



New South Wales

# Civil Procedure Act 2005 No 28

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New South Wales

## **Civil Procedure Act 2005 No 28**

Act No 28, 2005

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An Act with respect to practice and procedure in civil proceedings. [Assented to  
1 June 2005]

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**The Legislature of New South Wales enacts:**

## **Part 1 Preliminary**

### **1 Name of Act**

This Act is the *Civil Procedure Act 2005*.

### **2 Commencement**

- (1) This Act commences on a day or days to be appointed by proclamation, subject to this section.
- (2) Schedule 5.3 [1], [2] and [3], 5.15 [4], 5.17 [3] and 5.30 [8] commence on the commencement of section 3, or on the commencement of Part 3.2 of the *Legal Profession Act 2004*, whichever is the later.
- (3) Schedule 5.3 [4] commences on the commencement of section 9.
- (4) Schedule 5.43 and 5.44 commence on the commencement of section 18.
- (5) Different days may be appointed for the commencement of a single provision of Schedule 4 or 5 for the purpose of commencing the repeals or amendments effected by the provision on different days.

### **3 Definitions**

- (1) In this Act:

***civil proceedings*** means any proceedings other than criminal proceedings.

***claim for relief*** includes:

- (a) a claim for possession of land, and
- (b) a claim for delivery of goods, and
- (c) a claim for the recovery of damages or other money, and
- (d) a claim for a declaration of right, and
- (e) a claim for the determination of any question or matter that may be determined by the court, and
- (f) any other claim (whether legal, equitable or otherwise) that is justiciable in the court.

***costs***, in relation to proceedings, means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration.

***court*** includes tribunal.

***criminal proceedings*** means proceedings against a person for an offence (whether summary or indictable), and includes the following:

- (a) committal proceedings,
- (b) proceedings relating to bail,
- (c) proceedings relating to sentence,
- (d) proceedings on an appeal against conviction or sentence.

**cross-claim** means a claim by a defendant for the grant of relief under section 22.

**defendant** means a person against whom proceedings are commenced, and includes a person against whom a cross-claim is made.

**exercise** a function includes perform a duty.

**function** includes power, authority and duty.

**hearing** includes both trial and interlocutory hearing.

**judgment** includes any order for the payment of money, including any order for the payment of costs.

**judgment creditor** means the person to whom a judgment debt is payable.

**judgment debt** includes:

- (a) any amount payable under a judgment, and
- (b) any interest after judgment that is payable on that amount under section 101, and
- (c) any other amount payable under rules of court without the need for a judgment.

**judgment debtor** means the person by whom a judgment debt is payable.

**judicial officer** has the same meaning as it has in the *Judicial Officers Act 1986*.

**jurisdictional limit** means:

- (a) in relation to the District Court, the jurisdictional limit of that Court within the meaning of the *District Court Act 1973*, and
- (b) in relation to a Local Court sitting in its General Division, the jurisdictional limit of a Local Court when sitting in that Division within the meaning of the *Local Courts Act 1982*, and
- (c) in relation to a Local Court sitting in its Small Claims Division, the jurisdictional limit of a Local Court when sitting in that Division within the meaning of the *Local Courts Act 1982*.

**local rules** means rules of court other than uniform rules.

**minor** means a person who is under the age of 18 years.

**motor accident claim** has the same meaning as **claim** has in the *Motor Accidents Compensation Act 1999*.

**officer**, in relation to a court, includes any registrar or other member of staff employed in the administration of the business of the court, and includes the Judicial Registrar of the District Court.

**ordinary basis**, in relation to the assessment of legal costs that a court has ordered to be paid, means the basis of assessing costs set out in sections 208F (1) and 208G of the *Legal Profession Act 1987*.

**originating process** means the process by which proceedings are commenced, and includes the process by which a cross-claim is made.

**person under legal incapacity** means any person who is under a legal incapacity in relation to the conduct of legal proceedings (other than an incapacity arising under section 4 of the *Felons (Civil Proceedings) Act 1981*) and, in particular, includes:

- (a) a child under the age of 18 years, and
- (b) a temporary patient, continued treatment patient or forensic patient within the meaning of the *Mental Health Act 1990*, and
- (c) a person under guardianship within the meaning of the *Guardianship Act 1987*, and
- (d) a protected person within the meaning of the *Protected Estates Act 1983*, and
- (e) an incommunicate person, being a person who has such a physical or mental disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs.

**plaintiff** means a person by whom proceedings are commenced, or on whose behalf proceedings are commenced by a tutor, and includes a person by whom a cross-claim is made or on whose behalf a cross-claim is made by a tutor.

**possession**, otherwise than of land, includes custody and power.

**trial** means any hearing that is not an interlocutory hearing.

**tutor**, in relation to a person under legal incapacity, means a tutor appointed to represent the person (whether by the court or otherwise) in accordance with the uniform rules.

**uniform rules** means rules made, or taken to have been made, under section 9.

**Uniform Rules Committee** means the Uniform Rules Committee established under section 8.

**workplace injury damages claim** means a claim for an award of damages to which Division 3 of Part 5 of the *Workers Compensation Act 1987* applies.

**Note.** Other words and expressions (for example, rules of court) are defined in the *Interpretation Act 1987*.

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- (2) Notes included in this Act do not form part of this Act.

**Note.** In the notes to this Act, **DCR** means the *District Court Rules 1973*, **LCR** means the *Local Courts (Civil Claims) Rules 1988* and **SCR** means the *Supreme Court Rules 1970*.

#### **4 Application of Parts 3–9**

- (1) Subject to this section, Parts 3–9 apply to each court referred to in Schedule 1 in relation to civil proceedings of a kind referred to in that Schedule in respect of that court.
- (2) The uniform rules may exclude any class of civil proceedings from the operation of all or any of the provisions of Parts 3–9.
- (3) The Governor may, by regulation, amend or substitute Schedule 1.
- (4) A regulation under this section may contain provisions consequent on the amendment or substitution of Schedule 1, including:
- (a) provisions excluding any class of civil proceedings from the operation of all or any of the provisions of Parts 3–9, and
  - (b) provisions modifying any specified provision of Parts 3–9, or of any other Act or law, in its application to any class of civil proceedings.
- (5) Subject to any such regulation, this Act does not limit the operation of any other Act with respect to the conduct of civil proceedings.

#### **5 Jurisdiction of courts**

- (1) Nothing in this Act or the uniform rules limits the jurisdiction of the Supreme Court.
- (2) Nothing in the uniform rules extends the jurisdiction of any court except to the extent to which this Act expressly so provides.

#### **6 Repeals, amendments and savings provisions**

- (1) Each Act and instrument referred to in Schedule 4 is repealed.
- (2) Each Act and instrument referred to in Schedule 5 is amended as set out in that Schedule.
- (3) Schedule 6 has effect.

#### **7 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

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- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## **Part 2 Administrative matters**

### **Division 1 Rules, practice notes and forms**

#### **8 Uniform Rules Committee**

- (1) There is to be a Uniform Rules Committee comprising 10 members, of whom:
  - (a) one is to be the Chief Justice of the Supreme Court or a Judge of the Supreme Court nominated for the time being by the Chief Justice, and
  - (b) one is to be the President of the Court of Appeal or a Judge of Appeal nominated for the time being by the President, and
  - (c) two are to be Judges of the Supreme Court appointed by the Chief Justice, and
  - (d) one is to be the Chief Judge of the District Court or a Judge of the District Court nominated for the time being by the Chief Judge, and
  - (e) one is to be a Judge of the District Court appointed by the Chief Judge, and
  - (f) one is to be the Chief Magistrate or a Magistrate nominated for the time being by the Chief Magistrate, and
  - (g) one is to be a Magistrate appointed by the Chief Magistrate, and
  - (h) one is to be a practising barrister appointed by the Bar Council, and
  - (i) one is to be a practising solicitor appointed by the Law Society Council.
- (2) Schedule 2 has effect with respect to the constitution and procedure of the Uniform Rules Committee.

#### **9 Uniform rules**

- (1) The Uniform Rules Committee may make rules, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed by rules or that is necessary or convenient to be prescribed by rules for carrying out or giving effect to this Act.
- (2) Without limiting subsection (1), rules under this section may make provision, in relation to all civil proceedings in respect of which a court has jurisdiction (however arising), for or with respect to the matters specified in Schedule 3.

- (3) On the commencement of this section, the rules set out in Schedule 7 are taken to have been made under this section, and may be amended and repealed accordingly.
- (4) The rules made under this section may authorise or require the use of an electronic case management system established under section 14B of the *Electronic Transactions Act 2000* in relation to any proceedings in a court in respect of which the use of such a system is authorised by an order in force under section 14C of that Act.
- (5) This section does not give power to make rules with respect to any matter for which rules may be made under section 6 of the *Legal Profession Act 1987* or any matter relating to costs that is regulated by Part 11 of that Act.
- (6) This section does not limit the operation of section 78 of the *Interpretation Act 1987*.

**10 Rules of court taken to include uniform rules**

- (1) Rules of court are taken to include the uniform rules to the extent to which they are applicable in that court.
- (2) Subsection (1) does not authorise the person or body having power to make local rules to amend or repeal a uniform rule in its application to that court.

**11 Relationship between uniform rules and local rules**

- (1) The uniform rules prevail over any provision of any local rules unless the uniform rules expressly provide that the provision of the local rules is to prevail.
- (2) One rule prevails over another, as referred to in subsection (1), to the extent only of any inconsistency between them.

**12 Officers of the court may exercise functions conferred by uniform rules**

Without limiting any other functions he or she may exercise, a registrar or other officer of any court may exercise any function conferred on such an officer by the uniform rules.

**13 Officers of the court may be authorised to exercise court's functions**

- (1) The senior judicial officer of any court may, by instrument in writing:
  - (a) direct that any function of the court under this Act or the uniform rules may be exercised by such registrars or other officers of the court, and in such circumstances and subject to such conditions, as are specified in the instrument, and
  - (b) vary or revoke any such instrument.

- (2) This section does not limit any provision of the Act by which the court is constituted with respect to the exercise of the court's functions.

#### **14 Court may dispense with rules in particular cases**

In relation to particular civil proceedings, the court may, by order, dispense with any requirement of rules of court if satisfied that it is appropriate to do so in the circumstances of the case.

#### **15 Practice notes**

- (1) Subject to rules of court, the senior judicial officer of the court may issue practice notes for that court in relation to civil proceedings to which this Act applies.
- (2) Part 6 of the *Interpretation Act 1987* applies to a practice note issued under this section in the same way as it applies to a rule of court.

#### **16 Court may give directions in circumstances not covered by rules**

- (1) In relation to particular civil proceedings, the court may give directions with respect to any aspect of practice or procedure for which rules of court or practice notes do not provide.
- (2) Anything done in accordance with such a direction (including the commencing of proceedings and the taking of any step in proceedings) is taken to have been validly done.

#### **17 Forms**

- (1) Subject to the uniform rules, the Uniform Rules Committee:
- (a) may approve forms for documents to be used in connection with civil proceedings, and
  - (b) in the case of documents filed with a court, or issued by a court, by means of an ECM system within the meaning of the *Electronic Transactions Act 2000*, may approve the format in which such documents are to be filed or issued.
- (2) Copies of the approved forms are to be made available for public inspection at each registry of the court concerned and on the court's internet website.
- (3) If a form is approved in relation to a document to be used in connection with proceedings in a court, a document that is filed with or issued by the court is to be in that form.

**Note.** See section 80 of the *Interpretation Act 1987* with respect to compliance with approved forms.



## **Division 2 Fees**

### **18 Fees**

- (1) The Governor may make regulations for or with respect to the following matters:
  - (a) the fees payable to a court in relation to the conduct of civil proceedings in the court, including fees for the following:
    - (i) the filing or registration of any document in the court,
    - (ii) the allocation of hearing dates,
    - (iii) the conduct of hearings,
    - (iv) the retention of juries,
    - (v) the sealing or other authentication of any document that has been filed in the court,
    - (vi) the issue of any document out of the court,
  - (b) the fees payable in relation to proceedings referred to mediation under Part 4,
  - (c) the fees payable in relation to proceedings referred to arbitration under Part 5,
  - (d) the fees payable in relation to the examination of a judgment debtor by a registrar or other officer of the court under Part 8,
  - (e) the fees payable in relation to the functions exercised by the Sheriff, whether under this Act or otherwise,
  - (f) the fees payable for administrative services provided by a registrar or other officer of the court, whether in connection with the administration of this Act or otherwise,
  - (g) the waiver, postponement and remittal of fees.
- (2) Fees of the kind referred to in subsection (1) (a), (d) or (e) are not payable by the Crown, or by any person acting on behalf of the Crown, with respect to any civil proceedings to which any of the following persons or bodies is a party:
  - (a) the Crown,
  - (b) any Minister of the Crown,
  - (c) any person or body prescribed by the regulations or belonging to a class of persons or bodies so prescribed.
- (3) Subsection (2) does not prevent the recovery by the Crown or any such person or body of any fees that would, had they been paid by the Crown or any such person or body, have been so recoverable.
- (4) Unpaid fees may be recovered by the person to whom they are payable, as a debt, in any court of competent jurisdiction.

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## Part 3 Commencing and carrying on proceedings generally

### 19 Commencing and carrying on proceedings (cf Act No 9 1973, sections 53 and 56; Act No 11 1970, section 22)

- (1) Subject to this Act, proceedings are to be commenced and carried on in the manner prescribed by rules of court.
- (2) For the purposes of this Act and the uniform rules, *carry on proceedings* includes defend proceedings.

### 20 Claims for possession of land (cf Act No 52 1970, section 79)

A claim for judgment for possession of land takes the place of a claim in an action for ejectment that could have been brought under the practice of the Supreme Court as it was immediately before 1 July 1972.

**Note.** 1 July 1972 was the date of commencement of the *Supreme Court Act 1970*.

### 21 Defendant's right to set-off

- (1) If there are mutual debts between a plaintiff and a defendant in any proceedings, the defendant may, by way of defence, set off against the plaintiff's claim any debt that is owed by the plaintiff to the defendant and that was due and payable at the time the defence of set-off was filed, whether or not the mutual debts are different in nature.
- (2) This section extends to civil proceedings in which one or more of the mutual debts is owed by or to a deceased person who is represented by a legal personal representative.
- (3) This section does not apply to the extent to which the plaintiff and defendant have agreed that debts (whether generally or as to specific debts) may not be set off against each other.
- (4) This section does not affect any other rights or obligations of a debtor or creditor in respect of mutual debts, whether arising in equity or otherwise.
- (5) This section is subject to section 120 of the *Industrial Relations Act 1996*.
- (6) In this section, *debt* means any liquidated claim.

**Note.** The application of this provision to existing debts is dealt with in clause 6 of Schedule 6 (Savings, transitional and other provisions).

**22 Defendant's right to cross-claim** (cf Act No 52 1970, section 78; Act No 11 1970, section 15; DCR Part 20, rule 1)

- (1) Subject to subsection (2), the court may grant to the defendant in any proceedings (*the first proceedings*) such relief against any person (whether or not a plaintiff in the proceedings) as the court might grant against that person in separate proceedings commenced by the defendant for that purpose.
- (2) Relief may not be granted under this section against a person who is not a plaintiff in the first proceedings unless the relief relates to, or is connected with, the subject of the first proceedings.
- (3) A person against whom a defendant makes a claim for relief under this section:
  - (a) has the same rights in respect of his or her defence against the claim as he or she would have in separate proceedings commenced against the person by the defendant, and
  - (b) if not already a party to the first proceedings:
    - (i) becomes a party to the first proceedings, and
    - (ii) unless the court otherwise orders, is bound by any judgment (including a judgment by consent or by default) or decision (including a decision by consent) on any claim for relief in the proceedings (including a claim for relief in any cross-claim in the proceedings).

**23 Effect of abandoning excess claim** (cf Act No 9 1973, section 50; Act No 11 1970, section 14)

- (1) If, in any proceedings on a claim, the cause of action giving rise to the claim is for more than the court's jurisdictional limit:
  - (a) the person may abandon the excess by a statement to that effect in the originating process, and
  - (b) in that event, the person's claim is taken to be reduced by the amount of the excess.
- (2) If a person's claim is successful in respect of a cause of action:
  - (a) the amount recoverable by the person (exclusive of costs and interest) is not to exceed the court's jurisdictional limit, and
  - (b) the judgment in the proceedings is in full discharge of all of the person's demands in respect of that cause of action, and
  - (c) entry of the judgment in the records of the court is to be made accordingly.

- 
- (3) This section is subject to section 51 of the *District Court Act 1973* and section 66 of the *Local Courts Act 1982*.

**Note.** Under those sections, claims in the District Court or a Local Court for amounts in excess of the court's jurisdictional limit can, in some cases, be dealt with by consent of parties.

**24 Effect of splitting cause of action** (cf Act No 9 1973, section 49; Act No 11 1970, section 13)

- (1) If:
- (a) a person (*the first person*) splits any cause of action against another person (*the other person*) so as to commence proceedings, or make a cross-claim, for part only of the amount for which proceedings may be commenced on that cause, and
  - (b) judgment is given or entered, or a final order is made, on the proceedings or cross-claim,
- the other person is entitled to judgment in any other proceedings, whether in that or any other court, with respect to the same cause of action.
- (2) Despite subsection (1), if the other person has given a number of securities in respect of a claim made by the first person, the first person:
- (a) may commence proceedings in any court in respect of each of those securities, or
  - (b) may make a cross-claim in proceedings in any court in respect of each of those securities,
- as if each of those securities gave rise to a distinct cause of action, and may do so whether or not the claim made by the first person is for an amount that is more than the court's jurisdictional limit.

## Part 4 Mediation of proceedings

- 25 Definitions** (cf Act No 52 1970, sections 110I and 110J; Act No 9 1973, sections 163 and 164; Act No 11 1970, sections 21J and 21K)

In this Part:

**mediation** means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

**mediation session** means a meeting arranged for the mediation of a matter.

**mediator** means a person to whom the court has referred a matter for mediation.

- 26 Referral by court** (cf Act No 52 1970, section 110K; Act No 9 1973, section 164A; Act No 11 1970, section 21L)

- (1) If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned.
- (2) The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court, who may (but need not be) a listed mediator.
- (3) In this section, **listed mediator** means a mediator appointed in accordance with a practice note with respect to the nomination and appointment of persons to be mediators for the purposes of this Part.

- 27 Duty of parties to participate** (cf Act No 52 1970, section 110L; Act No 9 1973, section 164B; Act No 11 1970, section 21M)

It is the duty of each party to proceedings that have been referred for mediation to participate, in good faith, in the mediation.

- 28 Costs of mediation** (cf Act No 52 1970, section 110M; Act No 9 1973, section 164C; Act No 11 1970, section 21N)

The costs of mediation, including the costs payable to the mediator, are payable:

- (a) if the court makes an order as to the payment of those costs, by one or more of the parties in such manner as the order may specify, or
- (b) in any other case, by the parties in such proportions as they may agree among themselves.

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**29 Agreements and arrangements arising from mediation sessions** (cf Act No 52 1970, section 110N; Act No 9 1973, section 164D; Act No 11 1970, section 21O)

- (1) The court may make orders to give effect to any agreement or arrangement arising out of a mediation session.
- (2) On any application for an order under this section, any party may call evidence, including evidence from the mediator and any other person engaged in the mediation, as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.
- (3) This Part does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session, in relation to the matters the subject of a mediation session.

