

unsealed was held not to be proof that they were made expressly by a party or knowingly used as being true in a judicial proceeding to prove a fact; affidavits are admissible as evidence against that party in subsequent proceedings to prove the same fact; it seems that if they had been, they would be admissible even where the party then seeking to rely on them was a stranger to the litigation for which they have been produced).

- 18. *Angell v Angell* (1822) 1 Sim & St 83 at 89; 57 ER 33 per Leach VC.
- 19. See [195-8640] (deposition from dangerously ill person). The enactment of the (UK) Criminal Law Amendment Act 1867 s 6 turned the deposition of a deceased witness into an examination for perpetuating testimony by permitting justices to examine a dangerously ill person before other witnesses were heard at a preliminary hearing. Note that *ibid* s 6 is repealed in relation to any alleged offence into which no criminal investigation has begun before 1 April 1997: (UK) Criminal Procedure and Investigations Act 1996.

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(4) AFFIDAVITS

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(a) GENERAL

[195-8830] **Evidence given by affidavit** An affidavit is a written statement, made by a person who has sworn or affirmed before a person authorised to administer the oath that the statement is true.¹

The non-statutory law derives from the Court of Chancery, where evidence was generally given on affidavit. In equity, following civil and canon law, the affidavit is the testimony and if the affidavit is lost the evidence is lost. In that situation, secondary evidence of the lost writing rather than the oral answers on which it is based should be proved.² At common law, affidavits are used in non-responsory motions³ or to prove the loss of an original document.⁴ As affidavits are not vivá voce evidence and there is no cross-examination of the deponents at the time they are made, they are not otherwise admissible at common law.⁵

In all jurisdictions, provision is made by rules of court for evidence to be given by affidavit as a substitute for oral testimony.⁶ Matters may be tried on affidavits with deferred cross-examination.⁷ Such a trial is not likely to be ordered where

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the evidence of a witness will be strongly contested or credibility is an issue.⁸ The rules of court require that, in order for affidavits to be used as evidence, they must be filed⁹ and served on the other parties.¹⁰ However, the requirements for filing and, in some jurisdictions, the requirements for service, may be dispensed with by the court.¹¹ The requirement by the rules or by an order that affidavits be filed and served is a condition precedent to their becoming part of the evidence, subject to any dispensation which may be made. The filing and service of affidavits does not make them part of the evidence before the court.¹² When an affidavit is read to the court it becomes, subject to any rulings on admissibility, part of the evidence.¹³ There is no obligation on a party to read an affidavit which has been filed.¹⁴ A party may read an affidavit filed by another party, but the party who filed the affidavit may then cross-examine on it.¹⁵

A court should not reject an affidavit until such time as a party attempts to read it.¹⁶ Courts may reject affidavits where they are otherwise unsatisfactory or the interests of justice require that the witnesses be examined orally.¹⁷ It is no objection to an affidavit taken out of the jurisdiction that the witness is not liable to be punished for perjury.¹⁸ The party against whom the affidavit is read may object to the reading of anything in it on the same ground as an objection may have been made to it if a witness had stated it in open court.¹⁹

The court will generally give leave for the deponent to be cross-examined unless there is a reason to refuse it and the deponent may be required to attend for cross-examination.²⁰ Failure by the deponent to attend may render the affidavit incapable of being read or it may be given slight weight.²¹ Death,²² insanity²³ and paralysis²⁴ have resulted in the admission of affidavits. Where the deponent has absconded,²⁵ is absent from the country or is temporarily ill,²⁶ affidavits have been rejected in the absence of an application for an adjournment or a commission to take the evidence. Factors for the court to consider are:²⁷

- (1) whether the deponent is a party;
- (2) the importance of the evidence; and
- (3) the reason for non-production.

The party may not withdraw the affidavit when cross-examination is requested.²⁸ An affidavit witness who voluntarily attends for cross-examination but refuses to answer questions is in contempt and may be punished.²⁹ Affidavit witnesses who refuse to attend may be subpoenaed.³⁰ An affidavit required to be made by a particular person cannot be made by an agent.³¹

The deponent may be cross-examined on any relevant matter and it is no objection that the other party may be seeking to destroy the applicant's evidence in order to destroy the applicant's case or to establish a case for a rejection of the claim.³² Where there are discrepancies between affidavits used in the same matter for interlocutory relief and the affidavits or other evidence adduced at trial, this may be commented on at trial by the other party. The other party may also comment on the deponents to the affidavits that were used in the interlocutory proceeding. Where the affidavits were filed but not used in the interlocutory proceeding, the other party may not be permitted to comment on them at trial.³³

A party may cross-examine a witness who does not appear, if the party

Notes

- 1. For the meaning of cross-examination, see *Wigmore J F Little, Brown*.
- 2. *R v Ryle* (1884) 12 QJ 473.
- 3. *Wigmore J F Little, Brown*.
- 4. *R v Taylor* (1884) 12 QJ 473. It is evident that evidence taken by a party who does not appear, this had to be taken in a way which could not be challenged. See *Evidence at the Trial*.
- 5. (CTH) High Ct (ACT) Supr Ct Rules (ACT) Supr Ct Rules (NT) Supr Ct Rules (NSW) Unit Ct Rules (QLD) Unit Ct Rules. An order, evincing the truth of an affidavit, is not an affidavit (Ch of affidavit evidence (SA) Supr Ct Rules (TAS) Supr Ct Rules (VIC) Supr Ct Rules (WA) Rul 4 September 1988).

See *West v Gurney* 554. SC(WA) 1. 2(1); the court has held that it is not necessary to have viva voce evidence in a normal manner (unfair).

Common-law rules of evidence apply to the Court matters are frequently in opposition to the admitted facts. The circumstance characteristic of a cross-examination is that the witness's testimony is observed by the other party. It is prepared for the purpose of cross-examination which would be used to establish the truth. Another very common method of ascertaining the truth is by cross-examination.

A party may not give notice that a deponent must attend for cross-examination and object to the affidavit being read when the witness does not appear, if the party has not paid the deponent's witness expenses.³⁴

Notes

1. For the meaning of 'affidavit' see *Buttenthors Encyclopaedic Australian Legal Dictionary*.
2. Wigmore J H, *Evidence in Trials at Common Law*, Vol 4, Revised by Chadbourne J H, Little, Brown & Co. Boston, 1972, [1331].
3. *R v Ryle* (1841) 9 M & W 227; 152 ER 96.
4. Wigmore J H, *Evidence in Trials at Common Law*, Vol 6, Revised by Chadbourne J H, Little, Brown & Co. Boston, 1976, [1709].
5. *R v Taylor* (1691) Skin 403; 90 ER 179; Buller F, *An Introduction to the Law Relative to Trials Held at Nisi Prius*, 6th ed, A Strahan & W Woodfall, London, 1793, p 241 ('it is evident that, as there can be no cross-examination, a voluntary affidavit is no evidence between strangers'). Compare *Altham v Anglesey* (1709) Gilb Ch 16; 25 ER 12 per Holt J (admitted affidavit taken in Ireland as the 'best evidence', noting that this had to be considered in the context of the witness swearing and that the affidavit could not be used if the witness was 'here'); Thayer J B, *A Preliminary Treatise on Evidence at the Common Law*, Little, Brown & Co. Boston, 1898, p 489.
6. (CTH) High Court Rules 2004 r 53.04 (powers of taxing officer); (CTH) Federal Court of Australia Act 1976 s 47(1), 47(3), 47(5); (CTH) Federal Court Rules O 14; (ACT) Supreme Court Act 1933 s 37N(3) (Court of Appeal); (ACT) Court Procedures Rules 2006 r 6701; (NT) Supreme Court Act 1979 s 74(2); (NT) Supreme Court Rules O 43; (NSW) Uniform Civil Procedure Rules 2005 r 2.3; (QLD) Uniform Civil Procedure Rules 1999 r 390 (subject to the court rules or an order, evidence at the trial of a proceeding started by claim may only be given orally and evidence in a proceeding started by application may only be given by affidavit), Ch 11 Pt 7. See also *ibid* Ch 11 Pt 8 (exchange of correspondence instead of affidavit evidence); (SA) Supreme Court Civil Rules 2006 r 168 (for actions commenced on or after 4 September 2006); (TAS) Supreme Court Rules 2000 r 459, Pt 19 Div 4; (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 23.04; (WA) Rules of the Supreme Court O 36 r 2.

