

CW302

## SUPREME COURT ACT 1935

## SUPREME COURT AMENDMENT RULES (No. 4) 1990

Made by the Judges of the Supreme Court.

## Citation

1. These rules may be cited as the *Supreme Court Amendment Rules (No. 4) 1990*.

## Commencement

2. (1) Part I of these rules shall come into operation on the day on which section 9 of the *Evidence Amendment Act 1987* comes into operation.
- (2) Part II of these rules shall come into operation on the day on which the *Evidence Amendment Act 1989* comes into operation.

## Principal rules

3. In these rules the *Rules of the Supreme Court 1971\** are referred to as the principal rules.

[\*Reprinted in the Gazette of 18 March 1986 at pp. 779-1100. For Amendments to 2 July 1990 see pp. 358-359 of 1989 Index to Legislation of Western Australia and Gazettes of 23 February and 30 March 1990.]

## PART 1

## Order 38 amended

4. Order 38 of the principal rules is amended—
  - (a) in Rule 1 (1) by deleting “whether in or out of the jurisdiction.” and substituting the following—  
“ in the State. ”;
  - (b) by deleting Rules 2 and 3; and
  - (c) in Rule 14 by deleting “, or any person nominated or appointed to take the examination of a witness or person pursuant to the provisions of a Convention subsisting with a foreign country.”

## Order 38A inserted

5. The principal rules are amended by inserting after Order 38 the following order—

“

## Order 38A

## EXAMINATION OF WITNESSES OUTSIDE THE STATE

[Evidence Act 1906, ss. 109-14]

[Cwlth. Evidence Act 1905, Part IIIB]

## Interpretation

1. In this Order—

- (a) “the Act” means the *Evidence Act 1906*; and
- (b) words and expressions have the same definitions as in section 109 of the Act.

**Application of Order**

2. (1) This Order applies to applications—

- (a) under sections 110 and 111 of the Act; and
- (b) under sections 7V and 7W of the *Evidence Act 1905* of the Commonwealth.

(2) A reference in this Order to a provision in Column 1 of the Table to this subrule, shall, where an application is being made under section 7V or 7W of the *Evidence Act 1905* of the Commonwealth, be taken as a reference to the provision beside it in Column 2 of the Table.

TABLE

Column 1 Provision of the Act	Column 2 Provision of the <i>Evidence Act 1905</i> of the Commonwealth
109	7T
110	7V
110 (1)	7V (1)
110 (2)	7V (2)
111	7W

**Applications under sections 110 and 111 in civil proceedings**

3. (1) An application under section 110 of the Act in relation to civil proceedings before the Court must be made by summons supported by an affidavit.

(2) An application under section 111 of the Act in relation to civil proceedings before an inferior court must be made by originating summons supported by an affidavit.

(3) The affidavit in support of an application must—

- (a) address the matters referred to in section 110 (2) of the Act; and
- (b) exhibit all such documents in the proceedings as are necessary to inform the Court of the questions at issue between the parties.

(4) Where the application is for an order for the issue of a letter of request the affidavit must exhibit a draft of the letter (in Form No. 28) and, if the language of the country outside the State is not English, a translation of the letter into the language of the country together with a certificate by the translator stating his name, address and qualifications for making the translation and stating that the translation is correct.

**Application under sections 110 and 111 in criminal proceedings**

4. (1) Criminal proceedings are to be taken as being before the Court for the purposes of section 110 (1) of the Act where a person has been committed to take his trial before the Court.

(2) An application under section 110 of the Act in relation to criminal proceedings before the Court must be made by motion supported by an affidavit.

(3) An application under section 111 of the Act in relation to criminal proceedings before an inferior court must be made by originating summons supported by an affidavit which must exhibit the complaint in the inferior court.

(4) Rules 3 (3) and 3 (4) apply to applications under this Rule.

**Orders under sections 110 and 111**

5. An order under section 110 or 111 of the Act—

- (a) may require the filing of an undertaking by any party (in Form No. 29) as to the costs of examining or taking the evidence of the person outside the State; and
- (b) must be in Form No. 26 or in such form as the Court may approve.