**30 Privilege** (cf Act No 52 1970, section 110P; Act No 9 1973, section 164F; Act No 11 1970, section 21Q)

- (1) In this section, *mediation session* includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.
- (2) The same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to:
  - (a) a mediation session, or
  - (b) a document or other material sent to or produced to a mediator, or sent to or produced at the court or the registry of the court, for the purpose of enabling a mediation session to be arranged.
- (3) The privilege conferred by subsection (2) extends only to a publication made:
  - (a) at a mediation session, or
  - (b) in a document or other material sent to or produced to a mediator, or sent to or produced at the court or the registry of the court, for the purpose of enabling a mediation session to be arranged, or
  - (c) in circumstances referred to in section 31.
- (4) Subject to section 29 (2):
  - (a) evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body, and

- (b) a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body.
- (5) Subsection (4) does not apply with respect to any evidence or document:
  - (a) if the persons in attendance at, or identified during, the mediation session and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document, or
  - (b) in proceedings commenced with respect to any act or omission in connection with which a disclosure has been made as referred to in section 31 (c).

**31 Confidentiality** (cf Act No 52 1970, section 110Q; Act No 9 1973, section 164G; Act No 11 1970, section 21R)

A mediator may disclose information obtained in connection with the administration or execution of this Part only in one or more of the following circumstances:

- (a) with the consent of the person from whom the information was obtained,
- (b) in connection with the administration or execution of this Part, including section 29 (2),
- (c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,
- (d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,
- (e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

**32 Directions by mediator** (cf SCR Part 72C, rule 3)

Subject to the uniform rules and any relevant practice notes, a mediator may, by order, give directions as to the preparation for, and conduct of, the mediation.

**33 Protection from liability for mediator**

A mediator to whom the court refers proceedings has, in the exercise of his or her functions as a mediator in relation to those proceedings, the same protection and immunity as a judicial officer of the court has in the exercise of his or her functions as a judicial officer.

**34 Mediation otherwise than under this Part** (cf Act No 52 1970, section 110H (2); Act No 9 1973, section 162 (2))

This Part does not prevent:

- (a) the parties to proceedings from agreeing to and arranging for mediation of any matter otherwise than as referred to in this Part, or
- (b) a matter arising in proceedings from being dealt with under the provisions of the *Community Justice Centres Act 1983*.



## Part 5 Arbitration of proceedings

### Division 1 Preliminary

#### 35 Definitions (cf Act No 43 1983, section 3)

In this Part:

*arbitrator* means an arbitrator appointed under section 36.

*award* means an arbitrator's award under section 39.

*referred proceedings* means proceedings the subject of an unrevoked reference to an arbitrator under section 38.

*referring court*, in relation to referred proceedings, means the court by which the proceedings have been referred.

#### 36 Appointment to office as arbitrator (cf Act No 43 1983, section 5)

- (1) The senior judicial officer of the court may appoint suitable persons to be arbitrators to hear and determine referred proceedings.
- (2) A person is not eligible to be appointed as an arbitrator unless the person is a former judicial officer, a barrister nominated by the Bar Council or a solicitor nominated by the Law Society Council.
- (3) The senior judicial officer concerned may, and if the nominating body so requests in writing must, revoke an appointment under this section.
- (4) An appointment, or revocation of appointment, of an arbitrator is to be made by instrument in writing signed by the senior judicial officer.
- (5) An arbitrator may resign office by instrument in writing delivered to the senior judicial officer.
- (6) An arbitrator is entitled to such remuneration as the Minister may from time to time determine.
- (7) An arbitrator's remuneration is to be paid out of money provided by Parliament.

#### 37 Jurisdiction of arbitrator (cf Act No 43 1983, section 7)

- (1) The jurisdiction conferred on an arbitrator by this Part in relation to referred proceedings is part of the jurisdiction of the court by which the proceedings were referred.
- (2) Subject to this Part, but without limiting the specific powers and authorities of an arbitrator under this Part, an arbitrator has and may exercise, in relation to referred proceedings, all of the functions of the court by which the proceedings were referred.

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- (3) Subsection (2) does not confer on an arbitrator functions of the court which are the same as, or similar to, the functions conferred by sections 52 and 53 or any other functions in respect of contempt.
  - (4) The functions conferred on an arbitrator may be exercised only:
    - (a) for the purpose of determining the issues in dispute in referred proceedings, and
    - (b) for the purpose of making an award in referred proceedings, and
    - (c) for related purposes.
  - (5) Subject to this Part, a tribunal (other than the arbitrator to whom proceedings have been referred for determination) has no jurisdiction in respect of any issue in dispute in the proceedings while those proceedings are before the arbitrator.
  - (6) In subsection (5), *tribunal* means any court, tribunal, board or other body, or any person, empowered by an Act or by agreement of parties to determine by litigation, arbitration, conciliation or otherwise any issue that is in dispute.

## Division 2 Arbitration

### 38 Referral to arbitration (cf Act No 52 1970, section 76B; Act No 9 1973, section 63A; Act No 11 1970, section 21H)

- (1) The court may order that proceedings before it:
  - (a) in respect of a claim for the recovery of damages or other money, or
  - (b) in respect of a claim for any equitable or other relief ancillary to a claim for the recovery of damages or other money,be referred for determination by an arbitrator.
- (2) Before making such an order in relation to any proceedings, the referring court:
  - (a) is to consider the preparations made by the parties for the hearing of the proceedings, and
  - (b) is, as far as possible, to deal with all matters that may be dealt with by the court on application to the court before the hearing of the proceedings, and
  - (c) is to give such directions for the conduct of the proceedings before the arbitrator as appear best adapted for the just, quick and cheap disposal of the proceedings.
- (3) The referring court may not make such an order in relation to any proceedings if:

- (a) no issue in the proceedings is contested or judgment in the proceedings has been given or entered and has not been set aside, or
  - (b) rules of court provide that such an order may not be made in relation to proceedings of that kind, or
  - (c) cause is otherwise shown why the proceedings should not be so referred.
- (4) At any time before the making of an award in relation to referred proceedings, the referring court may revoke an order under this section and give directions for the subsequent conduct of the proceedings and directions as to any costs incurred before the revocation of the order.
- (5) This section does not limit any other power of the court to refer a matter to arbitration.

**39 Determination by arbitrator** (cf Act No 43 1983, section 15)

- (1) The issues in dispute in referred proceedings are to be determined by the arbitrator on the evidence adduced before the arbitrator.
- (2) The arbitrator must record the arbitrator's determination of the proceedings, and the reasons for the determination, by an award in writing signed by the arbitrator.
- (3) The arbitrator must immediately send the award to the referring court.
- (4) An arbitrator may not make a determination that could not have been made had the proceedings been heard and determined by the referring court.
- (5) Despite subsection (4), an award does not fail to have full effect, and may not be called in question, by reason only that the amount awarded exceeds the amount claimed in the proceedings to which the award relates.

**40 Award taken to be judgment of court** (cf Act No 43 1983, section 16A; Act No 52 1970, section 76B (5); Act No 9 1973, section 63A (5); Act No 11 1970, section 21H (5))

Subject to section 41 and Division 3, an award is final and conclusive, and is taken to be a judgment of the referring court:

- (a) if it is expressed to be made by consent of all the parties, on the date on which it is received by the referring court, or
- (b) in any other case, at the expiry of 28 days after it is sent to all of the parties.

**41 Judicial supervision of arbitrator** (cf Act No 43 1983, section 17)

- (1) No relief lies:
  - (a) under section 69 or 101 of the *Supreme Court Act 1970*, or
  - (b) by way of declaratory judgment or order, or
  - (c) by way of injunction, or
  - (d) under section 126, 127 or 128 of the *District Court Act 1973*, or
  - (e) under section 73 or 74 of the *Local Courts Act 1982*,in relation to proceedings under this Act on referred proceedings.
- (2) Subsection (1) does not apply if the relief is sought on the ground of a lack of jurisdiction or a denial of natural justice.

**Division 3 Rehearings****42 Application for rehearing** (cf Act No 43 1983, section 18)

- (1) A person aggrieved by an award may apply to the referring court for a rehearing of the proceedings concerned.
- (2) The application may (but need not) request that the rehearing be a full rehearing or limited rehearing.
- (3) The award is suspended from the time the application is made until an order for rehearing is made.

**43 Order for rehearing** (cf Act No 43 1983, section 18A)

- (1) The referring court must order a rehearing of proceedings the subject of an award if an application for rehearing is made before the award takes effect.
- (2) An order for rehearing may not be made unless the amount claimed in the proceedings, or the value of the property to which the proceedings relate, exceeds the jurisdictional limit of a Local Court when sitting in its Small Claims Division.
- (3) An order for rehearing need not be made if it appears to the court that the applicant failed to attend a hearing before an arbitrator without good reason.
- (4) In an order for rehearing, the referring court may direct that the rehearing be a full rehearing or a limited rehearing, as the court thinks appropriate, and may do so regardless of whether the applicant requested a full rehearing or a limited rehearing or made no such request.
- (5) In the absence of a direction under subsection (4), the rehearing is to be a full rehearing.

- (6) An order for a limited rehearing must specify the aspects that are to be the subject of the rehearing, whether by reference to specific issues in dispute, specific parties to the dispute or otherwise.
- (7) The referring court may amend an order for rehearing at any time before or during a rehearing.

**44 Rehearing** (cf Act No 43 1983, section 18B)

- (1) If an order is made for a full rehearing, the award ceases to have effect and the proceedings are to be heard and determined in the referring court as if they had never been referred to an arbitrator.
- (2) If an order is made for a limited rehearing:
  - (a) the award is suspended from the time the order is made until the proceedings are determined, and
  - (b) the aspects ordered to be dealt with at the limited rehearing are to be heard and determined in the court concerned as if they had not been dealt with in the arbitration, and
  - (c) following the rehearing, the court may reinstate the award with such modifications (if any) as the court thinks appropriate, and
  - (d) the award, as reinstated, is final and conclusive, and is taken to be a judgment of the referring court.
- (3) Subject to this Division, this Act and the uniform rules apply to proceedings on a rehearing in the same way as they apply to any other civil proceedings.

**45 Discontinuance of rehearing** (cf Act No 43 1983, section 18D)

- (1) A rehearing may be discontinued, but only with the consent of all parties or by leave of the court.
- (2) If a rehearing is discontinued, the court is to reinstate the award from which the rehearing has arisen.
- (3) An award that is reinstated under this section:
  - (a) is final and conclusive, and
  - (b) is taken to be a judgment of the referring court, and
  - (c) unless the court otherwise orders, is taken to have had effect as such a judgment as from the date on which it would have taken effect under section 40 (b) had no application for a rehearing been made under this Division.

**Note.** Under section 40 (b), the award would have taken effect at the expiry of 28 days after it was sent to all of the parties.

**46 Costs of rehearing** (cf Act No 43 1983, section 18C)

- (1) A court that hears and determines proceedings on a full rehearing:
  - (a) may make an order for costs in respect of the rehearing, and
  - (b) may, in addition, make an order for costs in respect of the hearing under Division 2.
- (2) A court that hears and determines any aspect of proceedings on a limited rehearing:
  - (a) may make an order for costs in respect of the rehearing as to that aspect, and
  - (b) may, in addition, make an order for costs in respect of the hearing as to that aspect under Division 2.
- (3) This section applies to proceedings in respect of which a rehearing is discontinued under section 45 in the same way as it applies to proceedings that are heard and determined on a rehearing.

**47 Subpoena at rehearing against arbitrator** (cf Act No 43 1983, section 18E)

A subpoena for the giving of evidence or the production of documents at a rehearing is not to be issued against the arbitrator to whom the proceedings concerned were referred just because the evidence or documents relate to the arbitration.

**Division 4 Miscellaneous****48 Appearances** (cf Act No 43 1983, section 8)

A party to referred proceedings before an arbitrator has the same rights as to:

- (a) representation by a barrister or solicitor, or otherwise, and
- (b) examination and cross-examination of witnesses,

as the party would have in relation to proceedings before the referring court.

**49 Procedure** (cf Act No 43 1983, section 10)

- (1) Subject to this Act and any directions given by the referring court, the procedure at an arbitration is to be determined by the arbitrator.
- (2) Subject to the rules of evidence, an arbitrator must act according to equity, good conscience and the substantial merits of the case without regard for technicalities or legal forms.

**50 Issue of subpoenas** (cf Act No 43 1983, section 11)

A referring court has the same powers with respect to:

- (a) ordering persons to attend as witnesses at referred proceedings or to attend and produce documents at referred proceedings, and
- (b) enforcing compliance with any such orders,

as it would have had in respect of the proceedings had they been heard and determined by the court.

**51 Evidence** (cf Act No 43 1983, section 13)

- (1) Subject to the uniform rules, evidence in referred proceedings before an arbitrator is to be given and received in the same way as it would be given and received before the referring court.
- (2) Subsection (1) does not require any such evidence to be recorded.
- (3) An arbitrator may administer an oath or take an affidavit for the purposes of referred proceedings.
- (4) Referred proceedings are taken to be judicial proceedings for the purposes of section 327 (Offence of perjury) of the *Crimes Act 1900*.

**52 Refusal or failure to take oath etc** (cf Act No 43 1983, section 12)

- (1) If, at any hearing of referred proceedings, a witness:
  - (a) refuses or fails to take an oath when required by the arbitrator to do so, or
  - (b) refuses or fails to answer a question that the witness is required by the arbitrator to answer,the arbitrator or a party to the proceedings may apply to the referring court for an order that the witness attend before the court for examination.
- (2) Unless satisfied that there was a reasonable excuse for the refusal or failure of the witness to take the oath or answer the question, the referring court must make the order applied for.
- (3) A court before which a witness attends and gives evidence pursuant to such an order may order the transmission to the arbitrator of the transcript of evidence.
- (4) Any such evidence is taken to have been given at the hearing before the arbitrator.
- (5) Failure to comply with an order under this section constitutes a contempt of the referring court, committed in the face of the court.

**53 Contempt** (cf Act No 43 1983, section 14)

- (1) A person must not:
  - (a) wilfully insult an arbitrator while the arbitrator is hearing referred proceedings or proceeding to or from such a hearing, or
  - (b) wilfully insult a person in attendance at such a hearing or proceeding to or from such a hearing, or
  - (c) wilfully misbehave during the hearing of referred proceedings, or
  - (d) wilfully and without lawful excuse interrupt the hearing of referred proceedings, or
  - (e) assault or wilfully obstruct an arbitrator or other person during the hearing of referred proceedings, or
  - (f) without lawful excuse, disobey a lawful direction given to the person by an arbitrator during the hearing of referred proceedings.
- (2) An arbitrator may direct a person who contravenes subsection (1) to leave the sitting of the arbitrator at which the contravention occurs and the person to whom the direction is given must immediately comply with the direction.
- (3) Failure to comply with such a direction constitutes a contempt of the referring court, committed in the face of the court.

**54 Costs** (cf Act No 43 1983, section 16)

- (1) An arbitrator may make orders with respect to the payment, as between the parties, of the costs of referred proceedings.
- (2) An arbitrator has the same powers in relation to an order for costs under subsection (1) as the referring court would have had if the hearing before the arbitrator had been a hearing before the court.
- (3) This section does not limit the power of the referring court to make orders under section 98 with respect to the costs of referred proceedings.

**55 Protection from liability for arbitrator** (cf Act No 43 1983, section 6)

An arbitrator to whom the court refers proceedings has, in the exercise of his or her functions as an arbitrator in relation to those proceedings, the same protection and immunity as a judicial officer of the court has in the exercise of his or her functions as a judicial officer.



## **Part 6 Case management and interlocutory matters**

### **Division 1 Guiding principles**

#### **56 Overriding purpose** (cf SCR Part 1, rule 3)

- (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
- (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
- (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
- (4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).
- (5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

#### **57 Objects of case management**

- (1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:
  - (a) the just determination of the proceedings,
  - (b) the efficient disposal of the business of the court,
  - (c) the efficient use of available judicial and administrative resources,
  - (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.
- (2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

#### **58 Court to follow dictates of justice**

- (1) In deciding:
  - (a) whether to make any order or direction for the management of proceedings, including:
    - (i) any order for the amendment of a document, and

- (ii) any order granting an adjournment or stay of proceedings, and
  - (iii) any other order of a procedural nature, and
  - (iv) any direction under Division 2, and
  - (b) the terms in which any such order or direction is to be made, the court must seek to act in accordance with the dictates of justice.
- (2) For the purpose of determining what are the dictates of justice in a particular case, the court:
- (a) must have regard to the provisions of sections 56 and 57, and
  - (b) may have regard to the following matters to the extent to which it considers them relevant:
    - (i) the degree of difficulty or complexity to which the issues in the proceedings give rise,
    - (ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,
    - (iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,
    - (iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),
    - (v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,
    - (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
    - (vii) such other matters as the court considers relevant in the circumstances of the case.

**59 Elimination of delay** (cf Western Australia Supreme Court Rules, Order 1, rule 4A)

In any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial.

## **60 Proportionality of costs**

In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

## **Division 2 Powers of court to give directions**

### **61 Directions as to practice and procedure generally** (cf SCR Part 23, rule 4; Act No 9 1973, section 68A)

- (1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings.
- (2) In particular, the court may, by order, do any one or more of the following:
  - (a) it may direct any party to proceedings to take specified steps in relation to the proceedings,
  - (b) it may direct the parties to proceedings as to the time within which specified steps in the proceedings must be completed,
  - (c) it may give such other directions with respect to the conduct of proceedings as it considers appropriate.
- (3) If a party to whom such a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:
  - (a) it may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,
  - (b) it may strike out or limit any claim made by a plaintiff,
  - (c) it may strike out any defence filed by a defendant, and give judgment accordingly,
  - (d) it may strike out or amend any document filed by the party, either in whole or in part,
  - (e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,
  - (f) it may direct the party to pay the whole or part of the costs of another party,
  - (g) it may make such other order or give such other direction as it considers appropriate.

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- (4) Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given by the court.

**62 Directions as to conduct of hearing** (cf Act No 52 1970, section 87; Act No 9 1973, section 77 (4); SCR Part 34, rules 6 and 6AA)

- (1) The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.
- (2) The court may, by order, give directions as to the order in which questions of fact are to be tried.
- (3) Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:
- (a) a direction limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,
  - (b) a direction limiting the number of witnesses (including expert witnesses) that a party may call,
  - (c) a direction limiting the number of documents that a party may tender in evidence,
  - (d) a direction limiting the time that may be taken in making any oral submissions,
  - (e) a direction that all or any part of any submissions be in writing,
  - (f) a direction limiting the time that may be taken by a party in presenting his or her case,
  - (g) a direction limiting the time that may be taken by the hearing.
- (4) A direction under this section must not detract from the principle that each party is entitled to a fair hearing, and must be given a reasonable opportunity:
- (a) to lead evidence, and
  - (b) to make submissions, and
  - (c) to present a case, and
  - (d) at trial, other than a trial before a Local Court sitting in its Small Claims Division, to cross-examine witnesses.
- (5) In deciding whether to make a direction under this section, the court may have regard to the following matters in addition to any other matters that the court considers relevant:
- (a) the subject-matter, and the complexity or simplicity, of the case,
  - (b) the number of witnesses to be called,

- (c) the volume and character of the evidence to be led,
  - (d) the need to place a reasonable limit on the time allowed for any hearing,
  - (e) the efficient administration of the court lists,
  - (f) the interests of parties to other proceedings before the court,
  - (g) the costs that are likely to be incurred by the parties compared with the quantum of the subject-matter in dispute,
  - (h) the court's estimate of the length of the hearing.
- (6) At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party a memorandum stating:
- (a) the estimated length of the trial, and the estimated costs and disbursements of the solicitor or barrister, and
  - (b) the estimated costs that, if the party were unsuccessful at trial, would be payable by the party to any other party.