See *West Australian Newspapers Pty Ltd v Nationwide News Pty Ltd* (1991) 4 WAR 554, SC(WA), Full Court (concerning (WA) Rules of the Supreme Court O 36 rr 1, 2(1); the discretion must be exercised judicially but there is no prima facie right to have vivá voce evidence; evidence on affidavit with a right to cross-examine is a normal method of proceeding on an originating summons and is not inherently unfair).

Common-Law Practice Commissioners, *Second Report* 1853 at 31 ('All applications to the Courts for their summary intervention in what may be termed incidental matters are founded on testimonies contained in affidavits. If resisted, the evidence in opposition is brought before the Court in the same manner. Now it must be admitted that this species of evidence is of all others the most unsatisfactory. All the circumstances which give to the system of English procedure its peculiar and characteristic merits — "vivá voce" interrogation, cross-examination, publicity, examination in the presence of the tribunal, whereby an opportunity is afforded of observing the demeanor of a witness — are here wanting; and not only this, but the testimony is often not the spontaneous statement of the witness; the affidavit is prepared for and sworn to by the deponent, often without the sense of responsibility which would be felt by a witness when delivering a statement in his own words. Another very serious objection to affidavit-evidence is that there is no effectual mode of ascertaining the means of knowledge or the grounds on which general conclusions

sworn to have been arrived at'); Buller F. *An Introduction to the Law Relative to Trade Held at Nisi Prius*, 6th ed, A Strahan & W Woodfall, London, 1793, p 241 ('from what has been said it is evident that (as there can be no cross-examination), a voluntary affidavit is no evidence between strangers... So where there cannot be cross-examination, as depositions taken before commissioners of bankrupts, they should not be read in evidence'); *R v Taylor* (1691) Skin 403; 90 ER 179.

7. The present rules are based on the (UK) Rules of the Supreme Court 1883 (repealed) O 37 (a broad licence for judges to admit affidavits subject to right to call deponent for cross-examination). This was extended by (UK) Rules of the Supreme Court (New Procedure) 1932 (repealed) (creating a general exception to prove facts by affidavit subject to the judge's power to call the deponent for cross-examination). This was approved in the recommendations of the *Royal Commission on the Dispatch of Business at Common Law* 1936 (Cmnd 78) at 228. See also *Smyth v FH Brunning Pty Ltd (No 3)* [1913] VLR 362; (1913) 19 ALR 360; 35 ALT 56 per Cussen J, SCVIC.
8. *Bonhote v Henderson* [1895] 1 Ch 742 (affirmed *Bonhote v Henderson* [1895] 2 Ch 22; *The Scarcity and The Daniel M* [1967] 2 Lloyd's Rep 498 at 508.
9. (CTH) High Court Rules 2004 r 1.07 (requirements for filing of documents generally); (CTH) Federal Court Rules O 14 r 6; (ACT) Court Procedures Rules 2006 r 6718; (NT) Supreme Court Rules r 43.09 (requirement to file and serve affidavit before it may used); (NSW) Uniform Civil Procedure Rules 2005 r 35.9; (QLD) Uniform Civil Procedure Rules 1999 r 437; (SA) Supreme Court Civil Rules 2006 r 117(2)(h); (TAS) Supreme Court Rules 2000 rr 507 (affidavit must be filed), 510 (requirement to file and serve affidavit before it may used); (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.09 (requirement to file and serve affidavit before it may used); (WA) Rules of the Supreme Court O 36 r 2(2) (court may give directions as to requirements for filing and serving affidavits), O 37 rr 13 (requirement to file), 14 (special times for filing).

For the history of the requirement to file affidavits see *R v Collins* [1954] VLR 46 at 50; [1954] ALR 122.

10. (CTH) High Court Rules 2004 r 9.01.5; (CTH) Federal Court Rules O 14 r 7; (ACT) Court Procedures Rules 2006 r 6718(2); (NT) Supreme Court Act 1979 s 74(3)(a); (NT) Supreme Court Rules r 43.09 (requirement to file and serve affidavit before it may used); (NSW) Uniform Civil Procedure Rules 2005 r 10.2; (QLD) Uniform Civil Procedure Rules 1999 r 438; (SA) Supreme Court Civil Rules 2006 r 60; (TAS) Supreme Court Rules 2000 rr 466 (requirement for notice where affidavit was made before issue was joined in proceeding), 510 (requirement for affidavit to be filed and served before it may be used); (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.09 (requirement to file and serve affidavit before it may used); (WA) Rules of the Supreme Court O 36 r 2(2) (court may give directions as to requirements for filing and serving affidavits).
11. (CTH) High Court Rules 2004 r 2.02; (CTH) Federal Court Rules O 14 r 6 (if affidavit not filed, it may be used with leave of court); (ACT) Court Procedures Rules 2006 r 6718(3) (if affidavit not filed or served, it may only be used with leave of court); (NT) Supreme Court Rules r 43.09 (affidavit must be filed and/or served, unless court otherwise directs); (NSW) Uniform Civil Procedure Rules 2005 r 10.2(2).

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16. *R v Watson*; 1 Fam LR 11.
17. *Lovell v Walli*; example, *Re*
18. *Omychund v* Willes 538 at
19. Stephen Sir J (citing *Hutch*
20. (CTH) Fede O 14 r 9; (ACT) Cou (NT) Supi (NSW) Uni (QLD) Uni (SA) Supi (TAS) Supi (VIC) Sup (WA) Rul See *Ship J* (1946) 56 C *Plastics Ltd* [*Queensland I* should not applications
21. (CTH) Fed 14 r 9; (ACT) Cot (NT) Sup

- (QLD) Uniform Civil Procedure Rules 1999 rr 437 (if affidavit not filed, it may be used with leave of court), 438 (if affidavit not served, it may be used with leave of court)
- (SA) Supreme Court Civil Rules 2006 r 117
- (TAS) Supreme Court Rules 2000 rr 466 (leave of court or notice required where affidavit was made before issue was joined in proceeding), 510 (if affidavit not filed and served, court may permit it to be used)
- (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.09 (affidavit must be filed and/or served, unless court otherwise directs)
- (WA) Rules of the Supreme Court O 37 rr 13 (affidavit must be filed, unless court otherwise directs), 14 (where there is a special time for filing, affidavits not filed within that time may be used with leave of court).
12. An affidavit which has been filed is not part of the proceedings until it is read or there is another indication that a party relies on it: *Manson v Punninghaus* [1911] VLR 239; (1911) 17 ALR 238; 33 ALT 1 per Madden CJ, SC(VIC); *Barristers' Board of Western Australia v Tranter Corp Pty Ltd* [1976] WAR 65 per Brinsden J, SC(WA).
 13. (CTH) Practice Note No 5 (Federal Court) reproduced in *Practice and Procedure High Court and Federal Court of Australia*, Butterworths, Sydney, 1991 to date (looseleaf), Federal Court Volume, [69.420] (the same considerations apply to annexures or exhibits to an affidavit, which may be received in evidence, either retaining their existing markings, or being freshly marked, as the court may order).
 14. *Leaders Shoes (Aust) Pty Ltd v National Insurance Co of New Zealand Ltd* [1968] 1 NSW 344; (1967) 86 WN (Pt 1) (NSW) 388 per Macfarlan J, SC(NSW) (a party who files an affidavit in a commercial cause is not obliged to read it).
 15. *Leaders Shoes (Aust) Pty Ltd v National Insurance Co of New Zealand Ltd* [1968] 1 NSW 344; (1967) 86 WN (Pt 1) (NSW) 388 per Macfarlan J, SC(NSW) (affidavit filed in commercial cause); *Muirfield Properties Pty Ltd v Erik Kolle & Assocs* [1988] VR 167 per Brooking J, SC(VIC) (a party may rely on affidavits filed in the same proceeding for the purposes of a different application by a different party).
 16. *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; 9 ALR 551; 50 ALJR 778; 1 Fam LR 11,297; BC7600059.
 17. *Lovell v Wallis* (1883) 53 LJ Ch 494; *Lawson v Quare* (1887) 32 Sol Jo 24. See, for example, *Re Whiteley and Roberts' Arbitration* [1891] 1 Ch 558 at 559.
 18. *Onychund v Barker* (1744) 1 Atk 21; 26 ER 15 sub nom *Omichund v Barker* (1744) Willes 538 at 553; 125 ER 1310 per Willes LCJ.
 19. Stephen Sir J F, *A Digest of the Law of Evidence*, MacMillan, London, 1876, art 125 (citing *Hutchinson v Bernard* (1836) 2 Mood & R 1; 174 ER 194).
 20. (CTH) Federal Court of Australia Act 1976 s 47(4); (CTH) Federal Court Rules O 14 r 9
 - (ACT) Court Procedures Rules 2006 r 6721
 - (NT) Supreme Court Act 1979 s 74(3)(b); (NT) Supreme Court Rules r 40.04
 - (NSW) Uniform Civil Procedure Rules 2005 r 35.2
 - (QLD) Uniform Civil Procedure Rules 1999 r 439
 - (SA) Supreme Court Civil Rules 2006 r 165(1)
 - (TAS) Supreme Court Rules 2000 r 463
 - (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 40.04
 - (WA) Rules of the Supreme Court O 36 r 2.

