

1995—No. 687

**SUPREME COURT RULES (AMENDMENT No. 296) 1995**

NEW SOUTH WALES



*[Published in Gazette No. 143 of 24 November 1995]*

1. These rules are made by the Rule Committee on 20 November 1995.
2. The Supreme Court Rules 1970 are amended as follows:

- (a) Part 40 rule 11 (c)

Omit “showing facts establishing”.

- (b) Part 40 rule 11 (g)

Omit “.” and insert instead “;”.

- (c) Part 40 rule 11

After paragraph (g), insert:

(h) that the institution of proceedings is not in contravention of section 71 of the Residential Tenancies Act 1987 (which relates to proceedings for possession of residential premises subject to a residential tenancy agreement within the meaning of that Act).

3. The amendment contained in paragraph 2 shall commence on 1 February 1996.

4. The Supreme Court Rules 1970 are further amended as follows:

**SCHEDULE D Part 3 paragraph 8**

Omit the paragraph and insert instead:

8. (*Possession of land*) Trial or hearing of proceedings (except with a jury) where:

(a) the only matter in question is a claim for the possession of land; or

(b) the only matters in question are a claim for the possession of land and one or more of the following:

(i) a claim or cross-claim for damages;

(ii) a claim or cross-claim for other money;

(iii) a claim or cross-claim for costs.

5. The Supreme Court Rules 1970 are further amended as follows:

(a) Part 80A rules 15 and 16

Omit the rules and insert instead:

**Form of affidavit in support of statutory demand (s. 459E (3))**

15. (1) An affidavit referred to in section 459E (3) must:

- (a) subject to subrule (2), be made by the creditor or, where there is more than one creditor, by one of them;
- (b) set out the facts entitling the deponent under paragraph (a) to make the affidavit;
- (c) state the source of the deponent's knowledge of the matters stated in the affidavit concerning the debt or debts;
- (d) state that the deponent believes those matters to be true; and
- (e) state that the deponent believes that there is no genuine dispute about the existence or amount of the debt or debts to which the demand relates.

(2) In the case of a creditor which is:

- (a) a corporation—an affidavit by a member or officer of the corporation having knowledge of the facts as they are known to the corporation is taken to be an affidavit by the creditor;
- (b) the Crown—an affidavit by an officer of the Crown having knowledge of the facts so far as they are known to the Crown is taken to be an affidavit by the creditor; and
- (c) a company to which a liquidator or provisional liquidator has been appointed—an affidavit by the liquidator or provisional liquidator is taken to be an affidavit by the creditor.

(3) An affidavit under this rule must:

- (a) be in accordance with the prescribed form;
- (b) contain the statement headed "Important Note" set out in the form; and
- (c) not state a proceeding number.

(4) An affidavit under this rule must not be filed with the Court.

(5) For the purposes of section 459E (3), an affidavit in support of a statutory demand that complies with the rules of:

- (a) the Federal Court of Australia; or

(b) the Supreme Court of another State or Territory in which the registered office of the company to be served is situated,

is taken to be an affidavit that complies with this rule.

(6) In subrule (2), “Crown” includes not only the Crown in right of New South Wales but also the Crown in any other capacity.

**Form of affidavit in support of an application to wind up relying on failure to comply with statutory demand (s. 459Q (c))**

16. (1) An affidavit referred to in section 459Q (c) must:
  - (a) be in accordance with the prescribed form;
  - (b) subject to subrule (2), be made by the plaintiff or, where there is more than one plaintiff, by one of them;
  - (c) set out the facts entitling the deponent under paragraph (b) to make the affidavit;
  - (d) state the source of the deponent’s knowledge of the matters stated in the affidavit concerning the debt or debts;
  - (e) state that the deponent believes those matters to be true; and
  - (f) state that the deponent believes that there is no genuine dispute about the existence or amount of the debt or debts to which the demand relates.
- (2) In the case of a plaintiff which is:
  - (a) a corporation—an affidavit by a member or officer of the corporation having knowledge of the facts so far as they are known to the corporation is taken to be an affidavit by the plaintiff;
  - (b) the Crown—an affidavit by an officer of the Crown having knowledge of the facts so far as they are known to the Crown is taken to be an affidavit by the plaintiff; and
  - (c) a company to which a liquidator or provisional liquidator has been appointed—an affidavit by the liquidator or provisional liquidator is taken to be an affidavit by the plaintiff.
- (3) In subrule (2), “Crown” includes not only the Crown in right of New South Wales but also the Crown in any other capacity.

## (b) SCHEDULE F

After Form 154E, insert:

**Form 154FA***P. 80A, r. 15.**(No heading or title)**(name of creditor)**(Creditor)**(name of company)**(Debtor)***AFFIDAVIT UNDER SECTION 459E OF THE  
CORPORATIONS LAW**On *(date)*, I, *(name, address and occupation)* say on oath:

- 1 *(Set out the matters referred to in paragraph (b) of Part 80A, rule 15 (1)).*
- 2 I believe that the amount of \$ \_\_\_\_\_, being the debt (*or* the total of the amounts of the debts) specified in the accompanying demand, is due and payable by the debtor to the creditor.
- 3 *(Set out the matters referred to in paragraph (c) of Part 80A, rule 15 (1)).*
- 4 I believe that there is no genuine dispute about the existence or amount of the debt (*or* debts) referred to in paragraph 2.