**63 Directions with respect to procedural irregularities** (cf Act No 52 1970, section 81; Act No 9 1973, section 159; Act No 11 1970, section 75A)

- (1) This section applies to proceedings in connection with which there is, by reason of anything done or omitted to be done, a failure to comply with any requirement of this Act or of rules of court, whether in respect of time, place, manner, form or content or in any other respect.
- (2) Such a failure:
  - (a) is to be treated as an irregularity, and
  - (b) subject to subsection (3), does not invalidate the proceedings, any step taken in the proceedings or any document, judgment or order in the proceedings.
- (3) The court may do either or both of the following in respect of proceedings the subject of a failure referred to in subsection (1):
  - (a) it may, by order, set aside the proceedings, any step taken in the proceedings or any document, judgment or order in the proceedings, either wholly or in part,
  - (b) it may exercise its powers to allow amendments and to make orders dealing with the proceedings generally.
- (4) The court may not take action of the kind referred to in subsection (3)
  - (a) on the application of any party unless the application is made within a reasonable time and, in any case, before the party takes any fresh step in the proceedings after becoming aware of the failure.

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**Division 3      Other powers of court****64    Amendment of documents generally** (cf SCR Part 20, rules 1 and 4; DCR Part 17, rules 1 and 4)

- (1) At any stage of proceedings, the court may order:
  - (a) that any document in the proceedings be amended, or
  - (b) that leave be granted to a party to amend any document in the proceedings.
- (2) Subject to section 58, all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings.
- (3) An order under this section may be made even if the amendment would have the effect of adding or substituting a cause of action that has arisen after the commencement of the proceedings but, in that case, the date of commencement of the proceedings, in relation to that cause of action, is, subject to section 65, taken to be the date on which the amendment is made.
- (4) If there has been a mistake in the name of a party, this section applies to the person intended to be made a party if he or she were a party.
- (5) This section does not apply to the amendment of a judgment, order or certificate.

**65    Amendment of originating process after expiry of limitation period**

(cf SCR Part 20, rule 4; DCR Part 17, rule 4)

- (1) This section applies to any proceedings commenced before the expiration of any relevant limitation period for the commencement of the proceedings.
- (2) At any time after the expiration of the relevant limitation period, the plaintiff in any such proceedings may, with the leave of the court under section 64 (1) (b), amend the originating process so as:
  - (a) to enable the plaintiff to maintain the proceedings in a capacity in which he or she has, since the proceedings were commenced, become entitled to bring and maintain the proceedings, or
  - (b) to correct a mistake in the name of a party to the proceedings, whether or not the effect of the amendment is to substitute a new party, being a mistake that, in the court's opinion, is neither misleading nor such as to cause reasonable doubt as to the identity of the person intended to be made a party, or

(c) to add or substitute a new cause of action, together with a claim for relief on the new cause of action, being a new cause of action that, in the court's opinion, arises from the same (or substantially the same) facts as those giving rise to an existing cause of action and claim for relief set out in the originating process.

- (3) Unless the court otherwise orders, an amendment made under this section is taken to have had effect as from the date on which the proceedings were commenced.
- (4) This section does not limit the powers of the court under section 64.
- (5) This section has effect despite anything to the contrary in the *Limitation Act 1969*.
- (6) In this section, *originating process*, in relation to any proceedings, includes any pleading subsequently filed in the proceedings.

**66 Adjourment of proceedings** (cf Act No 11 1970, section 75)

- (1) Subject to rules of court, the court may at any time and from time to time, by order, adjourn to a specified day any proceedings before it or any aspect of any such proceedings.
- (2) If a judicial officer is not available at the time appointed for the hearing of any proceedings, a registrar may adjourn, to a later time on the same day or to a later specified day, any matters listed for hearing by the judicial officer at the appointed time.

**67 Stay of proceedings** (cf Act No 9 1973, section 156)

Subject to rules of court, the court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day.

**68 Attendance at court and production of documents and things to court**

(cf Act No 9 1973, section 64; Act No 11 1970, section 72; SCR Part 36, rule 12)

Subject to rules of court, the court may, by subpoena or otherwise, order any person to do either or both of the following:

- (a) to attend court to be examined as a witness,
- (b) to produce any document or thing to the court.

**Note.** See also section 77 of the *Crimes (Administration of Sentences) Act 1999* and section 42 of the *Children (Detention Centres) Act 1987* with respect to the attendance of persons detained in custody.

**69 Affidavits and witness statements may be read in advance of hearing**

Proceedings are not to be challenged, reviewed, quashed or called into question by reason only that the judicial officer or other person before whom the proceedings are being conducted has, prior to hearing, read any affidavit or witness statement that has been filed or lodged in the proceedings.

**70 Informal proof and admissions** (cf Act No 52 1970, section 82)

- (1) At any stage of the proceedings, the court:
  - (a) may, by order, dispense with the rules of evidence for proving any matter that is not bona fide in dispute, also with such rules of evidence as may give rise to expense or delay, and
  - (b) without limiting the generality of paragraph (a), may, by order, dispense with the proof of handwriting, documents, the identity of parties or parcels of land, or of authority, and
  - (c) may, by order, require any party (not being a person under legal incapacity) to make admissions with respect to any document or to any question of fact, and
  - (d) in the case of a party's refusal or neglect to make any admission required under paragraph (c), may, unless of the opinion that the refusal or neglect is reasonable, order that the costs of proof occasioned by the refusal or neglect are to be paid by the party.
- (2) An admission made under subsection (1) (c):
  - (a) is to be for the purpose of the proceedings in which it is made and for no other purpose, and
  - (b) is to be subject to all just exceptions, and
  - (c) may, with the leave of the court, be amended or withdrawn.

**71 Business in the absence of the public** (cf Act No 52 1970, section 80)

Subject to any Act, the business of a court in relation to any proceedings may be conducted in the absence of the public in any of the following circumstances:

- (a) on the hearing of an interlocutory application, except while a witness is giving oral evidence,
- (b) if the presence of the public would defeat the ends of justice,
- (c) if the business concerns the guardianship, custody or maintenance of a minor,
- (d) if the proceedings are not before a jury and are formal or non-contentious,



- (e) if the business does not involve the appearance before the court of any person,
- (f) if, in proceedings in the Equity Division of the Supreme Court, the court thinks fit,
- (g) if the uniform rules so provide.

**72 Court may prohibit disclosure of information**

The court may, by order, prohibit the publication or disclosure of any information tending to reveal the identity of:

- (a) any party to proceedings, or
- (b) any witness in proceedings,

if it is of the opinion that it is necessary to do so to secure the proper administration of justice in the proceedings.

**73 Power of court to determine questions about compromises and settlements**

- (1) In any proceedings, the court:
  - (a) has and may exercise jurisdiction to determine any question in dispute between the parties to the proceedings as to whether, and on what terms, the proceedings have been compromised or settled between them, and
  - (b) may make such orders as it considers appropriate to give effect to any such determination.
- (2) This section does not limit the jurisdiction that the court may otherwise have in relation to the determination of any such question.

**Division 4 Persons under legal incapacity**

**74 Definitions and application** (cf Act No 25 1929, sections 2 and 3)

- (1) In this Division:
  - manager*, in relation to a protected person's estate, means the person having the management of the estate under the *Protected Estates Act 1983*.
  - protected person* has the same meaning as it has in the *Protected Estates Act 1983*.
- (2) This Division does not apply to claims made or compensation awarded under any of the following Acts:
  - (a) the *Workers Compensation Act 1987*,
  - (b) the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*,

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- (c) the *Workers' Compensation (Dust Diseases) Act 1942*,
  - (d) the *Workplace Injury Management and Workers Compensation Act 1998*.
- (3) This Division does not limit the operation of the *Minors (Property and Contracts) Act 1970* or section 16 of the *Infants' Custody and Settlements Act 1899*.

**75 Settlement of claim made on behalf of, or against, person under legal incapacity** (cf SCR Part 63, rule 13)

- (1) This section applies to any claim, enforceable by proceedings in the court, that is made by or on behalf of, or against, a person under legal incapacity.
- (2) If, before proceedings are commenced with respect to any such claim, an agreement for the compromise or settlement of the claim is made by or on behalf of the person under legal incapacity, the court may approve or disapprove the agreement.
- (3) An agreement disapproved by the court does not bind the person under legal incapacity.
- (4) An agreement approved by the court binds the person under legal incapacity as if he or she were of full capacity and (if it was made by some other person on his or her behalf) as if that other person had made the agreement as his or her agent.

**76 Settlement of proceedings commenced by or on behalf of person under legal incapacity** (cf Act No 25 1929, section 4)

- (1) This section applies to proceedings commenced by or on behalf of any of the following persons:
  - (a) a person under legal incapacity,
  - (b) a person who, during the course of the proceedings, becomes a person under legal incapacity,
  - (c) a person whom the court finds, during the course of the proceedings, to be incapable of managing his or her own affairs.
- (2) The court may make a finding referred to in subsection (1) (c) only on the basis of evidence given in the proceedings in which it is made, and such a finding has effect for the purpose only of those proceedings.
- (3) Except with the approval of the court, there may not be:
  - (a) any compromise or settlement of any proceedings to which this section applies, or
  - (b) any acceptance of money paid into court in any such proceedings, as regards the claim of a person referred to in subsection (1).

- (4) If an agreement for the compromise or settlement of any matter in dispute in any such proceedings is made by or on behalf of a person referred to in subsection (1), the court may approve or disapprove the agreement.
- (5) An agreement disapproved by the court does not bind the person by whom or on whose behalf it was made.
- (6) An agreement approved by the court binds the person by whom or on whose behalf it was made as if he or she were of full capacity and (if it was made by some other person on his or her behalf) as if that other person had made the agreement as his or her agent.

**77 Payment of money recovered on behalf of person under legal incapacity**

(cf Act No 25 1929, section 4)

- (1) This section applies to money recovered in any proceedings on behalf of any of the following persons:
  - (a) a person under legal incapacity,
  - (b) a person who, during the course of the proceedings, becomes a person under legal incapacity,
  - (c) a person whom the court has found, under section 76 (1) (c), to be incapable of managing his or her own affairs,pursuant to a compromise, settlement, judgment or order in any proceedings.
- (2) All money recovered on behalf of a person referred to in subsection (1) is to be paid into court.
- (3) Despite subsection (2), the court may order that the whole or any part of such money not be paid into court but be paid instead:
  - (a) if the person is a minor, to the Public Trustee, or
  - (b) if the person is a protected person, to the manager of the protected person's estate, or
  - (c) in any other case, to such person as the court may direct.
- (4) Money paid into court under subsection (2) is to be paid:
  - (a) if the person is a minor, to the Public Trustee, or
  - (b) if the person is a protected person, to the manager of the protected person's estate, or
  - (c) in any other case, to such person as the court may direct.

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**78 Application of money by Public Trustee** (cf Act No 25 1929, section 5 (1), (2) and (3))

- (1) Subject to any order of the court, money paid under this Division to the Public Trustee on behalf of a minor is to be held and applied by the Public Trustee for the maintenance and education of, or otherwise for the benefit of, the minor.
- (2) On the application of the Public Trustee, the Supreme Court may give directions to the Public Trustee as to the administration of any such money.
- (3) If given effect to by the Public Trustee, any such direction exonerates the Public Trustee from any claim or demand by any other person.

**79 Application of money by manager of protected person's estate** (cf Act No 25 1929, section 5 (4))

Subject to any order of the court, money paid under this Division to the manager of a protected person's estate is to be held and applied by the manager as part of that estate.

**80 Directions to tutor of person under legal incapacity**

On the application of the tutor for a person under legal incapacity, the Supreme Court may give directions with respect to the tutor's conduct of proceedings, whether before the Supreme Court or any other court, on behalf of that person.

**Division 5 Interim payments****81 Definitions and application** (cf Act No 52 1970, sections 76D and 76H; Act No 9 1973, sections 57 and 61)

- (1) In this Division:
  - interim payment***, in relation to proceedings for the recovery of damages, means a payment of any of those damages by a defendant before the completion of the proceedings, either voluntarily or in accordance with an order of the court under this Division.
  - public authority*** means a public or local authority constituted by or under an Act, a Government Department or a statutory body representing the Crown, and includes a person exercising functions on behalf of any such authority, Department or body.
- (2) This Division does not apply to an award of damages to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies.

**82 Court may order interim payments** (cf Act No 52 1970, section 76E; Act No 9 1973, section 58)

- (1) In any proceedings for the recovery of damages, the court may order a defendant in the proceedings to make one or more payments to the plaintiff of part of the damages sought to be recovered in the proceedings.
- (2) The court may make such an order against a defendant on the application of the plaintiff at any stage of the proceedings.
- (3) The court may not make such an order unless:
  - (a) the defendant has admitted liability, or
  - (b) the plaintiff has obtained judgment against the defendant for damages to be assessed, or
  - (c) the court is satisfied that, if the proceedings went to trial, the plaintiff would obtain judgment for substantial damages against the defendant.
- (4) The court may not make such an order if the defendant satisfies the court that:
  - (a) the defendant is not insured in respect of the risk giving rise to the plaintiff's claim for the recovery of damages, and
  - (b) the defendant is not a public authority, and
  - (c) the defendant would, having regard to the defendant's means and resources, suffer undue hardship if such a payment were to be made.
- (5) The court may order a defendant to make one or more payments of such amounts as it thinks just, but not exceeding a reasonable proportion of the damages that, in the court's opinion, are likely to be recovered by the plaintiff.
- (6) In estimating those damages, the court is to take into account any relevant contributory negligence, and any cross-claims, on which the defendant may be entitled to rely.

**83 Interim payment not admission of liability** (cf Act No 52 1970, section 76F; Act No 9 1973, section 59)

- (1) The fact that a defendant makes one or more interim payments is not of itself an admission of liability by the defendant.
- (2) The making of, or refusal to make, an order under this Division is not a finding as to liability in respect of the proceedings.

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**84 Adjustments on final judgment etc** (cf Act No 52 1970, section 76G; Act No 9 1973, section 60)

- (1) This section applies to proceedings in which a defendant makes one or more interim payments.
- (2) The court may make such orders with respect to the interim payments as may be just and, in particular, may order one or more of the following:
  - (a) the variation or discontinuance of interim payments,
  - (b) the repayment by the plaintiff of all or part of any interim payment, with or without interest,
  - (c) the payment by another party of all or part of any interim payment that the defendant is entitled to recover from that other party.
- (3) The court may make an order under this section:
  - (a) when making a final judgment or order, or
  - (b) when granting the plaintiff leave to discontinue proceedings or to withdraw a claim, or
  - (c) on the application of any party, at any other stage of the proceedings.

**Division 6 Miscellaneous****85 Examination on oath** (cf Act No 52 1970, section 83; Act No 9 1973, section 70)

If a person is authorised by this Act or by rules of court, or by an order of the court, to take the examination of any person:

- (a) the examination is to be taken on oath, and
- (b) the oath may be administered by the person taking the examination or by a judicial officer of the court.

**86 Orders** (cf Act No 52 1970, section 21; Act No 9 1973, section 6; SCR Part 1, rule 11A)

- (1) The power of the court to make orders in relation to proceedings, whether under this or any other Act or otherwise, includes the power:
  - (a) to make orders by way of leave or direction, and
  - (b) to make all or any orders on terms.
- (2) The power of the court to make orders on terms is taken to be a power to make orders on such terms and conditions as the court thinks fit.
- (3) Subject to this Act and to rules of court, the court may make any order that it has power to make either of its own motion or on the application of a party or any other person entitled to make such an application.

- (4) Nothing in this Act limits the operation of section 43 of the *Interpretation Act 1987*.

**87 Protection against self-incrimination in relation to interlocutory matters**  
(cf Act No 25 1995, sections 128 and 133)

- (1) In this section:

**civil penalty** has the same meaning as it has in the *Evidence Act 1995*.

**conduct** includes both act and omission.

**culpable conduct** means conduct that, under:

- (a) the laws of New South Wales, or
- (b) the laws of any other State or Territory, or
- (c) the laws of the Commonwealth, or
- (d) the laws of a foreign country,

constitutes an offence or renders a person liable to a civil penalty.

**order for production** means an interlocutory order requiring a person (other than a body corporate) to provide evidence to the court or to a party to a proceeding before the court.

**provide evidence** means:

- (a) to provide an answer to a question or to produce a document or thing, or
- (b) to swear an affidavit, or
- (c) to file and serve an affidavit or a witness statement, or
- (d) to permit possession to be taken of a document or thing.

- (2) This section applies in circumstances in which:

- (a) an application is made for, or the court makes, an order for production against a person, and
- (b) the person objects to the making of such an order, or applies for the revocation of such an order, on the ground that the evidence required by the order may tend to prove that the person has engaged in culpable conduct.

- (3) If the court finds that there are reasonable grounds for the objection or application referred to in subsection (2) (b), the court is to inform the person, or the person's legal representative:

- (a) that the person need not provide the evidence, and
- (b) that, if the person provides the evidence, the court will give a certificate under this section, and
- (c) of the effect of such a certificate.

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- (4) If the person informs the court that he or she will provide the evidence, the court is to cause the person to be given a certificate under this section in respect of the evidence.
- (5) The court is also to cause a person to be given a certificate under this section if the court overrules an objection to the making of an order for production, or refuses an application for the revocation of such an order, but, after the evidence is provided, the court finds that there were reasonable grounds for the objection or application.
- (6) Despite anything in this section, the court may make an order for production if it is satisfied of the following:
- (a) that the evidence required by the order may tend to prove that the person has engaged in culpable conduct,
  - (b) that the culpable conduct does not comprise conduct that, under:
    - (i) the laws of any State or Territory (other than New South Wales), or
    - (ii) the laws of the Commonwealth, or
    - (iii) the laws of a foreign country,constitutes an offence or renders a person liable to a civil penalty,
  - (c) that the interests of justice require that the person provide the evidence.
- (7) If the court makes an order for production under subsection (6), it is to cause the person to be given a certificate under this section in respect of the evidence required by the order.
- (8) In any proceedings:
- (a) evidence provided by a person in respect of which a certificate under this section has been given, and
  - (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having provided such evidence,
- cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.
- (9) If a question arises under this section relating to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

## **88 Fresh trial**

- (1) If a trial of proceedings has commenced before a judicial officer and he or she is unable to continue the trial or give judgment in the proceedings, by reason of death, resignation or incapacity, the senior



judicial officer of the relevant court may nominate some other judicial officer of that court as the judicial officer before whom the proceedings are to be listed for trial.

- (2) In this section, a reference to a trial of proceedings includes a reference to a trial of one or more questions in the proceedings.