See *Ship Joiners Society of Australia v Building Workers Industrial Union of Australia* (1946) 56 CAR 222 per Kelly J, Arb Ct(CTH); *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67; [1971] 1 All ER 1141; [1971] 2 WLR 361; *Nayeib Queensland Pty Ltd v Soric* [1974] Qd R 161 per Dunn J, SC(QLD) (it is not, and should not become, the practice to cross-examine deponents of affidavits in applications for summary judgment).
 21. (CTH) Federal Court of Australia Act 1976 s 47(4); (CTH) Federal Court Rules O 14 r 9
 - (ACT) Court Procedures Rules 2006 r 6721
 - (NT) Supreme Court Act 1979 s 74(3)(b); (NT) Supreme Court Rules r 40.04

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- (NSW) Uniform Civil Procedure Rules 2005 r 35.2
- (QLD) Uniform Civil Procedure Rules 1999 r 439
- (SA) Supreme Court Civil Rules 2006 r 165(2)
- (TAS) Supreme Court Rules 2000 r 463
- (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 40.04
- (WA) Rules of the Supreme Court O 36 r 2.

See *Siedman-Henderson Sweets Ltd v Angelides* (1926) 44 WN (NSW) 1 per Harve CJ in Eq, SC(NSW) (affidavit not to be used where party notified, but fails, to produce deponent for cross-examination); *Re Dairy Laboratories Pty Ltd (in liq)* [1972] Tas SR (NC 32) 280, SC(TAS) (where leave is given by the court exercising its discretion, and the affidavit is read, its weight is affected by the absence of cross-examination); *Shea v Green* (1886) 2 TLR 533 (court may refuse to act on an affidavit where the deponent cannot be cross-examined); *Re Brace (a debtor)*; *Ex parte Debtor v Gabriel and Official Receiver* [1966] 2 All ER 38; [1966] 1 WLR 595. CA (court may act without the deponent being cross-examined).

- 22. *Re O'Neil (dec'd)* [1972] VR 327 per Anderson J, SC(VIC) (where deponent not available by reason of death or otherwise, the court may reject the affidavit altogether or give it but slight weight); *Curley v Duff* (1985) 2 NSWLR 716 per Young J, SC(NSW) (intervening death of the deponent does not in itself make the affidavit inadmissible); *Elias v Griffith* (1877) 46 LJ Ch 806 (deponent to affidavit 'might have been cross-examined on it'); *Tanswell v Sarnah* (1865) 11 LT 761 (affidavit had been filed for some time before death but other party not aware that deponent might die).
- 23. *Curley v Duff* (1985) 2 NSWLR 716 per Young J, SC(NSW) (intervening senility of the deponent does not in itself make the affidavit inadmissible); *Ridley v Ridley* (1885) 34 Beav 329; 55 ER 662.
- 24. *Braithwaite v Kearns* (1865) 34 Beav 202; 55 ER 612 (little attention to be paid to affidavit not subject to cross-examination).
- 25. *Shea v Green* (1886) 2 TLR 533; *The Parisian* (1887) 13 PD 16 (where party living overseas, not wholly inadmissible but little weight may be allowed it).
- 26. *Dunne v English* (1874) LR 18 Eq 524 (absence of witness from the country; witness had been in the country but was obliged to leave, and only one day's notice given to defendant of witness' departure); *Nason v Clamp* (1864) 12 WR 973 per Sir John Romilly MR (in the case of illness: 'the defendant had an unquestionable right, in the absence of a witness whom he wished to examine, whatever might be the reason for the absence, to have the cause stood over till he should appear, or to have his affidavit withdrawn. His Honour would never in such a case allow part of the examination to be proceeded with, reserving the rest to a future day').
- 27. *Re Dairy Laboratories Pty Ltd (in liq)* [1972] Tas SR (NC 32) 280, SC(TAS); *Re Bacher* [1964] NSWLR 293; (1963) 80 WN (NSW) 1655 per McClelland CJ in Eq, SC(NSW) (court has a discretion to allow an affidavit to be read although the deponent does not attend for cross-examination, need not apply test of whether there would be a sufficient answer to an application for a bench warrant); *Re O'Brien*; *Ex parte Alchous* [1923] SASR 411, SC(SA), Full Court.
- 28. *Re Ottway*; *Ex parte Child* (1882) 20 Ch D 126.
- 29. *Cutler v Wright* [1890] WN 28.
- 30. *Stuart v Balkis Co* (1884) 53 LJ Ch 791; 32 WR 676; *Ex parte Fernandez* (1861) 7 CBNS 3; 30 LJP 321; 4 LT 324; 142 ER 349.
- 31. *Re Wilson* [1916] 1 KB 382. Compare *Earl of Mountcashell v Viscount O'Neill* (1885) 5 HL Cas 937; 11 ER 1172.
- 32. *Ship Joiners' Society of Australia v Building Workers Industrial Union of Australia* (1946) 53 CAR 222 per Kelly J, Arb Ct(CTH); *Keogh v Dalgety & Co Ltd* (1917) 17 SR (NSW) 573; 34 WN (NSW) 223 per Street J, SC(NSW).
- 33. *Earles Utilities Ltd v Jacobs* (1934) 52 RPC 72; 51 TLR 43 at 43 per Farwell J.
- 34. *Wiss v Finance and Insurance Corp Ltd* (1937) 37 SR (NSW) 217; 54 WN (NSW) 22 per Maughan AJ, SC(NSW).

(b)

[195-8835] For court rules, with (1) an affidavit (2) an affidavit it is sworn (3) when the to state the are other (4) the first and the (5) an affidavit (6) an affidavit consecut the subject (7) each page (8) an affidavit occupatio party to The introductory The court may form.¹⁰ However allowed for the including probate be given to use unless there is sc An affidavit not of it is available.

