



## District Court Amendment (Evidence on Commission) Rule 2002

under the

District Court Act 1973

The District Court Rule Committee made the following rule of court under the *District Court Act 1973* on 20 February 2002.

J G Cowen

Secretary to the Rule Committee

### Explanatory note

The object of this Rule is to replace Part 25 of the *District Court Rules 1973* dealing with the taking of evidence otherwise than at trial. The provisions of the new Part 25 are based on the provisions of Part 27 of the *Supreme Court Rules 1970*, which make provision (among other things) for examination orders under the *Evidence on Commission Act 1995*. The District Court has recently been given the same jurisdiction to make examination orders under the *Evidence on Commission Act 1995* in relation to witnesses abroad as the Supreme Court by an amendment made to that Act by the *Courts Legislation Further Amendment Act 2001*.

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Clause 1                      District Court Amendment (Evidence on Commission) Rule 2002

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**District Court Amendment (Evidence on  
Commission) Rule 2002**

**1 Name of Rule**

This Rule is the *District Court Amendment (Evidence on Commission) Rule 2002*.

**2 Amendment of District Court Rules 1973**

The *District Court Rules 1973* are amended as set out in Schedule 1.

## Schedule 1 Amendment

(Clause 2)

### Part 25

Omit the Part. Insert instead:

## Part 25 Taking evidence otherwise than at the trial

### 1 Order for examination of witness

The Court may, for the purpose of proceedings in the Court, make orders for the examination of any person before a Judge or other officer of the Court or before such other person as the Court may appoint as examiner at any place:

- (a) in the State or out of the State in Australia, or
- (b) out of Australia.

### 2 Criminal proceedings

- (1) If a person has been committed for trial or to be dealt with before the Court, a proceeding between the prosecuting authority and the person is before the Court for the purposes of any application to the Court under section 6 (1) of the *Evidence on Commission Act 1995*.
- (2) Any application under section 6 (1) of the *Evidence on Commission Act 1995* must be made by notice of motion in the proceedings.
- (3) Rule 18 (1) (b) (which relates to a stay of proceedings) does not apply in criminal proceedings.

### 3 Judge etc as examiner

- (1) A Judge or other officer of the Court may not act as an examiner otherwise than with the concurrence of the Chief Judge.

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- (2) If the proposed examiner is a Judge or other officer of the Court, an applicant for an order (in this rule called an ***examination order***) under rule 1 (b), section 6 (1) (a) of the *Evidence on Commission Act 1995* or, where the order is of a kind referred to in section 6 (1) (a) of that Act, under section 9 of that Act, must request the proposed examiner to certify the amount which in the examiner's opinion should be paid into Court as provision for expenses in relation to the examination.
- (3) An examination order must be expressed to be conditional on the payment into Court by such person and within such time as the Court may specify of not less than the amount certified in accordance with subrule (2).
- (4) If the registrar forms the opinion that the amount paid or payable into Court under subrule (3) is or may be insufficient to provide for the expenses of the examination, the Court may, on application of the registrar:
  - (a) order the party on whose application the examination order was made to pay into Court such further amount, and within such time, as the Court may specify, or
  - (b) stay the proceedings until payments so far as concerns the whole or any part of any claim for relief by that party, or
  - (c) suspend the operation of the examination order until payment.
- (5) The registrar must apply so much of the amount paid into Court as may from time to time be required for the purpose, in the payment to or at the direction of the examiner of expenses or advances for expenses incurred or to be incurred in relation to the examination.
- (6) Any amount paid under subrule (5) that is not required for expenses in relation to the examination must be repaid into Court.
- (7) After the conclusion of the examination, on the examiner certifying that no expenses in relation to the examination remain unpaid or unrecouped from the money in Court, the registrar must, subject to any order of the Court, refund to the

person by whom the money was paid into Court (and, if more than one, in the same proportions as their respective payments into Court) any money remaining in Court.

#### 4 Forms of order

Orders under rule 1 or section 6 (1) (a) or (c) of the *Evidence on Commission Act 1995* may be in or to the effect of the approved forms.

