
JUSTICE

JM301*

Supreme Court Act 1935

Supreme Court Amendment Rules 1999

Made by the Judges of the Supreme Court.

1. Citation

These Rules may be cited as the *Supreme Court Amendment Rules 1999*.

2. The Rules amended

The amendments in these Rules are to the *Rules of the Supreme Court 1971**.

[* Reprinted as at 21 November 1994.

For amendments to 23 April 1999 see 1998 Index to Legislation of Western Australia, Table 4, pp. 296-7.]

3. Order 29A amended

- (1) Order 29A Rule 3(2)(k) is amended by deleting “(f)” and inserting instead —
 “ (j) ”.
- (2) Order 29A Rule 6(3) is amended as follows:
- (a) by deleting “writ is issued” and inserting instead —
 “ case is commenced ”;
- (b) by inserting after “of the writ” —
 “ , originating motion or originating summons ”;
- (c) by deleting “to the writ” and inserting instead —
 “ in the case ”.
- (3) Order 29A Rule 6(6) is amended as follows:
- (a) at the end of paragraph (c) by deleting the full stop and inserting a semicolon instead;
- (b) after paragraph (c) by inserting the following paragraph —
 “
 (d) make an order that Rule 7 does not apply to the case.
 ”.
- (4) Order 29A Rule 7(1) is amended by deleting “A Case” and inserting instead —
 “ Subject to any order made under Rule 6(6)(d), a Case ”.

4. Order 36 amended

- (1) Order 36 Rule 12 is amended as follows:
- (a) at the end of paragraph (1) by deleting the full stop and inserting instead —
 “
 , unless it is a subpoena for which leave to serve the subpoena in New Zealand is to be sought pursuant to Order 39A in which case the writ of subpoena shall be in accordance with Form No. 23.
 ”;
- (b) in paragraph (1a) —
- (i) after subparagraph (a) by deleting “and”;
- (ii) at the end of subparagraph (b) by deleting the comma and inserting instead —
 “ ; or ”;

- (iii) after subparagraph (b) by inserting the following subparagraph —

“

- (c) Form 23A, if the person to whom the writ is addressed is to be served by leave of the Court under Order 39A,

”.

- (2) After Order 36 Rule 18(2) the following subrule is inserted —

“

- (3) This Rule does not apply to a subpoena served, or to be served, by leave of the Court under Order 39A.

”.

5. **Order 37 amended**

Order 37 Rule 6(2) is deleted and the following subrules are inserted instead —

“

- (2) An affidavit used for the purposes of —
- (a) interlocutory proceedings; or
 - (b) an application under the —
 - (i) *Coroners Act 1996*;
 - (ii) *Surveillance Devices Act 1998*; or
 - (iii) *Witness Protection (Western Australia) Act 1996*,

may contain statements of information or belief.

- (2a) An affidavit containing statements of information or belief must set out the sources or grounds of that information or belief.

”.

6. **Order 39A inserted**

After Order 39 the following Order is inserted —

“

Order 39A

Trans-Tasman proceedings

1. Interpretation

- (1) In this Order, unless the contrary intention appears —
“the Act” means the *Evidence and Procedure (New Zealand) Act 1994* of the Commonwealth.
- (2) Unless the contrary intention appears, an expression used in this Order and in the Act has the same meaning as in the Act.

2. Application

- (1) This Order applies to proceedings to which the Act applies.
- (2) Subject to this Order, unless the contrary intention appears, these Rules apply to proceedings referred to in this Order.

3. Leave to serve subpoena

- (1) Leave to serve a subpoena in New Zealand must be sought by filing —
 - (a) if the subpoena was issued by the Court, a motion in that proceeding; or
 - (b) if the subpoena was issued by an inferior court, an originating motion to be heard *ex parte*.
- (2) The motion must be supported by an affidavit annexing a copy of the subpoena and setting out —
 - (a) the name, designation or occupation, and address of the person named and whether that person is over 18 years of age;
 - (b) the nature and significance of the evidence required from the person named, or of the document or thing required to be produced by the person;
 - (c) details of the steps taken to ascertain whether the evidence, document or thing could be obtained by other means without significantly greater expense, and with less inconvenience, to the person named;
 - (d) the date by which it is intended to serve the subpoena;
 - (e) details of —
 - (i) the calculation of the sum sufficient to meet reasonable expenses in complying with the subpoena; and
 - (ii) how those expenses are to be paid, or tendered, to the person named, in money or in vouchers;
 - (f) where the subpoena requires the person named to give evidence, an estimate of the time that the person will be required to attend to give evidence; and
 - (g) details of any facts or matters known to the deponent which may provide cause for the subpoena to be set aside under section 14(2) or (3) of the Act.