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(b) FORM AND CONTENTS OF AFFIDAVITS

[195-8835] Form The required form for an affidavit is prescribed by the court rules, with some differences between the various jurisdictions, as follows:

- (1) an affidavit must be in the approved or prescribed form;¹
- (2) an affidavit must bear the title and number of the proceeding in which it is sworn;²
- (3) when there is more than one matter, plaintiff or defendant, it is sufficient to state the name of the first matter, plaintiff or defendant and that there are other matters, plaintiffs or defendants;³
- (4) the first page of the affidavit must show the full name of the deponent and the date on which the affidavit is sworn;⁴
- (5) an affidavit must be made in the first person;⁵
- (6) an affidavit must be divided into paragraphs, each numbered consecutively and as near as possible confined to a distinct portion of the subject;⁶
- (7) each page of an affidavit must be numbered;⁷ and
- (8) an affidavit must state the name, the address, the description and/or the occupation of the deponent and whether he or she is employed by a party to the proceedings.⁸

The introductory elements form part of an affidavit.⁹ The court may receive an affidavit notwithstanding any irregularity in its form.¹⁰ However, if formal requirements are not satisfied, costs may not be allowed for the affidavit or relevant part of it.¹¹ In some areas of practice, including probate, affidavits must be carefully prepared and permission will not be given to use affidavits containing mistakes which could have been avoided unless there is some urgency.¹²

An affidavit not in English should not be rejected where a proper translation of it is available.¹³

Notes

1. (CTH) Federal Court Rules O 14 r 2(1) (Form 20)
(ACT) Court Procedures Rules 2006 r 6710; see approved Form 6.11
(QLD) Uniform Civil Procedure Rules 1999 r 431(1) (approved form)
(SA) Supreme Court Civil Rules 2006 r 162(1).
2. (CTH) High Court Rules 2004 r 1.08.2
(ACT) Court Procedures Rules 2006 r 6710; see approved Form 6.11
(SA) Supreme Court Civil Rules 2006 r 162; (SA) Supreme Court Practice Directions 2006 Form 14
(TAS) Supreme Court Rules 2000 r 501(a) (title)
(WA) Rules of the Supreme Court O 37 r 1(1), 1(4).
3. (WA) Rules of the Supreme Court O 37 r 1(2), 1(3) (where proceedings are entitled in a matter or matters and between parties, so much of the title as consists of the matter or matters may be omitted).
4. (CTH) High Court Rules 2004 r 24.01.8
(CTH) Federal Court Rules O 14 r 2(2C)
(ACT) Court Procedures Rules 2006 r 6710; see approved Form 6.11
(NT) Supreme Court Rules r 43.01(7) (requirement for first page). 43.01(8) (additional requirement that the affidavit must on the outside identify the party on whose behalf it is filed and state the name of the deponent and the date of swearing)

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- (QLD) Uniform Civil Procedure Rules 1999 r 431(2) (requires the name of the person making the affidavit and the name of the party on whose behalf it is filed)
 - (SA) Supreme Court Practice Directions 2006 Direction 3.1
 - (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.01(3) (requirement to complete jurat).
5. (CTH) High Court Rules 2004 r 24.01.1
 (CTH) Federal Court Rules O 14 r 2(1)
 (ACT) Court Procedures Rules 2006 r 6710(1)(a)
 (NT) Supreme Court Rules r 43.01(1)
 (QLD) Uniform Civil Procedure Rules 1999 r 431(3)
 (SA) Supreme Court Practice Directions 2006 Direction 3.1
 (TAS) Supreme Court Rules 2000 r 501(b)
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.01(1)
 (WA) Rules of the Supreme Court O 37 r 2(1).

This is based on the recommendation of Bentham: Bentham J, *Rationale of Judicial Evidence*, Hunt & Clarke, London, 1828, Vol 2, Book III, Chapter X, pp 188-96. See further pp 196-203 (examples in common law where this recommended practice was disregarded by evidence being recorded in the third person, making it unclear what was said by the witness).

See also *Re Husband* (1865) 12 LT 303; *Blamey v Blamey* [1902] WN 138 (affidavit made in the United States in the third person, in accordance with United States practice, admitted).

6. (CTH) High Court Rules 2004 r 24.01.4
 (CTH) Federal Court Rules O 14 r 2(2)
 (ACT) Court Procedures Rules 2006 r 6710(1)(c)
 (NT) Supreme Court Rules r 43.01(4)
 (NSW) Uniform Civil Procedure Rules 2005 r 35.4
 (QLD) Uniform Civil Procedure Rules 1999 r 431(5)
 (SA) Supreme Court Practice Directions 2006 Direction 3.1
 (TAS) Supreme Court Rules 2000 r 501(d)
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.01(4)
 (WA) Rules of the Supreme Court O 37 r 2(3).

This is based on the recommendation of Bentham: Bentham J, *Rationale of Judicial Evidence*, Hunt & Clarke, London, 1828, Vol 2, Book III, Chapter X, pp 203-10. See also pp 210-20 (examples in English law where this recommended practice was disregarded by the practice in chancery of all the questions being 'squeezed' together in the Bill and all the answers being 'squeezed' together in the Answer).

7. (CTH) High Court Rules 2004 r 1.08.1(d)
 (CTH) Federal Court Rules O 14 r 2(2A)
 (NSW) Uniform Civil Procedure Rules 2005 r 35.6(3)
 (SA) Supreme Court Practice Directions 2006 Direction 3.1
 (QLD) Uniform Civil Procedure Rules 1999 r 431(6)
 (WA) Rules of the Supreme Court O 37 r 2(6).
8. (CTH) High Court Rules 2004 r 24.01.2
 (ACT) Court Procedures Rules 2006 r 6710
 (NT) Supreme Court Rules r 43.01(2), 43.01(3)
 (QLD) Uniform Civil Procedure Rules 1999 r 431(4)
 (SA) Supreme Court Practice Directions 2006 Direction 3.1; (SA) Supreme Court Practice Directions 2006 Form 14
 (TAS) Supreme Court Rules 2000 r 501(c)
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.01(2), 43.01(3)
 (WA) Rules of the Supreme Court O 37 r 2(1) (vague occupations or descriptions must not be used); 2(2).

See *Hyde v Hyde* (1888) 59 LT 523; *Re Levy; Levin v Levin* (1889) 60 LT 317 (admission must be 'sufficient'); *Re Church Press Ltd; Victoria House Printing Co Ltd v Church Press Ltd* (1917) 116 LT 247 per Eve J ('director of public companies' and 'merchant' insufficient descriptions).

9. *In The Will of Todd* (1887) 13 VLR 185; 8 ALT 185. SC(VIC), Full Court.

10. (CTH) High Court Rules 2004 r 24.01.1
 (CTH) Federal Court Rules O 14 r 2(1)
 (ACT) Court Procedures Rules 2006 r 6710(1)(a)
 (NT) Supreme Court Rules r 43.01(1)
 (NSW) Uniform Civil Procedure Rules 2005 r 35.4
 (QLD) Uniform Civil Procedure Rules 1999 r 431(3)
 (SA) Supreme Court Practice Directions 2006 Direction 3.1
 (TAS) Supreme Court Rules 2000 r 501(b)
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.01(1)
 (WA) Rules of the Supreme Court O 37 r 2(1).
 an affidavit may be filed with the affidavit.
 See *Blamey v Blamey* [1902] WN 138 although title of matter was affidavit filed with-
 11. *Raven v Cleveland I* (1902) 10 CLR 198 (appellant for a probate and irrelevant affidavit, J, SC(NSW) (no cost order)).
 12. *Re Johnson* [1903] 10 CLR 198.
 13. *Re Pakusa* [1975] CLR 147 (1947) 64 RPC 5.

[195-8840] **Formal requirements**
 set out the name and signature of the person before whom the affidavit is sworn.¹ The place where it is sworn.² by the deponent and the manner in which it is sworn.³ Where an affidavit is sworn by the deponent or physically in the presence of the deponent, the affidavit or physically in the presence of the deponent.³

(1) the affidavit was sworn by the deponent or physically in the presence of the deponent.
 (2) the deponent signed the affidavit.
 (3) (in some jurisdictions) the deponent signed, that he or she signed, the affidavit in the presence of the deponent or physically in the presence of the deponent.

In most jurisdictions, the affidavit must be sworn in a certificate unless the certificate is provided to the deponent and the deponent signs the certificate. Australian Capital Territory and Northern Territory have specific provisions in their laws that require the affidavit to be interpreted in accordance with the provisions in the Australian Capital Territory and Western Australia, in the Australian Capital Territory and Western Australia, in the name of each deponent and the name of all the deponents is to be stated that it was sworn.

