



New South Wales

Supreme Court Rules (Amendment No. 337) 1999

1. These rules are made by the Rule Committee on 20 December 1999.

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

(a) Part 1 rule 8

In alphabetical order insert—

“expert” means a person who has specialised knowledge based on the person’s training, study or experience.

(b) Part 14 rule 9 and Part 14A rule 14

Omit the rules.

(c) Part 14C rule 1

Omit the definition of “expert”.

(d) Part 36

Omit rule 13C and insert instead—

Expert witnesses

13C(1) For the purposes of this rule and rule 13CA:

“expert witness” means an expert engaged for the purpose of:

(a) providing a report as to his or her opinion for use as evidence in proceedings or proposed proceedings; or

(b) giving opinion evidence in proceedings or proposed proceedings;

“the code” means the expert witness code of conduct in Schedule K.

(2) Unless the Court otherwise orders:

(a) at or as soon as practicable after the engagement of an expert as a witness, whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert shall provide the expert with a copy of the code;

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- (b) unless an expert witness's report contains an acknowledgment by the expert witness that he or she has read the code and agrees to be bound by it:
 - (i) service of the report by the party who engaged the expert witness shall not be valid service for the purposes of the rules or of any order or practice note; and
 - (ii) the report shall not be admitted into evidence;
- (c) oral evidence shall not be received from an expert witness unless:
 - (i) he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code and agrees to be bound by it; and
 - (ii) a copy of the acknowledgment has been served on all parties affected by the evidence.

(3) If an expert witness furnishes to the engaging party a supplementary report, including any report indicating that the expert witness has changed his or her opinion on a material matter expressed in an earlier report by the expert witness:

- (a) the engaging party must forthwith serve the supplementary report on all parties on whom the engaging party has served the earlier report; and
- (b) the earlier report must not be used in the proceedings by the engaging party, or by any party in the same interest as the engaging party on the question to which the earlier report relates, unless paragraph (a) is complied with.

(4) This rule shall not apply to an expert engaged before this rule commences.

Conference between experts

13CA (1) The Court may, on application by a party or of its own motion, direct expert witnesses to:

- (a) confer and may specify the matters on which they are to confer;
- (b) endeavour to reach agreement on outstanding matters; and

- (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.
- (2) An expert so directed may apply to the Court for further directions.
- (3) The Court may direct that such conference be held with or without the attendance of the legal representatives of the parties affected, or with or without the attendance of legal representatives at the option of the parties respectively.
- (4) The content of the conference between the expert witnesses shall not be referred to at the hearing or trial unless the parties affected agree.
- (5) An agreement reached during the conference shall not bind the parties affected except insofar as they expressly agree.

(e) Part 39

Omit the Part and insert instead—

PART 39—COURT APPOINTED EXPERT AND ASSISTANCE TO THE COURT

Division 1—Court Appointed Expert

Selection and appointment

1.(1) Where a question for an expert witness arises in any proceedings the Court may, at any stage of the proceedings, on application by a party or of its own motion, after hearing any party affected who wishes to be heard:

- (a) appoint an expert (in this Division referred to as “the expert”) to inquire into and report upon the question;
- (b) authorise the expert to inquire into and report upon any facts relevant to the inquiry and report on the question;
- (c) direct the expert to make a further or supplemental report or inquiry and report; and
- (d) give such instructions (including provision concerning any examination, inspection, experiment or test) as the Court thinks fit relating to any inquiry or report of the expert.

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(2) The Court may appoint as the expert a person selected by the parties affected or a person selected by the Court or selected in a manner directed by the Court.

Code of conduct

2.(1) A copy of the expert witness code of conduct in Schedule K ("the code") shall be provided to the expert by the registrar or as the Court may direct.

(2) A report by the expert shall not be admitted into evidence unless the report contains an acknowledgment by the expert that he or she has read the code and agrees to be bound by it.

(3) Oral evidence shall not be received from the expert unless the Court is satisfied that he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code and agrees to be bound by it.

Report

3.(1) The expert shall send his or her report to the registrar.

(2) The registrar shall send a copy of the report to each party affected.

(3) Subject to compliance with this rule, the report shall be deemed to have been admitted into evidence in the proceedings unless the Court otherwise orders.

Cross-examination

4. Any party affected may cross-examine the expert and the expert shall attend court for examination or cross-examination if so requested on reasonable notice by the registrar or by a party affected.

Remuneration

5.(1) The remuneration of the expert shall be fixed by the Court.

(2) Subject to subrule (3), the parties specified by the Court shall be jointly and severally liable to the expert to pay the amount fixed by the Court for his remuneration.

(3) The Court may direct when and by whom the expert is to be paid.

(4) Subrules (2) and (3) do not affect the powers of the Court as to costs.

