



New South Wales

Supreme Court Rules (Amendment No. 332) 1999

These rules are made by the Rule Committee on 16 August 1999.

1. The Supreme Court Rules 1970 are amended as follows—

- (a) Part 1 rule 8(1)

In alphabetical order insert—

“the Evidence Act” means the Evidence Act 1995.

- (b) Part 23 rule 1(c)

Omit the paragraph and insert instead—

- (c) “privileged document” means in relation to proceedings, unless and until the Court directs that it cease to be a privileged document:

- (i) a document of which evidence could not be adduced in the proceedings over the objection of any person, by virtue of the operation of Part 3.10 Division 1 of the Evidence Act;
- (ii) a document the contents or production of which would disclose:

- (A) a protected confidence or the contents of a document recording a protected confidence or protected identity information, within the meaning of section 126B of the Evidence Act, where:

- (I) consent by the protected confider within the meaning of section 126C of the Evidence Act has not been given to disclosure of the confidence, contents or information; and

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- (II) section 126D of the Evidence Act would not operate to stop Part 3.10 Division 1A of the Evidence Act from preventing the adducing of evidence in respect of the confidence, contents or information; or
- (B) a protected confidence or the contents of a document recording a protected confidence, within the meaning of section 126H of the Evidence Act, where:
 - (I) consent by the protected confider within the meaning of section 126I of the Evidence Act has not been given to disclosure of the confidence or contents; and
 - (II) section 126J of the Evidence Act would not operate to stop Part 3.10 Division 1B of the Evidence Act from preventing the adducing of evidence in respect of the confidence or contents;
- (iii) where Party B is a natural person, a document the contents or production of which may tend to prove that party B:
 - (A) has committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (B) is liable to pay a civil penalty, within the meaning of section 128 of the Evidence Act;
- (iv) a document the admission or use of which in a proceeding would be contrary to section 129 of the Evidence Act;

- (v) a document that relates to matters of state within the meaning of section 130 of the Evidence Act;
- (vi) a document to which section 131 of the Evidence Act applies;
- (vii) a document:
 - (A) the disclosure of the contents of which;
 - (B) the production of which; or
 - (C) the admission or use of which, in the proceedings would be contrary to any Act or Commonwealth Act other than the Evidence Act or the Evidence Act 1995 of the Commonwealth.

2. The amendments contained in paragraph 1(b) shall commence on 1 October 1999 and shall not apply to:
 - (a) a document produced in the proceedings prior to 1 October 1999 pursuant to a notice served under Part 23 rule 2; or
 - (b) a document included in a list served in the proceedings prior to 1 October 1999 pursuant to an order made under Part 23 rule 3.
3. Part 23 of the Supreme Court Rules 1970, as it applies to proceedings commenced before 1 October 1996, is amended as follows—

Rule 16

Omit the rule and insert instead—

Privilege

16.(1) For the purposes of this Part, a document shall be privileged from production, unless and until the Court directs that it cease to be a privileged document, if it is:

- (a) a document of which evidence could not be adduced in the proceedings over the objection of any person, by virtue of the operation of Part 3.10 Division 1 of the Evidence Act;

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(b) a document the contents or production of which would disclose:

(i) a protected confidence or the contents of a document recording a protected confidence or protected identity information, within the meaning of section 126B of the Evidence Act, where:

(A) consent by the protected confider within the meaning of section 126C of the Evidence Act has not been given to disclosure of the confidence, contents or information; and

(B) section 126D of the Evidence Act would not operate to stop Part 3.10 Division 1A of the Evidence Act from preventing the adducing of evidence in respect of the confidence, contents or information; or

(ii) a protected confidence or the contents of a document recording a protected confidence, within the meaning of section 126H of the Evidence Act, where:

(A) consent by the protected confider within the meaning of section 126I of the Evidence Act has not been given to disclosure of the confidence or contents; and

(B) section 126J of the Evidence Act would not operate to stop Part 3.10 Division 1B of the Evidence Act from preventing the adducing of evidence in respect of the confidence or contents;

- (c) where Party B is a natural person, a document the contents or production of which may tend to prove that party B:
 - (i) has committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (ii) is liable to pay a civil penalty, within the meaning of section 128 of the Evidence Act;
- (d) a document the admission or use of which in a proceeding would be contrary to section 129 of the Evidence Act;
- (e) a document that relates to matters of state within the meaning of section 130 of the Evidence Act;
- (f) a document to which section 131 of the Evidence Act applies;
- (g) a document:
 - (i) the disclosure of the contents of which;
 - (ii) the production of which; or
 - (iii) the admission or use of which, in the proceedings would be contrary to any Act or Commonwealth Act other than the Evidence Act or the Evidence Act 1995 of the Commonwealth.