- 2) (requires the name of the person on whose behalf it is filed) section 3.1
 Rules 2005 r 43.01(5)
10. (CTH) High Court Rules 2004 r 2.03.2
 (CTH) Federal Court Rules O 14 r 6(b). Unless the court otherwise orders, an affidavit may be filed notwithstanding any irregularity in form: *ibid* O 14 r 5.
 (ACT) Court Procedures Rules 2006 r 6719
 (NT) Supreme Court Rules r 43.08
 (NSW) Uniform Civil Procedure Rules 2005 r 35.1
 (QLD) Uniform Civil Procedure Rules 1999 r 436(2). Unless the court otherwise orders, an affidavit may be filed despite an irregularity in form, including a failure to use the approved form: *ibid* r 436(1).
 (SA) Supreme Court Civil Rules 2006 r 162(9)
 (TAS) Supreme Court Rules 2000 r 506
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.08
 (WA) Rules of the Supreme Court O 37 r 5(2). Unless the court otherwise orders, an affidavit may be filed despite an irregularity in form: *ibid* O 37 r 5(1).
 See *Blamey v Blamey* [1902] WN 138 (affidavits sworn in the United States admitted although title of matter was missing); *Underdown v Stannard* [1871] WN 171 (corrected affidavit filed without further fee).
11. *Raven v Cleveland Divisional Board* (1894) 6 QLJ 67, SC(QLD), Full Court (successful appellant for a prohibition order given no evidence costs because of the voluminous and irrelevant affidavits filed); *Whyte v Whyte* (1906) 23 WN (NSW) 85 per Simpson J, SC(NSW) (no costs given for an affidavit containing objectionable matter).
12. *Re Johnson* [1903] QWN 12 per Real J, SC(QLD).
13. *Re Pakuzza* [1975] Qd R 141 at 145 per Matthews J; *Re Letters Patent Granted to Sarazin* (1947) 64 RPC 51.

[195-8840] **Formal requirements for jurat** The jurat, or attestation, must set out the name and signature of the deponent, the name, title and signature of the person before whom the affidavit is sworn, and the date when and the place where it is sworn.¹ Each page of the affidavit must be signed or initialled by the deponent and the person before whom it is sworn.²

Where an affidavit is sworn by a deponent who appears to the person before whom the affidavit is taken to be illiterate, blind, otherwise unable to read the affidavit or physically incapable of signing it, that person must certify in or near the jurat that:³

- (1) the affidavit was read in his or her presence to the deponent;
- (2) the deponent seemed to understand it perfectly; and
- (3) (in some jurisdictions) the deponent signified, by either marking or signing, that he or she swore or affirmed the affidavit.⁴

In most jurisdictions, the affidavit must not be used in evidence without such a certificate unless the court is otherwise satisfied that the affidavit was read over to the deponent and that he or she appeared to understand it perfectly.⁵ In the Australian Capital Territory, South Australia and Western Australia, there are specific provisions in the case of a deponent who appears to be unable to understand the affidavit when read to him or her in English and requires the affidavit to be interpreted.⁶

In the Australian Capital Territory, the Northern Territory, Tasmania, Victoria and Western Australia, in an affidavit made by two or more deponents, the full name of each deponent must be inserted in the jurat.⁷ However, if the affidavit of all the deponents is taken at one time before the same person, it is sufficient to state that it was sworn by 'both (or all) of the abovenamed deponents'.⁸ In

Queensland, where multiple deponents will be making an affidavit and they swear the affidavit at the same place and before the same person, the name of each deponent must be inserted in the same jurat.⁹ If there are multiple deponents to an affidavit but they swear separately, their names must be inserted in separate jurats in the affidavit.¹⁰

A jurat, like other certificates that an oath has been taken, is ordinarily not conclusive and evidence is admissible to show that it is inaccurate.¹¹ Parties may not waive irregularities in it,¹² however, the court may have it resworn in open court.¹³

Notes

- 1. (CTH) High Court Rules 2004 r 24.01
 (CTH) Federal Court Rules O 14 r 2(1), Sch 1 Form 20
 (ACT) Oaths and Affirmations Act 1984 s 10, Sch 5; (ACT) Court Procedures Rules 2006 r 6715
 (NT) Supreme Court Rules r 43.01(5)
 (NSW) Uniform Civil Procedure Rules 2005 r 35.7A(1) (if solicitor takes affidavit he or she must add, legibly below his or her signature, his or her name and address together with 'solicitor', by use of a stamp or otherwise), 35.7A(2) (person authorised to take affidavit must add, legibly below his or her signature, his or her name and address together with 'commissioner for affidavits', by use of a stamp or otherwise)
 (QLD) Uniform Civil Procedure Rules 1999 r 432(2), 432(3)
 (SA) Supreme Court Civil Rules 2006 r 162; (SA) Supreme Court Practice Directions 2006 Form 14
 (TAS) Supreme Court Rules 2000 r 501(f) (jurat must state that it was sworn by the deponent on the date when and the place where it was sworn)
 (VIC) Evidence Act 1958 s 126 (jurat must state the date when and the place where the affidavit was sworn); (VIC) Supreme Court (General Civil Procedure) Rules 2003 rr 43.01(5) (affidavit must be signed by deponent), 43.02 (where affidavit by illiterate or blind person)
 (WA) Oaths, Affidavits and Statutory Declarations Act 2005 s 9(2).

The jurat, or attestation, comprises a section at the conclusion of an affidavit setting out the name of the deponent, the signature of the deponent, where and when the affidavit was sworn, the name of the person before whom it was sworn, and the signature and title or description of the person before whom it was sworn. For the meaning of 'jurat' see *Butterworths Encyclopaedic Australian Legal Dictionary*.

See *Dunn v Yearley* [1874] WN 158 (signature should be written opposite jurat); *Hinds v Clements* (1843) 11 M & W 816; 152 ER 1034 (signature of person making affidavit need not correspond exactly with his or her full name stated at the beginning of the affidavit); *Re Chapman; Ex parte Johnson* (1884) 26 Ch D 338 (title of person administering oath should be stated; though failure to state title not fatal); *Edlow v Argentine Loan and Agency Co* (1899) 59 LJ Ch 392 ('before me' omitted from jurat); *Pilkington v Himswoth* (1835) 1Y & C Ex 612; 160 ER 250 (defective affidavit may be filed with leave of the court); *Best v Woods* (1905) 39 ILTR 44; 5 NIJR 72 (KB(Ireland) (an affidavit not permitted to be used where the affidavit served, unlike the affidavit filed, did not show the signature of the deponent or the place of swearing); *Gibson, Boyd and Wright JJ*: 'The point is a technical one, but we must follow our rules, and it is a vital point of procedure that a true copy of every affidavit should be served on the opposite party'.

- 2. (CTH) High Court Rules 2004 r 24.01.11
 (CTH) Federal Court Rules O 14 r 2(6) (unless the deponent is physically incapable)
 (ACT) Court Procedures Rules 2006 r 6715(1)
 (NT) Supreme Court Rules r 43.01(6)
 (NSW) Uniform Civil Procedure Rules 2005 r 35.7B
 (QLD) Uniform Civil Procedure Rules 1999 r 432(1)

- (SA) Supreme Court
- (TAS) Supreme Court
- (VIC) Supreme Court
- (WA) Oaths, Affidavits and Statutory Declarations

- 3. (CTH) High Court
- (CTH) Federal Court
- (ACT) Oaths and Affirmations Act 1984 s 10, Sch 5; (ACT) Court Procedures Rules 2006 r 6716 (incapable)
- (NT) Supreme Court
- (NSW) Uniform Civil Procedure Rules 2005 r 433(2) (physical incapacity)
- (SA) Supreme Court
- (TAS) Supreme Court
- (VIC) Supreme Court
- (WA) Oaths, Affidavits and Statutory Declarations

- 4. In respect of deponent

- 5. (CTH) Federal Court
- (ACT) Court Procedures Rules 2006 r 6716(2)
- (NT) Supreme Court
- (NSW) Uniform Civil Procedure Rules 2005 r 433(2) (physical incapacity)
- (SA) Supreme Court
- (TAS) Supreme Court
- (VIC) Supreme Court
- (WA) Oaths, Affidavits and Statutory Declarations

The provision complied with 1 sufficient: *R v F*
It is not sufficient: *deponent appear*
Ch 516. Compa

- 6. (ACT) Oaths and Affirmations Act 1984 s 10, Sch 5; (ACT) Court Procedures Rules 2006 r 6716(2)
- (SA) Supreme Court
- (WA) Oaths, Affidavits and Statutory Declarations