#### 5 Letter of request

(1) On the making of an order under section 6 (1) (c) of the *Evidence on Commission Act 1995* or, where the order is of a kind referred to in section 6 (1) (c) of that Act, under section 9 of that Act, for the issuing of a letter of request, the party obtaining the order must:

- (a) lodge with the registrar:
  - (i) a form of the appropriate letter of request,
  - (ii) the interrogatories (if any) and cross-interrogatories (if any) to accompany the letter of request, and
  - (iii) unless the Court otherwise orders, if the letter of request is to be issued to the judicial authorities of a country in which English is not an official language appropriate to the place where the evidence is to be taken, a translation of each of the documents mentioned in subparagraphs (i) and (ii) in an official language of that country appropriate to the place where the evidence is to be taken, and
- (b) file:
  - (i) a copy of each of the documents mentioned in paragraph (a), and
  - (ii) an undertaking by the party obtaining the order or the party's legal representative to be responsible for all expenses incurred by the Court or by any person at the request of the Court in respect of the letter of request and, on being given notice of the amount of any such expenses, to pay the amount to the registrar.

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- (2) A translation lodged under subrule (1) (a) (iii) must be certified by the person making it to be a correct translation, and the certificate must state the person's full name and address and the office or qualification by reason of which the person so certifies.

### 6 Evidence on Commission Act 1995

If an order is made under section 6 (1) (a) of the *Evidence on Commission Act 1995* or, where the order is of a kind referred to in section 6 (1) (a) of that Act, under section 9 of that Act, rules 8–17 apply subject to any directions given by the Court under section 7 (1) of that Act.

### 7 Evidence otherwise than on oath

Unless the Court otherwise orders:

- (a) a person may be examined in another country pursuant to an order under rule 1 (b), or
- (b) evidence of a person may be taken in another country pursuant to an order under section 6 (1) (c) of the *Evidence on Commission Act 1995*,

otherwise than on oath or affirmation if the person is examined or the evidence is taken in accordance with the procedure of the country.

### 8 Documents for examiner

- (1) The party obtaining an order for examination before an examiner under rule 1, section 6 (1) (a) of the *Evidence on Commission Act 1995* or, where the order is of a kind referred to in section 6 (1) (a) of that Act, under section 9 of that Act, must furnish the examiner with copies of such of the documents in the proceedings as are necessary to inform the examiner of the questions to which the examination is to relate.
- (2) If the documents in the proceedings are not sufficient to inform the examiner of the questions to which the examination is to relate the Court must, in the order for examination or in a later order, state the questions to which the examination is to relate.
- (3) This rule does not apply if a Judge is the examiner.

**9 Appointment for examination**

- (1) The examiner must appoint a place and time for the examination.
- (2) The time appointed must, having regard to the convenience of the person to be examined, and to the circumstances, be as soon as practicable after the making of the order.
- (3) The examiner must give notice of an appointment under this rule to the party obtaining the order and that party must, not later than the earlier of:
  - (a) 3 days, or
  - (b) a reasonable time,before the time appointed, give notice of the appointment to each other party.

**10 Conduct of examination**

- (1) The examiner must permit each party, the party's counsel and solicitor to attend the examination.
- (2) Subject to this Part, the proceedings before the examiner must be in accordance with the procedure of this Court.
- (3) A person examined before an examiner may, unless the Court otherwise orders, be cross-examined and re-examined.
- (4) The examination, cross-examination and re-examination of a person before an examiner must, unless the Court otherwise orders, be conducted in like manner as at a trial.
- (5) The examiner may put any question to a person examined before him as to:
  - (a) the meaning of any answer made by that person, or
  - (b) any matter arising in the course of the examination.
- (6) The examiner may adjourn the examination from time to time or from place to place.

**11 Examination of additional persons**

- (1) If the examiner is a Judge, the examiner may, on application of a party to the proceedings, take the examination of any person not named or provided for in the order for examination.

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- (2) If the examiner is not a Judge, the examiner may, with the consent in writing of each party to the proceedings, take the examination of any person not named or provided for in the order for examination and, if the examiner does so, the examiner must annex to the written record or transcript of the deposition of that person the consent of each of the parties.

### 12 Objection

- (1) If objection is taken to a question put to a person being examined before an examiner, or a person being so examined takes objection to answering a question put to the person or to produce any document or thing:
  - (a) the examiner must state to the parties the examiner's opinion on, but must not decide, the validity of the ground for the objection, and
  - (b) the question, the ground for the objection, the opinion of the examiner, and the answer (if any) must be set out in the written record or transcript of the deposition of that person or in a statement attached to the written record or transcript, and
  - (c) the Court may, on motion by any party, decide the validity of the ground for the objection, and
  - (d) if the Court decides against the objector, the Court may order the person to pay the costs occasioned by the objection.
- (2) This rule does not apply if the examiner is a Judge.