**Manner of examination**

6. In the absence of specific directions in an order made under section 110 or 111 of the Act as to the procedure to be followed in and in relation to the examination, Order 38, Rules 6, 8, 11, 12, 13 and 14 apply.

**Examiner's remuneration**

7. In the absence of specific directions in an order made under section 110 or 111 of the Act as to the remuneration of the examiner, Order 38, Rules 16 and 17 apply. "

**Order 60 amended****8. Order 60 of the principal rules is amended—**

- (a) in Rule 1 (1) (g) by deleting "or 95" and substituting the following—  
" , 95, 110 or 111 "; and
- (b) by inserting after Rule 1 (1) (g), the following—  
" (ga) under sections 7V and 7W of the *Evidence Act 1905* of the Commonwealth; "

**Second Schedule amended****9. The Second Schedule to the principal rules is amended—**

- (a) by deleting Form No. 26 and substituting the following form—  
" O.38A, R.5

No. 26.

ORDER UNDER EVIDENCE ACT 1906,

s. 110 or 111

**[HEADING]**

On the application of . . . , and after reading the affidavit of . . .  
dated . . . and hearing . . . ,

**IT IS ORDERED THAT—**

1. AB ("the examiner") is hereby appointed to examine CD ("the witness") on oath or affirmation.

-or-

1. A commission shall be issued to AB ("the examiner") for the examination of CD ("the witness") on oath or affirmation.

2. The examination shall take place on (date) at (time) at (place outside the State) or at such other time and place as the examiner may appoint and where the examiner does appoint another time or place, notice thereof must be given to the witness and to the parties to these proceedings not less than . . . days before the appointed time.

3. The examiner may invite but must not exercise any powers to compel the witness to attend and to produce documents.

4. The examination must be in the following manner—

(set out the manner of the examination either specifically or  
by reference to the Rules)

5. The examiner shall—

- (a) put the evidence of the witness into writing;
- (b) appropriately mark for identification any document produced by the witness;
- (c) certify the written evidence as being the evidence of the witness; and
- (d) send the written evidence and any document produced by registered or certified post to—

Principal Registrar  
Supreme Court of Western Australia PERTH  
Western Australia 6000

6. When the Principal Registrar receives them, any party to these proceedings shall be at liberty to read the written evidence of the witness and any document produced, except where the Court otherwise orders.

7. The trial of these proceedings shall be stayed or adjourned until the Principal Registrar receives the written evidence of the witness and any document produced.

8. The costs of and incidental to the application for this order and to the examination shall be costs in the cause.

-or-

1. A letter of request shall be issued to (name of judicial authority in a place outside the State) to take, or to cause to be taken, the evidence of CD ("the witness").

2. When the Principal Registrar receives them, any party to these proceedings shall be at liberty to read the written evidence of the witness and any document produced, except where the Court otherwise orders.

3. The trial of these proceedings shall be stayed or adjourned until the Principal Registrar receives the written evidence of the witness and any document produced.

4. The costs of and incidental to the application for this order and to the issue of the letter of request shall be costs in the cause.

Dated:  
[L.S.]

BY THE COURT  
Registrar. ”;

(b) by deleting Form No. 27; and

(c) by deleting Form No. 28 and substituting the following form—

“ O.38A, R.3

No. 28.

#### LETTER OF REQUEST

TO: (name of judicial authority in place outside the State)

I, . . ., Principal Registrar of the Supreme Court of Western Australia, respectfully request your assistance/the assistance of your court with regard to the following matters.

1. There are before the Supreme Court of Western Australia/before (name of inferior court in W.A.) civil/criminal proceedings entitled as follows—

(set out full title and action no.) between—(name parties, their descriptions—plaintiff etc.—and their addresses).

2. The names and addresses of the representatives or agents of the parties are as follows—

(set out names and addresses.)

3. The proceedings concern—

(set out—

(a) the nature of the proceedings;

(b) the relief sought (if applicable); and

(c) a summary of the facts.)