- 7. (ACT) Court Procedures Rules 2006 r 6716(2)
- (NT) Supreme Court
- (TAS) Supreme Court
- (VIC) Supreme Court
- (WA) Rules

- 8. (ACT) Court Procedures Rules 2006 r 6716(2)
- (NT) Supreme Court
- (TAS) Supreme Court
- (VIC) Supreme Court
- (WA) Rules

See *Re James*

- Supreme Court Practice Directions 2006 Direction 3.1.3
- (SA) Supreme Court Rules 2000 r 501(g) (signed by person before whom affidavit taken)
- (TAS) Supreme Court (General Civil Procedure) Rules 2005 r 43.01(6) (signed by the person before whom it is sworn)
- (VIC) Oaths, Affidavits and Statutory Declarations Act 2005 s 9(3), 9(5).
- (WA) For the meaning of 'affidavit' see *Butterworths Encyclopaedic Australian Legal Dictionary*.
3. (CTH) High Court Rules 2004 r 24.01.12
- (CTH) Federal Court Rules O 14 r 2(3) (blind or illiterate), 2(4) (physical incapacity)
- (ACT) Oaths and Affirmations Act 1984 s 20; (ACT) Court Procedures Rules 2006 r 6716 (incapable of reading)
- (NT) Supreme Court Rules r 43.02(1) (blind or illiterate)
- (NSW) Uniform Civil Procedure Rules 2005 r 35.7 (blind or illiterate).
- (QLD) Uniform Civil Procedure Rules 1999 r 433(1) (unable to read affidavit), 433(2) (physical incapacity)
- (SA) Supreme Court Civil Rules 2006 r 162(7) (blind or illiterate)
- (TAS) Supreme Court Rules 2000 r 503(1) (blind or illiterate)
- (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.02 (blind or illiterate). See also Williams N, *Civil Procedure Victoria*, Butterworths, Sydney, 1986 to date (looseleaf). [I 43.02.10] (form of attestation made by person physically incapable of signing affidavit).
- (WA) Oaths, Affidavits and Statutory Declarations Act 2005 s 13 (blind or illiterate).
4. In respect of deponents unable to sign their marks see *R v Holloway* (1901) 65 JP 712.
5. (CTH) Federal Court Rules O 14 r 2(5)
- (ACT) Court Procedures Rules 2006 r 6716
- (NT) Supreme Court Rules r 43.02(2) (blind or illiterate)
- (NSW) Uniform Civil Procedure Rules 2005 r 35.7
- (QLD) Uniform Civil Procedure Rules 1999 r 433(3) (unable to read affidavit and physical incapacity)
- (SA) Supreme Court Civil Rules 2006 r 162(7)
- (TAS) Supreme Court Rules 2000 r 503(2) (blind or illiterate)
- (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.02(2) (blind or illiterate)
- (WA) Oaths, Affidavits and Statutory Declarations Act 2005 s 13 (blind or illiterate).
- The provision would appear to exclude depositions where this has not been complied with but the verbal assent of a dying deponent has been found to be sufficient: *R v Holloway* (1901) 65 JP 712.
- It is not sufficient to state that the affidavit was read to the deponent and that the deponent appeared to understand it: *Re Longstaffe; Bleukarn v Longstaffe* (1884) 54 LJ Ch 516. Compare *Verner v Cochrane* (1889) LR 23 Ir 422.
6. (ACT) Oaths and Affirmations Act 1984 s 19; (ACT) Court Procedures Rules 2006 r 6716(2)
- (SA) Supreme Court Civil Rules 2006 r 162(8)
- (WA) Oaths, Affidavits and Statutory Declarations Act 2005 s 14.
7. (ACT) Court Procedures Rules 2006 r 6715
- (NT) Supreme Court Rules r 43.04
- (TAS) Supreme Court Rules 2000 r 504(1)
- (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.04
- (WA) Rules of the Supreme Court O 37 r 3.
8. (ACT) Court Procedures Rules 2006 r 6715(3)
- (NT) Supreme Court Rules r 43.04
- (TAS) Supreme Court Rules 2000 r 504(2)
- (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.04
- (WA) Rules of the Supreme Court O 37 r 3.

See *Re James* (1868) 5 VLR (IE & M) 1 at 2 per Molesworth J, SC(VIC). (where

[195-8840]

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an affidavit is made by two people, it is not necessary for the jurat to state that it was sworn it 'severally' as long as both names appear in the jurat.

- 9. (QLD) Uniform Civil Procedure Rules 1999 r 432(4).
- 10. Ibid r 432(2), 432(3).
- 11. *Thunston v Slatford* (1700) 1 Salk 284; 91 ER 251 (held, in relation to a clerk's record that an official did not take an oath: 'if there is a misentry, it might be supplied and corrected by other evidence, for he should not be concluded by the mistake or negligence of the officer': *R v Emden* (1808) 9 East 437; 103 ER 640 (jurat of an affidavit not conclusive of the place of swearing)).
- 12. *Pilkington v Himswoth* (1835) 1 Y & C Ex 612; 160 ER 250.
- 13. *Ex parte Harris; R v Harris* (1875) LR 10 Ch App 264 at 266.

[195-8845] **Alterations** An affidavit in which an alteration has been made must not be used or read without leave of the court, unless:

- (1) the alteration is authenticated by the initials of the person taking the affidavit (or the stamp of the Registry if taken at the Principal or a District Registry);¹ or
- (2) in some jurisdictions, in the case of an alteration by erasure, the words or figures that were written on the erasure at the time of taking the affidavit are rewritten and signed or initialled in the margin of the affidavit by the person taking it.²

Notes

- 1. (CTH) High Court Rules 2004 r 1.08.1(e)
 (CTH) Federal Court Rules O 14 r 3 (the affidavit may nevertheless be filed, unless the court otherwise orders)
 (ACT) Court Procedures Rules 2006 r 6717(3)
 (NT) Supreme Court Rules r 43.05 (the affidavit may nevertheless be filed, unless the court otherwise orders)
 (NSW) Uniform Civil Procedure Rules 2005 r 35.5
 (QLD) Uniform Civil Procedure Rules 1999 r 434 (the affidavit may nevertheless be filed)

(TAS) Supreme Court Rules 2000 r 505
(VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.05 (the affidavit may nevertheless be filed, unless the court otherwise orders)

(WA) Oaths, Affidavits and Statutory Declarations Act 2005 s 9(5)(c).
See *Re Gherson* (1865) 2 W.W. & A.B. (H.E. & M.) 14 per Molesworth J. SCATC (affidavits, deposing to the act of insolvency, contained erasures not initialled by commissioner but as this was not an essential fact and could be found elsewhere in affidavits admitted); *Re Cloake* (1891) 61 L.J. Ch 69 (interlineation not initialled by notary; an affidavit with an interlineation not properly initialled ought not to be filed without an order of the court); *Best v Hoods* (1905) 39 ILTR 44; 5 NJR 72 KB (Ireland) (unlike the affidavit filed, the affidavit served did not show the signature of the deponent or the place of swearing; Gibson, Boyd and Wright JJ: 'The point is a technical one, but we must follow our rules, and it is a vital point of procedure that a true copy of every affidavit should be served on the opposite party'). Compare *Re Coleman* (1911) 45 ILTR 244 per Barton J. HC (Ireland). Chancery D. (interlineation not initialled by the Vice-Consul taking affidavit; after canvassing the possibility of having the affidavit filed with the interlineations struck out, ordered the affidavit be filed with the interlineations included).

In South Australia, (SA) Supreme Court Civil Rules 2006 r 162(4) provide that the contents of an affidavit cannot be altered after it has been certified (but this caveat does not prevent the making of a later affidavit drawing attention to the error in the earlier affidavit).

- 2. (CTH) High C
- (CTH) Federal
- the court other
- (NSW) Unifor
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[195-8850] **Exhibit** documents and other exhibits, and must not be annexed.¹

In the Federal Court and not annexed to an affidavit must be

In the Australian Court to be used in conjunction to the affidavit.⁴ When an exhibit to the affidavit is annexed to an affidavit in the body of the affidavit document whenever

In New South Wales may be made an annexed exhibit.⁸ A party who must, at the option

- (1) produce the
- (2) provide a ph
- (3) produce the photocopied

In Queensland, annexed with and mentioned documents may form part of a document, a copy

Generally, exhibits in South Australia

In Tasmania, an affidavit or other document referred to in an affidavit

In Victoria, a document is an exhibit to the affidavit but must be annexed.