Other expert evidence

6. Where an expert has been appointed pursuant to this Part in relation to a question arising in the proceedings, the Court may limit the number of other experts whose evidence may be adduced on that question.

Division 2—Assistance to the Court

Assistance to the Court

7. The Court may, in any proceedings other than proceedings entered in the Admiralty List or proceedings tried with a jury, obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings, may act upon the adviser's opinion, and may make orders for the adviser's remuneration.

(f) After Schedule J insert—

SCHEDULE K

*P. 36, r. 13C(1),
P. 39, r. 2(1)*

EXPERT WITNESS CODE OF CONDUCT

Application of code

1. This code of conduct applies to any expert engaged to:
 - (a) provide a report as to his or her opinion for use as evidence in proceedings or proposed proceedings; or
 - (b) give opinion evidence in proceedings or proposed proceedings.

General Duty to the Court

2. An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.
3. An expert witness's paramount duty is to the Court and not to the person retaining the expert.
4. An expert witness is not an advocate for a party.

The Form of Expert Reports

5. A report by an expert witness must (in the body of the report or in an annexure) specify:

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- (a) the person's qualifications as an expert;
- (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed);
- (c) reasons for each opinion expressed;
- (d) if applicable—that a particular question or issue falls outside his or her field of expertise;
- (e) any literature or other materials utilised in support of the opinions; and
- (f) any examinations, tests or other investigations on which he or she has relied and identify, and give details of the qualifications of, the person who carried them out.

6. If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

7. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

8. An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter shall forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect which shall contain such of the information referred to in 5(b), (c), (d), (e) and (f) as is appropriate.

9. Where an expert witness is appointed by the Court, the preceding paragraph applies as if the Court were the engaging party.

Experts' Conference

10. An expert witness must abide by any direction of the Court to:

- (a) confer with any other expert witness;
- (b) endeavour to reach agreement on material matters for expert opinion; and
- (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.

11. An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.
3. Subject to paragraphs 4 and 5, the amendments contained in paragraph 2 shall commence on 1 March 2000.
4. Part 36 rule 13C(2)(b) shall not apply to a report written before 1 March 2000.
5. The amendments contained in paragraph 2(e) shall apply to persons appointed on or after 1 March 2000 under Part 39. Part 39, as it is immediately before 1 March 2000, shall continue to apply to persons appointed under Part 39 before that date.
6. The Supreme Court Rules 1970 are further amended as follows—
 - (a) After Part 15 insert—

PART 15A—LIMITING ISSUES

Putting matters in issue unreasonably

- 1.(1) A party to proceedings must not in a pleading or at a trial or hearing make, or put in issue, an allegation of fact unless it is reasonable to do so.
- (2) A party to proceedings who has in a pleading or at a trial or hearing made, or put in issue, an allegation of fact must not maintain that allegation or its controversion unless it is reasonable to do so.

Reasonableness of issue

2. In determining whether it is reasonable for a party to make or put in issue an allegation of fact or to maintain such an allegation or its controversion, consideration must be given to the steps taken by the party to ascertain whether there is a reasonable basis for doing so.

Scope of Part

3. Nothing in this Part shall give rise to, or affect, any right to seek that proceedings or any claim for relief or any defence be stayed or dismissed or struck out.

Certifying as separate issues

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4(1) During final submissions at any trial or hearing, a party may request the presiding Judge or Master to certify, at the time of delivering the final or a supplementary judgment, that:

- (a) identified allegations of fact were made or put in issue; or
- (b) identified allegations of fact, or their controversion, were maintained,
by another party contrary to rule 1, either generally or from a specified time, and to further certify:
 - (c) the party acting contrary to rule 1; and
 - (d) the party in whose favour the certificate is granted.

(2) Where:

- (a) a request is made under subrule (1); and
- (b) the presiding Judge or Master is satisfied that it is appropriate to do so,

he or she may by order certify accordingly.

(3) A certificate may be refused notwithstanding that non compliance with rule 1 is shown.

(b) Part 52A

After rule 11 insert—

Costs of separate issues

11A(1) When making a costs order, the Court may take into account any non-compliance with Part 15A rule 1 insofar as it is relevant to the order.

(2) Where a certificate is granted under Part 15A rule 4, unless the Court otherwise orders, the party specified in the certificate as acting contrary to Part 15A rule 1 shall pay the costs of the issue to which the certificate relates, on an indemnity basis, of the party in whose favour the certificate is granted.

(3) An entitlement to costs under subrule (2) shall not be affected by any order as to costs unless that order refers to the certificate giving rise to the entitlement.

(4) Subrule (2) has effect notwithstanding rules 18, 21, 22, 23, 28, 29, and 30 (4) and (5).

(c) Part 52A rules 19(3) and 20(3)

After “rules”, wherever occurring, insert “11A.”.

