



New South Wales

Uniform Civil Procedure Rules (Amendment No 17) 2007

under the

Civil Procedure Act 2005

The Uniform Rules Committee made the following rules of court under the *Civil Procedure Act 2005* on 2 October 2007.

Jennifer Atkinson
Secretary of the Rules Committee

Explanatory note

The object of these Rules is to amend the *Uniform Civil Procedure Rules 2005* so as:

- (a) to replicate, with minor modifications, Parts 58, 59A, 68, 70, 73 and 76 of the *Supreme Court Rules 1970* (see new Parts 52–57), and
- (b) to make minor amendments in relation to discovery and affidavits, and
- (c) to make other minor, consequential or ancillary amendments.

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Rule 1 Uniform Civil Procedure Rules (Amendment No 17) 2007

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1 Name of Rules

These Rules are the *Uniform Civil Procedure Rules (Amendment No 17) 2007*.

2 Amendment of Uniform Civil Procedure Rules 2005

The *Uniform Civil Procedure Rules 2005* are amended as set out in Schedule 1.

Schedule 1 Amendments

(Rule 2)

[1] Rule 6.1A

Insert after rule 6.1:

6.1A Proceedings that do not require a defendant (cf SCR Part 58, rule 1, Part 70, rule 11, Part 73, rule 4 and Schedule J)

Unless the court otherwise orders, proceedings that may be commenced without joining any person as a defendant include the following:

- (a) proceedings under the *Adoption Act 2000*,
- (b) proceedings under section 33 of the *Evidence on Commission Act 1995*,
- (c) proceedings under the *Jury Act 1977*,
- (d) proceedings under section 17 of the *Witness Protection Act 1995*,
- (e) proceedings under rule 55.9.

[2] Rules 10.24, 11.13, 11.14, 11.15, 11.16 and 11.17

Omit “Principal Registrar” wherever occurring.

Insert instead “principal registrar”.

[3] Rule 33.1 Definitions

Omit “Principal Registrar” wherever occurring in the definition of *registrar* in rule 33.1.

Insert instead “principal registrar”.

[4] Rule 35.3 Persons who may make affidavit

Insert after rule 35.3 (2):

- (2A) If more than one person is qualified to make an affidavit on behalf of a party, it is sufficient for such an affidavit to be made (subject to subrules (1) and (2)) by any one or more of them.

[5] Rule 36.16 Further power to set aside or vary judgment or order

Omit “the order” from rule 36.16 (3). Insert instead “it”.

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[6] Rule 45.1 Entry as indicated by originating process

Insert in alphabetical order in rule 45.1 (2):

The Protective List

[7] New Parts 52–57

Insert before Schedule 1:

Part 52 Taking evidence for foreign and Australian courts and tribunals

52.1 Procedure (cf SCR Part 58, rule 1)

- (1) Proceedings for an order under section 33 of the *Evidence on Commission Act 1995* in relation to a matter pending before a requesting court may be commenced in the Supreme Court:
 - (a) by a person nominated for that purpose by the requesting court, or
 - (b) if no person is so nominated, by the Attorney General.
- (2) In proceedings for such an order, no person is required to be joined as a defendant.
- (3) If proceedings for such an order have been commenced in relation to a matter pending before a requesting court, any other application for such an order in relation to the same matter is to be made by notice of motion in the proceedings.
- (4) Rules 52.2–52.5 have effect unless the Supreme Court otherwise orders.

52.2 Application of other rules regarding the taking of evidence (cf SCR Part 58, rule 2)

Subject to this Part, rules 24.7–24.16 apply to an examination held pursuant to an order under this Part:

- (a) as if the matter pending before the requesting court were proceedings in the Supreme Court, and
- (b) as if the order had been made under rule 24.3 in proceedings in the Supreme Court, and
- (c) if a Judge, associate Judge or registrar is appointed under section 33 of the *Evidence on Commission Act 1995*, as if an order had been made under rule 24.3 for the examination of a person on oath before a Judge, associate Judge or registrar.

52.3 Attendance of applicant (cf SCR Part 58, rule 3)

The person commencing proceedings under this Part may attend and take part in the examination.

52.4 Transcript of evidence and exhibits (cf SCR Part 58, rule 4)

- (1) The provisions of rule 24.14 (4) and (5) do not apply to an examination under this Part.
- (2) Subject to rule 52.6, the examiner must send the transcript of evidence and any document which constitutes a recording under rule 24.13 (which relates to videotape, etc) to the principal registrar of the Supreme Court.
- (3) An examiner who receives an exhibit on production by any person must, at the conclusion of the examination, return the exhibit to the person producing it unless that person consents to the retention of the exhibit.
- (4) If the examiner retains the exhibit, he or she must send it to the principal registrar of the Supreme Court together with the transcript of evidence.

52.5 Certificate (cf SCR Part 58, rule 5)

On receipt of a transcript of evidence taken under this Part, the principal registrar of the Supreme Court:

- (a) must issue a certificate, sealed with the seal of the Supreme Court, annexing and identifying:
 - (i) the request, and
 - (ii) the order of the Court for examination, and
 - (iii) the transcript of evidence, and
 - (iv) any document that constitutes a recording under rule 24.13, and
 - (v) any exhibits received from the examiner, and
- (b) must send the certificate and annexures to the Attorney General or, if the request was sent to the principal registrar by some other person pursuant to a convention, to that other person.