In Western Australia an affidavit must be annexed.¹⁷ A party who produces more volumes as

annexures, an index of the respective page numbers must be bound with the

2. (CTH) High Court Rules 2004 r 1.08.1(e)
 (CTH) Federal Court Rules O 14 r 3 (the affidavit may nevertheless be filed, unless the court otherwise orders)
 (NSW) Uniform Civil Procedure Rules 2005 r 35.5
 (TAS) Supreme Court Rules 2000 r 505.

[195-8850] Exhibits and annexures In the High Court of Australia, documents and other things referred to by affidavit must be referred to as exhibits, and must not be annexed to the affidavit or referred to in the affidavit as annexed.¹

In the Federal Court of Australia, any original document must be exhibited and not annexed to an affidavit.² Copies of all documents exhibited or annexed to an affidavit must be served with the affidavit.³

In the Australian Capital Territory and the Northern Territory, a document to be used in conjunction with an affidavit must, where convenient, be annexed to the affidavit.⁴ Where annexure is inconvenient, the document may be made an exhibit to the affidavit.⁵ Instead of making a document an annexure or an exhibit to an affidavit, the relevant portion of the document may be included in the body of the affidavit, and the party filing the affidavit must produce the document whenever the affidavit is used.⁶

In New South Wales, a document to be used in conjunction with an affidavit may be made an annexure or an exhibit to the affidavit.⁷ An exhibit must not be filed.⁸ A party who serves an affidavit to which a document is an exhibit must, at the option of any other party:⁹

- (1) produce the document for inspection by the other party;
- (2) provide a photocopy of the document to the other party; or
- (3) produce the document at some convenient place to enable it to be photocopied by the other party.

In Queensland, an original document (and an original thing, if practicable) used with and mentioned in an affidavit is an exhibit.¹⁰ A group of different documents may form one exhibit.¹¹ If it is impracticable to exhibit the original of a document, a copy of the document may be an exhibit to the affidavit.¹² Generally, exhibits must be bound to the affidavit.¹³

In South Australia, an exhibit to an affidavit must be clearly marked so as to identify it as the exhibit referred to in the affidavit.¹⁴

In Tasmania, an account, an extract from a register, particulars of a creditor's debt or other document referred to must not be annexed to an affidavit, or referred to in an affidavit as annexed, but must be referred to as an exhibit.¹⁵

In Victoria, a document referred to in an affidavit must not be annexed to the affidavit but may be referred to as an exhibit.¹⁶

In Western Australia, a document that is to be used in conjunction with an affidavit must be annexed to the affidavit and be referred to in the affidavit as being annexed.¹⁷ Annexures to an affidavit must be bound with it in one or more volumes as may be necessary.¹⁸ Where an affidavit has one or more annexures, an index which refers to the affidavit, lists the annexures and their respective page numbers, and contains a short description of each annexure must be bound with the affidavit.¹⁹ Except where the court allows otherwise, the

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thickness of a volume of an affidavit and its annexures must not exceed 40 millimetres.²⁰ A bound register, an account book or other book or any document of an unusual size must not be annexed to an affidavit or referred to in an affidavit as being annexed, but must be referred to as an exhibit.²¹

In all jurisdictions except South Australia, an exhibit must have attached to it a certificate signed by the person before whom the affidavit is sworn, and the exhibit or attached certificate must bear the title of the affidavit or some other identifying mark.²²

Exhibits may be inspected by parties²³ even where they contain confidential material.²⁴

Notes

1. (CTH) High Court Rules 2004 r 24.01.13.
2. (CTH) Federal Court Rules O 14 r 4(1).
3. *Ibid* O 14 r 4(3).
4. (ACT) Court Procedures Rules 2006 r 6712(1)
(NT) Supreme Court Rules r 43.06(1).
5. (ACT) Court Procedures Rules 2006 r 6712(7)
(NT) Supreme Court Rules r 43.06(2).
6. (ACT) Court Procedures Rules 2006 r 6713
(NT) Supreme Court Rules r 43.06(3).
7. (NSW) Uniform Civil Procedure Rules 2005 r 35.6(1).
8. *Ibid* r 35.6(5).
9. *Ibid* r 35.6(6).
10. (QLD) Uniform Civil Procedure Rules 1999 r 435(1), 435(2).
11. *Ibid* r 435(3).
12. *Ibid* r 435(4).
13. *Ibid* r 435(8). However, if exhibits are not bound to an affidavit, they must be bound, if practicable, in an indexed and paginated book and be filed with the affidavit *ibid* r 435(9). Also, if an exhibit is comprised of a group of documents, it must be bound in an indexed and paginated book and be filed with the affidavit: *ibid* r 435(10).
14. (SA) Supreme Court Civil Rules 2006 r 162(5).
15. (TAS) Supreme Court Rules 2000 r 501(j).
16. (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.06(1).
17. (WA) Rules of the Supreme Court O 37 r 2(8).
18. *Ibid* O 37 r 2(9).
19. *Ibid* O 37 r 2(7).
20. *Ibid* O 37 r 2(10).
21. *Ibid* O 37 r 9(1).
22. (CTH) High Court Rules 2004 r 24.01.14
(CTH) Federal Court Rules O 14 r 4(2)
(ACT) Court Procedures Rules 2006 r 6712(8)-(10)
(NT) Supreme Court Rules r 43.06(4)
(NSW) Uniform Civil Procedure Rules 2005 r 35.6(2)
(QLD) Uniform Civil Procedure Rules 1999 r 435(5)-(7)
(TAS) Supreme Court Rules 2000 r 501(h) (annexure or exhibit)
(VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.06(2)
(form of certificate)
(WA) Rules of the Supreme Court O 37 r 9(2).
23. *Re Hinchcliffe* [1895] 1 Ch 117 at 120; (1894) 71 LT 532 per A L Smith LJ; *Smith v British Steamship Co Ltd* [1897] 1 QB 185; (1896) 75 LT 542.

24. *Hassle v Cmr of Patents*

[195-8855] Contents I
 affidavit must be confined to
 knowledge to prove.¹ How
 contain statements of infor
 use of the word 'belief' by
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 In all jurisdictions excep
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 he or she continues to act

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1. (CTH) High Court
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(SA) Supreme Co
(TAS) Supreme Co
(VIC) Supreme Co
(WA) Rules of th
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(WA) Rules of th
See also Stephen S
art 124.
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(VIC) Supreme C
(WA) Rules of th
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347, Indus Comm (1
17 ALR 238; 33 AL
(where the named
affidavit on inform

24. *Haste v Comr of Patents* (1987) 9 IPR 565 per Young J, SC(NSW).

[195-8855] Contents In all jurisdictions, court rules provide that an affidavit must be confined to such facts as the witness is able of his or her own knowledge to prove.¹ However, on interlocutory proceedings, an affidavit may contain statements of information and belief² if the grounds are set out.³ The use of the word 'belief' by the deponent does not necessarily mean that the deponent does not have personal knowledge.⁴ In all jurisdictions except the Commonwealth, the Northern Territory and Victoria, scandalous, irrelevant, offensive or oppressive matter may be struck out from an affidavit.⁵ In all jurisdictions except the Northern Territory and Victoria, the affidavit may be taken off the file.⁶ A solicitor discovering that an affidavit which has been filed is false must remedy the matter immediately if he or she continues to act.⁷

Notes

- (1) (CTH) High Court Rules 2004 r 24.01.5 (there are no similar provisions in the (ACT) Federal Court Rules) (ACT) Court Procedures Rules 2006 r 6711(1) (NT) Supreme Court Rules r 43.03(1) (QLD) Uniform Civil Procedure Rules 1999 r 430(1) (affidavit must be confined to the evidence the person making it could give if giving evidence orally) (SA) Supreme Court Civil Rules 2006 r 162(2) (TAS) Supreme Court Rules 2000 r 502(1) (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.03(1) (WA) Rules of the Supreme Court O 37 r 6(1).