Sworn at      }  
before me      }**[IMPORTANT NOTE:**

- (1) This affidavit accompanies a statutory demand under section 459E of the Corporations Law.
- (2) No proceedings (*or, if applicable*, no winding up proceedings) have been commenced in respect of any debt to which this affidavit relates.
- (3) Any questions relating to this affidavit or any debt to which it relates should be directed either to the person named as creditor or the creditor's solicitors.]

**Form 154FB***P. 80A, r. 16.***AFFIDAVIT VERIFYING DEBT UNDER SECTION 459Q  
OF THE CORPORATIONS LAW**On *(date)*, I, *(name, address and occupation)* say on oath:

- 1 *(Set out the matters referred to in paragraph (c) of Part 80A, rule 16 (1))*
- 2 I believe that the amount of \$ \_\_\_\_\_, being the debt (or the total of the amounts of the debts) specified in the statutory demand served on the defendant, is due and payable by the defendant to the plaintiff.
- 3 *(Set out the matters referred to in paragraph (d) of Part 80A, rule 16 (1))*
- 4 I believe that there is no genuine dispute about the existence or amount of the debt (or debts) referred to in paragraph 2.
- 5 The defendant has failed to pay the said amount to the plaintiff or to secure or compound for that amount to the reasonable satisfaction of the plaintiff.

Sworn at }  
before me }(c) **SCHEDULE F Index of Forms**

After the matter relating to Form 154E, insert:

154FA. Affidavit under s. 459E of the Corporations Law (P. 80A, r. 15).

154FB. Affidavit under s. 459Q of the Corporations Law (P. 80A, r. 16).

6. The amendments contained in paragraph 5 shall apply to demands made on or after 1 April 1996.

7. The Supreme Court Rules 1970 are further amended as follows:

Part 20 rule 1

After subrule (3) insert:

(3A) An order may be made, or leave may be granted, under subrule (1) notwithstanding that the effect of the amendment is, or would be, to add or substitute a cause of action arising after the commencement of the proceedings, but in such a case the date of commencement of the proceedings, so far as concerns that cause of action, shall be the date on which the amendment is made.

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8. The Supreme Court Rules 1970 are further amended as follows:

Part 1 rule 3

Omit the rule.

9. The Supreme Court Rules 1970 are further amended as follows:

**SCHEDULE H Part 1**

Omit “Freedom of Information (Amendment) Act 1989” and insert instead “Freedom of Information Act 1989”.

10. The Supreme Court Rules 1970 are further amended as follows:

Part 65A rule 4

Omit the rule.

11. The Supreme Court Rules 1970 are further amended as follows:

(a) **SCHEDULE E Part 1**

Insert, in the matter relating to Part 36 in the appropriate columns, after “Medical expert: cross-examination ..... “:

Rule 13D	Order re notice	.....
	under s. 67 or	
	s. 99 of the	
	Evidence Act	
	1995....	

(b) **SCHEDULE E Part 2**

After paragraph 36 insert:

37. Making a finding as to:

(a) whether a reasonable request has been made under section 167 of the Evidence Act 1995 within the time prescribed by section 168 (1), (3), (5) or (6) of that Act; and

(b) whether a party has, without reasonable cause, failed or refused to comply with such a request.

38. Direction or order under section 50 or section 168 (2), (4) or (7) or section 169 (1) (a), (b) or (d) of the Evidence Act 1995.

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#### **EXPLANATORY NOTE**

*(This note does not form part of the rules)*

1. The object of the amendment contained in paragraph 2 (a) is to make the form of wording in a paragraph consistent with other paragraphs in the same rule.

2. The object of the amendment contained in paragraph 2 (b) and (c) is to require, in proceedings for possession of land, an affidavit stating that the institution of proceedings is not in contravention of s. 71 of the Residential Tenancies Act 1987.

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3. The object of the amendments contained in paragraph 4 is to allow masters to deal with the trial or hearing of defended proceedings (except with a jury) where:

- (a) the only matter in question is a claim for the possession of land; or
- (b) the only matters in question are a claim for the possession of land and one or more of the following:
  - (i) a claim or cross-claim for damages;
  - (ii) a claim or cross-claim for other money;
  - (iii) a claim or cross-claim for costs.

4. The object of the amendments contained in paragraph 5 is to amend the requirements concerning affidavits in support of a statutory demand or in support of an application to wind up relying on failure to comply with a statutory demand under the Corporations Law with a view to achieving uniformity with proposed new rules of the Federal Court of Australia.

5. The object of the amendment contained in paragraph 7 is to allow the Court to order any document in proceedings to be amended, or that any party has leave to amend any such document, notwithstanding that the effect is to add or substitute a cause of action arising after the commencement of the proceedings.

6. The object of the amendment contained in paragraph 8 is to omit a superfluous rule which contained a superseded table of provisions in the rule.

7. The object of the amendment contained in paragraph 9 is to correct an error in a reference to the Freedom of Information Act 1989.

8. The object of the amendment contained in paragraph 10 is to omit a rule which was made superfluous by the Legal Profession Reform Act 1993.

9. The object of the amendments contained in paragraph 11 is to allow a registrar to exercise the powers of the Court in:

- (a) making an order under s. 67 or s. 99 of the Evidence Act 1995;
- (b) making a finding as to:
  - (i) whether a reasonable request has been made under section 167 of the Evidence Act 1995 within the time prescribed by section 168 (1), (3), (5) or (6) of that Act; and
  - (ii) whether a party has, without reasonable cause, failed or refused to comply with such a request; and
- (c) making a direction or order under section 50 or section 168 (2), (4) or (7) or section 169 (1) (a), (b) or (d) of the Evidence Act 1995.

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M. A. Blay,  
the Secretary of the Rule Committee.