52.6 Privilege of witness (cf SCR Part 58, rule 6)

- (1) This rule applies if a claim by a witness to be exempt from giving any evidence on the ground specified in section 34 (1) (b) of the *Evidence on Commission Act 1995* is not supported or conceded as mentioned in section 34 (2) of that Act.

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- (2) The witness may be required to give the evidence to which the claim relates:
- (a) by the examiner, or
 - (b) if the examiner does not so require, by the Supreme Court on the application of the person who obtained the order under section 33 of the *Evidence on Commission Act 1995*.
- (3) An application referred to in subrule (2) (b) need not be served on any person unless the Supreme Court otherwise orders.
- (4) The following provisions apply if the evidence is taken pursuant to such a requirement:
- (a) the evidence must be recorded in a transcript (***the disputed transcript***) that is separate to the transcript in which the rest of the witness's evidence is recorded,
 - (b) the transcript of evidence that is sent to the principal registrar of the Supreme Court must be accompanied by a statement, signed by the examiner, setting out the claim and the ground on which it was made,
 - (c) on receipt of the statement, the principal registrar of the Supreme Court:
 - (i) must retain the disputed transcript, and
 - (ii) must send to the requesting court, together with the documents mentioned in rule 52.4, both the statement and a request to determine the claim,
 - (d) on receiving notice of the requesting court's determination of the claim, the principal registrar of the Supreme Court:
 - (i) if the claim is rejected, must send the disputed transcript to the requesting court, or
 - (ii) if the claim is upheld, must send the disputed transcript to the witness,and, in either case, must cause notice of the determination to be given both to the witness and to the person who obtained the order under section 33 of the *Evidence on Commission Act 1995*.

Part 53 Matters arising under the Foreign Judgments Act 1991 of the Commonwealth

53.1 Definitions (cf SCR Part 59A, rule 1)

In this Part, *judgment*, *judgment creditor*, *judgment debtor* and *money judgment* have the same meanings as they have in the *Foreign Judgments Act 1991* of the Commonwealth.

53.2 Commencement of proceedings (cf SCR Part 59A, rule 2)

- (1) Proceedings for registration of a judgment under Part 2 of the *Foreign Judgments Act 1991* of the Commonwealth are to be commenced in the Supreme Court.
- (2) In any such proceedings, the judgment creditor is to be the plaintiff and the judgment debtor is to be the defendant.
- (3) Unless the Supreme Court otherwise orders, the judgment creditor may proceed without service of the summons on the judgment debtor.
- (4) If the judgment creditor adds to the summons a request that the application be granted under this rule, the Supreme Court may make the order in the absence of the public and without any attendance by or on behalf of the judgment creditor.

53.3 Evidence (cf SCR Part 59A, rule 3)

- (1) The evidence in support of an application for registration of a judgment must include the following:
 - (a) the judgment or a verified or certified or otherwise duly authenticated copy of the judgment,
 - (b) if the judgment is not in English, a translation of the judgment into English, certified by a notary public or authenticated by evidence,
 - (c) evidence showing which, if some only, provisions of the judgment are the subject of the application,
 - (d) if it is a money judgment, evidence showing the amount originally payable under the judgment,
 - (e) evidence showing that the Supreme Court is the appropriate court under section 6 (1) of the *Foreign Judgments Act 1991* of the Commonwealth,
 - (f) evidence showing the name and trade or business, and the usual or last known residential or business addresses, of the judgment creditor and judgment debtor,

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- (g) evidence showing that the judgment creditor is entitled to enforce the judgment,
 - (h) evidence showing:
 - (i) that, at the date of the application, the judgment can be enforced by execution in the country of the original court, and
 - (ii) that, if the judgment were registered in the Supreme Court, the registration would not be liable to be set aside under section 7 of the *Foreign Judgments Act 1991* of the Commonwealth,
 - (i) if interest is payable by the law of the country of the original court on any money which is payable under the judgment, evidence showing:
 - (i) the rate of interest, and
 - (ii) the amount of interest which has become due under the judgment up to the time of application for registration, and
 - (iii) the daily amount of interest which, subject to any future payment on account of the judgment, will accrue after the date of the application,
 - (j) evidence showing the extent to which the judgment is unsatisfied,
 - (k) such other evidence as may be required having regard to any regulations made under the *Foreign Judgments Act 1991* of the Commonwealth.
- (2) The evidence referred to in subrule (1) must relate to those provisions of the judgment that are the subject of the application.
- (3) The evidence referred to in subrule (1) (g)–(j) may be evidence to the best of the information or belief of the deponent or witness giving the evidence.
- (4) All amounts of money referred to in this rule must be expressed:
- (a) in the currency in which the judgment is expressed, and
 - (b) if the judgment creditor has not made a statement under section 6 (11) (a) of the *Foreign Judgments Act 1991* of the Commonwealth, as an equivalent amount in Australian currency calculated in accordance with section 6 (11) (b), (11A) and (11B) of that Act.

53.4 Security for costs (cf SCR Part 59A, rule 4)

For the purposes of proceedings under the *Foreign Judgments Act 1991* of the Commonwealth, the Supreme Court may make an order under rule 42.21 otherwise than on the application of the judgment debtor.

53.5 Order for registration (cf SCR Part 59A, rule 5)

- (1) The time fixed under section 6 (4) of the *Foreign Judgments Act 1991* of the Commonwealth must not, except in exceptional circumstances, be less than 14 days after service on the judgment debtor of notice of the registration.
- (2) An order for registration of a judgment must specify the extent to which the judgment may be enforced.