(2) For the purposes of this Part, a document shall not be privileged from production except as provided in subrule (1).

4. The amendments contained in paragraph 3 shall commence on 1 October 1999 and shall not apply to:

- (a) a document included in a list of documents served in the proceedings under the Part prior to 1 October 1999; or
- (b) a document:
 - (i) that has been produced; or

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(ii) a copy of the whole or part of which has been served,

in the proceedings prior to 1 October 1999 pursuant to the Part.

5. The Supreme court rules 1970 are further amended as follows—

(a) Part 24 rule 6(3)

Omit the subrule and insert instead—

(3) Subject to subrule (4), a party may object to answer any interrogatory on the following grounds but no other:

(a) where the answer is not required by an order, that the interrogatory does not relate to any matter in question between him or her and the party requiring the answer;

(b) that the interrogatory is vexatious or oppressive;

(c) unless and until the Court directs that the question shall not be prevented by this subrule:

(i) that evidence in answer to a question in terms of the interrogatory could not be adduced in the proceedings over the objection of any person, by virtue of the operation of Part 3.10 Division 1 of the Evidence Act;

(ii) that an answer to the interrogatory could disclose:

(A) a protected confidence or the contents of a document recording a protected confidence or protected identity information, within the meaning of section 126B of the Evidence Act, where:

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- (I) consent by the protected confider within the meaning of section 126C of the Evidence Act has not been given to disclosure of the confidence, contents or information; and
- (II) section 126D of the Evidence Act would not operate to stop Part 3.10 Division 1A of the Evidence Act from preventing the adducing of evidence in respect of the confidence, contents or information; or

(B) a protected confidence or the contents of a document recording a protected confidence, within the meaning of section 126H of the Evidence Act, where:

- (I) consent by the protected confider within the meaning of section 126I of the Evidence Act has not been given to disclosure of the confidence or contents; and

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- (II) section 126J of the Evidence Act would not operate to stop Part 3.10 Division 1B of the Evidence Act from preventing the adducing of evidence in respect of the confidence or contents;
- (iii) where the party is a natural person, that an answer to the interrogatory may tend to prove that the party:
 - (A) has committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (B) is liable to a civil penalty, within the meaning of section 128 of the Evidence Act;
- (iv) that admission or use in a proceeding of evidence in answer to a question in terms of the interrogatory would be contrary to section 129 of the Evidence Act;
- (v) that an answer to the interrogatory would contain information that relates to matters of state within the meaning of section 130 of the Evidence Act;
- (vi) that an answer to the interrogatory would disclose a communication or a document to which section 131 of the Evidence Act applies;

(vii) that an answer to the interrogatory would disclose or result in disclosure of information the disclosure, admission or use of which in the proceedings would be contrary to any Act or Commonwealth Act other than the Evidence Act or the Evidence Act 1995 of the Commonwealth.

6. The amendments contained in paragraph 5 shall commence on 1 October 1999 and shall not apply to an interrogatory that has been sufficiently answered prior to that date.
7. The Supreme court rules 1970 are further amended as follows—
 - (a) Part 25, Part 36, Part 75 and Schedule E
Omit “the Evidence Act 1995”, wherever occurring, and insert instead “the Evidence Act”.
 - (b) Part 36 rule 13
Omit the rule and insert instead—

Privilege

13.(1) This rule applies where:

 - (a) the Court, by subpoena or otherwise, orders any person to produce any document to;
 - (b) a party is required by a notice served under rule 16(1) to produce any document to; or
 - (c) a question is put to a person in the course of examination before, the Court or a Judge or any officer of the Court, or any examiner, referee, arbitrator or other person authorised to receive evidence and neither Part 3.10 of the Evidence Act nor Part 3.10 of the Evidence Act 1995 of the Commonwealth is applicable.

(2) The Court shall not compel, and rule 16 shall not require, production of a document or an answer to a question, unless and until the Court directs that the production or answer shall not be prevented by this subrule:

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- (a) over the objection of a person if evidence of the document, or of an answer to the question, could not be adduced in the proceedings over the objection of the person, by virtue of the operation of Part 3.10 Division 1 of the Evidence Act;
- (b) if the contents or production of the document, or an answer to the question, would disclose:
 - (i) a protected confidence or the contents of a document recording a protected confidence or protected identity information, within the meaning of section 126B of the Evidence Act, where:
 - (A) consent by the protected confider within the meaning of section 126C of the Evidence Act has not been given to disclosure of the confidence, contents or information; and
 - (B) section 126D of the Evidence Act would not operate to stop Part 3.10 Division 1A of the Evidence Act from preventing the adducing of evidence in respect of the confidence, contents or information; or
 - (ii) a protected confidence or the contents of a document recording a protected confidence, within the meaning of section 126H of the Evidence Act, where:
 - (A) consent by the protected confider within the meaning of section 126I of the Evidence Act has not been given to disclosure of the confidence or contents; and