**89 Procedure on fresh trial**

- (1) If:
- (a) any proceedings have been listed for trial pursuant to section 88, or
  - (b) an appellate court has made an order for a fresh trial generally (being an order given on an appeal after a trial of any proceedings), or
  - (c) a judicial officer before whom a trial of any proceedings has commenced has discharged himself or herself from the trial without having given judgment in the proceedings,
- the court may give such directions as it thinks fit as to the evidence to be used in the fresh trial.
- (2) In particular, the court may give either or both of the following directions:
- (a) a direction that all or any part of the evidence given at the previous trial is to be taken to be evidence in the fresh trial without the need for the witnesses to be recalled,
  - (b) a direction that all or any of the witnesses are to be recalled for examination or cross-examination, or both, either generally or as to a particular question or questions in the proceedings.
- (3) In subsection (1), a reference to a trial of proceedings includes a reference to a trial of one or more questions in the proceedings.

## Part 7 Judgments and orders

### Division 1 Judgments and orders generally

**90 Judgments generally** (cf Act No 52 1970, section 91; Act No 9 1973, section 81)

- (1) The court is, at or after trial or otherwise as the nature of the case requires, to give such judgment or make such order as the nature of the case requires.
- (2) If there is a claim by a plaintiff and a cross-claim by a defendant, the court:
  - (a) may give judgment for the balance only of the sums of money awarded on the respective claims, or
  - (b) may give judgment in respect of each claim, and may give judgment similarly where several claims arise between plaintiffs, defendants and other parties.

**91 Effect of dismissal of proceedings** (cf SCR Part 40, rule 8)

- (1) Dismissal of:
  - (a) any proceedings, either generally or in relation to any cause of action, or
  - (b) the whole or any part of a claim for relief in any proceedings, does not, subject to the terms on which any order for dismissal was made, prevent the plaintiff from bringing fresh proceedings or claiming the same relief in fresh proceedings.
- (2) Despite subsection (1), if, following a determination on the merits in any proceedings, the court dismisses the proceedings, or any claim for relief in the proceedings, the plaintiff is not entitled to claim any relief in respect of the same cause of action in any subsequent proceedings commenced in that or any other court.

**92 Judgments for possession of land** (cf Act No 52 1970, sections 92 and 96 (3))

Judgment for possession of land takes the place of, and, subject to the uniform rules, has the same effect as, a judgment for the claimant in ejectment given under the practice of the Supreme Court as it was immediately before 1 July 1972.

**Note.** 1 July 1972 was the date of commencement of the *Supreme Court Act 1970*.

**93 Judgments for detention of goods** (cf Act No 52 1970, section 93; Act No 9 1973, section 83; Act No 11 1970, section 28A)

- (1) In proceedings for the detention of goods, the court may (whether or not their value has yet been assessed) give judgment:
  - (a) for their delivery to the plaintiff, or
  - (b) for payment to the plaintiff of an amount equivalent to their assessed value, or
  - (c) for their delivery to the plaintiff or for payment to the plaintiff of their assessed value, at the defendant's option,and, in addition to any judgment referred to in paragraph (a), (b) or (c), may also give judgment for payment to the plaintiff of damages for their detention.
- (2) The court may, in an order for delivery of goods or in a subsequent order, specify the date by which delivery of the goods must be effected.
- (3) If judgment has been given as referred to in subsection (1) (a), but the goods are subsequently damaged, destroyed or otherwise rendered unavailable for delivery, the court may, on application by the plaintiff, make an order for the payment to the plaintiff of an amount equivalent to their assessed value, as referred to in subsection (1) (b).
- (4) If judgment has been given as referred to in subsection (1) (c) and the plaintiff subsequently applies for an order under this subsection, the court may make an order for the delivery of the goods to the plaintiff without the option for any payment of the kind referred to in subsection (1) (b).
- (5) In this section, the *assessed value* of goods is their value as assessed by, or in accordance with the directions of, the court.

**94 Failure to comply with order to execute instrument** (cf Act No 52 1970, section 100)

- (1) If any person does not comply with a judgment or order directing the person:
  - (a) to execute any conveyance, contract or other document, or
  - (b) to endorse any negotiable instrument,the court may order that the conveyance, contract or other document be executed, or the negotiable instrument endorsed, by such person as the court may nominate for that purpose.
- (2) A conveyance, contract, document or instrument that is executed or endorsed pursuant to an order under subsection (1) operates, and is for all purposes available, as if it had been executed or endorsed by the person originally directed to execute or endorse it.

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**95 Joint liability** (cf Act No 52 1970, section 97)

- (1) If two or more persons have a joint liability and, in any proceedings, judgment on the liability is given against one or more but not all of them:
  - (a) the liability of the other or others of them is not discharged by the judgment or by any step taken for the enforcement of the judgment, and
  - (b) after the judgment takes effect, those of them against whom the judgment is given and the other or others of them become liable, as between those of them against whom the judgment is given on the one hand and the other or the others of them on the other hand, severally but not jointly, and
  - (c) if there are two or more such persons against whom the judgment is not given, they remain, after the judgment takes effect, jointly liable amongst themselves, and
  - (d) if the judgment is satisfied wholly or in part by payment or by recovery under execution, the liability of the persons against whom the judgment is not given is taken also to have been satisfied in the amount of the payment or recovery.
- (2) This section does not affect a person's right to contribution or indemnity in respect of the person's satisfaction, wholly or in part, of a liability that the person has (whether jointly or severally or jointly and severally) with any other person.
- (3) This section does not apply to a judgment to which section 5 (1) (a) of the *Law Reform (Miscellaneous Provisions) Act 1946* applies.
- (4) In this section, **liability** includes liability in contract, liability in tort and liability under a statute.

**96 Set-off of judgments** (cf DCR Part 31, rule 23; Act No 11 1970, section 64)

- (1) This section applies if, in relation to any two or more judgments of the same court, the judgment creditor and judgment debtor under one or more of the judgments are the judgment debtor and judgment creditor, respectively, under the other judgments.
- (2) The judgment debtor under any such judgment (***the first judgment***) may apply to the court for an order that the judgment be set off against any other such judgment (***the second judgment***) in respect of which he or she is the judgment creditor.
- (3) An order under this section has the following effect:
  - (a) if the amount of the first judgment is less than the amount of the second judgment, the first judgment is taken to have been

- satisfied and the amount of the second judgment is taken to have been reduced by the amount of the first judgment,
- (b) if the amount of the first judgment is equal to the amount of the second judgment, both judgments are taken to have been satisfied,
  - (c) if the amount of the first judgment is greater than the amount of the second judgment, the second judgment is taken to have been satisfied and the amount of the first judgment is taken to have been reduced by the amount of the second judgment.
- (4) For the purposes of this section:
- (a) judgments of different Local Courts are taken to be judgments of the same court, and
  - (b) an application for an order that one such judgment be set off against another may be made to either of the Local Courts in which those judgments were given or entered.
- (5) This section does not apply to judgments of the Supreme Court.

**97 Arrest warrants** (cf SCR Part 42, rule 7)

- (1) Subject to rules of court:
- (a) if, by subpoena or otherwise, the court makes an order, whether under this or any other Act or under rules of court:
    - (i) for a person to attend court for any purpose, or
    - (ii) for a person to produce any document or thing to the court, and
  - (b) the person fails to comply with the order,
- the court may issue, or make an order for the issue of, a warrant for the person's arrest.
- (2) Subject to rules of court, an arrest warrant may be issued without notice to the person.
- (3) The court from which an arrest warrant has been issued may revoke the warrant.
- (4) An arrest warrant is sufficient authority for any person to whom it is addressed, with the assistance of such police officers as may be necessary, to arrest the person named in the warrant, to convey the person to the place specified in the warrant and to deliver the person into the custody of the court sitting at that place.

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## Division 2      Costs in proceedings

**98 Courts powers as to costs** (cf Act No 52 1970, section 76; SCR Part 52A, rules 5, 6, 7 and 8; Act No 9 1973, section 148B; Act No 11 1970, section 34)

- (1) Subject to rules of court and to this or any other Act:
  - (a) costs are in the discretion of the court, and
  - (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and
  - (c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.
- (2) Subject to rules of court and to this or any other Act, a party to proceedings may not recover costs from any other party otherwise than pursuant to an order of the court.
- (3) An order as to costs may be made by the court at any stage of the proceedings or after the conclusion of the proceedings.
- (4) In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to:
  - (a) costs up to, or from, a specified stage of the proceedings, or
  - (b) a specified proportion of the assessed costs, or
  - (c) a specified gross sum instead of assessed costs, or
  - (d) such proportion of the assessed costs as does not exceed a specified amount.
- (5) The powers of the court under this section apply in relation to a married woman, whether as party, tutor, relator or otherwise, and this section has effect in addition to, and despite anything in, the *Married Persons (Equality of Status) Act 1996*.
- (6) In this section, *costs* include:
  - (a) the costs of the administration of any estate or trust, and
  - (b) in the case of an appeal to the court, the costs of the proceedings giving rise to the appeal, and
  - (c) in the case of proceedings transferred or removed into the court, the costs of the proceedings before they were transferred or removed.

**99 Liability of legal practitioner for unnecessary costs** (cf Act No 52 1970, section 76C; SCR Part 52A, rules 43 and 43A)

- (1) This section applies if it appears to the court that costs have been incurred:

- (a) by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or
  - (b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.
- (2) After giving the legal practitioner a reasonable opportunity to be heard, the court may do any one or more of the following:
- (a) it may, by order, disallow the whole or any part of the costs in the proceedings:
    - (i) in the case of a barrister, as between the barrister and the instructing solicitor, or as between the barrister and the client, as the case requires, or
    - (ii) in the case of a solicitor, as between the solicitor and the client,
  - (b) it may, by order, direct the legal practitioner:
    - (i) in the case of a barrister, to pay to the instructing solicitor or client, or both, the whole or any part of any costs that the instructing solicitor or client, or both, have been ordered to pay to any other person, whether or not the solicitor or client has paid those costs, or
    - (ii) in the case of a solicitor, to pay to the client the whole or any part of any costs that the client has been ordered to pay to any other person, whether or not the client has paid those costs,
  - (c) it may, by order, direct the legal practitioner to indemnify any party (other than the client) against costs payable by that party.
- (3) Before making such an order, the court may refer the matter to a costs assessor (within the meaning of Part 11 of the *Legal Profession Act 1987*) for inquiry and report.
- (4) The court may direct that notice of any proceedings or order under this section with respect to a legal practitioner be given:
- (a) in the case of a barrister, to the instructing solicitor or client, or both, as the court may direct, or
  - (b) in the case of a solicitor, to the client.
- (5) The court may give ancillary directions to give full effect to an order under this section, including directions to a legal practitioner to provide a bill of costs in assessable form:
- (a) to the court, or
  - (b) to a party to the proceedings, or

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- (c) in the case of a barrister, to the instructing solicitor or client, or both, or
  - (d) in the case of a solicitor, to the client.
- (6) A party's legal practitioner is not entitled to demand, recover or accept:
- (a) in the case of a barrister, from the instructing solicitor or client, or
  - (b) in the case of a solicitor, from the client,
- any part of the amount for which the legal practitioner is directed by the court to indemnify any party pursuant to an order referred to in subsection (2) (c).
- (7) In this section, *client* includes former client.

### Division 3 Payment of interest

**100 Interest up to judgment** (cf Act No 52 1970, section 94; Act No 9 1973, section 83A; Act No 11 1970, section 39A)

- (1) In proceedings for the recovery of money (including any debt or damages or the value of any goods), the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate as the court thinks fit:
  - (a) on the whole or any part of the money, and
  - (b) for the whole or any part of the period from the time the cause of action arose until the time the judgment takes effect.
- (2) In proceedings for the recovery of a debt or damages in which payment of the whole or a part of the debt or damages has been made after the proceedings commenced but before, or without, judgment being given, the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate as the court thinks fit:
  - (a) on the whole or any part of the money paid, and
  - (b) for the whole or any part of the period from the time the cause of action arose until the time the money was paid.
- (3) This section:
  - (a) does not authorise the giving of interest on any interest awarded under this section, and
  - (b) does not authorise the giving of interest on a debt in respect of any period for which interest is payable as of right, whether by virtue of an agreement or otherwise, and
  - (c) does not authorise the giving of interest in any proceedings for the recovery of money in which the amount claimed is less than such amount as may be prescribed by the uniform rules, and



- (d) does not affect the damages recoverable for the dishonour of a bill of exchange.
- (4) In any proceedings for damages, the court may not order the payment of interest under this section in respect of the period from when an appropriate settlement sum was offered (or first offered) by the defendant unless the special circumstances of the case warrant the making of such an order.
- (5) For the purposes of subsection (4), *appropriate settlement sum* means a sum offered in settlement of proceedings in which the amount for which judgment is given (including interest accrued up to and including the date of the offer) does not exceed the sum offered by more than 10 per cent.

**101 Interest after judgment** (cf Act No 52 1970, section 95; Act No 9 1973, section 85; Act No 11 1970, section 39)

- (1) Unless the court orders otherwise, interest is payable on so much of the amount of a judgment (exclusive of any order for costs) as is from time to time unpaid.
- (2) Interest under subsection (1) is to be calculated, at the prescribed rate or at such other rate as the court may order, as from:
  - (a) the date on which the judgment takes effect, or
  - (b) such later date as the court may order.
- (3) Despite subsection (1), interest is not payable on the amount of a judgment if the amount is paid in full within 28 days after the date on which the judgment takes effect, unless the court orders to the contrary.
- (4) The court may order that interest is to be paid on any amount payable under an order for the payment of costs.
- (5) Interest under subsection (4) is to be calculated, at the prescribed rate or at such other rate as the court may order, as from:
  - (a) the date or dates on which the costs concerned were paid, or
  - (b) such later date as the court may order.
- (6) This section does not authorise the giving of interest on any interest payable under this section.
- (7) In this section, a reference to the *prescribed rate* of interest is a reference to the rate of interest prescribed by the uniform rules for the purposes of this section.

**Note.** See section 136 in relation to the order in which payments on account of a judgment debt are to be appropriated.

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## Part 8 Enforcement of judgments and orders

### Division 1 Preliminary

#### 102 Definitions (cf Act No 9 1973, section 99; Act No 11 1970, section 49)

In this Part:

*chargee* means the person to whom a charging order is addressed.

*charging order* means an order referred to in section 106 (1) (c).

*financial institution* means an authorised deposit-taking institution within the meaning of the *Banking Act 1959* of the Commonwealth.

*garnishee* means the person to whom a garnishee order is addressed.

*garnishee order* means an order referred to in section 106 (1) (b).

*goods* means chattels, other than chattels real.

*instalment order* means an order referred to in section 107 (1).

*order for examination* means an order referred to in section 108 (1).

*wage or salary* includes:

- (a) earnings that, although not payable under a contract of employment, are analogous to or in the nature of wage or salary, and
- (b) earnings of a share farmer or share worker.

*writ for the levy of property* means a writ referred to in section 106 (1) (a).

*writ of delivery* means a writ referred to in section 105.

*writ of execution* means a writ of delivery, writ for the levy of property or writ of possession.

*writ of possession* means a writ referred to in section 104.

**Note.** Other words and expressions (for example, *land* and *property*) are defined in the *Interpretation Act 1987*.

#### 103 Enforcement of judgments generally

Subject to this Part, the procedure for enforcing a judgment or order of the court is to be as prescribed by rules of court.

#### 104 Judgments for possession of land

- (1) A judgment for the possession of land may be enforced by a writ of possession.
- (2) Execution of a writ of possession does not require any goods to be removed from the land.

**105 Judgments for delivery of goods**

A judgment or order for the delivery of goods may be enforced by a writ of delivery.

**106 Judgments for payment of money** (cf Act No 9 1973, section 109; Act No 8 1901, sections 4 and 5)

- (1) A judgment debt may be enforced by means of any one or more of the following:
  - (a) a writ for the levy of property,
  - (b) a garnishee order,
  - (c) in the case of a judgment of the Supreme Court or the District Court, a charging order.
- (2) Subject to the uniform rules, a writ for the levy of property is sufficient authority for the Sheriff:
  - (a) to seize and to sell goods of or to which the judgment debtor is or may be possessed or entitled or which the judgment debtor may, at law or in equity, assign or dispose of, and
  - (b) to seize money belonging to the judgment debtor, and
  - (c) to seize and to realise cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the judgment debtor, and
  - (d) to enter into possession of, and to sell, land of or to which the judgment debtor is seized or entitled, or which the judgment debtor may, at law or in equity, assign or dispose of, and
  - (e) to take and to sell choses in action or equitable interests in goods or land held by the judgment debtor.
- (3) The power conferred on the Sheriff by subsection (2) (a) may not be exercised in relation to:
  - (a) any clothing, or
  - (b) any bedroom or kitchen furniture, or
  - (c) any tools of trade (including vehicles, plant, equipment and reference books) not exceeding, in aggregate value, the sum prescribed by the uniform rules,if the clothing, furniture or tools are used by the judgment debtor or by any member of his or her family.
- (4) For the purposes of subsection (2) (d), the Sheriff is taken to have entered into possession of land when notice of the proposed sale of the land is published in accordance with the uniform rules.

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- (5) The power conferred on the Sheriff by subsection (2) (d) may not be exercised in relation to land if the amount outstanding under the judgment is less than the jurisdictional limit of a Local Court when sitting in its Small Claims Division.
- (6) A garnishee order or charging order addressed to the Crown binds the Crown as garnishee or chargee, as the case requires.
- Note.** Divisions 2, 3 and 4, respectively, apply to the enforcement of writs for the levy of property, garnishee orders and charging orders.

### 107 Deferred payment and payment by instalments

- (1) A court in which judgment has been entered may, subject to and in accordance with the uniform rules, make an order allowing for:
- (a) payment of the judgment debt within such time as is specified in the order, or
  - (b) payment of the judgment debt by instalments, payable in such amounts and at such times as are specified in the order.
- Note.** Such an order may be varied or rescinded pursuant to section 43 (2) of the *Interpretation Act 1987*. The circumstances in which such an order may be varied or rescinded, and the procedure for varying or rescinding such an order, may be dealt with by the uniform rules.
- (2) Subject to section 119, execution of a judgment for the payment of money is stayed while the judgment is the subject of an order in force under this section.
- (3) If the uniform rules so provide, the functions conferred on a Local Court by this section in relation to a judgment debt may be exercised by any Local Court, whether or not the Local Court in which the judgment was given.

### 108 Order for examination (cf Act No 9 1973, section 91; Act No 11 1970, section 41; SCR Part 43, rule 1)

- (1) The court may, subject to and in accordance with the uniform rules, make an order requiring a person bound by a judgment or order:
- (a) to attend the court to be orally examined as to any material question, or
  - (b) to produce any document or thing that is in his or her possession and that relates to a material question.
- (2) An order under this section with respect to a person that is a corporation:
- (a) may be addressed to any officer or former officer of the corporation, and
  - (b) binds any such officer or former officer as if he or she were the person bound by the judgment or order.