53.6 Notice of registration (cf SCR Part 59A, rule 7)

- (1) Notice of registration of a judgment must be served on the judgment debtor.
- (2) Service of the notice must be personal unless:
 - (a) the judgment debtor has entered an appearance or is in default of appearance, or
 - (b) the Supreme Court otherwise orders.
- (3) The notice of registration must state:
 - (a) particulars of the judgment and of the order for registration, and
 - (b) the right of the judgment debtor to apply for an order:
 - (i) setting aside the registration, and
 - (ii) staying enforcement of the judgment, and
 - (c) the time within which the judgment debtor may apply for an order setting aside the registration.
- (4) If the summons has not been served on the judgment debtor, the notice of registration must also state the address for service of the judgment creditor.

53.7 Setting aside registration (cf SCR Part 59A, rule 8)

- (1) Subject to subrule (2), the Supreme Court may, on the application of the judgment debtor, make an order setting aside the registration.
- (2) An application for such an order must be made within the time fixed under section 6 (4) of the *Foreign Judgments Act 1991* of

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the Commonwealth or within such further period as may be allowed under section 6 (5) of that Act.

53.8 Enforcement (cf SCR Part 59A, rule 9)

- (1) Subject to this rule, on registration of a judgment, the judgment may, to the extent specified in the order for registration, be enforced as a judgment of the Supreme Court in the proceedings in which it is registered.
- (2) The judgment creditor must not take any step for enforcement of the judgment until an affidavit of service of the notice of registration is filed or the Supreme Court is otherwise satisfied that the requirements of these rules as to service of the notice of registration have been complied with.
- (3) Except by leave of the Supreme Court, the judgment creditor may not take any step for enforcement of the judgment:
 - (a) before the expiry of the time within which the judgment debtor may apply for an order setting aside registration, or
 - (b) if within that time the judgment debtor makes such an application, before the application is disposed of.

Part 54 Administration of estates and execution of trusts

54.1 Definitions (cf SCR Part 68, rule 1)

In this Part:

administration proceedings means proceedings for the administration of an estate, or for the execution of a trust, under the direction of the Supreme Court.

ancillary proceedings means proceedings brought pursuant to rule 54.3.

estate means a deceased person's estate.

54.2 Application of Part (cf SCR Part 68, rule 3)

This Part applies to both administration proceedings and ancillary proceedings.

54.3 Relief without general administration (cf SCR Part 68, rule 2)

- (1) Proceedings may be brought for any relief which could be granted in administration proceedings.

- (2) Proceedings may be brought for the determination of any question which could be determined in administration proceedings, including:
 - (a) any question arising in the administration of an estate or in the execution of a trust,
 - (b) any question as to the composition of any class of persons:
 - (i) having a claim against an estate, or
 - (ii) having a beneficial interest in an estate, or
 - (iii) having a beneficial interest in property subject to a trust,
 - (c) any question as to the rights or interests of a person who claims:
 - (i) to be a creditor of an estate, or
 - (ii) to be entitled under the will, or on the intestacy, of a deceased person, or
 - (iii) to be beneficially entitled under a trust.
- (3) Proceedings may be brought for an order directing any executor, administrator or trustee:
 - (a) to furnish accounts, or
 - (b) to verify accounts, or
 - (c) to pay funds of the estate or trust into court, or
 - (d) to do or abstain from doing any act.
- (4) Proceedings may be brought for:
 - (a) an order approving any sale, purchase, compromise or other transaction by an executor, administrator or trustee, or
 - (b) directing any act to be done in the administration of an estate that the Supreme Court could order to be done if the estate were being administered under the direction of the Court, or
 - (c) directing any act to be done in the execution of a trust that the Supreme Court could order to be done if the trust were being executed under the direction of the Court.
- (5) Subrules (1)–(4) do not limit the operation of each other.
- (6) In any proceedings brought pursuant to this rule, a claim need not be made for the administration of the estate, or the execution of the trust, under the direction of the Supreme Court.

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54.4 Claim under judgment (cf SCR Part 68, rule 6)

If, in the taking of an account of debts or liabilities under an order in proceedings relating to an estate or trust, a person who is not a party to the proceedings makes a claim:

- (a) no party (other than an executor or administrator of the estate or a trustee under the trust) is entitled to appear in relation to the claim except by leave of the Supreme Court, and
- (b) the Supreme Court may direct or allow any party to appear, either in addition to or in substitution for the executors, administrators or trustees.

54.5 Relief that may be granted (cf SCR Part 68, rule 7)

- (1) The Supreme Court may make any certificate or order and grant any relief to which the plaintiff is entitled by reason of a defendant's breach of trust, wilful default or other misconduct.
- (2) Subrule (1) does not affect the power of the Supreme Court under rule 6.6.

54.6 Supreme Court not required to order general administration (cf SCR Part 68, rule 8 (1))

The Supreme Court need not make an order for the administration of an estate, or for the execution of a trust, under the direction of the Court unless the order is necessary for the determination of the questions arising between the parties.

54.7 Supreme Court may order general administration in certain circumstances (cf SCR Part 68, rule 8 (2))

- (1) This rule applies if it appears to the Supreme Court that an order for the administration of an estate or the execution of a trust under the direction of the Court is necessary:
 - (a) to prevent proceedings by any person who claims:
 - (i) to be a creditor of the estate, or
 - (ii) to be entitled under the will, or on the intestacy, of the deceased, or
 - (iii) to be beneficially entitled under the trust, or
 - (b) to protect the interests of any person who is, or who may be, beneficially entitled under the trust.
- (2) In these circumstances, the Court:
 - (a) may make such an order, and

- (b) may further order that no steps are to be taken under the order, or under any account or inquiry directed, without the leave of the Court.