- (3) Before granting leave under the Act to serve a subpoena, a Judge may require the applicant for leave to undertake to meet the expenses reasonably incurred by the person named, not being a party to the proceeding, in complying with the subpoena, if those expenses exceed the allowances and travelling expenses to be provided to that person at the time of service of the subpoena.
- (4) No document relating to an application under this Rule is to be searched, inspected or copied without leave of a Judge.

4. Setting aside subpoena

- (1) An application to the Court under section 13 of the Act must be made in accordance with Form No. 31A.
- (2) The application must be supported by an affidavit setting out the facts and grounds on which the application is based.
- (3) The application must —
 - (a) be headed with the heading on the copy order of the Court granting leave to serve the subpoena; and
 - (b) be filed, by lodgment or by fax, at the Central Office.
- (4) The application must set out the applicant's address for service in Australia or New Zealand, telephone number and, if applicable, fax number.
- (5) If the application is filed by fax, the Principal Registrar must acknowledge, by fax, the receipt of a clear and legible copy of the application and accompanying affidavit.
- (6) The Principal Registrar must deliver a copy of the application and accompanying affidavit, by mail, or fax, to the address for service of the party who obtained leave to serve the subpoena.
- (7) An application made under this Rule is to be determined at a date, time and place and in a manner directed by the Court.
- (8) An objection under section 14(4) of the Act must be made by filing a notice in accordance with Form No. 31B not later than 7 days after —
 - (a) if the objection is made by the person named in the subpoena, the date on which the application was filed; or

- (b) otherwise, the date on which the application is served on the party who obtained leave to serve the subpoena.
- (9) A request under section 14(6) of the Act that is not made in the application must be made by filing a form in accordance with Form No. 31C.

5. Failure to comply with subpoena

- (1) A certificate under section 16 of the Act, in accordance with Form No. 31D, may be issued on the motion of the court out of which the subpoena was issued or on the application of a party.
- (2) Application for the issue of a certificate may be made —
 - (a) if the proceeding in which the certificate is brought is then before the court, orally, accompanied by a draft certificate in accordance with Form No. 31D; or
 - (b) by motion.
- (3) An application made by motion for the issue of a certificate must be supported by —
 - (a) an affidavit of service of the subpoena, the order and the notice referred to in section 10(3) of the Act; and
 - (b) an affidavit stating —
 - (i) particulars of the order granting leave to serve the subpoena;
 - (ii) whether application was made to set aside the subpoena and, if so, particulars of the application and any orders made; and
 - (iii) that the subpoena was not complied with.

6. Evidence by video link or telephone

- (1) An application for a direction under section 25 of the Act may be made orally or by summons.
- (2) The application must be supported by an affidavit stating —
 - (a) the reasons why such a procedure is desirable;
 - (b) the nature of the evidence to be taken;
 - (c) the number of witnesses to be examined;
 - (d) the expected duration of the evidence;
 - (e) whether issues of character are likely to be raised;

- (f) in the case of submissions, the expected duration of the submissions;
 - (g) the facilities available for such a procedure or that can reasonably be made available; and
 - (h) that the requirements of section 26 or 27 of the Act can be met.
- (3) In deciding whether to grant the application, the Court may take account of the matters set out in the applicant's affidavit in addition to any other matters considered to be material, including cost and convenience to witnesses and all parties.
- (4) If the Court determines that it is appropriate to hear evidence or receive submissions by video link or telephone, the Principal Registrar may be directed to arrange and coordinate the appropriate facilities in Australia and New Zealand.
- (5) Without limiting the generality of subrule (4), the Court may direct that —
- (a) the Principal Registrar arrange for the evidence to be given, or the submissions to be made, at the High Court of New Zealand or at another place approved by the High Court of New Zealand; or
 - (b) an officer of the High Court of New Zealand, or another person approved by the Court, be requested to be present to assist in the transmission of the evidence or submissions, and, in particular to —
 - (i) introduce witnesses to be called and legal representatives;
 - (ii) assist with the administration of oaths, if necessary; and
 - (iii) assist with the implementation of any directions or requests given or made by the Judge or other person presiding in the proceeding.