7. The amendments contained in paragraph 6 shall commence on 1 March 2000.
8. The Supreme Court Rules 1970 are further amended as follows—
 - (a) Part 1

After rule 2 insert—

Overriding Purpose

(1) The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings.

(2) The Court must seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule.

(3) A party to civil proceedings is under a duty to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

(4) A solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of the duty identified in (3).

(5) The Court may take into account any failure to comply with (3) or (4) in exercising a discretion with respect to costs.

- (b) Part 26

After rule 2 insert—

Case management by the Court

3. Without limiting the generality of rule 1, orders and directions may relate to:

- (a) the filing of pleadings;
- (b) the defining of issues, including requiring counsel or the parties to exchange memoranda in order to clarify issues;
- (c) the provision of any essential particulars;
- (d) the making of admissions;
- (e) the filing of lists of documents, either generally or with respect to specific matters;

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- (f) the delivery or exchange of experts' reports and the holding of conferences of experts;
- (g) the provision of copies of documents, including the provision in electronic form;
- (h) the administration and answering of interrogatories, either generally or with respect to specific matters;
- (i) the service and filing of affidavits or statements of evidence or documents to be relied on by a specified date or dates;
- (j) the giving of evidence at the hearing, including whether evidence of witnesses in chief shall be given orally, or by affidavit or statement, or both;
- (k) the use of telephone or video conference facilities, video tapes, film projection, computer and other equipment and technology;
- (l) the provision of affidavit evidence by specified persons in support of an application for an adjournment;
- (m) a timetable with respect to any matters to be dealt with.

(c) Part 34

After rule 6 insert—

6AA(1) At any time before or during a trial, the Court may by direction:

- (a) limit the time to be taken in examining, cross-examining or re-examining a witness;
- (b) limit the number of witnesses (including expert witnesses) that a party may call;
- (c) limit the time to be taken in making any oral submissions;
- (d) limit the time to be taken by a party in presenting its case;
- (e) limit the time to be taken by the trial;
- (f) amend a direction made under this rule.

(2) Any such direction must not detract from the principle that each party is entitled to a fair trial, and must be given a reasonable opportunity to lead evidence, cross-examine witnesses and make submissions.

(3) In deciding whether to make any such direction, the Court may have regard to the following matters in addition to any other matters that may be relevant:

- (a) the subject matter, complexity or simplicity of the case;
- (b) the number of witnesses to be called;
- (c) the volume and character of the evidence to be led;
- (d) the time expected to be taken for the trial;
- (e) the need to place a reasonable limit on the time allowed for the trial;
- (f) the efficient administration of the Court lists; and
- (g) the interests of parties to other proceedings before the Court.

(4) The Court may, at any time, direct a solicitor or barrister for a party to give to the party a memorandum stating:

- (a) the estimated length of the trial and the estimated costs and disbursements of the solicitor or barrister;
- (b) the estimated costs that would be payable by the party to another party if the party were unsuccessful at trial.

(d) Part 52A rule 9

At the end of the rule insert—

(3) Where in any proceedings:

- (a) it appears to the Court that:
 - (i) a party has been subject to unreasonable delay or default on the part of any other party;
 - (ii) the proceedings are unreasonably protracted; or
 - (ii) justice otherwise demands it, or
- (b) a costs order is made under rule 43 or rule 43A,

the Court may order that costs, or a specified amount on account of costs, be payable forthwith.

(e) Part 52A rule 25

Omit the rule and insert instead—

Disobedience to rule, judgment or order

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25. Where any person fails to comply with any provision of the rules or any judgment or order or direction of the Court, the Court may order that person to pay the costs of any other person occasioned by the failure.

(f) Part 52A rules 43 and 43A

Omit the rules and insert instead—

Liability of solicitor

43.(1) Where costs are incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default, and it appears to the Court that a solicitor is responsible (whether personally or through a servant or agent), the Court may, after giving the solicitor a reasonable opportunity to be heard:

- (a) disallow the costs as between the solicitor and the solicitor's client, including disallowing the costs for any step in the proceedings;
- (b) direct the solicitor to repay to the client costs which the client has been ordered to pay to any other party; and
- (c) direct the solicitor to indemnify any party other than the client against costs payable by the party indemnified.

(2) Without limiting the generality of subrule (1), a solicitor is responsible for default for the purposes of that subrule where any proceedings cannot conveniently proceed, or can proceed only with the incurring of extra costs or with the inconvenience of the Court or another party to the proceedings, because of the failure of the solicitor:

- (a) to attend in person or by a proper representative;
- (b) to file any document which ought to have been filed;
- (c) to deliver any document which ought to have been delivered for the use of the Court;
- (d) to be prepared with any proper evidence or account;
- (e) to comply with any provision of the rules or any judgment or order or direction of the Court; or
- (f) otherwise to proceed.

(3) The Court may, before making an order under subrule (1), refer the matter to a Registrar for inquiry and report.