54.8 Conduct of sale (cf SCR Part 68, rule 9)

If the Supreme Court makes an order:

- (a) for the sale of property comprised in an estate, or
- (b) for the sale of trust property,

then, unless the Court otherwise orders, the executors, administrators or trustees, as the case requires, are to have the conduct of the sale.

Part 55 Matters arising under the Trustee Act 1925

Division 1 Judicial advice

55.1 Statement (cf SCR Part 70, rule 3)

- (1) A statement under section 63 of the *Trustee Act 1925*:
 - (a) must be divided into consecutively numbered paragraphs, and
 - (b) must state the facts concisely, and
 - (c) must state the question for opinion, advice or direction.
- (2) Despite rule 6.12 (2), the originating process in proceedings under section 63 of the *Trustee Act 1925* need not state the question for opinion, advice or direction.

55.2 Order (cf SCR Part 70, rule 4)

An opinion, advice or direction under section 63 of the *Trustee Act 1925* must be given by order.

55.3 Application by beneficiary (cf SCR Part 70, rule 5)

The time for an application under section 63 (10) of the *Trustee Act 1925* is, subject to that subsection, 28 days after the date of receipt by the applicant of notice under section 63 (8) of that Act or the date of entry of the order containing the opinion, advice or direction, whichever date is the later.

55.4 Appeal (cf SCR Part 70, rule 6)

An appeal lies to the Court of Appeal from an opinion, advice, direction or order given or made by the Supreme Court under

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section 63 of the *Trustee Act 1925*, including an opinion, advice, direction or order given or made by an associate Judge.

Note. Pursuant to section 104 of the *Supreme Court Act 1970*, this rule overrides the prohibition on an appeal from an associate Judge that would otherwise exist under that section.

Division 2 New trustees

55.5 Application (cf SCR Part 70, rule 7)

This Division applies to an application for the appointment of a new trustee under Part 3 of the *Trustee Act 1925* (a **Part 3 application**).

55.6 Evidence generally (cf SCR Part 70, rule 8)

The evidence in support of a Part 3 application must show each of the following:

- (a) the nature of the trusts still subsisting,
- (b) the nature and value of the trust property,
- (c) whether any and, if so, what part of the trust property is subject to the *Real Property Act 1900*,
- (d) the person beneficially entitled,
- (e) the fitness of the proposed new trustee,
- (f) the consent of the proposed new trustee.

55.7 Fitness of new trustee (cf SCR Part 70, rule 9)

- (1) Only one affidavit of the fitness of a proposed new trustee may be required, unless the Supreme Court otherwise orders.
- (2) The affidavit must set out the following:
 - (a) the proposed new trustee's position in life,
 - (b) how long the deponent has known the proposed new trustee,
 - (c) that the proposed new trustee is, to the knowledge of the deponent, of good credit,
 - (d) that the proposed new trustee is, to the best of the information and belief of the deponent, of good character, repute and business habits.

Division 3 Payment into court**55.8 Application** (cf SCR Part 70, rule 10)

This Division applies to the payment of funds into court under Part 4 of the *Trustee Act 1925* and to proceedings arising out of payment into court under that Part.

55.9 Cases where proceedings required (cf SCR Part 70, rule 11)

- (1) A person wishing to transfer funds (other than money) into court must commence proceedings for directions in relation to the transfer and must transfer the funds into court in the proceedings in accordance with the directions of the Supreme Court.
- (2) A person wishing to pay funds into court and to obtain an order in relation to the funds must first commence proceedings for the order and must then pay the funds into court in the proceedings.
- (3) Unless the Supreme Court otherwise orders, a person commencing proceedings under this rule must not join any person as a defendant in the proceedings.

55.10 Payment into court without proceedings (cf SCR Part 70, rule 12)

- (1) Subject to rule 55.9, a person wishing to pay funds into court need not commence any proceedings in relation to the payment.
- (2) Subject to subrule (3), the affidavit required by rule 55.11 and any other document filed in relation to the funds paid into court:
 - (a) must be entitled in the matter of the trust concerned, describing the trust so as to be distinguishable, and
 - (b) must be assigned a case number or other unique identifier under rule 4.11,as if the filing of the affidavit were the commencement of proceedings.
- (3) If funds have been paid into court without the commencement of proceedings and afterwards proceedings are commenced for any order in relation to the funds:
 - (a) documents in the proceedings must be entitled in accordance with the rules but must bear the case number or other unique identifier referred to in subrule (2) (b), and
 - (b) the affidavit filed under rule 55.11 may be used as if filed in the proceedings.