(B) section 126J of the Evidence Act would not operate to stop Part 3.10 Division 1B of the Evidence Act from preventing the adducing of evidence in respect of the confidence or contents;

(c) if the person required to produce, or answer, is a natural person and an answer to the question, or the contents or production of the document, would tend to prove that the person:

- (i) has committed an offence against or arising under an Australian law or a law of a foreign country; or
- (ii) is liable to a civil penalty, within the meaning of section 128 of the Evidence Act;

(d) if admission or use, in a proceeding, of the document, or of evidence in answer to the question, would be contrary to section 129 of the Evidence Act;

(e) if the document relates to, or an answer to the question would contain information that relates to, matters of state within the meaning of section 130 of the Evidence Act;

(f) if the contents or production of the document, or an answer to the question, would disclose a communication or a document to which section 131 of the Evidence Act applies;

(g) in the case of the production of a document—if:

- (i) the disclosure of its contents;
- (ii) its production; or
- (iii) its admission or use,

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in the proceedings would be contrary to any Act or Commonwealth Act other than the Evidence Act or the Evidence Act 1995 of the Commonwealth.

- (h) in the case of the answer to a question—if an answer would disclose or result in disclosure of information the disclosure, admission or use of which in the proceeding would be contrary to any Act or Commonwealth Act other than the Evidence Act or the Evidence Act 1995 of the Commonwealth.
- (3) Where a party to any proceedings claims privilege from production of any document, the Court may, if it thinks fit:
 - (a) permit evidence in relation to the claim to be given by any other party by affidavit or otherwise; and
 - (b) permit cross-examination on any affidavit used in support of the claim.
- (c) Part 36 rule 16(1).
Omit “Where” and insert instead “Subject to rule 13, where”.
- (d) Part 75
 - (i) rule 6(d)
Omit the paragraph and insert instead—
 - (d) Part 36 rule 16, except as if the words “Subject to rule 13, where” read “Where”.
 - (ii) After rule 10 insert—
Privilege
10A (1) Where the Court, by subpoena or otherwise, orders any person to produce any document or thing, and any person makes and substantiates sufficient lawful objection to production on grounds of privilege, the Court shall not compel production of that document or thing except production to the Court for the purpose of ruling on the objection.

(2) Where a question is put to a person in the course of examination, and any person makes and substantiates sufficient lawful objection on grounds of privilege to the question being answered, the Court shall not compel an answer to the question.

(3) Subrule (1) applies where an order is made for production to, and subrule (2) applies where a question is put to a person in the course of examination before, the Court or a Judge or any officer of the Court, or any examiner, referee, arbitrator or other person authorised to receive evidence, whether on a trial or hearing or on any other occasion.

(3A) Where a party to any proceedings claims privilege from production of any document, the Court may, if it thinks fit:

- (a) permit evidence in relation to the claim to be given by any other party by affidavit or otherwise; and
- (b) permit cross-examination on any affidavit used in support of the claim.

(4) This rule does not affect any rule of law which authorises or requires the withholding of any document or thing or the refusal to answer any question on the ground that the disclosure of the document or thing or the answering of the question would be injurious to the public interest.

(5) Subrules (1), (2) and (3) do not apply to an objection to produce any document or thing or to answer any question on the ground mentioned in subrule (4).

8. The amendments contained in paragraph 7(b)–(d) shall commence on 1 October 1999 and shall not apply to a document that has been produced prior to that date.

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EXPLANATORY NOTE

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

The object of the above amendments is to—

- (a) include references to relevant sections recently added to the Evidence Act 1995;
- (b) clarify the definition of privilege in parts 23 and 24 of the Supreme Court Rules 1970;
- (c) extend the application of uniform principles to—
 - (i) production pursuant to subpoenas, notices to produce and orders; and
 - (ii) giving oral evidence,in situations where neither Part 3.10 of the Evidence Act 1995 nor Part 3.10 of the Evidence Act 1995 of the Commonwealth apply;
- (d) extend the application of uniform principles to Acts, other than the Evidence Acts, that restrict access to information; and
- (e) apply the new rules retrospectively except for documents discovered or produced, or interrogatories answered, prior to commencement date.

M A Blay

The Secretary of the Rule Committee

BY AUTHORITY