

ANNEXURE B

~~Annexure D~~ Proposed Federal Court Rules Order 16A

Rule 1 When a Deposition May Be Taken.

(1) *At the Court's Initiative.* The court in its discretion may order that a party be allowed, by oral questions, to depose any person, including a party. The deponent's attendance may be compelled by subpoena.

(2) *With Leave.* A party may seek leave of court to depose, by oral questions, any person, including a party. The deponent's attendance may be compelled by subpoena.

(3) *Terms.* The leave granted under subrule (2) may be upon such terms and conditions as the court sees fit, including limits on, or specification of, the time, place, duration, and subject matter of the deposition.

Rule 2 Notice of the Deposition; Other Formal Requirements.

(1) Notice in General.

A party making an application under Rule 1 must give notice to every other party. The notice must state the time and place of the proposed deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Method of Recording.

(A) *Method Stated in the Notice.* The party making the application must also state in the notice the proposed method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(3) By Remote Means.

The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means.

(4) Officer's Duties.

(A) *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before a discovery master appointed by the court pursuant to O 72A of these Rules. The master must begin the deposition with an on-the-record statement that includes:

- (i) the master's name and business address;
- (ii) the date, time, and place of the deposition;
- (iii) the deponent's name;
- (iv) the master's administration of the oath or affirmation to the deponent;
and
- (v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 2(4)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of a deposition, the master must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(5) Notice or Subpoena Directed to an Organization.

In its application for leave, a party may propose as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. If leave is granted to take the deposition, the named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization.

Rule 3 Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) Examination and Cross-Examination.

The examination of a deponent proceed as they would at trial under the Evidence Act 1995 (Cth) [perhaps with certain exceptions]. After putting the deponent under oath or affirmation, the master must record the testimony by the method designated under Rule 2(2)(A). The testimony must be recorded by the master personally or by a person acting in the presence and under the direction of the master.

(2) Objections.

An objection at the time of the examination — whether to evidence, to a party's conduct, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 4(3).

(3) Participating Through Written Questions.

Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the master. The master must ask the deponent those questions and record the answers verbatim.

Rule 4 Duration; Sanction; Motion to Terminate or Limit.

(1) Duration.

Unless otherwise ordered, a deposition is limited to 1 day of 7 hours. The court may allow additional time if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) Sanction.

The court may impose an appropriate sanction — including the reasonable expenses and legal adviser's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) Motion to Terminate or Limit.

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as it sees fit. If terminated, the deposition may be resumed only by order of the court where the action is pending.

Rule 5 Review by the Witness; Changes.

(1) Review; Statement of Changes.

On request by the deponent or a party before the deposition is completed, the deponent must be allowed 10 days after being notified by the master that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Master's Certificate.

The master must note in the certificate prescribed by Rule 6(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 10-day period.

Rule 6 Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) Certification and Delivery.

The master must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the master must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the legal adviser who arranged for the transcript or recording. The legal adviser must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording.

Unless otherwise stipulated or ordered by the court, the master must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the master must furnish a copy of the transcript or recording to any party or the deponent.

Rule 7 Failure to Attend a Deposition or Serve a Subpoena; Expenses.

A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including legal adviser's fees, if the party requesting the deposition failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.