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55.11 Affidavit (cf SCR Part 70, rule 13)

- (1) A person paying funds into court must file an affidavit in accordance with this rule.
- (2) The affidavit must be made by the person paying the funds into court or, if that person is a corporation, by an officer of the corporation.
- (3) The affidavit must set out the following:
 - (a) a short description of the trust and of the instrument creating it or, as the case may be, of the circumstances in which the trust arose,
 - (b) the amount and description of the funds,
 - (c) the names and addresses, so far as known to the deponent, of the person interested in or entitled to the funds,
 - (d) if any person interested in or entitled to the funds is a minor:
 - (i) the name and address, so far as known to the deponent, of a parent or guardian of the minor's person or estate, or
 - (ii) if the minor has no such parent or guardian or any such parent's or guardian's name or address are unknown to the deponent, the name and address, so far as known to the deponent, of a person with whom the minor resides or in whose care the minor is,
 - (e) if any person interested in or entitled to the funds is a protected person:
 - (i) the name and address, so far as known to the deponent, of the person's manager, or
 - (ii) if the person has no manager or any such manager's name or address is unknown to the deponent, the name and address, so far as known to the deponent, of a person with whom the person resides or in whose care the person is,
 - (f) the name of the person paying the funds into court and his or her address for service.

55.12 Notice (cf SCR Part 70, rule 14)

Unless the Supreme Court otherwise orders, a person paying funds into court must, not more than one day after the date of payment into court, serve notice of the payment into court on

each person whose name and address are set out in the affidavit under rule 55.11.

55.13 Inquiries (cf SCR Part 70, rule 15)

A person paying funds into court must answer all such inquiries relating to the application of the funds as the Supreme Court may make or direct.

Division 4 Distribution of assets

55.14 Notice of intended distribution (cf SCR Part 70, rule 16)

- (1) A notice under section 60 (1) of the *Trustee Act 1925* must be published:
 - (a) if it relates to a deceased estate trust in respect of:
 - (i) a deceased person who was resident in the State when he or she died, in a newspaper circulating in the district where the deceased person resided, or
 - (ii) a deceased person who was not resident in the State when he or she died, in a Sydney daily newspaper, or
 - (b) in any other case, in a Sydney daily newspaper.
- (2) This rule is subject to section 60 (8) of the *Trustee Act 1925*.
- (3) In this rule, *deceased estate trust* means a trust that has arisen in respect of a deceased estate for which probate or letters of administration has or have been granted, or has or have been sealed under section 107 of the *Wills, Probate and Administration Act 1898*, by the Supreme Court.

Part 56 Matters arising under the Adoption Act 2000

56.1 Interpretation (cf SCR Part 73, rule 1)

- (1) Words and expressions used in this Part have the same meanings as they have in the *Adoption Act 2000*.
- (2) In this Part, a reference to an originating process includes a reference to a notice of motion referred to in rule 56.2 (1).

56.2 Commencement of proceedings (cf SCR Part 73, rule 4)

- (1) Once proceedings (*the original proceedings*) have been commenced under the *Adoption Act 2000* in relation to any person, any further proceedings under that Act in relation to the

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same person (whether or not they form part of, or relate to, the original proceedings), are to be commenced by notice of motion filed in the original proceedings.

Note. Pursuant to rule 6.4, the original proceedings must be commenced by summons.

- (2) Applications for adoption orders for 2 or more children may be joined in one application if the same person is the proposed adoptive parent, or the same persons are the proposed adoptive parents, of all the children.
- (3) The originating process is not to state a return day.
- (4) Nothing in subrule (3) affects any requirement under rule 56.5 to state an appointment for a preliminary hearing.
- (5) The Supreme Court may of its own motion appoint a day for the hearing of the proceedings.
- (6) If the Supreme Court appoints a day for hearing the proceedings, it must ensure that the parties are given notice of the appointment at least 5 days before the day appointed.
- (7) If the Supreme Court makes an appointment for hearing under this rule, it may give directions for service of notice of the appointment or for otherwise notifying the parties of the appointment.

56.3 Duty to make full and frank disclosure (cf SCR Part 73, rule 3)

Each party to proceedings in the Supreme Court under the *Adoption Act 2000* has a duty to the Court to make known fully and frankly all matters relevant to the making of an adoption order, whether those matters tend to support or tend not to support making the order.

56.4 How application for adoption order is to be dealt with (cf SCR Part 73, rule 6)

- (1) Unless the Supreme Court otherwise orders, an application for an adoption order is to be dealt with and determined by the Court in the absence of the public and without any attendance by or on behalf of the plaintiff.
- (2) If it is not appropriate for an application for an adoption order to be dealt with without the attendance by and on behalf of the plaintiff, the plaintiff must, in the originating process, apply for a preliminary hearing and for directions relating to the hearing.

56.5 Preliminary hearing (cf SCR Part 73, rule 8)

- (1) The plaintiff may, in the originating process, apply for a preliminary hearing and, if the plaintiff does so, the originating process must contain an appointment for a preliminary hearing.
- (2) A party may obtain a preliminary hearing by filing a notice of motion.
- (3) The party applying for a preliminary hearing must state shortly in the originating process or notice of motion the terms, or the effect, of any order or direction for which the party will apply at the preliminary hearing.
- (4) A person other than a party may apply for a preliminary hearing by filing a notice of motion that seeks the approval of the Supreme Court as referred to in the regulations under the *Adoption Act 2000*.
- (5) The Supreme Court may grant such approval on perusal of the notice of motion and the evidence filed in support of the notice of motion before hearing the notice of motion and without affording any person other than the applicant an opportunity to be heard.

