

Procedure for taking evidence under a letter of request—application of Division 3 rules

“24F. (1) Rules 13 to 20 (inclusive), and rule 22, apply as far as practicable, with necessary changes, to the taking of evidence pursuant to a letter of request as if the foreign court or tribunal where the evidence is to be taken were an examiner appointed for the purposes of those rules.

“(2) Subrule (1) applies subject to the terms of the letter of request and of any applicable convention.

Division 5—Taking evidence for interstate and foreign courts and tribunals

Application of Division—orders under Part XIIB of the *Evidence Act 1971*

“24G. (1) 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.

- “(2) This Division applies subject to—
- (a) the terms of the relevant letter of request and of any applicable convention; and
 - (b) in relation to the application of rules 24J to 24P (inclusive)—any direction by the Court consistent with the letter of request and any applicable convention.

Application for order

“24H. (1) An application for an order to which this Division applies—

- (a) may be made by a person nominated for the purpose by the requesting tribunal or, if a person is not nominated, by the Attorney-General; and
- (b) shall be made by summons without defendant.

“(2) After an order to which this Division applies is made, any further related order shall be applied for by motion.

“(3) No notice need be given of a motion referred to in subrule (2).

Form

“24J. An order to which this Division applies shall be made in accordance with Form 42 in the First Schedule.

Appointment of examiner

“24K. (1) For the purposes of this Division, evidence may be taken before any of the following examiners:

- (a) a Judge;
- (b) the Master;
- (c) an officer of the Court;
- (d) any other person considered by the Court to be suitable.

“(2) A Judge, the Master or an officer of the Court shall only be appointed with the concurrence of the Chief Justice.

Attendance at examination by applicant

“24L. The applicant for an order to which this Division applies may attend and take part in the examination held pursuant to the order.

Procedure for taking evidence—application of Division 3 rules

“24M. Subject to this Division, rules 13 to 20 (inclusive) and rule 22 apply as far as practicable, with necessary changes, to an examination to which this Division applies.

Retention of exhibits

“24N. (1) Notwithstanding the application of paragraph 19 (4) (c), where, in an examination to which this Division applies, the examiner receives an exhibit from a person, the examiner shall return it to the person unless the person consents to the retention of the exhibit by the examiner.

“(2) Where an examiner retains an exhibit under subrule (1), he or she shall send it to the Registrar with the deposition and other documents as required by rule 19 in its application to the examination.

Certificate of order and depositions

“24P. On receipt of a deposition of a witness, and of any transcript of a deposition, taken in the course of an examination to which this Division applies, the Registrar shall—

- (a) issue a certificate, sealed with the Court seal, in accordance with Form 43 in the First Schedule; and
- (b) give the certificate, and the documents specified in the certificate, to the Attorney-General.

Privilege of witnesses

“24Q. (1) This rule applies to evidence which is the subject of a claim for privilege referred to in section 85L of the *Evidence Act 1971*, being a claim which is not supported or conceded in accordance with paragraph 85L (2) (a) or (b) of that Act.

“(2) The deposition, and any transcript, recording evidence to which this rule applies shall—

- (a) be kept separate from any deposition and transcript in the examination; and
- (b) when given to the Registrar—be accompanied by a statement signed by the examiner setting out the claim for privilege and the ground on which it was made.

“(3) The Registrar—

- (a) shall include the statement of the claim for privilege with the documents sent to the Attorney-General under rule 24P, together with a request to determine the claim; and

- (b) shall not include with those documents the deposition, and any transcript, recording the evidence which is the subject of the claim.

“(4) Upon the determination of the claim for privilege by the court or tribunal which requested the examination, the Registrar shall—

- (a) if the claim is rejected by the requesting court or tribunal—send to that court or tribunal the deposition, and any transcript, recording the evidence to which the claim relates; or
- (b) if the claim is upheld by the requesting court or tribunal—return the deposition and any transcript to the person claiming privilege.