### 13 Taking of depositions

- (1) The deposition of a person examined before an examiner must be recorded by means of writing, shorthand, stenotype machine or sound-recording apparatus.
- (2) The deposition must contain as nearly as may be the statement of the person examined.
- (3) The examiner may direct that the words of any question and the answer to the question be recorded.
- (4) Subject to subrules (2) and (3) and subject to rule 12 (1) (b) every question and answer need not be recorded.

**14 Videotaping etc the examination**

The Court or the examiner may give directions for making, by any audio-visual method, a recording of proceedings on an examination.

**15 Authentication and filing**

- (1) If, for the purposes of rule 13 (1), the deposition of a person examined is recorded by means of writing, the written record must be read over either to or by the person, as the examiner may direct, and be signed by the person examined.
- (2) A transcript must be prepared of a deposition recorded by one of the means other than writing, referred to in rule 13 (1) and the person who prepared the transcript must certify that it is a correct transcript of the deposition so recorded.
- (3) The examiner must authenticate by his or her signature the written record or transcript of the deposition and any document which constitutes a recording under rule 14.
- (4) The examiner must make on, or attach to, the written record or transcript of the deposition a note signed by the examiner of the time occupied in the examination and the fees received by the examiner in respect of the examination.
- (5) The examiner must send the written record or transcript of the deposition and any document which constitutes a recording under rule 14 to the registrar and the registrar must file them in the proceedings.
- (6) The examiner must, unless the Court otherwise orders, send the exhibits to the registrar and the registrar must deal with the exhibits in such manner as the Court may direct.
- (7) Subrules (1), (2), (4) and (5) do not apply if the examiner is a Judge.

**16 Special report**

- (1) The examiner may make to the Court a special report with regard to an examination before him and with regard to the absence of any person from, or the conduct of any person at, the examination.

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- (2) The Court may direct such proceedings to be taken, or make such order, on the report as the Court thinks fit.

**17 Default of witness**

- (1) If a person has been required by subpoena to attend before an examiner who is not a Judge, and the person refuses to be sworn for the purposes of the examination or to answer any lawful question, or to produce any document or thing, the examiner must, at the request of any party, give to that party a certificate, signed by the examiner, of the refusal.
- (2) The Court may on the certificate being filed, and on motion by any party:
  - (a) order that person to be sworn, or to answer the question or to produce the document or thing as the case may be, and
  - (b) order that person to pay any costs occasioned by the person's refusal.

**18 Order for payment of expenses**

- (1) If a party has given an undertaking as mentioned in rule 5 (1) (b) (ii) and does not, within 7 days after service on him of notice of the amount of the expenses concerned, pay the amount of the expenses to the registrar, the Court may, on application by the registrar:
  - (a) order the party to pay the amount of the expenses to the registrar, and
  - (b) stay the proceedings until payment so far as concerns the whole or any part of any claim for relief by that party.
- (2) In subrule (1) (b), *proceedings* includes, if the undertaking was filed on the making of an order under section 9 of the *Evidence on Commission Act 1995* of a kind referred to in section 6 (1) (c) of that Act, a proceeding (except a criminal proceeding) before the inferior court.

**19 Perpetuation of testimony**

- (1) Witnesses must not be examined to perpetuate testimony unless proceedings have been commenced for the purpose.

- (2) Any person may commence proceedings to perpetuate testimony which may be material for establishing any right or claim to any relief, which right or claim cannot be established before the happening of a future event.
- (3) Proceedings to perpetuate the testimony of witnesses must not be set down for trial.
- (4) If proceedings to perpetuate testimony touch any matter or thing in which the Crown may have an interest, the Attorney General may be made a defendant.
- (5) If, pursuant to subrule (4), the Attorney General is made a defendant to proceedings to perpetuate testimony, a deposition taken in those proceedings is not be inadmissible in other proceedings by reason that the Crown was not a party to the proceedings to perpetuate testimony.
- (6) Subrule (2) does not affect the right of any person to commence proceedings to perpetuate testimony in cases to which that subrule does not apply.

**20 Evidence admissible**

The evidence of a witness taken under rule 1 is admissible, subject to all just exceptions, at the trial of the proceedings unless it is proved that the witness is, at the time of the trial, within a convenient distance of the place at which the proceedings is being tried and able to attend.

**21 Expenses**

A witness attending before an examiner to be examined, or to produce a document, as allowed by an order under rule 1 is entitled to payment of the like amount for conduct money expenses and loss of time as he would have been entitled to on the witness attending to give evidence or to produce a document at the trial of the proceedings before the Court.