56.6 Applications appropriate for preliminary hearing (cf SCR Part 73, rule 10)

- (1) Applications appropriate for a preliminary hearing are applications for any order or direction that the Supreme Court should determine before it determines the application for an adoption order or other principal application.
- (2) Applications appropriate for a preliminary hearing include applications relating to the following:
 - (a) joinder of a party in accordance with section 118 of the *Adoption Act 2000*, including joinder of a non-consenting father,
 - (b) giving notice of proceedings to any person,
 - (c) appointing a guardian ad litem in accordance with section 123 of the *Adoption Act 2000* or guardian ad litem or amicus curiae in accordance with section 124 of the *Adoption Act 2000*,
 - (d) a consent dispense order,
 - (e) the placement for adoption of an Aboriginal or Torres Strait Islander child, if a preliminary hearing is required by section 80 (2) of the *Adoption Act 2000*,

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- (f) the adoption of an Aboriginal or Torres Strait Islander child,
- (g) the registration of an adoption plan,
- (h) dispensing with notice under section 88 (4) of the *Adoption Act 2000*,
- (i) the revocation of a consent dispense order.

56.7 Filing of report in accordance with section 91 of the Adoption Act 2000 (cf SCR Part 73, rule 12)

A plaintiff applying for an adoption order in relation to a child under 18 years of age must file a report under section 91 of the *Adoption Act 2000*:

- (a) except as provided by paragraph (b), when filing the originating process, or
- (b) if there is a preliminary hearing, before the preliminary hearing.

56.8 Evidence in support of application for adoption order (cf SCR Part 73, rule 13)

Evidence in support of an application for an adoption order must include evidence of the following:

- (a) the matters specified in section 90 of the *Adoption Act 2000*,
- (b) the facts and circumstances that give the Supreme Court jurisdiction in accordance with section 23, 106 or 107 of the *Adoption Act 2000*,
- (c) the date and place of the child's birth,
- (d) the names of the child, including all names that the child has or has had, and the facts relating to any change of the child's name,
- (e) the names that it is proposed the child should have on the making of the adoption order, showing separately:
 - (i) the proposed given name or names and the proposed surname, and
 - (ii) all facts relating to any consent required under section 101 (4) of the *Adoption Act 2000*, and
 - (iii) any relevant special reasons under section 101 (5) of the *Adoption Act 2000*,
- (f) the name, place of residence and occupation of each person with whom the child resides or who has the child in that person's care or custody,

- (g) the name, place of residence, age and occupation of each proposed adoptive parent,
- (h) if it is proposed that there be one adoptive parent, the facts and circumstances that show that an order may be made having regard to the provisions of section 27 of the *Adoption Act 2000*,
- (i) if it is proposed that a couple be the adoptive parents, the facts and circumstances that show that an order may be made having regard to the provisions of section 28 of the *Adoption Act 2000*,
- (j) the following matters relating to consents under the *Adoption Act 2000* or the regulations under that Act:
 - (i) the facts and circumstances relating to which persons' consents are necessary,
 - (ii) the provisions of the *Adoption Act 2000* or regulations that make the consents necessary,
 - (iii) consents that have been obtained,
 - (iv) notice or advice to the birth father under section 56 of the *Adoption Act 2000*,
 - (v) consents for which there is a consent dispense order,
 - (vi) consents for which it is contended that the court should make a consent dispense order,
- (k) whether there is, or has been, an adoption plan, the facts and circumstances relating to the making of any adoption plan, whether the adoption plan has been registered and the terms of any adoption plan that remains in effect,
- (l) the opinions, and reasons for those opinions, of persons who are not related to the proposed adoptive parent or parents relating to the adoptive parent's or parents' character and suitability to be an adoptive parent or adoptive parents,
- (m) the facts and circumstances relating to the principles stated in section 8 (1) of the *Adoption Act 2000* and the matters to which the Court is to have regard in accordance with section 8 (2) of the *Adoption Act 2000*,
- (n) the facts and circumstances relied on to show that the best interests of the child will be promoted by the adoption,
- (o) the facts and circumstances relied on to show that the wishes and feelings of the child have been ascertained and that due consideration has been given to those wishes and feelings,

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- (p) whether there have been any proceedings relating to the interests, welfare or adoption of the child under the law of New South Wales or of the Commonwealth or any other place, whether any orders relating to the interests, welfare or adoption of the child have been made in any such proceedings, the terms of those orders and whether they remain in effect,
- (q) whether the child is, or has ever been, an immigrant and whether the Minister administering the *Immigration (Guardianship of Children) Act 1946* of the Commonwealth has consented to the making of the application for adoption,
- (r) whether the child is a non-citizen child, showing whether the child is a non-citizen child from a Convention country or from another country outside Australia,
- (s) whether a proposed adoptive parent is a step-parent or relative of the child,
- (t) if a proposed adoptive parent is a step-parent of the child, whether leave of the Family Court of Australia has been obtained under section 60G of the *Family Law Act 1975* of the Commonwealth,
- (u) whether any notice has been given to persons notice to whom is referred to in section 88 of the *Adoption Act 2000* (which relates, among other persons, to persons whose consent is required and has not been given and has not been dispensed with).

56.9 Judicial notice of instrument of consent (cf SCR Part 73, rule 14)

The Supreme Court may take notice, without verification, of an instrument of consent:

- (a) that appears on its face to have been given in accordance with section 61 of the *Adoption Act 2000*, and
- (b) that appears on its face to have been witnessed in accordance with section 62 of the *Adoption Act 2000*, and
- (c) that is accompanied by statements that on their face appear to have been made in accordance with sections 61 and 62 of the *Adoption Act 2000*.

56.10 Notice to be given to Director-General (cf SCR Part 73, rule 15)

- (1) Notice must be given to the Director-General of any application for the discharge of an adoption order, declaration of validity,

declaration that an adoption is not recognised or an order terminating a legal relationship.