- (3) Without limiting subsection (1), the uniform rules may require the judgment creditor under a judgment debt to have attempted to obtain information as to the judgment debtor's financial circumstances (whether by means of a notice requiring the judgment debtor to supply such information or otherwise) before the judgment creditor may apply for an order under this section.
- (4) If the uniform rules so provide, the functions conferred on a Local Court by this section in relation to a judgment or order may be exercised by any Local Court, whether or not the Local Court in which the judgment or order was given or made.
- (5) For the purposes of this section, the *material questions* in relation to a judgment or order are:
  - (a) to the extent to which it requires the person bound by it to pay money:
    - (i) questions as to whether any and, if so, what debts are owing to that person, and
    - (ii) questions as to whether that person has any and, if so, what other property or other means of satisfying the judgment or order, and
  - (b) to the extent to which it does not require the person bound by it to pay money, such questions concerning or in aid of the enforcement or satisfaction of the judgment or order as may be specified in the order under this section.

## **Division 2 Writs for the levy of property**

### **Subdivision 1 Enforcement against goods and securities**

#### **109 Effect of writ of execution on goods** (cf Act No 1 1923, section 29)

- (1) A writ of execution against goods binds the property in the goods as from the time the writ is delivered to the Sheriff.
- (2) Despite subsection (1), a writ of execution does not affect the title to goods acquired by a person in good faith and for valuable consideration unless, when the person acquires title, he or she has notice that such a writ has been delivered to the Sheriff and remains unexecuted.

#### **110 How goods subject to conditional bill of sale to be dealt with** (cf Act No 8 1901, section 16)

- (1) If goods the subject of a writ for the levy of property (being goods in the possession of the judgment debtor) are the subject of a conditional bill of sale, the Sheriff may sell the judgment debtor's interest in the goods without taking possession of them.

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- (2) On receiving written notice of the purchase of the judgment debtor's interest, the person having the benefit of the bill of sale (*the holder of the bill*) may take possession of the goods and, if he or she does so, is taken to hold them for the use of the purchaser, subject to the purchaser's due payment of any amounts payable under the bill of sale.
  - (3) If the goods are subsequently sold under the bill of sale, and there is any surplus remaining from the proceeds of sale after the debt to the holder of the bill is satisfied, the holder must pay the surplus to the purchaser, and, accordingly, the amount of that surplus is recoverable by the purchaser from the holder as a debt.
  - (4) Nothing in this section affects the right of any judgment creditor to test the validity of any bill of sale by interpleader.

**111 How securities to be dealt with** (cf Act No 8 1901, sections 6, 7 and 8)

- (1) The Sheriff may hold any cheque, bill of exchange, promissory note, bond, specialty or other security for money as a security for the amount outstanding under the judgment and, if payment thereof has become due, may sue in the name of the Sheriff for the recovery of the sum secured thereby.
- (2) The payment to the Sheriff by the person liable on any such security for money, or the recovery by the Sheriff against the person so liable, discharges the person from that liability to the extent of the payment or recovery.

## **Subdivision 2 Enforcement against land**

**112 Effect of judgment and writ of execution on land** (cf Act No 8 1901, section 13)

- (1) A writ of execution against land binds the land, as from the time the writ is delivered to the Sheriff, in the same way as a writ of execution against goods binds the property in the goods.
- (2) Despite subsection (1), a writ of execution does not affect the title to land acquired by a person in good faith and for valuable consideration unless, when the person acquires title, he or she has notice that such a writ has been delivered to the Sheriff and remains unexecuted.
- (3) A judgment in any action at law does not of itself bind or affect any land.

**113 Sale or mortgage by judgment debtor of land affected by order** (cf Act No 52 1970, section 98A; Act No 9 1973, section 112; Act No 11 1970, section 62A)

- (1) This section applies to land the subject of a writ for the levy of property:
  - (a) that is registered, in the Register kept under the *Real Property Act 1900*, pursuant to section 105 of that Act, or
  - (b) that is registered, in the General Register of Deeds kept under the *Conveyancing Act 1919*, pursuant to section 186 of that Act.
- (2) During the period:
  - (a) that begins when the writ is registered in the relevant register, and
  - (b) that ends at the expiration of 6 months after the writ is registered in the relevant register, or on the expiration of the writ, whichever first occurs,land the subject of the writ may not be sold or mortgaged by the judgment debtor otherwise than in accordance with this section.
- (3) Before the land may be sold or mortgaged by the judgment debtor:
  - (a) the judgment creditor:
    - (i) must consent, by notice in writing, to the sale or mortgage of the land by the judgment debtor, and
    - (ii) must stipulate, in the notice of consent, the minimum amount to be paid to the Sheriff from the proceeds of the sale of the land or from the money advanced under the mortgage of the land, and
  - (b) the judgment debtor must lodge the notice of consent with the Sheriff, and
  - (c) the Sheriff, after due inquiry, must endorse the notice of consent with a certificate to the effect that the land has not been sold under the writ.
- (4) During the period of 8 weeks commencing on the date on which the Sheriff endorses the notice of consent, as referred to in subsection (3) (c):
  - (a) the judgment debtor may enter into an agreement for the sale or mortgage of the land, and
  - (b) the Sheriff is prohibited from causing the land to be sold.
- (5) Any deposit paid under an agreement for the sale of the land is to be paid to the Sheriff, to be held by the Sheriff as stakeholder.
- (6) On payment to the Sheriff, from the proceeds of the sale of the land or from the money advanced under the mortgage of the land, of an amount that (together with any such deposit) is at least as much as the minimum amount referred to in subsection (3) (a) (ii):

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- (a) any liability of the purchaser or mortgagee for payment to the judgment debtor from those proceeds or that advance is extinguished, to the extent of the amount paid to the Sheriff, and
  - (b) the Sheriff, on production of the agreement for the sale or mortgage of the land, must endorse the agreement with the Sheriff's consent to the sale or mortgage.
- (7) The purchaser's or mortgagee's interest in the land, as evidenced by the agreement so endorsed, is not affected by anything done under the writ, whether before or after the endorsement of the consent.
- (8) The amount paid to the Sheriff, as referred to in subsection (6), is to be paid:
- (a) firstly, towards the Sheriff's costs in connection with the execution of the writ, and
  - (b) secondly, in reduction of the judgment debt, and
  - (c) thirdly, if the amount exceeds the amounts required to satisfy the Sheriff's costs and the judgment debt, to the judgment debtor.
- (9) In this section, *notice of consent* means a notice referred to in subsection (3) (a) (i).

**114 Entry onto land for purposes of sale by auction** (cf Act No 8 1901, section 17A)

- (1) The court may, in relation to land to be sold by public auction under a writ of execution, make orders:
- (a) authorising entry onto the land by the Sheriff (including entry by force if necessary) for the purpose of showing the land to prospective purchasers, and
  - (b) authorising entry onto the land by prospective purchasers in the presence of the Sheriff.
- (2) For those purposes, such an order may also authorise the Sheriff to do either or both of the following:
- (a) to secure entry onto the land (including by breaking or replacing locks, bars and other devices restricting entry, if necessary),
  - (b) to take such steps as are necessary to prevent persons from entering the land.
- (3) This section does not affect any other power of the court to make orders in relation to such matters.
- (4) A reference in this section to land includes any premises on land.



### **Subdivision 3 General**

#### **115 Effect of sale of property** (cf Act No 8 1901, section 12)

- (1) A sale of property by the Sheriff under this Part is as valid and effectual as if the property had been sold to the purchaser by the judgment debtor personally.
- (2) Subsection (1) does not apply to the sale of an equity of redemption or other equitable interest relating to land unless a deed of bargain and sale to the purchaser is duly executed by the Sheriff.
- (3) In a deed of conveyance executed by the Sheriff in relation to any land, a statement to the effect that:
  - (a) the land has been sold under a writ for the levy of property, and
  - (b) the writ for the levy of property has been issued pursuant to a judgment of a court in relation to proceedings specified in the writ,is admissible in any proceedings as evidence of those facts.

#### **116 Effect of expiry of writ**

Subject to section 135:

- (a) the expiry of a writ for the levy of property does not affect any agreement for sale or other transaction entered into under the authority of the writ before that expiry, and
- (b) any action necessary to complete that sale or give effect to that transaction may be taken as if the writ were still in force.

### **Division 3 Garnishee orders**

#### **Subdivision 1 Enforcement against debts**

#### **117 Operation of garnishee order in relation to debts** (cf Act No 9 1973, section 97)

- (1) Subject to the uniform rules, a garnishee order operates to attach, to the extent of the amount outstanding under the judgment, all debts that are due or accruing from the garnishee to the judgment debtor at the time of service of the order.
- (2) For the purposes of this Division, any amount standing to the credit of the judgment debtor in a financial institution is taken to be a debt owed to the judgment debtor by that institution.

**118 Time within which payment to be made** (cf Act No 9 1973, section 97B; Act No 11 1970, section 47B)

Payment of an amount with respect to a debt attached by a garnishee order must be made:

- (a) within 14 days after the date on which the order is served on the garnishee, or
- (b) if the order attaches a debt that falls due after that date, within 14 days after the date on which the debt falls due.

**Subdivision 2 Enforcement against income****119 Operation of garnishee order in relation to income** (cf Act No 9 1973, section 97)

- (1) Subject to sections 121 and 122 and the uniform rules, a garnishee order operates to attach, to the extent of the amount outstanding under the judgment:
  - (a) any wage or salary that, while the order is in force, is payable to the judgment debtor by the garnishee, or
  - (b) if the judgment debt becomes the subject of an instalment order, such amounts from the wage or salary payable to the judgment debtor by the garnishee as are equivalent to the instalments payable under the instalment order.
- (2) An instalment order with respect to a judgment debt the subject of a garnishee order takes effect in relation to the amounts payable under the garnishee order as from the time the instalment order is served on the garnishee.
- (3) A garnishee order ceases to have effect, in relation to the wage or salary payable to a judgment debtor, when the judgment debt is satisfied.
- (4) An order under this section addressed to the Crown as garnishee binds the Crown.

**120 Time within which payment to be made** (cf Act No 9 1973, section 97B; Act No 11 1970, section 47B)

Payment of an amount with respect to a wage or salary attached by a garnishee order must be made within 14 days after the date on which the wage or salary falls due.

**121 Maximum payment under one of several concurrent garnishee orders**

(cf Act No 9 1973, section 101; Act No 11 1970, section 51)

- (1) This section applies in circumstances in which a wage or salary is attached by one or more garnishee orders of which one or more (but not all) are limited garnishee orders.

- (2) Unless the court orders otherwise, the amount payable by a garnishee under a garnishee order that is not a limited garnishee order must not, in respect of any wage or salary attached by the garnishee order, exceed the greatest amount payable by the garnishee under any limited garnishee order that attaches the same wage or salary.
- (3) In this section, **limited garnishee order** means a garnishee order in respect of a judgment debt that is the subject of an instalment order.

**122 Maximum total payment under all garnishee orders** (Act No 9 1973, section 99; Act No 11 1970, section 49)

- (1) The amounts attached under one or more garnishee orders must not, in total, reduce the net weekly amount of any wage or salary received by the judgment debtor from the garnishee to less than 80 per cent of the standard workers compensation weekly benefit.
- (2) In this section:  
**net weekly amount**, in relation to any wage or salary payable to a judgment debtor, means the amount payable each week to the judgment debtor after deducting any taxes or other sums that, pursuant to any Act (including any Commonwealth Act), are required to be deducted from any such money.  
**standard workers compensation weekly benefit** means an amount equivalent to the weekly payment of compensation referred to in section 37 (1) (a) (i) of the *Workers Compensation Act 1987*, as adjusted under Division 6 of Part 3 of that Act.

### Subdivision 3 General

**123 Payments by garnishee** (cf Act No 9 1973, section 105; DCR Part 33, rule 7; Act No 11 1970, section 47D; LCR Part 29, rule 3)

- (1) A payment under a garnishee order must be made in accordance with, and to the judgment creditor specified in, the order.
- (2) Out of each amount attached under the garnishee order, the garnishee:
  - (a) subject to payment of the balance being made within the time required by section 118 or 120, as the case may be, may retain up to the amount prescribed by the uniform rules to cover the garnishee's expenses in complying with the garnishee order, and
  - (b) must pay the balance to the judgment creditor.
- (3) A payment to the judgment creditor must be accompanied by a statement showing:
  - (a) the amount attached under the garnishee order, and
  - (b) how much of that amount has been retained by the garnishee, and

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- (c) how much of that amount has been paid to the judgment creditor.
- (4) As between the garnishee and the judgment debtor, the amount attached under the garnishee order is taken, subject to any order of the court, to have been paid by the garnishee to the judgment debtor.  
**Note.** Such an order may be made, for example, if the garnishee has failed to comply with the requirements of subsection (3).
- (5) As between the judgment creditor and the judgment debtor, the amount of the payment to the judgment creditor is taken to have been paid by the judgment debtor to the judgment creditor in satisfaction, to the extent of that amount, of the judgment.

**124 Procedure where garnishee order not complied with** (cf Act No 9 1973, section 102; Act No 11 1970, section 52)

- (1) On the application of a judgment creditor who considers that a garnishee order has not been complied with, the court:
- (a) may hear and determine any question as to the liability of the garnishee to pay the debt, wage or salary sought to be attached by the garnishee order, and
- (b) if satisfied that the garnishee is so liable, may give judgment in favour of the judgment creditor against the garnishee:
- (i) for the amount of that debt, wage or salary, or
- (ii) for the unpaid amount of the judgment debt, whichever is the lesser.
- (2) The court may refuse to give such a judgment if it is of the opinion that such a judgment should not be given.
- (3) Without limiting subsection (2), the reasons that may lead the court to form such an opinion may include:
- (a) the smallness of the amount outstanding under the judgment, and
- (b) the smallness of the debt, wage or salary to be attached.
- (4) As between the garnishee and the judgment debtor, an amount paid to the judgment creditor by the garnishee under a judgment given under this section is taken to have been paid to the judgment debtor.

**125 Repayment of excess amounts** (cf Act No 9 1973, section 106; Act No 11 1970, section 56)

- (1) If a judgment creditor receives an amount paid under a garnishee order in excess of the amount required to satisfy the judgment, the judgment creditor:
- (a) must forthwith notify the judgment debtor and the garnishee of that fact, and

- (b) on demand made by the judgment debtor, must repay the excess to the judgment debtor.
- (2) The amount of the excess is recoverable from the judgment creditor, by the judgment debtor or by the garnishee, as a debt in any court of competent jurisdiction.

#### **Division 4 Charging orders**

**126 Operation of charging order in relation to specified security interests (cf Act No 8 1901, section 27)**

- (1) This section applies to the following kinds of property in relation to a judgment debtor (referred to in this Division as *security interests*):
  - (a) stock and shares in a public company,
  - (b) money on deposit in a financial institution, being:
    - (i) money held in the judgment debtor's name in the judgment debtor's own right, or
    - (ii) money held in the name of some other person in trust for the judgment debtor,
  - (c) any equitable interest in property.
- (2) Subject to the uniform rules, a charging order operates, in relation to each security interest specified in the order:
  - (a) to charge the security interest in favour of the judgment creditor to the extent necessary to satisfy the judgment, and
  - (b) to restrain the chargee from dealing with the security interest otherwise than in accordance with the directions of the judgment creditor.
- (3) A charging order takes effect when it is made.
- (4) Despite subsection (3), the judgment creditor may not commence proceedings to take the benefit of a charge arising under a charging order until after the expiration of 3 months from the date of the order.
- (5) A charging order entitles the judgment creditor, in relation to the security interests charged by the order, to any relief to which the judgment creditor would have been entitled had the charge been made in the judgment creditor's favour by the judgment debtor.

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**127 Unauthorised transfer or disposal of security interest under charging order** (cf Act No 8 1901, section 29)

- (1) A chargee or other person who, having notice of a charging order, deals with any security interest charged by the order otherwise than in accordance with the directions of the judgment creditor is liable to the judgment creditor for such amount (not exceeding the value of the security interest) as may be necessary to satisfy the judgment.
- (2) This section does not prevent the court from granting the judgment creditor, as a consequence of the chargee or other person having dealt with the security interest, any relief that is available apart from this section.

**128 Disposal of security interest by judgment debtor invalid** (cf Act No 8 1901, section 30)

While a charging order is in force, any purported transfer or disposal by the judgment debtor of a security interest charged by the order, being a transfer or disposal effected otherwise than in accordance with the directions of the judgment creditor, is of no effect as against the judgment creditor.

**Division 5 Miscellaneous****129 No arrest on mesne process** (cf Act No 52 1970, section 10)

- (1) No person is to be arrested on mesne process issued by the court.
- (2) This section does not affect any power of arrest exercisable pursuant to an arrest warrant issued under this or any other Act.

**130 Judgments not enforceable by certain means** (cf Act No 52 1970, section 98)

A judgment or order is not enforceable against a person:

- (a) by any process for attachment of the person, or
- (b) by any process for committal of the person, or
- (c) by any writ of *capias ad satisfaciendum*.

**131 Committal for contempt**

Nothing in this Act or the uniform rules limits or otherwise affects the power of the court to attach or commit a person for contempt.

**132 Sheriff may appoint custodian for goods** (cf Act No 9 1973, section 109 (9))

- (1) After seizing a judgment debtor's goods pursuant to a writ of delivery or writ for the levy of property, the Sheriff, by notice in writing served on:

- (a) the judgment debtor, or
  - (b) any other person who has the custody of the goods,
- may appoint the judgment debtor or other person as custodian of the goods pending their delivery or sale under the writ.
- (2) A custodian so appointed, and any other person aware that a custodian is so appointed, must not:
    - (a) sell, give or otherwise deal with the goods, or
    - (b) damage or destroy the goods, or
    - (c) hide or remove the goods, or
    - (d) cause, permit or allow the goods to be sold, given or otherwise dealt with, damaged or destroyed or hidden or removed,otherwise than with the leave of the court or the written consent of the Sheriff.
- Maximum penalty: 50 penalty units.
- (3) Prosecution of a person for an offence under subsection (2) does not prevent any other proceedings from being taken against the person in respect of an alleged failure to comply with a duty arising from the person's appointment as a custodian of goods.

**133 Judgments and orders unenforceable until entered**

- (1) A judgment or order of the court may not be enforced until it has been entered in accordance with the uniform rules.
- (2) This section extends to:
  - (a) any judgment, order, determination or decree of a court, and
  - (b) any adjudication or award of a person having authority to make an adjudication or award,that may be filed or registered in the court, or of which a certificate may be filed or registered in the court, under any other Act or law.
- (3) In subsection (2), *law* includes:
  - (a) a law of the Commonwealth, and
  - (b) a law of another State or Territory, and
  - (c) in relation to the Supreme Court, a law of a foreign country.

**134 Stale judgments and orders enforceable only by leave** (cf Act No 9 1973, section 84A)

- (1) An application by a judgment creditor for:
  - (a) a writ of execution, or
  - (b) a garnishee order, or

- (c) a charging order, or
- (d) an order for examination,

may not be made, except by leave of the court, if the prescribed period has elapsed since the judgment was given or (in the case of a judgment, order or decree referred to in section 133 (2)) was registered as referred to in section 133 (2).

- (2) In this section, *prescribed period* means 12 years or, if the uniform rules prescribe a different period, the period so prescribed.

### **135 Directions as to enforcement**

- (1) The court may, by order, give directions with respect to the enforcement of its judgments and orders.
- (2) Without limiting subsection (1), the court may make any of the following orders:
  - (a) an order authorising the Sheriff to enter premises for the purpose of taking possession of goods under a writ of execution,
  - (b) an order prohibiting the Sheriff from taking any further action on a writ,
  - (c) an order prohibiting any other person from taking any further action, either permanently or until a specified day, to enforce a judgment or order of the court,
  - (d) an order requiring the Registrar-General to cancel any recording of a writ for the levy of property that, under section 105 of the *Real Property Act 1900*, has been made in the Register under that Act, either generally or in relation to specified land.