4. The Supreme Court has decided, in the interests of justice, to request you to take, or to cause to be taken, the evidence of a person resident in your jurisdiction. Accordingly, I request you to take, or to cause to be taken, the evidence of (name and address of the person or persons) who is/are resident in your jurisdiction.

5. I respectfully request that the evidence be taken in the following manner—

(set out matters relating to the taking of that evidence—see *Evidence Act 1906*, s. 110 (4). Include references, if appropriate, to lists of questions, to detail of evidence sought, or to documents required to be produced.)

6. I request you to inform me or the representatives or agents of the parties of the date when and the place where the evidence is to be taken.

7. Finally, I request that—

(a) the evidence of the person(s) mentioned in paragraph 4 above be put into writing;

(b) any document produced by the person(s) be appropriately marked for identification;

(c) the written evidence and any document produced be authenticated with the seal of your court or in such other way as is in accordance with your procedure; and

(d) you send the written evidence and any document produced to me by registered or certified post at the following address—

Principal Registrar  
Supreme Court of Western Australia  
PERTH  
Western Australia 6000

Dated:  
[L.S.]

Principal Registrar. ”.

## PART II

## Order 39 amended

8. Order 39 of the principal rules is amended—

- (a) by deleting the heading "OBTAINING EVIDENCE FOR FOREIGN TRIBUNALS" and substituting the following heading—

" TAKING OF EVIDENCE FOR FOREIGN AND AUSTRALIAN COURTS

[Evidence Act 1906, ss. 115-118C] ";

- (b) by repealing Rules 1, 2, 3 and 4 and substituting the following rules—

## Interpretation

" 1. In this Order—

- (a) "the Act" means the *Evidence Act 1906*; and  
(b) words and expressions have the same definitions as in section 115 of the Act.

## Applications under section 116

2. (1) An application under section 116 of the Act may be made by the person nominated for that purpose by the requesting court, or, if no person is so nominated, by the Attorney General.

(2) The application must be made *ex parte* and must be supported by an affidavit that exhibits the request and, where the request is not in English, a translation into English.

(3) When an application has been made under section 116 of the Act any application for a further order or direction in relation to the same matter must be made by summons.

## Orders under section 117

3. (1) An order made under section 117 of the Act must be in Form No. 30 or in such form as the Court may approve and—

- (a) may order any fit and proper person nominated by the applicant, or any officer of the Court, or such other qualified person as to the Court seems fit, to obtain the evidence;  
(b) may give such directions about the manner of obtaining the evidence as the Court thinks fit, including directions that the evidence be obtained—  
(i) in the manner specified in the request;  
(ii) in accordance with the practice of the requesting court; or  
(iii) in the manner requested by the applicant;  
(c) may give such directions as the Court thinks fit about the transmission of the evidence obtained.

(2) In the absence of any special directions in the order, the examination of a witness must be taken in the manner prescribed by Order 38, Rules 11 (1) to (8).

## Examiner's remuneration

4. Order 38, Rule 17 applies *mutatis mutandis* in the case of an examination under this Order and the Court may make an order thereunder for the fees and expenses due a person who obtains evidence pursuant to an order made under section 117 of the Act.

## Examiner's power to administer oaths

4A. A person appointed to obtain evidence may administer oaths. ";

- (c) in Rule 5 (2) by deleting "Letter of Request, certificate or other document from the court or tribunal requesting the examination" and substituting the following—

" request ";

- (d) in Rule 5 (3)—

(i) by deleting "foreign court or tribunal requesting the examination" and substituting the following—

" requesting court ";

- (ii) by deleting "Letter of Request, certificate or other document" and substituting the following—  
" request "; and
- (iii) by deleting "foreign court or tribunal" and substituting the following—  
" requesting court ";
- and
- (e) by inserting after Rule 5, the following Rule—

**Procedure where witness claims privilege**

" 6. (1) This rule applies where a person claims to be exempt from giving evidence under section 118 (1) (b) of the Act and the claim is not supported or conceded as mentioned in section 118 (2) of the Act.