7. Fax copies

If a fax of a document is adduced in evidence under Part 6 of the Act, the party adducing that evidence must file in the Central Office a copy of the fax —

- (a) on paper of durable quality measuring about 295 mm in length and 210 mm in width; and
- (b) on which the writing is permanent,

unless the fax meets those specifications.

7. Order 60 amended

After Order 60 Rule 1(1C) the following subrule is inserted —

“

- (1D) A Master shall have power to hear and determine all applications under Parts 2 and 4 of the *Evidence and Procedure (New Zealand) Act 1994* of the Commonwealth.

”.

8. Order 60A amended

- (1) Order 60A Rule 1 is amended by inserting before paragraph (a) the following paragraph —

“

- (aa) under Order 36A, the powers of the Court in relation to expert evidence;

”.

- (2) Order 60A Rule 2(1) is amended by inserting before “Order 73” —

“ Order 66 ”.

- (3) After Order 60A Rule 2 the following Rule is inserted —

“

2A. Applications within Registrar’s jurisdiction to be made to Registrar

An application in relation to a power of the Court that is exercisable by a Registrar or Case Management Registrar shall be made to a Registrar or Case Management Registrar, as the case requires, unless —

- (a) the application or matter has been referred under Rule 3 to a Master or to the Court; or
 (b) a Judge or Registrar has granted leave for the application to be made to a Master or to a Judge.

”.

- (4) After Order 60A Rule 5(1) the following subrule is inserted —

“

- (1a) The appeal shall be commenced and proceed on the file in which the action was commenced.

”.

9. Order 65A amended

- (1) Order 65A Rule 2(b) is amended by deleting “made” and inserting instead —

“ filed and served on the clerk of petty sessions ”.

- (2) After Order 65A Rule 2 the following Rule is inserted —

“

2AA. Clerk to forward petty sessions court record

The clerk of petty sessions served under Rule 2(b) shall deliver to the Registrar the Court of Petty Sessions' record relating to the matter the subject of the appeal including —

- (a) all exhibits;
- (b) the transcript of evidence; and
- (c) any notes or transcripts of reasons for decision and sentencing remarks.

”.

- (3) Order 65A Rule 7 is repealed and the following Rule is inserted instead —

“

7. Clerk to notify justices

The clerk of petty sessions to whom notice is given under Rule 6(1) shall, as soon as is practicable, give a copy of the application and order granting leave to the justices whose decision is subject to appeal.

”.

10. Order 67 amended

After Order 67 Rule 11(1) the following subrule is inserted —

“

- (1a) Rule 1 does not apply in relation to documents filed, or judgments or orders made, in any cause or matter under the *Witness Protection (Western Australia) Act 1996* or the *Surveillance Devices Act 1998*.

”.

11. Second Schedule amended

- (1) Form No. 18A in the Second Schedule is amended by inserting before “Dated” —

“

A copy of the memorandum referred to in Order 59 Rule 9(1) is attached as Annexure [A] to this application.

”.

- (2) After Form No. 22B in the Second Schedule the following forms are inserted —

“

No. 23

[O.36 R.12(1)]

WRIT OF SUBPOENA: FOR SERVICE IN NEW ZEALAND

(Heading as in cause or matter)

Elizabeth the Second *(as in No. 22)*

To *[names of witnesses]*:

We command you to attend before

at _____ on _____ the _____ day of _____,
at the hour of _____ in the _____ noon, and from day to day thereafter until
the end of the trial, to give evidence on behalf of the plaintiff *[or defendant]**.

Witness *(as in No. 22)*

Issued *(as in No. 22)*

- Note:
1. Failure to comply with this subpoena may result in your arrest and the imposition of a fine under section 16 of the *Evidence Amendment Act 1994* of New Zealand.
 2. Service of this subpoena is effective only if it is accompanied by a copy of the order giving leave to serve the subpoena in New Zealand and by a Notice to Witness setting out your rights and obligations in relation to this subpoena.

**If duces tecum add:* And we also command you to bring with you and produce at the time and place aforesaid *[here describe the documents or things to be produced]*, unless you produce this subpoena and those documents or things either —

- (a) to the Central Office of the Supreme Court not later than 2 days before the first day on which you are required to attend; or
- (b) to a registry of the High Court of New Zealand not later than 10 days before the first day on which you are required to attend (in which case you must obtain from the Registrar of the High Court of New Zealand a receipt of the documents or things produced and send a copy of the receipt by fax to the Central Office of the Supreme Court together with a copy of the subpoena).