(4) The Court may order that notice of any proceedings or order against a solicitor under this rule shall be given to the solicitor's client in such manner as may be specified in the order under this subrule.

(5) The Court may give ancillary directions in order to give full effect to a costs order, including directing a solicitor to provide to the Court or a party to the proceedings a bill of costs in assessable form.

(6) This rule is in addition to and is intended to operate independently of the provisions of section 76C of the Act and does not apply in circumstances where section 76C of the Act applies.

Liability of barrister

43A.(1) Where costs are incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default, and it appears to the Court that a barrister is responsible (whether personally or through a servant or agent), the Court may, after giving the barrister a reasonable opportunity to be heard:

- (a) disallow the costs as between the barrister and his or her instructing solicitor or as between the barrister and the client, including disallowing the costs for any step in the proceedings;
- (b) direct the barrister to repay to the client costs which the client has been ordered to pay to any other party; and
- (c) direct the barrister to indemnify any party other than the client against costs payable by the party indemnified.

(2) Without limiting the generality of subrule (1), a barrister is responsible for default for the purposes of that subrule where any proceedings cannot conveniently proceed, or can proceed only with the incurring of extra costs or with the inconvenience of the Court or another party to the proceedings, because of the failure of the barrister:

- (a) to attend in person or by a proper representative;
- (b) to file any document which ought to have been filed;
- (c) to deliver any document which ought to have been delivered for the use of the Court;
- (d) to be prepared with any proper evidence or account;
- (e) to comply with any provision of the rules or any judgment or order or direction of the Court; or

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(f) otherwise to proceed.

(3) The Court may, before making an order under subrule (1), refer the matter to a registrar for enquiry and report.

(4) The Court may order that notice of any proceedings or order against a barrister under this rule shall be given to the barrister's instructing solicitor or client in such manner as may be specified in the order under this subrule.

(5) The Court may give ancillary directions in order to give full effect to a costs order, including directing a barrister to provide to the Court or a party to the proceedings a bill of costs in assessable form.

9. The amendments contained in paragraph 8 shall commence on 1 March 2000.

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

Part 52A

After rule 35 insert—

Power to order maximum costs

35A(1). The Court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.

(2) A maximum amount specified in an order under subrule (1) shall not include an amount that a party is ordered to pay because the party:

- (a) has failed to comply with an order or with any of these rules;
- (b) has sought leave to amend its pleadings or particulars;
- (c) has sought an extension of time for complying with an order or with any of these rules; or
- (d) has otherwise caused another party to incur costs that were not necessary for the just, quick and cheap:
 - (i) progress of the proceedings to trial or hearing; or
 - (ii) trial or hearing of the proceedings.

(3) An order under subrule (1) may include such directions as the Court considers necessary to effect the just, quick and cheap:

- (a) progress of the proceedings to trial or hearing; or
- (b) trial or hearing of the proceedings.

(4) If, in the Court's opinion, there are special reasons, and it is in the interests of justice to do so, the Court may vary the specification of maximum recoverable costs ordered under subrule (1).

EXPLANATORY NOTE

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

1. The object of the amendment contained in paragraph 2 is to:
 - (a) ensure that an expert engaged to:
 - (i) provide a report as to his or her opinion for use as evidence; or
 - (ii) give opinion evidence, in proceedings or proposed proceedings;
 - (iii) observes an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise;
 - (iv) observes a paramount duty to the Court and not to the person retaining the expert;
 - (v) does not act as an advocate for a party;
 - (vi) makes full disclosure of all matters relevant to his or her report and evidence; and
 - (vii) cooperates with other expert witnesses;
 - (b) facilitate the appointment of expert witnesses by the Court; and
 - (c) extend the existing power of the Court to obtain assistance from an expert in proceedings in the Equity Division (other than in the Admiralty List) to proceedings in the Common Law Division (other than in proceedings tried with a jury).
2. The object of the amendments contained in paragraph 6 is to make it clear that parties have an obligation to avoid unreasonably making or disputing an allegation of fact and imposing a costs sanction.
3. The object of the amendments contained in paragraph 8 is to make it clear that the overriding purpose of the rules is to facilitate the just, quick and cheap resolution of the real issues in civil proceedings. This has been achieved by:
 - (a) stating the overriding purpose;

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- (b) imposing obligations on parties and their barristers and solicitors to assist the Court in achieving the overriding purpose;
- (c) imposing wider costs sanctions on parties and their barristers and solicitors to enforce the overriding purpose; and
- (d) specifying expanded case management powers of the Court designed to assist in achieving the overriding purpose.

4. The object of the amendments contained in paragraph 10 is to enable the Court to specify the maximum costs that may be recovered by one party from another, with certain necessary exceptions.

M. A Blay

The Secretary of the Rule Committee

BY AUTHORITY