(2) The examiner may require the person to give the evidence to which the claim relates and, if the examiner does not do so, the Court may do so on the *ex parte* application of the applicant who obtained the order under section 117 of the Act.

(3) If the evidence is taken—

- (a) it must be contained in a document separate from the remainder of the deposition of the person;
- (b) the examiner shall send to the Principal Registrar with the deposition and the document, a statement signed by the examiner setting out the claim and the ground on which it is made;
- (c) the Principal Registrar shall not send the document to the requesting court but shall send the items mentioned in Rule 5, the statement and a request that it determine the claim;
- (d) the Principal Registrar shall—
  - (i) if the requesting court dismisses the claim, send it the document; or
  - (ii) if the requesting court upholds the claim, send the document to the person,
 and notify the person of the requesting court's determination ".

**Order 60 amended**

9. Order 60 of the principal rules is amended in Rule 1 (1)—

- (a) by deleting paragraph (h) and substituting the following—  
" (h) under sections 116 and 117 of the *Evidence Act 1906*; ";
- and
- (b) by deleting paragraph (j).

**Second Schedule amended**

10. The Second Schedule to the principal rules is amended—

- (a) by deleting Form No. 30 and substituting the following form—  
" O.39, R.3

No. 30.

ORDER UNDER EVIDENCE ACT 1906, s. 117  
IN THE SUPREME COURT OF WESTERN AUSTRALIA

No. . . . of 19 . . .

IN THE MATTER of the *Evidence Act 1906*, s. 117, and a (civil/commercial/criminal) proceeding now pending before (requesting court) intituled as follows—

BETWEEN:

AB

Plaintiff,

- and -

CD

Defendant.

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ORDER FOR OBTAINING EVIDENCE

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## [HERE SET OUT FORMALITIES REQUIRED BY PRACTICE DIRECTIONS]

On the application of . . . , and after reading the affidavit (if any) of . . . dated . . . and the request of (requesting court), and hearing . . . and being satisfied—

- (a) that the application is made in pursuance of a request by (the requesting court) exercising jurisdiction in (place outside W.A.); and
- (b) that the evidence to which the application relates is to be obtained for the purposes of proceedings (which have been instituted before that court) or (whose institution before that court is contemplated),

## IT IS ORDERED THAT—

- 1. (If applicable) (name of examiner or person who is to obtain the evidence) is hereby appointed to— (set out function).
- 2. (name of examiner or person who is to obtain the evidence) must—
  - (a) (set out the matters required— such as the manner of the examination, the manner of transmitting the evidence when taken or the person to whom the evidence is to be transmitted.)
- 3. (name of witness to be examined or person from whom evidence is to be obtained) must—
  - (a) (set out the matters required of the witness or person from whom the evidence is to be obtained— see *Evidence Act 1906*, s. 117 (3)).

Dated:

BY THE COURT

[L.S.]

Registrar. ”; and

(b) by deleting Form 31 and substituting the following form—

“ 0.39, R.5 (2)

No. 31.

## CERTIFICATE

I, . . . , Principal Registrar of the Supreme Court of Western Australia, hereby certify that the attached documents are—

- (a) a request of (requesting court);
- (b) the order of the Supreme Court of Western Australia dated (date) made for the purpose of giving effect to the request;
- (c) the deposition (or as the case may be) taken by the examiner pursuant to the order;
- (d) (if applicable) the examiner's statement setting out the witness's claim to be exempt from giving evidence;
- (e) (if applicable) this Court's request that the witness's claim be determined.

Dated:

[L.S.]

Principal Registrar. ”.

Dated 31 January 1991.

DAVID K. MALCOLM,  
 R. WALLACE,  
 G. A. KENNEDY,  
 W. P. PIDGEON,  
 B. W. ROWLAND,  
 E. M. FRANKLYN,  
 R. J. ANDERSON,  
 D. A. IPP,  
 H. A. WALLWORK  
 R. D. NICHOLSON,  
 TERENCE A. WALSH.