### **136 Appropriation of payments towards judgment debt**

Unless the court otherwise orders, any payment made on account of a judgment debt is to be appropriated:

- (a) firstly, towards such part of the judgment debt as comprises interest payable under section 101, and
- (b) secondly, towards the balance of the judgment debt.

### **137 Execution of judgments and orders for costs**

- (1) A judgment may be enforced in relation to costs separately from its enforcement in relation to matters other than costs.
- (2) Unless the court otherwise orders, the costs recoverable under a writ of execution, garnishee order or charging order include:



- (a) costs in relation to any prior writ of execution, garnishee order or charging order in relation to the same judgment, whether or not the prior writ or order was productive, and
- (b) money recoverable under section 107 (1) of the *Service and Execution of Process Act 1992* of the Commonwealth.

**138 Other methods of enforcing judgments**

- (1) Nothing in this Part limits the manner in which a judgment or order of the court may be enforced apart from this Act.
- (2) Without limiting subsection (1), nothing in this Part prevents the court:
  - (a) from issuing consecutive writs for the levy of property against the same judgment debtor, or making consecutive garnishee orders or consecutive charging orders in respect of the same judgment debtor, in respect of the same judgment debt, or
  - (b) from making concurrent garnishee orders against different garnishees, or consecutive garnishee orders against the same garnishee, in respect of the same judgment debt.

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## Part 9 Transfer of proceedings between courts

### Division 1 Transfer of proceedings from lower to higher court

#### 139 Definitions

In this Division:

*higher court* means the court to which proceedings are transferred, or are proposed to be transferred, by a transfer order.

*lower court* means the court from which proceedings are transferred, or are proposed to be transferred, by a transfer order.

*transfer order* means an order referred to in section 140.

#### 140 Transfer of proceedings to higher court (cf Act No 9 1973, section 145; Act No 11 1970, section 21B)

- (1) The Supreme Court may, of its own motion or on application by a party to proceedings before the District Court or a Local Court, order that the proceedings, including any cross-claim in the proceedings, be transferred to the Supreme Court.
- (2) The District Court may, of its own motion or on application by a party to proceedings before a Local Court, order that the proceedings, including any cross-claim in the proceedings, be transferred to the District Court.
- (3) Proceedings in the District Court on a claim for damages arising from personal injury or death are not to be transferred to the Supreme Court under this section unless the Supreme Court is satisfied:
  - (a) in the case of a motor accident claim or a workplace injury damages claim:
    - (i) that the amount to be awarded to the plaintiff, if successful, is likely to be more than \$1,000,000, and
    - (ii) that the case involves complex legal issues or issues of general public importance, or
  - (b) in any other case:
    - (i) that the amount to be awarded to the plaintiff, if successful, is likely to exceed the jurisdictional limit of the District Court, or
    - (ii) that there is other sufficient reason for hearing the proceedings in the Supreme Court.
- (4) Proceedings in a Local Court are not to be transferred to a higher court under this section unless the higher court is satisfied that there is sufficient reason for hearing the proceedings in the higher court.

- (5) This section extends to proceedings that have been transferred to the District Court or a Local Court pursuant to a previous transfer order under this Division or under Division 2 or 3.

**141 Transfer orders** (cf Act No 9 1973, section 145; Act No 11 1970, section 21B)

- (1) A transfer order takes effect when it is made.
- (2) A transfer order does not invalidate any order made or other thing done in proceedings before the order was made.
- (3) Any order made by the lower court may be varied or revoked by an order of the higher court.

**142 Stay of proceedings in lower court** (cf Act No 9 1973, section 146; Act No 11 1970, section 21C)

- (1) The higher court may make an order for a stay of proceedings in respect of which an application for a transfer order has been made.
- (2) Subsection (1) does not limit the power of the lower court to adjourn or stay the proceedings.

**143 Proceedings after transfer** (cf Act No 11 1970, section 21E; DCR Part 5, rule 12)

- (1) Subject to the rules of court applicable in the higher court, any proceedings with respect to which a transfer order takes effect are to be continued in the higher court:
  - (a) as if the proceedings had been duly commenced in the higher court on the date on which they were commenced in the lower court, and
  - (b) as if any cross-claim in the proceedings had been duly made in the higher court on the date on which it was made in the lower court.
- (2) For the purposes of any proceedings continued in the higher court:
  - (a) any abandonment of an amount under section 23 ceases to have effect except to the extent to which the amount originally claimed in the proceedings, or in any cross-claim in the proceedings, exceeded the jurisdictional limit of the higher court, and
  - (b) any admission duly made in the lower court is to be treated as if it had been duly made in the higher court.
- (3) Subject to the rules of court applicable in the higher court, the power of the higher court to make orders as to costs includes a power to make orders with respect to the costs of:
  - (a) the application for, and the making of, the transfer order, and

- 
- (b) any step taken in the proceedings before the transfer order was made.

**144 Transfer of certain proceedings from District Court to Supreme Court**

(cf Act No 9 1973, section 147)

- (1) This section applies to proceedings under Subdivision 2 of Division 8 of Part 3 of the *District Court Act 1973*.
- (2) If, during proceedings to which this section applies, the District Court decides that it lacks, or may lack, jurisdiction to hear and dispose of the proceedings, the District Court must order that the proceedings be transferred to the Supreme Court.
- (3) Proceedings that are transferred to the Supreme Court under subsection (2):
- (a) are to be continued in the Supreme Court:
    - (i) as if the proceedings had been duly commenced in the Supreme Court on the date on which they were commenced in the District Court, and
    - (ii) as if any cross-claim in the proceedings had been duly made in the Supreme Court on the date on which it was made in the District Court, or
  - (b) if the Supreme Court so orders, are to be remitted to the District Court and continued in the District Court as if they had not been transferred.
- (4) The District Court has, and may exercise, jurisdiction to hear and dispose of proceedings the subject of an order by the Supreme Court under subsection (3) (b), including such jurisdiction as is necessary to determine any question arising in any such proceedings.
- (5) If, during proceedings to which this section applies, the District Court decides that it is appropriate to do so for any reason other than the reason referred to in subsection (2), the District Court may order that the proceedings be transferred to the Supreme Court.
- (6) Proceedings that are transferred to the Supreme Court under subsection (5), are to be continued in the Supreme Court:
- (a) as if the proceedings had been duly commenced in the Supreme Court on the date on which they were commenced in the District Court, and
  - (b) as if any cross-claim in the proceedings had been duly made in the Supreme Court on the date on which it was made in the District Court.

- (7) Subject to the rules of court applicable in the Supreme Court, the power of the Supreme Court to make orders as to costs includes a power to make orders with respect to the costs of:
- (a) the application for, and the making of, the transfer order, and
  - (b) any step taken in the proceedings before the transfer order was made.
- (8) The making of an order under subsection (2) or (5) does not invalidate any order previously made by the District Court in the proceedings.

## **Division 2 Transfer of proceedings from higher to lower court**

### **145 Definitions**

In this Division:

**higher court** means the court from which proceedings are transferred, or are proposed to be transferred, by a transfer order.

**lower court** means the court to which proceedings are transferred, or are proposed to be transferred, by a transfer order.

**transfer order** means an order referred to in section 146.

### **146 Transfer of proceedings to lower court** (cf Act No 9 1973, section 143; Act No 11 1970, section 21F)

- (1) If the Supreme Court is satisfied, in relation to proceedings before it:
- (a) that the proceedings could properly have been commenced in the District Court or a Local Court, and
  - (b) that any cross-claim in the proceedings could properly have been brought as a cross-claim in the District Court or a Local Court,
- the Supreme Court may order that the proceedings, including any such cross-claim, be transferred to the District Court or to a Local Court, as the case requires.
- (2) If the District Court is satisfied, in relation to proceedings before it:
- (a) that the proceedings could properly have been commenced in a Local Court, and
  - (b) that any cross-claim in the proceedings could properly have been brought as a cross-claim in a Local Court,
- the District Court may order that the proceedings, including any such cross-claim, be transferred to a Local Court.
- (3) In determining:
- (a) whether any proceedings could properly have been commenced in the lower court, or

- 
- (b) whether any cross-claim could properly have been brought in the lower court,  
the higher court must have regard to the current limits of the lower court's jurisdiction as if they had been the limits of that jurisdiction when the proceedings were commenced, or the cross-claim brought, in the higher court.
- (4) Proceedings in the Supreme Court on a claim for damages arising from personal injury or death are to be transferred under this section unless the Supreme Court is satisfied:
- (a) in the case of a motor accident claim or workplace injury damages claim:
- (i) that the amount to be awarded to the plaintiff, if successful, is likely to be more than \$1,000,000, and
- (ii) that the case involves complex legal issues or issues of general public importance, or
- (b) in any other case:
- (i) that the amount to be awarded to the plaintiff, if successful, is likely to exceed the jurisdictional limit of the District Court, or
- (ii) that there is other sufficient reason for hearing the proceedings in the Supreme Court.
- (5) This section extends to proceedings that have been transferred to the Supreme Court or the District Court pursuant to a previous transfer order under Division 1.

**147 Transfer orders** (cf Act No 11 1970, section 21F)

- (1) A transfer order takes effect when it is made.
- (2) A transfer order does not invalidate any order made or other thing done in the proceedings before the transfer order was made.

**148 Proceedings after transfer** (cf Act No 11 1970, section 21G)

- (1) Subject to the rules of court applicable in the lower court, any proceedings with respect to which a transfer order takes effect continue in the lower court:
- (a) as if the proceedings had been duly commenced in the lower court on the date on which they were commenced in the higher court, and
- (b) as if any cross-claim in the proceedings had been duly made in the lower court on the date on which it was made in the higher court.

- (2) For the purposes of any proceedings continued in the lower court, any admission duly made in the higher court is to be treated as if it had been duly made in the lower court.
- (3) Subject to the rules of court applicable in the lower court, the power of the lower court to make orders as to costs includes a power to make orders with respect to the costs of:
  - (a) the application for, and the making of, the transfer order, and
  - (b) any step taken in the proceedings before the transfer order was made.

#### **149 Jurisdiction of lower court**

Pursuant to this section, the lower court has, and may exercise, all of the jurisdiction of the higher court in relation to any proceedings to which a transfer order relates, including jurisdiction to determine any question arising in any such proceedings.

### **Division 3 Transfer of proceedings between Local Courts**

#### **150 Definitions**

In this Division:

*transfer order* means an order referred to in section 151.

*transferee court* means the Local Court to which proceedings are transferred, or are proposed to be transferred, by a transfer order.

*transferor court* means the Local Court from which proceedings are transferred, or are proposed to be transferred, by a transfer order.

#### **151 Transfer of proceedings between Local Courts**

- (1) A Local Court may, of its own motion or on application by a party to proceedings before it, order that the proceedings, including any cross-claim in the proceedings, be transferred to some other Local Court.
- (2) Without limiting subsection (1), the uniform rules may authorise the transfer of proceedings from one Local Court to another in circumstances in which none of the parties to the proceedings object to the transfer.
- (3) Proceedings are not to be transferred under this section to a Local Court that, pursuant to an order in force under section 78 of the *Local Courts Act 1982*, has no jurisdiction to hear and determine the proceedings.
- (4) This section extends to proceedings that have been transferred to the Local Court pursuant to a previous transfer order under this Division or under Division 2.

**152 Transfer orders**

- (1) A transfer order takes effect when it is made.
- (2) A transfer order does not invalidate any order made or other thing done in proceedings before the order was made.
- (3) Any order made by the transferor court may be varied or revoked by an order of the transferee court.

**153 Proceedings after transfer**

- (1) Any proceedings with respect to which a transfer order takes effect are to be continued in the transferee court:
  - (a) as if the proceedings had been duly commenced in the transferee court on the date on which they were commenced in the transferor court, and
  - (b) as if any cross-claim in the proceedings had been duly made in the transferee court on the date on which it was made in the transferor court.
- (2) Subject to rules of court, the power of the transferee court to make orders as to costs includes a power to make orders with respect to the costs of:
  - (a) the application for, and the making of, the transfer order, and
  - (b) any step taken in the proceedings before the transfer order was made.



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## Schedule 1 Application of Act

(Section 4)

<b>Column 1</b>	<b>Column 2</b>
<b>Court</b>	<b>Kinds of civil proceedings</b>
Supreme Court	All civil proceedings
District Court	All civil proceedings
Dust Diseases Tribunal	All civil proceedings
Local Court	All civil proceedings under Part 7 of the <i>Local Courts Act 1982</i>

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## Schedule 2 Constitution and procedure of Uniform Rules Committee

(Section 8)

### Part 1 Constitution

#### 1 Definitions

In this Schedule:

*ex-officio member* means the Chief Justice of the Supreme Court, the President of the Court of Appeal, the Chief Judge of the District Court or the Chief Magistrate, and includes any of their nominees under section 8.

*member* means a member of the Uniform Rules Committee.

#### 2 Term of office

Subject to this Schedule:

- (a) an *ex-officio member* holds office indefinitely, and
- (b) any other member holds office for such period as is specified in his or her instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

#### 3 Vacancy in office

- (1) The office of a member (other than an *ex-officio member*) becomes vacant if the member:
  - (a) dies, or
  - (b) resigns office by instrument in writing addressed to the Chief Justice of the Supreme Court, or
  - (c) ceases to hold the office or qualification by virtue of which he or she was eligible for appointment as a member, or
  - (d) has his or her appointment revoked by the person or body by whom or by which he or she was appointed.
- (2) If the office of a member becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

**Note.** See also section 47 of the *Interpretation Act 1987* with respect to appointments generally.

## **Part 2 Procedure**

### **4 General procedure**

The procedure for the calling of meetings of the Uniform Rules Committee and for the conduct of business at those meetings is, subject to this Part, to be as determined by the Committee.

### **5 Quorum**

The quorum for a meeting of the Uniform Rules Committee is 6 members, of whom at least 3 must be judicial officers.

### **6 Presiding member**

- (1) At any meeting of the Uniform Rules Committee:
  - (a) the Chief Justice of the Supreme Court, or
  - (b) the Chief Justice's nominee referred to in section 8 (1) (a),  
is to preside.
- (2) In the absence of the Chief Justice or the Chief Justice's nominee:
  - (a) the President of the Court of Appeal, or
  - (b) the President's nominee referred to in section 8 (1) (b),  
is to preside.
- (3) In the absence of:
  - (a) the Chief Justice or the Chief Justice's nominee, and
  - (b) the President of the Court of Appeal or the President's nominee,  
the next most senior of the Judges of the Supreme Court who are present  
is to preside.
- (4) In the absence of any Judge of the Supreme Court, the next most senior  
judicial officer who is present is to preside.
- (5) The presiding member has a deliberative vote and, in the event of an  
equality of votes, has a second or casting vote.

### **7 Decisions**

A decision supported by a majority of the votes cast at a meeting of the Uniform Rules Committee at which a quorum is present is a decision of the Uniform Rules Committee.

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**8 Transaction of business outside meetings or by telephone**

- (1) The Uniform Rules Committee may, if it thinks fit, transact any of its business by the circulation of papers among all the members of the Committee for the time being, and a resolution in writing approved in writing by a majority of those members is taken to be a decision of the Committee, but only if the members from whom votes are received in relation to the resolution would form a quorum at an ordinary meeting of the Committee.
- (2) The Uniform Rules Committee may, if it thinks fit, transact any of its business at a meeting at which members (or some members) participate by telephone, closed-circuit television or other means, but only if any member who speaks on a matter before the meeting can be heard by the other members.
- (3) For the purposes of:
  - (a) the approval of a resolution under subclause (1), or
  - (b) a meeting held in accordance with subclause (2),the presiding member and each other member have the same voting rights as they have at an ordinary meeting of the Uniform Rules Committee.
- (4) A resolution approved under subclause (1) is to be recorded in the minutes of the meetings of the Uniform Rules Committee.
- (5) Papers may be circulated among the members for the purposes of subclause (1) by facsimile or other transmission of the information in the papers concerned.

**9 First meeting**

The first meeting of the Uniform Rules Committee is to be called by the Chief Justice of the Supreme Court in such manner as the Chief Justice thinks fit.

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## Schedule 3 Rule-making powers

(Section 9 (3))

- 1 The procedure (including the method of pleading) and the practice to be followed in the court in all civil proceedings in, or with respect to which, the court has jurisdiction (including the procedure and practice to be followed in the offices of the court), and any matters incidental to, or relating to, any such procedure or practice (including the manner and time of making any applications that under this or any other Act, or under any Commonwealth Act, are to be made to the court).
- 2 The rights and obligations of parties, prospective parties and other persons as to examination, interrogatories, discovery and inspection in relation to civil proceedings and prospective civil proceedings.
- 3 The service of documents (including the service of documents outside New South Wales, whether interstate or overseas).
- 4 The form and contents of any case stated to the court by or from any other court or person, and the time within which and the manner in which proceedings on a stated case are to be commenced and maintained and the court's decision notified.
- 5 The practice and procedure to be followed in connection with interpleaders.
- 6 The practice and procedure to be followed in connection with the splitting and consolidation of civil proceedings.
- 7 The admission and exclusion of evidence and the manner in which evidence is to be tendered.
- 8 The practice and procedure to be followed in connection with the review by the court of decisions made on its behalf by registrars and other officers of the court.
- 9 The practice and procedure to be followed in connection with any appeal to the court, including the time within which, and the manner in which, such an appeal is to be made, and the practice and procedure to be followed in the court with respect to such an appeal.
- 10 The practice and procedure to be followed in connection with the transfer of any civil proceedings to or from the court and the practice and procedure to be followed with respect to civil proceedings that are so transferred.
- 11 The assignment of civil proceedings to any division of the court or to any list established within the court.
- 12 The nomination and appointment of suitable persons to be mediators for the purposes of Part 4.
- 13 The practice and procedure to be followed in relation to the mediation of any matter under Part 4 or the arbitration of any matter under Part 5.