See *McSharry v Railway Comrs* (1896) 13 WN (NSW) 127; *Re Juson Pty Ltd* (1992) 8 WAR 13 per Adams M, SC(WA) (material which cannot be proved because it is opinion or otherwise inadmissible is not allowed in affidavits in interlocutory proceedings).

The costs of an affidavit which unnecessarily sets forth matters of hearsay, argumentative matter or copies of or extracts from documents must be paid by the party filing the affidavit:

- (QLD) Uniform Civil Procedure Rules 1999 r 430(3)
 (WA) Rules of the Supreme Court O 37 r 6(3).

See also Stephen Sir J F, *A Digest of the Law of Evidence*, MacMillan, London, 1876, art 124.

- (2) (CTH) High Court Rules 2004 r 24.01.6 (ACT) Court Procedures Rules 2006 r 6711(2) (NT) Supreme Court Rules r 43.03(2) (QLD) Uniform Civil Procedure Rules 1999 r 430(2) (or an affidavit for use in an application because of default) (SA) Supreme Court Civil Rules 2006 r 162(2) (TAS) Supreme Court Rules 2000 r 502(1), 502(3) (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 43.03(2) (WA) Rules of the Supreme Court O 37 r 6(2) (or affidavits used for the purposes of applications under certain Acts), 6(2A).
 This was the practice in chancery: *Seward v Quigley* (1901) 18 WN (NSW) 35; *Grealy v Australasian Meat Industry Employees' Union (NSW Branch)* 1961 AR (NSW) 347, Indus Comm (NSW), Full Bench; *Manson v Pomminghaus* [1911] VLR 239; (1911) 17 ALR 238; 33 ALT 1; *Re Juson Pty Ltd* (1992) 8 WAR 13 per Adams M, SC(WA) (where the named sources have themselves sworn affidavits this does not make the affidavit on information and belief inadmissible but it goes to the value of that affidavit on information and belief inadmissible but it goes to the value of that

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- evidence). On the issue of what is interlocutory see *Ex parte Britt* [1987] 1 Qd R 221; (1986) 5 MVR 285 per McPherson J, SC(QLD) (the test is whether a decision will finally dispose of the rights of the parties in the ultimate dispute between them whether or not litigation has already commenced and whether or not the practical effect of the decision will be to make such litigation impracticable); *Lewandowski v Lovell* (1991) 4 WAR 311 per Adams AM, SC(WA) (court will consider the nature and substance of the proceedings and not just their form); *Cowie v State Electricity Commission of Victoria* [1964] VR 788 per Gowans J, SC(VIC) (application to extend time to commence action not an interlocutory application permitting the use of hearsay in an affidavit); *Comalco Aluminium (Bell Bay) Ltd v Claudio* [1970] Tas SR 231 per Neasey J, SC(TAS) (application to extend time to commence action not an interlocutory application permitting the use of hearsay in an affidavit); *Campbell v United Pacific Transport Pty Ltd* [1966] Qd R 465 at 471 per Gibbs J, SC(QLD) (the test is whether the application is one that would finally determine the rights of the parties and that hearsay is admissible where the application seeks leave to take further steps in an action dormant for over six years); *National Mutual Life Assn of Australasia Ltd v Chris Poulson Insurance Agencies Pty Ltd* (1997) 7 Tas R 10 per Underwood J, SC(TAS) (court may exclude hearsay if it is inadmissible for other reasons); *Jacob v Australian Abrasives Pty Ltd (No 1)* [1971] Tas SR (NC 3) 378 per Neasey J, SC(TAS) (information and belief cannot be relied upon in an affidavit supporting an application to set aside a judgment).
- Manson v Pomminghaus* [1911] VLR 239; (1911) 17 ALR 238; 33 ALT 1 per Madden CJ, SC(VIC) (affidavit on information and belief not admissible unless the source of the deponent's information and belief is set out). Compare *Re Gleeson (decd)* (1887) 13 VLR 365 per Webb J, SC(VIC) (the absence of the grounds of belief goes to the weight and not to the admissibility of the affidavit).
 - Atherton v Jackson's Corio Meat Packing (1965) Pty Ltd* [1967] VR 850; (1967) 29 LGRA 289 per Smith J, SC(VIC) (a witness who experienced an event is not limited to what he or she can swear to with complete certainty or precision, but where a reference to 'belief' means that the deponent's evidence is based on conjectures, deductions or information from others it will generally be rejected); *Re Juson Pty Ltd* (1992) 8 WAR 13 at 15 per Adams M, SC(WA) (it is not sufficient disclosure of a source to name a company, the person in the company should be identified).
 - (ACT) Court Procedures Rules 2006 r 6720(1)(a)
(NSW) Uniform Civil Procedure Rules 2005 r 4.15(1)(a)
(QLD) Uniform Civil Procedure Rules 1999 r 440
(SA) Supreme Court Civil Rules 2006 r 164(a)
(TAS) Supreme Court Rules 2000 r 508
(WA) Rules of the Supreme Court O 37 r 7.
See *Re Juson Pty Ltd* (1992) 8 WAR 13 per Adams M, SC(WA) (in interlocutory proceedings, question of relevance to be determined at the hearing by the trial judge; scandalous material does not render an affidavit inadmissible as it must also be irrelevant and this should be substantial and obvious); *Macpherson v Kerr, Ex parte Lee* (1893) 19 VLR 23; 14 ALT 215 per Hodges J, SC(VIC) (a third party may apply to strike out scandalous matter); *Slack v Burt* (1862) 1 QSCR 50 per Lutwyche J, SC(QLD) (costs of affidavits containing irrelevant or scandalous matters disallowed).
 - (CTH) High Court Rules 2004 r 6.05
(CTH) Federal Court Rules O 14 r 8
(ACT) Court Procedures Rules 2006 r 6720(1)(b)
(NSW) Uniform Civil Procedure Rules 2005 r 4.15(1)(c)
(QLD) Uniform Civil Procedure Rules 1999 r 440 (affidavit may also be destroyed)
(SA) Supreme Court Civil Rules 2006 r 53(4)
(TAS) Supreme Court Rules 2000 r 508
(WA) Rules of the Supreme Court O 37 r 7.
See *Re A Pty Ltd v B* [1962] QWN 79 per Mack J, SC(QLD).
 - Myers v Elman* [1940] AC 282; [1939] 4 All ER 484.

(c) SW

[195-8860] Who may take affidavits. 1 In some jurisdictions particular offices are empowered and justices of the peace; in some jurisdictions sworn or affirmed before a

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- (CTH) Evidence Act 1957
(CTH) High Court Rules 2004 r 6.05
(CTH) Federal Court Rules 2001 r 45(2), 45(3) (affidavits taken in the State)
(ACT) Oaths and Affidavits Act 1999 s 11(1)(b) (affidavits taken abroad)
(NT) Oaths Act 1991 s 15
(NT) Commissioner for Oaths and Affidavits Act 1991 s 43.10
(NSW) Oaths Act 1990 s 15
(QLD) Oaths Act 1990 s 1
(SA) Evidence Act 1995 s 28 (who may be sworn)
(TAS) Supreme Court Rules 2000 r 163(1) (affidavits taken in the State)
(VIC) Evidence Act 1958 s 125 (out of the State), 125A (if affidavit is taken in the State)
(WA) Oaths, Affidavits and Swearing Act 1995 s 12 (taken in the State).
 - (CTH) High Court Rules 2004 r 6.05
(ACT) Court Procedures Rules 2006 r 6720(1)(b)
(NT) Supreme Court Rules 2001 s 5
(NSW) Supreme Court Rules 2005 r 5
(QLD) Uniform Civil Procedure Rules 1999 r 440
(SA) Supreme Court Civil Rules 2006 r 164(a)
(TAS) Supreme Court Rules 2000 r 508
(WA) Oaths, Affidavits and Swearing Act 1995 s 12 (lawyer means a legal practitioner who holds office in the proceedings and who holds office in the proceedings)
See also *Ross v Northumberland v T* [1995] 1 All ER 110 at 126 per

[195-8865] Manner of taking affidavits specifically provided that