“(5) After the requesting court or tribunal has made a determination about a claim for privilege, the Registrar shall accordingly notify—

- (a) the person claiming privilege; and
- (b) the applicant for the order for examination.”.

Substitution

7. The heading to Division 3 of Order 39 of the Principal Rules is omitted and the following heading substituted:

“Division 6—Subpoenas”.

Substitution

8. The heading to Division 4 of Order 39 of the Principal Rules is omitted and the following heading substituted:

“Division 7—Perpetuating testimony”.

Repeal

9. Division 5 of Order 39 of the Principal Rules is repealed.

Substitution

10. The heading to Division 6 of Order 39 of the Principal Rules is omitted and the following heading substituted:

“Division 8—Disclosure of experts’ reports and hospital reports”.

Authority of Master

11. Rule 1 of Order 61A of the Principal Rules is amended by omitting from paragraph (i) “Order 39, rules 4, 5, 38, 40 and 42” and substituting “Order 39, rules 10, 11, 12, 24A and 24B, paragraph 24G (2) (b) (in relation to the application of rules 24J and 24K) and rules 24J and 24K”.

.....
(Registrar)

FORM 41
UNDERTAKING—LETTER OF REQUEST
[Heading as in Form 1]

O. 39 r. 24C (1) (b) (ii)

1. I [or We], [name(s)] of [address(es)], undertake to be responsible for any reasonable expenses incurred by the Territory, the Commonwealth, or both, in respect of the letter of request dated [date of issue of letter of request].

2. On receiving due notification of the amount of such expenses I [or we] undertake to pay that amount as directed by the Registrar.

3. The plaintiff's agent in connection with the execution of that letter of request is [name] of [address].

4. The defendant's agent in connection with the execution of that letter of request is [name] of [address].

Dated the day of , .

.....
([Solicitors for] Party obtaining order for issue of letter of request.)

FORM 42
ORDER FOR EXAMINATION
UNDER FOREIGN OR INTERSTATE LETTER OF REQUEST

O. 39 r. 24J

IN THE SUPREME COURT
OF THE AUSTRALIAN
CAPITAL TERRITORY

No. of .

Before .

In the matter of—

(a) the letter of request dated [date of issue of letter of request] in connection with the proceeding pending, or instituted, before [name of foreign or interstate court or tribunal] between [name of plaintiff] and [name of defendant]; and

(b) an application under Part XIIB of the Evidence Act 1971 in relation to that letter of request;

THE COURT ORDERS THAT—

[name and address of examiner, or description] take the examination on oath or affirmation of [name] of [address] pursuant to the letter of request.

Dated the day of , .

.....
(Registrar)

FORM 43

O. 39 r. 24P

CERTIFICATE OF ORDER AND DEPOSITIONS—EXAMINATION FOR INTERSTATE OR
FOREIGN COURT OR TRIBUNAL

I CERTIFY THAT THE FOLLOWING ITEMS ARE ANNEXED:

1. The original order of the Supreme Court of the Australian Capital Territory dated [*date*], made in the matter of—
 - (a) the letter of request dated [*date of issue of letter of request*] in connection with a proceeding pending, or instituted, before [*name of foreign or interstate court or tribunal*] between [*name of plaintiff*] and [*name of defendant*]; and
 - (b) an application under Part XIIB of the *Evidence Act 1971* of the Australian Capital Territory in relation to that letter of request.
 2. The examination, depositions [and transcripts] taken pursuant to that order on [*date*].
 - [3. The exhibits produced in the course of that examination, as follows:
[*description of exhibits*]].
- Dated the _____ day of _____, _____.

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(Registrar of the Supreme Court of the
Australian Capital Territory)

NOTES

1. Reprinted as at 18 December 1992. See also Subordinate Law Nos. 4 and 11, 1993.
2. Notified in the ACT Gazette on 7 May 1993.