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- 14 The circumstances in which civil proceedings, or claims in civil proceedings, may be dismissed.
  - 15 The circumstances in which the court may order parties to civil proceedings not to disclose matters that arise in hearings that are held in the absence of the public.
  - 16 The circumstances in which the court may stay civil proceedings, either permanently or temporarily.
  - 17 The practice and procedure to be followed with respect to the giving of judgment, including judgment that is reserved and judgment where the giving of reasons is deferred.
  - 18 Matters relating to the costs of civil proceedings in the court and, in particular, prescribing, limiting or otherwise affecting the costs recoverable in any action or proceedings that the court considers might properly have been dealt with in a lower court.
  - 19 The means for, and the practice and procedure to be followed in, securing the future conduct of parties to civil proceedings.
  - 20 The means for, and the practice and procedure to be followed in, the enforcement and execution of judgments and orders.
  - 21 The circumstances in which the court may authorise entry on land for the purpose of enabling its orders to be enforced.
  - 22 The exercise by the Supreme Court of its jurisdiction to make orders for the enforcement of its judgments and orders.
  - 23 The circumstances in which the court may vary or set aside its judgments and orders.
  - 24 The means for proving particular facts, and the mode in which evidence may be given (including the administration of oaths to and the taking of the evidence of witnesses in or out of New South Wales), in any civil proceedings, or on any application in connection with, or at any stage of, any civil proceedings.
  - 25 Matters relating to expert evidence, including:
    - (a) the disclosure (by the furnishing of copies of reports or otherwise) of the nature of expert evidence to be given, and including the exclusion of expert evidence in case of non-compliance with the rules relating to expert evidence or with any order for disclosure of the nature of expert evidence, and
    - (b) the use of expert witnesses including, in particular, the use of expert witnesses engaged jointly by parties to civil proceedings and the use of court-appointed expert witnesses.
  - 26 The cases in which security may be required, and the form of such security, and the manner in which, and the person to whom, it is to be given.
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- 27 For regulating or making other provision concerning interim payments referred to in Division 5 of Part 6.
- 28 The payment or transfer into or out of court and, subject to the consent of the Treasurer, the custody, management and investment of moneys, securities and effects.
- 29 The duties of registrars and other officers of the court in relation to or for the purpose of any civil proceedings.
- 30 Any matter with respect to civil proceedings for which rules of court may be made under the Act by which the court is constituted.
- 31 Any matter with respect to which the court has jurisdiction under any other Act or law (including any Commonwealth Act).
- 32 Any matter for which the rules set out in Schedule 7 made provision when that Schedule commenced.
- 33 Any matter for which any other Act provides that rules may be made under this Act.
- 34 Any matter of a savings or transitional nature consequent on the making of any uniform rule.

Civil Procedure Act 2005 No 28

Repeals

Schedule 4

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## **Schedule 4    Repeals**

(Section 6 (1))

*Administration of Justice Act 1924 No 42*

*Arbitration (Civil Actions) Act 1983 No 43*

*Arbitration (Civil Actions) Regulation 1999*

*Attachment of Wages Limitation Act 1957 No 28*

*Damages (Infants and Persons of Unsound Mind) Act 1929 No 25*

*Foreign Judgments Act 1973 No 39*

*Judgment Creditors' Remedies Act 1901 No 8*

*Local Courts (Civil Claims) Act 1970 No 11*

*Maintenance Orders (Facilities for Enforcement) Act 1923 No 4*



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## Schedule 5 Amendments

(Section 6 (2))

### 5.1 Agricultural Industry Services Act 1998 No 45

#### Section 25 Interest on unpaid rates

Omit “section 95 of the *Supreme Court Act 1970*” from section 25 (2).

Insert instead “section 101 of the *Civil Procedure Act 2005*”.

### 5.2 Apiaries Act 1985 No 16

#### [1] Section 46 Recovery of expenses

Omit “the amount for the time being specified in section 12 (1) of the *Local Courts (Civil Claims) Act 1970*” from section 46 (4).

Insert instead “the jurisdictional limit of a Local Court when sitting in its General Division within the meaning of the *Local Courts Act 1982*”.

#### [2] Section 46 (5) and (6)

Omit section 46 (5). Insert instead:

- (5) An order under subsection (2) may be enforced in a Local Court exercising jurisdiction under Part 7 of the *Local Courts Act 1982*.
- (6) Part 8 of the *Civil Procedure Act 2005* applies to and in respect of an order under subsection (2) as if:
  - (a) the order were a judgment of a Local Court in civil proceedings, and
  - (b) the amount ordered to be paid were a judgment debt, and
  - (c) the person against whom the order is made were a judgment debtor, and
  - (d) the person in whose favour the order is made were a judgment creditor.

### 5.3 Civil Procedure Act 2005

#### [1] Section 3 Definitions

Omit “sections 208F (1) and 208G of the *Legal Profession Act 1987*” from the definition of **ordinary basis** in section 3 (1).

Insert instead “section 364 (1) and (2) of the *Legal Profession Act 2004*”.

**[2] Section 9 Uniform rules**

Omit section 9 (5). Insert instead:

- (5) This section does not give power to make rules with respect to any matter for which rules may be made under section 38 of the *Legal Profession Act 2004* or any matter relating to costs that is regulated by Part 3.2 of that Act.

**[3] Section 99 Liability of legal practitioner for unnecessary costs**

Omit “Part 11 of the *Legal Profession Act 1987*” from section 99 (3).

Insert instead “Part 3.2 of the *Legal Profession Act 2004*”.

**[4] Schedule 7 Uniform Civil Procedure Rules 2005**

Omit the Schedule.

**Note.** The continued effect of the *Uniform Civil Procedure Rules 2005* is unaffected by the repeal of Schedule 7. See section 30 of the *Interpretation Act 1987*.

**5.4 Commercial Arbitration Act 1984 No 160**

**[1] Section 3 Repeal, transitional and application provisions**

Omit “the *Arbitration (Civil Actions) Act 1983*” from section 3 (6) (a).

Insert instead “Part 5 of the *Civil Procedure Act 2005*”.

**[2] Section 4 Definitions**

Insert “or a Local Court” after “District Court” in section 4 (2) (a) and (b) wherever occurring.

**[3] Section 4 (2)**

Insert “or a Local Court, as the case requires” after “District Court” where thirdly occurring.

**5.5 Consumer Claims Act 1998 No 162**

**Section 12 Joint liability**

Omit “Section 97 of the *Supreme Court Act 1970*”.

Insert instead “Section 95 of the *Civil Procedure Act 2005*”.

## **5.6 Consumer, Trader and Tenancy Tribunal Act 2001 No 82**

### **[1] Section 26 Parties to proceedings (joint liability)**

Omit “Section 97 (Joint liability) of the *Supreme Court Act 1970*” from section 26 (3).

Insert instead “Section 95 of the *Civil Procedure Act 2005*”.

### **[2] Section 26 (3)**

Omit “section 97”. Insert instead “section 95”.

## **5.7 Consumer, Trader and Tenancy Tribunal Regulation 2002**

### **Clause 45 Interest on judgment debt**

Omit “section 39 of the *Local Courts (Civil Claims) Act 1970*” from clause 45 (2).

Insert instead “section 101 of the *Civil Procedure Act 2005*”.

## **5.8 Contracts Review Act 1980 No 16**

### **Section 4 Definitions**

Omit “section 12A of the *Local Courts (Civil Claims) Act 1970*” from paragraph (c) of the definition of **Court** in section 4 (1).

Insert instead “section 68 of the *Local Courts Act 1982*”.

## **5.9 Co-operatives Act 1992 No 18**

### **Section 408 Extension or abridgment of time**

Omit “section 81 of the *Supreme Court Act 1970*” from section 408 (3).

Insert instead “section 63 of the *Civil Procedure Act 2005*”.

## **5.10 Credit Act 1984 No 94**

### **[1] Section 6 Jurisdiction of courts and Tribunal**

Omit “section 77 (3) of the *Local Courts (Civil Claims) Act 1970*” from section 6 (1) (c) (ii).

Insert instead “section 78 (1) of the *Local Courts Act 1982*”.

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**[2] Section 170 Contract void if annual percentage rate exceeds maximum rate**

Omit “the rate of interest prescribed under section 95 (1) of the *Supreme Court Act 1970*” from section 170 (1).

Insert instead “the prescribed rate of interest under section 101 of the *Civil Procedure Act 2005*”.

### **5.11 Criminal Procedure Act 1986 No 209**

**[1] Section 4A**

Insert after section 4:

**4A Fees**

- (1) The regulations may make provision for or with respect to the following matters:
  - (a) the fees payable to a court in relation to the conduct of criminal proceedings in the court, including fees for the following:
    - (i) the filing or registration of any document in the court,
    - (ii) the sealing or other authentication of any document that has been filed in the court,
    - (iii) the issue of any document out of the court,
  - (b) the fees payable in relation to the functions exercised by the Sheriff in relation to criminal proceedings,
  - (c) the fees payable for administrative services provided by a registrar or other officer of the court, whether in connection with the administration of this Act or otherwise,
  - (d) the waiver, postponement and remittal of fees.
- (2) Fees of the kind referred to in subsection (1) (a) or (b) are not payable by the Crown, or by any person acting on behalf of the Crown, with respect to any criminal proceedings prosecuted by:
  - (a) the Crown,
  - (b) any Minister of the Crown,
  - (c) any person or body prescribed by the regulations or belonging to a class of persons or bodies so prescribed.

- (3) Subsection (2) does not prevent the recovery by the Crown or any such person or body of any fees that would, had they been paid by the Crown or any such person or body, have been so recoverable.
- (4) Unpaid fees may be recovered by the person to whom they are payable, as a debt, in any court of competent jurisdiction.
- (5) In this section, *criminal proceedings* means proceedings for an offence (whether summary or indictable), and includes the following:
  - (a) committal proceedings,
  - (b) proceedings relating to bail,
  - (c) proceedings relating to sentence,
  - (d) proceedings on an appeal against conviction or sentence.

**[2] Section 114 Copies of transcripts of evidence and witnesses' statements**

Insert "the regulations may make provision for or with respect to the" before "fees" in section 114 (2).

**5.12 District Court Act 1973 No 9**

**[1] Section 4 Definitions: general**

Insert in alphabetical order in section 4 (1):

*jurisdictional limit* of the Court means \$750,000.

**[2] Section 4 (1)**

Omit the definitions of *writ against the person* and *writ of execution*.

**[3] Section 4 (6)**

Omit the subsection. Insert instead:

- (6) A reference in this Act to a stay of enforcement of a judgment includes a reference to a stay of the issue of an order or writ under Part 8 of the *Civil Procedure Act 2005*.

**[4] Section 18H Functions of registrars**

Omit section 18H (1). Insert instead:

- (1) The registrar for a proclaimed place has and may exercise:
  - (a) in the case of an action to which the *Civil Procedure Act 2005* applies, the functions conferred on the registrar pursuant to section 12 or 13 of that Act, or

- (b) in any other case, the functions prescribed by the civil procedure rules or the criminal procedure rules.

**[5] Section 18J Functions of assistant registrars**

Omit section 18J (1). Insert instead:

- (1) An assistant registrar for a proclaimed place has and may exercise:
  - (a) in the case of an action to which the *Civil Procedure Act 2005* applies, the functions conferred on the assistant registrar pursuant to section 12 or 13 of that Act, or
  - (b) in any other case, such of the registrar's functions as may be prescribed by the civil procedure rules or the criminal procedure rules.

**[6] Part 3, Division 1, Subdivision 2, heading**

Omit "and bailiffs".

**[7] Sections 26–30**

Omit the sections.

**[8] Section 32 Directions as to sittings of Court in its civil jurisdiction**

Omit "during a specified period" from section 32 (4).

**[9] Section 32 (4) (a)**

Omit "during that period".

**[10] Section 34 Permanent substitution of proclaimed place**

Omit "section 40" from section 34 (3). Insert instead "rules of Court".

**[11] Section 39 Proper place not affected**

Omit "section 40". Insert instead "rules of court".

**[12] Part 3, Division 1, Subdivisions 4–6**

Omit the Subdivisions.

**[13] Sections 44 and 48**

Omit "\$750,000" wherever occurring.

Insert instead "the Court's jurisdictional limit".

**[14] Section 44 (1) (e)**

Omit “section 143 (1)”.

Insert instead “section 146 (1) of the *Civil Procedure Act 2005*”.

**[15] Section 44 (2)**

Omit “section 83A (1)”.

Insert instead “section 100 (1) of the *Civil Procedure Act 2005*”.

**[16] Section 47 Cause of action or defendant outside the State**

Omit section 47 (1). Insert instead:

- (1) If a defendant has been duly served with the document commencing an action:
    - (a) the Court has jurisdiction in accordance with this Act to hear and dispose of the action, and
    - (b) a registrar has and may exercise:
      - (i) if the action involves proceedings to which the *Civil Procedure Act 2005* applies, the functions conferred on the registrar pursuant to section 12 or 13 of that Act, or
      - (ii) in any other case, the functions prescribed by the civil procedure rules,
- regardless of whether the cause of action to which the action relates arose wholly or partly outside New South Wales.

**[17] Part 3, Division 2, Subdivision 2**

Omit the Subdivision.

**[18] Section 51**

Omit the section. Insert instead:

**51 Consent jurisdiction**

- (1) This section applies to an action or cross-claim that, but for this section, the Court would not have jurisdiction to hear and dispose of by reason only of the fact that the amount claimed exceeds the jurisdictional limit of the Court as at the time the action was commenced.
- (2) The Court has, and may exercise, jurisdiction to hear and dispose of an action or cross-claim to which this section applies:
  - (a) if a party to the action or cross-claim files a memorandum of consent in respect of the action or cross-claim, or

- 
- (b) if no objection to the Court's jurisdiction has been raised by any of the parties prior to 3 months before the trial of the action commences.
  - (3) For the purposes of subsection (1):
    - (a) the jurisdictional limit of the Court in relation to an action commenced before 1 July 1993 is taken to be \$100,000, and
    - (b) the jurisdictional limit of the Court in relation to an action commenced on or after 1 July 1993 but before 18 July 1997 is taken to be \$250,000.
  - (4) The maximum amount for which judgment may be given in relation to an action or cross-claim that is dealt with pursuant to subsection (2) (b) is an amount equivalent to 50 per cent above the jurisdictional limit of the Court as at the time the action was commenced.
  - (5) This section does not apply in relation to an action referred to in section 44 (1) (c).
  - (6) Nothing in this section limits the operation of section 140 of the *Civil Procedure Act 2005*.
  - (7) In this section, *memorandum of consent* in relation to an action or cross-claim means a document signed by each party to the action or cross-claim, or the party's solicitor, in which it is stated that each of those parties consents to the action or cross-claim being tried in the Court and is aware that, unless the document is filed, the Court will not have jurisdiction to dispose of the action or cross-claim.

**[19] Part 3, Division 3, Subdivisions 2–4, 6 and 7**

Omit the Subdivisions.

**[20] Section 76A Action to be tried without jury unless jury required in interests of justice**

Omit "section 150" from section 76A (2) (a) (ii).

Insert instead "section 18 of the *Civil Procedure Act 2005*".

**[21] Section 77 Questions of fact and law**

Omit section 77 (4).

**[22] Sections 83 and 83A**

Omit the sections.



**[23] Part 3, Divisions 4 and 5**

Omit the Divisions.

**[24] Sections 134 and 134A**

Omit "\$750,000" wherever occurring.

Insert instead "the Court's jurisdictional limit".

**[25] Part 3, Divisions 9 and 9A**

Omit the Divisions.

**[26] Section 153 Proceedings for offences**

Omit section 153 (2).

**[27] Section 159**

Omit the section.

**[28] Section 161 Civil procedure rules**

Insert after section 161 (6):

- (6A) This section does not give power to make rules in terms inconsistent with those of the uniform rules under the *Civil Procedure Act 2005* unless the uniform rules expressly permit rules under this section to be made in those terms.
- (6B) The rules made under this section may authorise or require the use of an electronic case management system established under section 14B of the *Electronic Transactions Act 2000* in relation to any proceedings in a court in respect of which the use of such a system is authorised by an order in force under section 14C of that Act.
- (6C) The rules made under this section may provide for the exercise by a registrar or other officer of the Court of any of the Court's administrative or judicial functions under this or any other Act and for the review by the Court of the exercise by a registrar or other such officer of any such function.

**[29] Part 3A Mediation and neutral evaluation**

Omit the Part.

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### 5.13 District Court Regulation 2000

**[1] Schedule 1 Court fees**

Omit “the *Arbitration (Civil Actions) Act 1983*” from item 14.

Insert instead “section 38 of the *Civil Procedure Act 2005*”.

**[2] Schedule 1**

Omit “section 18A (1) of the *Arbitration (Civil Actions) Act 1983*” from item 15.

Insert instead “section 43 of the *Civil Procedure Act 2005*”.

### 5.14 Dividing Fences Act 1991 No 72

**Section 13 Jurisdiction of Local Court or local land board**

Omit “the *Arbitration (Civil Actions) Act 1983*” from section 13 (5).

Insert instead “Part 5 of the *Civil Procedure Act 2005*”.

### 5.15 Dust Diseases Tribunal Act 1989 No 63

**[1] Section 16 Interest normally payable in respect of unpaid damages**

Omit “section 95 (1) of the *Supreme Court Act 1970*” from section 16 (2) (b).

Insert instead “section 101 of the *Civil Procedure Act 2005*”.

**[2] Section 17 Parties to proceedings before the Tribunal**

Omit “Section 97 of the *Supreme Court Act 1970*” from section 17 (3).

Insert instead “Section 95 of the *Civil Procedure Act 2005*”.

**[3] Section 33 Rules**

Insert after section 33 (5):

- (6) This section does not give power to make rules with respect to any matter relating to costs that is regulated by Part 11 of the *Legal Profession Act 1987*.
- (7) This section does not give power to make rules in terms inconsistent with those of the uniform rules under the *Civil Procedure Act 2005* unless the uniform rules expressly permit rules under this section to be made in those terms.

- (8) The rules made under this section may authorise or require the use of an electronic case management system established under section 14B of the *Electronic Transactions Act 2000* in relation to any proceedings in a court in respect of which the use of such a system is authorised by an order in force under section 14C of that Act.
- (9) The rules made under this section may provide for the exercise by a registrar or other officer of the Tribunal of any of the Tribunal's administrative or judicial functions under this or any other Act and for the review by the Tribunal of the exercise by a registrar or other such officer of any such function.

**[4] Section 33 (6) (as inserted by item [3])**

Omit "Part 11 of the *Legal Profession Act 1987*".

Insert instead "Division 11 of Part 3.2 of the *Legal Profession Act 2004*".

**[5] Section 41 Interim payments before assessment of damages, where no inter-insurer dispute**

Omit "Division 2 of Part 5 of the *Supreme Court Act 1970*" from section 41 (1).

Insert instead "Division 5 of Part 6 of the *Civil Procedure Act 2005*".

## **5.16 Electricity Supply Act 1995 No 94**

**[1] Section 76 Orders for payment operate as judgments**

Omit section 76 (1) (b). Insert instead:

- (b) may be enforced in a Local Court exercising jurisdiction under Part 7 of the *Local Courts Act 1982*.

**[2] Section 76 (2)**

Omit the subsection. Insert instead:

- (2) Part 8 of the *Civil Procedure Act 2005* applies to and in respect of an order under this Division as if:
  - (a) the order were a judgment of a Local Court in civil proceedings, and
  - (b) the amount ordered to be paid were a judgment debt, and
  - (c) the person against whom the order is made were a judgment debtor, and
  - (d) the person in whose favour the order is made were a judgment creditor.

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## 5.17 Electronic Transactions Act 2000 No 8

### [1] Section 14B Establishment of ECM system

Omit section 14B (1). Insert instead:

- (1) The Attorney General may establish an electronic case management system to do any one or more of the following:
  - (a) to enable documents with respect to legal proceedings to be created in electronic form,
  - (b) to enable documents with respect to legal proceedings to be filed in electronic form,
  - (c) to enable documents with respect to legal proceedings to be issued in electronic form,
  - (d) to enable documents with respect to legal proceedings to be used in electronic form,
  - (e) to enable documents with respect to legal proceedings to be served in electronic form,
  - (f) to enable parties to legal proceedings to communicate in electronic form with other parties to the proceedings and with the court before which the proceedings are being taken,
  - (g) to enable information concerning the progress of legal proceedings to be provided in electronic form to parties to the proceedings and to members of the public generally.