- (2) The Supreme Court must not determine any application referred to in subrule (1) unless the Director-General has had a reasonable opportunity to become a party to the proceedings.
- (3) Despite subrule (2), the Supreme Court may determine an application referred to in subrule (1) without the Director-General having a reasonable opportunity to become a party to the proceedings if the Court considers it necessary in the circumstances.

56.11 Proper officer of the Court (cf SCR Part 73, rule 16)

For the purposes of section 143 (3) of the *Adoption Act 2000*, any registrar of the Supreme Court is a proper officer of the Court.

56.12 Access to Court records (cf SCR Part 73, rule 17)

- (1) This rule applies to any application under section 143 (2) of the *Adoption Act 2000* for the supply of information from records of proceedings in the Court.
- (2) The Supreme Court may deal with the application informally by correspondence or on the personal attendance of the applicant without conducting a formal hearing.
- (3) The applicant must fulfil such reasonable requirements as may be made by the Supreme Court as to:
 - (a) the verification of facts on which the application is based, and
 - (b) identification of the proceedings in the Supreme Court to which the application relates, and
 - (c) giving notice to any person, and
 - (d) compliance with the requirements of the *Adoption Act 2000* and the regulations under that Act, and
 - (e) any other matter.

Part 57 Matters arising under the Protected Estates Act 1983 or Guardianship Act 1987

Division 1 Preliminary

57.1 Interpretation

- (1) Words and expressions used in this Part have the same meanings as they have in the *Protected Estates Act 1983* or the *Guardianship Act 1987*, as the case requires.
- (2) In this Part, a reference to an originating process includes a reference to a notice of motion referred to in rule 57.2 (1).

57.2 Commencement of proceedings (cf SCR Part 76, rule 5)

- (1) Once proceedings (*the original proceedings*) have been commenced under the *Protected Estates Act 1983* or the *Guardianship Act 1987* in relation to any person, any further proceedings under that Act in relation to the same person (whether or not they form part of, or relate to, the original proceedings), are to be commenced by notice of motion filed in the original proceedings.

Note. Pursuant to rule 6.4, the original proceedings must be commenced by way of summons.

- (2) If it is necessary for the Protective Commissioner to apply to the Supreme Court, he or she may apply on report and proposal.

Note. In relation to the management of estates by persons other than the Protective Commissioner, see the provisions of Division 4 of Part 3 of the *Protected Estates Act 1983* and, in particular, the power conferred on the Protective Commissioner by section 30 of that Act to make orders and give authorities and directions in that regard.

Division 2 Applications under the Protected Estates Act 1983

57.3 Parties to proceedings on application under section 13, 21C or 68 (cf SCR Part 76, rule 9)

- (1) If an application is made under section 13 or 68 of the *Protected Estates Act 1983*, the person in respect of whom the application is made must be made a defendant.
- (2) If an application is made under section 21C of the *Protected Estates Act 1983*, the person in respect of whom the application is made must be made a defendant but need not be served.

57.4 Business concerning application under section 13 or 68 in the absence of the parties (cf SCR Part 76, rule 10)

If:

- (a) the plaintiff claims a declaration and order under section 13, or an order under section 68, of the *Protected Estates Act 1983*, and
- (b) no appearance is entered within the time limited for appearance, and
- (c) there is no attendance, at the time appointed by the originating process for the hearing, by any person opposing the claim,

the Supreme Court may determine or deal with the application in the absence of the parties and without any attendance by or on behalf of any person.

57.5 Evidence in support of application under section 13, 21C or 68 (cf SCR Part 76, rule 11)

- (1) The evidence in support of an application under section 13, 21C or 68 of the *Protected Estates Act 1983* must include the following:
 - (a) an affidavit or affidavits setting out:
 - (i) the conduct and conversation or conversations claimed to establish that the defendant is incapable of managing his or her affairs, and
 - (ii) the nature and amount of the property of the defendant, and
 - (iii) the names of the defendant's nearest relatives, so far as they are known, and the attitude of each of them to the application, and
 - (iv) the name of, and reason for selecting, the proposed manager,
 - (b) the affidavits of at least 2 medical practitioners or other persons qualified to give an expert opinion on the defendant's condition, each of whom must set out:
 - (i) his or her formal qualifications, the extent of his or her experience in practice and his or her special qualifications in regard to questions relating to the defendant's condition, and
 - (ii) his or her diagnosis of the defendant's condition, explained in his or her own words and set out in his or her own handwriting, and

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- (iii) that, in his or her opinion, the defendant is incapable of managing his or her affairs, and
 - (iv) the reasons for that opinion or the tests on which that opinion is based, set out in his or her own words and handwriting,
- (c) except where the proposed manager is:
- (i) the Protective Commissioner, or
 - (ii) the Public Trustee, or
 - (iii) a trustee company,
- the affidavits of at least 2 persons as to the fitness of the proposed manager,
- (d) except where the proposed manager is:
- (i) the Protective Commissioner, or
 - (ii) the plaintiff,
- a consent executed by the proposed manager and an affidavit verifying the execution of the consent.
- (2) Subrule (1) (a) and (b) do not apply to an application under section 21C of the *Protected Estates Act 1983*.