No. 23A

[O.36 R.12(1a)]

NOTICE TO WITNESS

THIS NOTICE IS VERY IMPORTANT

**PLEASE READ IT AND THE ATTACHED DOCUMENT
OR DOCUMENTS VERY CAREFULLY**

**IF YOU HAVE ANY TROUBLE UNDERSTANDING
THESE DOCUMENTS YOU SHOULD GET LEGAL
ADVICE AS SOON AS POSSIBLE**

Attached to this notice is a subpoena.

The subpoena has been issued by the Supreme Court of Western Australia.

The subpoena may be served in New Zealand under New Zealand law (section 14 of the *Evidence Amendment Act 1994* of New Zealand).

This notice:

- sets out your rights relating to the subpoena;

- sets out your obligations relating to the subpoena; and
- includes information about the way in which you may make an application to have the subpoena set aside.

YOUR RIGHTS

1. You are entitled to receive payment of an amount equal to the reasonable expenses you incur in complying with the subpoena.
2. An amount of money, or money and vouchers, that is sufficient to meet your reasonable expenses of complying with the subpoena must be given to you within a reasonable time before the date for compliance with the subpoena (see below: “**YOUR OBLIGATIONS**”).
3. If, in complying with the subpoena, you incur expenses that are more than the amount that was given to you before you complied, you may obtain an order from the [court that issued the subpoena] that you be paid the additional amount you incurred.
4. You may apply to the Supreme Court to have the subpoena wholly or partly set aside. If you wish to apply to have the subpoena set aside you should get legal advice as soon as possible.
5. An application can be made and determined by the Supreme Court without you having to go to Australia, or to retain Australian solicitors. All the necessary arrangements can be made in New Zealand.

[NOTE: Details of some of the grounds on which a subpoena can be set aside and the procedures for setting aside a subpoena are set out at the end of this notice.]

YOUR OBLIGATIONS

1. Unless the subpoena is set aside, you must comply with the subpoena if —
 - (a) when the subpoena was served on you, or at some reasonable time before the date specified in the subpoena for compliance with it, you were offered or given either —
 - (i) enough money to meet your reasonable expenses in complying with it, including any travel and accommodation expenses; or
 - (ii) a combination of money and vouchers (for example, travel tickets) to meet those expenses;
 - (b) you were given with the subpoena a copy of an order by a Judge giving leave to serve the subpoena in New Zealand;
 - (c) the subpoena was served on you before or on the date specified in the order as the last day on which the subpoena may be served;
 - (d) service of the subpoena complied with any other conditions specified in the order; and
 - (e) you are over 18 years of age.
2. If the subpoena only requires you to produce documents or things, it must specify the date on which the documents or things are required for production in the court that issued the subpoena. You may comply with the subpoena by producing the documents or things at a registry of the High Court of New Zealand at least 10 days before the date specified in the subpoena. When you produce the documents or things at the registry you will be required to produce the subpoena and to pay the cost of sending the documents or things to the court that issued the subpoena. You will be able to pay that cost out of the money given to you to meet your reasonable expenses of complying with the subpoena.

FAILURE TO COMPLY WITH THE SUBPOENA

If you do not comply with this subpoena you may be arrested and taken before the High Court of New Zealand. Unless the High Court is satisfied that failure to comply should be excused, a fine not exceeding NZ\$10 000 may be imposed.

GROUND FOR SETTING ASIDE A SUBPOENA

1. The Supreme Court must set aside the subpoena if the subpoena requires you to attend at a place in Australia and —
 - (a) you do not have necessary travel documents and cannot reasonably get them within the time allowed for compliance with the subpoena;
 - (b) if you complied with the subpoena, you would be liable to be detained for the purpose of serving a sentence;
 - (c) you are being prosecuted or you are liable to prosecution for an offence in Australia;

- (d) you are liable to the imposition of a penalty in civil proceedings in Australia (other than proceedings under the *Trade Practices Act 1974* of Australia); or
 - (e) you are subject to a restriction on your movements imposed by law or an order of a court that is inconsistent with you complying with the subpoena (for example, bail conditions, release conditions or terms of a community based sentence).
2. The grounds on which the Supreme Court may set aside the subpoena include —
- (a) the evidence you give in the proceedings can be obtained satisfactorily by other means without significantly greater expense;
 - (b) compliance with the subpoena would cause you hardship or serious inconvenience;
 - (c) if the subpoena requires you to produce a document or thing and —
 - (i) that document or thing should not be taken out of New Zealand; and
 - (ii) satisfactory evidence of the contents of the document or satisfactory evidence of the thing can be given by other means.

[NOTE: The above list does not include all the matters the Court will consider in an application to set aside a subpoena, but if any of the matters in the list apply to you they should be included in your application.]

PROCEDURE FOR APPLYING TO SET ASIDE A SUBPOENA

1. Application must be made to the Supreme Court.
2. You may fax your application to that Court on fax number [*fax number of the Supreme Court*].
3. Your application must contain an address for service in New Zealand or Australia. Any documents to be served on you will be delivered, faxed or posted to you at that address.
4. The Principal Registrar of the Supreme Court will arrange for service of your application and of any affidavit you lodge with the Court with your application.
5. The Supreme Court may determine your application without a hearing unless you, or the person who requested that the subpoena be issued, asks for a hearing.
6. If there is a hearing the Supreme Court can direct that it be held by video link (that is, a conference television link) or telephone. In that case you or your lawyer can take part in the hearing by video link or by telephone from a place in New Zealand.
7. If, in your application or within a reasonable time after lodging your application, you request that the hearing be held by video link or telephone, the Supreme Court must hold a hearing by video link or telephone. However, in such a case, the Supreme Court will determine whether video link or telephone will be used.

- ”
- (3) After Form No. 31 in the Second Schedule the following forms are inserted —

“

No. 31A

[O.39A R.4(1)]

APPLICATION FOR SUBPOENA TO BE SET ASIDE

(Heading as in order for leave to issue subpoena)

1. The applicant seeks an order that the subpoena [identify subpoena] be set aside on the grounds appearing in the accompanying affidavit.
2. The applicant requests the Court's directions as to the manner in which this application is to be determined.

- 3.* The applicant requests that any hearing of this application be held by video link or telephone.

Dated:

[Signature of applicant
or applicant's solicitor]

[Applicant's address, telephone
number and, if applicable,
fax number for service.]

*[Delete if not required]

No. 31B

[O.39A R.4(8)]

**OBJECTION TO DETERMINATION WITHOUT
HEARING**

(Heading as in order for leave to issue subpoena)

The [identify person] objects to the application to set aside the subpoena [identify subpoena] being determined without a hearing.

Dated:

[Signature of applicant
or applicant's solicitor]

No. 31C

[O.39A R.4(9)]

**REQUEST FOR HEARING BY VIDEO LINK OR
TELEPHONE**

(Heading as in order for leave to issue subpoena)

The applicant requests that the hearing of the application to set aside the subpoena [identify subpoena] be held by video link or telephone.

Dated:

[Signature of applicant
or applicant's solicitor]

No. 31D

[O.39A R.5]

**CERTIFICATE OF NON-COMPLIANCE WITH
SUBPOENA**

To: The High Court of New Zealand
[Address]

The [name of court that issued the subpoena] respectfully requests you to exercise your powers under section 16 of the *Evidence Amendment Act 1994* of New Zealand in relation to non-compliance by [name of person subpoenaed] with a subpoena issued by the [name of court that issued the subpoena] and for which leave to serve in New Zealand was given by the Supreme Court of Western Australia under the *Evidence and Procedure (New Zealand) Act 1994* on [insert date of leave].

A copy of the subpoena and a copy of the order giving leave to serve in New Zealand are annexed to this certificate.

[Either]

No application to set aside the subpoena either wholly or in part has been made.

[Or]

An application to set aside the subpoena was dismissed by order made on [*insert date*]. A copy of this order is annexed to this certificate.

Dated:

BY THE COURT

[*Signature of appropriate officer*]

Note: The seal of the court is to be affixed.

”.

12. Fifth Schedule amended

After Part 1, item 1A in the Second Schedule the following item is inserted —

“

1B.	Commencing an appeal to which O. 60A r.4 applies	200.00
-----	--	--------

”.

Dated: 11th May 1999.

DAVID K. MALCOLM, CJ
Chief Justice's signature

G. A. KENNEDY, J

K. H. PARKER, J

W. P. PIDGEON, J

H. WALLWORK, J

M. J. MURRAY, J

R. J. M. ANDERSON, J

K. WHITE, J

G. F. SCOTT, J

A. J. TEMPLEMAN, J

C. D. STEYTLER, J

Judges' signatures