57.6 Appointment of managers under section 22 (cf SCR Part 76, rule 12)

If it appears expedient:

- (a) that several persons should be appointed managers under section 22 of the *Protected Estates Act 1983*, and
- (b) that one or more of them should continue to act after the death or discharge of the others, or any of them,

the order appointing the manager may direct that, after any such death or discharge, the surviving or continuing manager or managers are to continue to act.

57.7 “Usual orders” under sections 13 and 21C (cf SCR Part 76, rules 13 and 13A)

- (1) If:
- (a) under section 13 of the *Protected Estates Act 1983*, the Supreme Court makes a declaration that the defendant is incapable of managing his or her affairs, or
 - (b) under section 21C of the *Protected Estates Act 1983*, the Supreme Court makes a declaration that the defendant is a missing person,
- it may, with or without further order, also make the usual orders.

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- (2) The *usual orders* referred to in subrule (1) are as follows:
- (a) an order that the defendant's estate be subject to management under the *Protected Estates Act 1983*,
 - (b) an order that:
 - (i) the person proposed in the originating process be appointed manager of the defendant's estate, to act in relation thereto under the order and direction of the Protective Commissioner, or
 - (ii) if the Protective Commissioner is the person proposed, that the management of the defendant's estate be committed to the Protective Commissioner,
 - (c) if the person appointed manager of the defendant's estate is not the Protective Commissioner, an order that the person may not do anything in reliance on the appointment until the Protective Commissioner has authorised the person to assume management of the defendant's estate,
 - (d) if 2 or more persons are appointed to be managers, an order that, on the death or discharge of any of them, custody of the defendant's estate continues to the remainder of them,
 - (e) an order that the plaintiff's costs (and, if the defendant appears, the defendant's costs) on an indemnity basis be paid out of the defendant's estate,
 - (f) an order that all parties be at liberty to apply as they may be advised.

Note. See sections 32 and 33 of the *Protected Estates Act 1983* as to the orders that the Supreme Court may make in relation to estates under the management of persons other than the Protective Commissioner.

57.8 Evidence in support of application under section 35 (cf SCR Part 76, rules 19 and 20)

The evidence in support of an application under section 35 of the *Protected Estates Act 1983* must include the following:

- (a) the affidavits of at least 2 medical practitioners or other persons qualified to give an expert opinion on the defendant's condition, each of whom must state:
 - (i) his or her formal qualifications, the extent of his or her experience in practice and his or her special qualifications in regard to questions relating to the condition of the protected person, and
 - (ii) that, in his or her opinion, the protected person is capable of managing his or her affairs, and

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- (iii) the reasons for that opinion or the tests on which that opinion is based, set out in his or her own handwriting,
- (b) the affidavits of members of the defendant's family or other persons, each of whom must state:
 - (i) what opportunity he or she has had of assessing whether or not the protected person is capable of managing his or her affairs, and
 - (ii) his or her assessment and the facts, grounds and circumstances on which he or she made his or her assessment, and
 - (iii) any other facts that may be relevant.

57.9 Mode of making application under section 35A (cf SCR Part 76, rules 23A and 23B)

- (1) An application under section 35A of the *Protected Estates Act 1983* is to be made by motion in the proceedings in which the declaration and order under section 21C of that Act were made.
- (2) Notice of the motion is to be served on the manager or on the person on whose application the declaration and order were made.

57.10 "Usual orders" under section 68 (cf SCR Part 76, rule 14)

- (1) If, under section 68 of the *Protected Estates Act 1983*, the Supreme Court makes an order that the defendant, being a protected person, is incapable of managing his or her person, owing to mental illness, it may, with or without further order, also make the usual orders.
- (2) The *usual orders* referred to in subrule (1) are as follows:
 - (a) an order that the person proposed in the originating process be appointed guardian of the defendant's person with, to the exclusion of any other person, all such powers as would be exercisable by him or her in relation to the defendant if he or she were the defendant's father or mother and the defendant were under the age of 14 years,
 - (b) if 2 or more persons are appointed to be guardians, an order that, on the death or discharge of any of them, guardianship of the defendant continues to the remainder of them,
 - (c) an order that the plaintiff's costs (and, if the defendant appears, the defendant's costs) on an indemnity basis be paid out of the defendant's estate,

- (d) an order that all parties be at liberty to apply as they may be advised.

Note. The Public Guardian cannot be appointed a joint guardian (see section 16 (3) of the *Guardianship Act 1987*).

Division 3 Miscellaneous

57.11 Setting aside or varying order (cf SCR Part 76, rule 16)

The Supreme Court may set aside or vary any order for the appointment of a manager or guardian or for the allowance of maintenance.

57.12 Review under section 6L of the Guardianship Act 1987 (cf SCR Part 76, rule 52)

- (1) An application for review under section 6L of the *Guardianship Act 1987* must join the enduring guardian as a defendant.
- (2) The applicant must file and serve with the originating process an affidavit showing the applicant's relationship to the appointor and the applicant's interest in the matter.

[8] Schedule 2 Local rules that prevail over these rules

Omit the matter relating to Parts 68, 70, 73 and 76 of the *Supreme Court Rules 1970*.

[9] Schedule 8 Assignment of business in the Supreme Court

Insert in appropriate order in Columns 1, 2 and 3 of Part 1 of the Schedule:

<i>Evidence on Commission Act 1995</i>	Section 33	Common Law
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[10] Schedule 8

Insert in appropriate order in Columns 1, 2 and 3 of Part 2 of the Schedule:

<i>Foreign Judgments Act 1991</i>	Part 2	Common Law
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