### [2] Section 14I Use of ECM system for the conduct of certain hearings

Insert “and received” after “sent”.

### [3] Section 14Q Proceedings on application for assessment of bill of costs

Omit “Division 6 of Part 11 of the *Legal Profession Act 1987*”.

Insert instead “Division 11 of Part 3.2 of the *Legal Profession Act 2004*”.

## 5.18 Fair Trading Act 1987 No 68

### Section 63A Compensation orders by Local Court on conviction of person

Omit section 63A (2). Insert instead:

- (2) The compensation that a Local Court may order to be paid under this section is not to exceed the jurisdictional limit of a Local Court when sitting in its General Division within the meaning of the *Local Courts Act 1982*.

## **5.19 Fines Act 1996 No 99**

**[1] Section 72 Order to seize property of fine defaulter**

Omit section 72 (5).

**[2] Section 72 (6)**

Omit “writ of execution issued by a Local Court under section 58 of the *Local Courts (Civil Claims) Act 1970*”.

Insert instead “writ for the levy of property issued by a Local Court under Part 8 of the *Civil Procedure Act 2005*”.

**[3] Section 73 Order to garnishee debts, wages or salary of fine defaulter**

Omit “Division 3 of Part 5 of the *Local Courts (Civil Claims) Act 1970*” from section 73 (4).

Insert instead “Part 8 of the *Civil Procedure Act 2005*”.

**[4] Section 73 (4) (b)**

Omit “section 48”. Insert instead “section 107”.

**[5] Section 76A Sheriff’s additional costs of taking enforcement action under this Division**

Omit “the *Local Courts (Civil Claims) Act 1970*” from section 76A (2).

Insert instead “the *Civil Procedure Act 2005*”.

**[6] Section 110 Enforcement as civil judgments**

Omit “the *Local Courts (Civil Claims) Act 1970*” from section 110 (1).

Insert instead “the *Civil Procedure Act 2005*”.

## **5.20 Gas Supply Act 1996 No 38**

**[1] Section 75 Orders for payment to operate as judgments**

Omit section 75 (1) (b). Insert instead:

- (b) if made by a Local Court, may be enforced in a Local Court exercising jurisdiction under Part 7 of the *Local Courts Act 1982*.

**[2] Section 75 (2)**

Omit the subsection. Insert instead:

- (2) Part 8 of the *Civil Procedure Act 2005* applies to and in respect of an order made by a Local Court under this Division as if:
  - (a) the order were a judgment of a Local Court in civil proceedings, and
  - (b) the amount ordered to be paid were a judgment debt, and
  - (c) the person against whom the order is made were a judgment debtor, and
  - (d) the person in whose favour the order is made were a judgment creditor.

**5.21 Gas Supply (Natural Gas Retail Competition) Regulation 2001**

**[1] Clause 27 Correction where customer overcharged**

Omit “section 95 (1) of the *Supreme Court Act 1970*” from section 27 (1) (c) and (2) (b) wherever occurring.

Insert instead “section 101 of the *Civil Procedure Act 2005*”.

**[2] Schedule 1 Requirements applicable to customer supply contracts**

Omit “section 95 (1) of the *Supreme Court Act 1970*” from clause 3 (3) of Schedule 1.

Insert instead “section 101 of the *Civil Procedure Act 2005*”.

**5.22 Industrial Relations Act 1996 No 17**

**[1] Section 185 Rules of Commission**

Insert “or the *Civil Procedure Act 2005*” after “*Supreme Court Act 1970*” in section 185 (2) (e).

**[2] Section 372 Order for interest**

Omit “section 95 (1) of the *Supreme Court Act 1970*” from section 372 (4).

Insert instead “section 101 of the *Civil Procedure Act 2005*”.

**[3] Section 383 Procedure**

Omit “the *Local Courts (Civil Claims) Act 1970*” from section 383 (1).

Insert instead “the *Civil Procedure Act 2005*”.

**[4] Section 383A Recovery of amount ordered to be paid by Industrial Magistrate under other legislation**

Omit “the *Local Courts (Civil Claims) Act 1970*”.

Insert instead “Part 7 of the *Local Courts Act 1982*”.

**5.23 Infants’ Custody and Settlements Act 1899 No 39**

**Section 5 Custody of minor**

Omit section 5 (9).

**5.24 Land and Environment Court Act 1979 No 204**

**[1] Section 20 Class 4—environmental planning and protection and development contract civil enforcement**

Omit section 20 (4). Insert instead:

- (4) Subject to any adaptations prescribed by the rules, the provisions of the *Supreme Court Act 1970*, the *Civil Procedure Act 2005* and the rules made under those Acts apply to the enforcement of a judgment or order of the Court in the same way as they apply to the enforcement of a judgment or order of the Supreme Court.

**[2] Section 74 Rules**

Insert “or the *Civil Procedure Act 2005*” after “the *Supreme Court Act 1970*” in section 74 (2) and (3) wherever occurring.

**[3] Section 74 (2)**

Omit “the *Supreme Court (Summary Jurisdiction) Act 1967*”.

Insert instead “section 257 of the *Criminal Procedure Act 1986*”.

**5.25 Law Reform (Miscellaneous Provisions) Act 1944 No 28**

**Section 2 Effect of death on certain causes of action**

Omit “or to claims under section 52 of the *Matrimonial Causes Act 1899*, as amended by subsequent Acts, for damages on the ground of adultery” from section 2 (1).

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## 5.26 Legal Aid Commission Act 1979 No 78

**[1] Section 47 Payment of costs awarded against legally assisted persons**

Omit “section 18 (2) of the *Arbitration (Civil Actions) Act 1983*” from section 47 (4) (c).

Insert instead “section 42 of the *Civil Procedure Act 2005*”.

**[2] Section 71A Interest**

Omit “section 39 (1) of the *Local Courts (Civil Claims) Act 1970*” from paragraph (a) of the definition of *prescribed rate* in section 71A (2).

Insert instead “section 101 of the *Civil Procedure Act 2005*”.

## 5.27 Legal Profession Act 1987 No 109

**[1] Section 20**

Insert after section 19:

**20 Legal practitioner not to be allowed certain privilege**

No privilege from suit in any court or tribunal is to be allowed to any legal practitioner by reason only that he or she is an officer of the Supreme Court.

**[2] Section 208V Application of Division**

Omit “section 85 (4) of the *District Court Act 1973* or section 95 (4) of the *Supreme Court Act 1970*”.

Insert instead “section 101 (3) of the *Civil Procedure Act 2005*”.

## 5.28 Legal Profession Regulation 2002

**[1] Clause 20 Scope of practice of foreign law: section 48ZS (1) (b) and (d)**

Omit clause 20 (2) (b). Insert instead:

- (b) services relating to mediation or neutral evaluation undertaken in accordance with Part 4 of the *Civil Procedure Act 2005* or Part 5A of the *Land and Environment Court Act 1979*.

**[2] Schedule 3 Costs for uncontested recovery of lump sum debts and for enforcement of judgments by judgment creditors**

Omit item 6 from Part 1 of Schedule 3.



## 5.29 Limitation Act 1969 No 31

### [1] Section 74 Set off etc

Insert at the end of the section:

- (2) This section extends to a claim by way of set off made by a defendant under the *Civil Procedure Act 2005*, even if one or more of the debts giving rise to the set off became due and payable after the date on which the defendant became a party to the principal action, so long as at least one of those debts became due and payable on or before that date.

### [2] Section 77 Rules of Court

Omit “the *Local Courts (Civil Claims) Act 1970*” from section 77 (1) (b).

Insert instead “Part 7 of the *Local Courts Act 1982*”.

## 5.30 Local Courts Act 1982 No 164

### [1] Section 4 Definitions

Insert in alphabetical order in section 4 (1):

*Assessor* means an Assessor appointed under section 76.

*jurisdictional limit* of a Court means:

- (a) \$60,000, in relation to the Court sitting in its General Division, and
- (b) \$10,000, in relation to the Court sitting in its Small Claims Division.

*money claim* means a claim for recovery of any debt, demand or damage (whether liquidated or unliquidated).

### [2] Section 7A

Insert after section 7:

#### 7A Divisions of Courts exercising civil jurisdiction

For the purposes of exercising its civil jurisdiction, a Court is to be divided into:

- (a) the General Division, and
- (b) the Small Claims Division.

### [3] Section 8 Composition of a Court

Insert “this or” after “under”.

**[4] Section 26 Directions as to procedure**

Omit “the *Local Courts (Civil Claims) Act 1970*”.

Insert instead “the *Civil Procedure Act 2005*”.

**[5] Section 28 Regulations**

Omit section 28 (2). Insert instead:

- (2) In particular, the regulations may make provision for or with respect to fees payable in respect of proceedings to which Part 6 applies.

**[6] Section 36 Proceedings to which Part does not apply**

Omit section 36 (1). Insert instead:

- (1) This Part does not apply to the following proceedings:
  - (a) proceedings for a summary or indictable offence,
  - (b) proceedings with respect to any order that may be made in, or as a result of, criminal proceedings,
  - (c) proceedings with respect to any matter for which jurisdiction is conferred on a Local Court under Part 15A of the *Crimes Act 1900*,
  - (d) proceedings with respect to any matter for which jurisdiction is conferred on a Local Court under Part 7.

**[7] Part 7**

Insert after Part 6:

## **Part 7 Civil jurisdiction**

### **Division 1 Jurisdictional limits**

**65 Limits of jurisdiction** (cf Act No 11 1970, section 12)

- (1) Subject to this Part, a Court sitting in its General Division has jurisdiction to hear and determine:
  - (a) proceedings on any money claim, if the amount claimed, whether on a balance of account or after an admitted set-off or otherwise, is less than or equal to the jurisdictional limit of the Court when sitting in that Division, and

- (b) proceedings to recover detained goods, or to recover the assessed value of detained goods, if the value of the goods, together with the amount of any consequential damages claimed for their detention, is less than or equal to the jurisdictional limit of the Court when sitting in that Division.
- (2) Subject to this Part, a Court sitting in its Small Claims Division has jurisdiction to hear and determine:
  - (a) proceedings on any money claim, if the amount claimed, whether on a balance of account or after an admitted set-off or otherwise, is less than or equal to the jurisdictional limit of the Court when sitting in that Division, and
  - (b) proceedings to recover goods that are detained, or to recover the assessed value of the goods, if the value of the goods, together with the amount of any consequential damages claimed for their detention, is less than or equal to the jurisdictional limit of the Court when sitting in that Division.
- (3) Nothing in subsection (2) prevents proceedings under that subsection from being heard and determined by a Court sitting in its General Division.
- (4) If the amount claimed in proceedings includes interest up to judgment under section 100 of the *Civil Procedure Act 2005*, that interest is to be disregarded for the purpose of determining:
  - (a) whether the maximum amount for which the proceedings are authorised by this Part to be brought has been exceeded or not, and
  - (b) whether or not the court sitting in a Division has jurisdiction to hear and determine the proceedings.
- (5) If:
  - (a) the jurisdictional limit of a Division is increased, and
  - (b) proceedings in which an amount of money is claimed are pending in a Court when that increase takes effect,the Court may, on the application of a plaintiff, make an order altering the amount specified in the claim to an amount not exceeding the new jurisdictional limit.
- (6) In this section, ***admitted set-off***, in relation to proceedings, means set-off admitted by the plaintiff in the originating process in the proceedings.

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- (7) In this section, a reference to proceedings extends to an action referred to in section 68 of the *Fair Trading Act 1987*.

**Note.** The effect of subsection (7) is to confer jurisdiction on a Court in respect of proceedings for damages referred to in section 68 of the *Fair Trading Act 1987*. That jurisdiction is similar to the jurisdiction conferred on a Court by section 86 of the *Trade Practices Act 1974* of the Commonwealth in respect of proceedings for damages referred to in section 82 of that Act.

**66 Limits may be exceeded for certain money claims**

- (1) This section applies to proceedings before a Court sitting in its General Division, and so applies despite section 65 (1) (a).
- (2) The Court has jurisdiction to hear and determine proceedings on a money claim for an amount not exceeding 20 per cent more than the jurisdictional limit of the Court when sitting in its General Division:
- (a) if a memorandum of consent has been filed in relation to the proceedings, or
- (b) if no objection to the Court's jurisdiction has been raised by any of the parties prior to one month before the trial of the action commences.
- (3) A memorandum of consent referred to in subsection (2) (a):
- (a) must be signed by each party to the proceedings, or by the party's solicitor, and
- (b) must state that each of those parties consents to the proceedings being heard and determined by the Court and is aware that, unless the memorandum is filed, the Court will not have jurisdiction to hear or determine the proceedings.
- (4) Nothing in this section limits the operation of section 140 of the *Civil Procedure Act 2005*.

**67 Limitation of jurisdiction** (cf Act No 11 1970, section 19)

- (1) A Court does not have jurisdiction under this Part in any of the following circumstances:
- (a) proceedings in which the validity or effect of any devise, bequest or limitation under any will or settlement, or under any document in the nature of a settlement, is disputed,
- (b) proceedings for passing-off, wrongful arrest, false imprisonment, malicious prosecution, defamation, seduction, enticement or breach of promise of marriage,
- (c) proceedings for infringement of letters patent or copyright,

- (d) proceedings for the detention of goods:
  - (i) where the goods are the subject of a hire-purchase agreement, or
  - (ii) where the goods are detained by their owner or by some other person acting on the owner's behalf,
- (e) proceedings in which the title to land is in question, other than proceedings on a claim in respect of which the question of the title to land is merely incidental.
- (2) The judgment of a Court in proceedings in which the title to land has been in question, as referred to in subsection (1) (e), is not admissible as evidence of the title to the land in any other proceedings in that or any other court, whether or not a Court.
- (3) Except as may be provided by the rules, a Court sitting in its Small Claims Division has no power to award costs to or against a party to proceedings in the Division.

**68 Jurisdiction in proceedings for review of contracts** (cf Act No 11 1970, section 12A)

- (1) In relation to a contract, a Court has the same jurisdiction as the Supreme Court, and may exercise all the powers and authority of the Supreme Court, to grant relief under section 7 (1) (a) of the *Contracts Review Act 1980*.
- (2) This section applies only if application for the exercise of the jurisdiction is made in proceedings concerning the contract that are in the course of being heard by the Court.
- (3) This section does not authorise a Court to exercise the jurisdiction conferred by any other provision of the *Contracts Review Act 1980*.

**69 Jurisdiction when cause of action or defendant outside the State** (cf Act No 11 1970, section 17)

- (1) A Court has jurisdiction to hear and determine proceedings with respect to a cause of action:
  - (a) even if part of the cause of action arose outside New South Wales, so long as a material part of the cause of action arose within New South Wales, and
  - (b) even if the whole cause of action arose outside New South Wales, so long as the defendant was resident in New South Wales at the time of service of the document that commenced the proceedings, and

- 
- (c) even if the defendant is not within New South Wales, so long as:
- (i) the whole or a material part of the cause of action arose within New South Wales, and
  - (ii) the defendant was within a State or a part of the Commonwealth (within the meaning of the *Service and Execution of Process Act 1992* of the Commonwealth) at the time of service of the document that commenced the proceedings.
- (2) Subsection (1) (c) applies whether or not the defendant has ever been resident or carried on business in New South Wales.
- (3) In this section, *defendant* includes, if there are 2 or more defendants, any one of those defendants.

## **Division 2 Proceedings in Small Claims Division**

### **70 Procedure generally in Small Claims Division** (cf Act No 11 1970, section 23B)

- (1) The jurisdiction conferred by or under this Act on a Court sitting in its Small Claims Division is to be exercised by a Magistrate or an Assessor.
- (2) Proceedings in a Court's Small Claims Division are to be conducted with as little formality and technicality as the proper consideration of the matter permits.
- (3) The rules of evidence do not apply to proceedings being heard or other proceedings in a Court's Small Claims Division.
- (4) Witnesses may not be cross-examined except in circumstances in which, and to the extent to which, the cross-examination of witnesses is authorised by a practice note.
- (5) An Assessor or Magistrate exercising the jurisdiction of a Court sitting in its Small Claims Division may inform himself or herself on any matter relating to proceedings being heard or other proceedings in the Small Claims Division in such manner as he or she thinks fit.
- (6) Proceedings in a Court's Small Claims Division (other than any judgment given or order made in respect of the proceedings) are not required to be recorded.

**71 Conciliation of parties** (cf Act No 11 1970, section 23A)

- (1) An Assessor or Magistrate is not to give judgment or make a final order in respect of proceedings being heard in a Court's Small Claims Division unless the Assessor or Magistrate has brought, or has used his or her best endeavours to bring, the parties to the proceedings to a settlement acceptable to the parties.
- (2) If such a settlement is reached, the Assessor or Magistrate is to give judgment or make a final order that gives effect to the terms of the settlement.

**Division 3 Appeals from Local Courts**

**72 Judgments and orders final** (cf Act No 11 1970, section 69 (1))

Subject to this Division, all judgments and orders of a Court exercising jurisdiction under this Part are final and conclusive.

**73 Appeals as of right** (cf Act No 11 1970, section 69 (2) and (2A))

- (1) A party to proceedings under this Part who is dissatisfied with the judgment or order of a Court sitting in its General Division may appeal to the Supreme Court against the judgment or order, but only as being erroneous in point of law.
- (2) A party to proceedings under this Part who is dissatisfied with the judgment or order of a Court sitting in its Small Claims Division may appeal to the Supreme Court against the judgment or order, but only on the ground of lack of jurisdiction or denial of natural justice.

**74 Appeals requiring leave** (cf Act No 11 1970, section 69 (2B) and (3))

- (1) A party to proceedings under this Part who is dissatisfied with the judgment or order of a Court sitting in its General Division may appeal to the Supreme Court against the judgment or order on a ground that involves a question of mixed law and fact, but only by leave of the Supreme Court.
- (2) A party to proceedings under this Part who is dissatisfied with any of the following judgments or orders of a Court sitting in its General Division may appeal to the Supreme Court against the judgment or order, but only by leave of the Supreme Court:
  - (a) an interlocutory judgment or order,
  - (b) a judgment or order made with the consent of the parties,
  - (c) an order as to costs.

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**75 Determination of appeals** (cf Act No 11 1970, section 69 (4) and (5))

The Supreme Court may determine an appeal made under this Division:

- (a) by varying the terms of the judgment or order, or
- (b) by setting aside the judgment or order, or
- (c) by setting aside the judgment or order and remitting the matter to the Court for determination in accordance with the Supreme Court's directions, or
- (d) by dismissing the appeal.

**Division 4 Miscellaneous**

**76 Appointment of, and qualifications for, Assessors** (cf Act No 11 1970, section 10)

- (1) The Minister may appoint any qualified person to be an Assessor.
- (2) The appointment of an Assessor may be on a full-time or part-time basis.
- (3) A person is qualified to be appointed as an Assessor if the person is, or is eligible to be admitted as:
  - (a) a barrister or solicitor of the Supreme Court, or
  - (b) a barrister or solicitor (or both) of any Court of another State or Territory or of the High Court.
- (4) If appointed on a full-time basis, an Assessor is to devote the whole of his or her time to the duties of the office of an Assessor.
- (5) Schedule 2 has effect with respect to Assessors.

**77 Consequences of abolition of Court** (cf Act No 11 1970, section 77 (1))

- (1) All proceedings pending under this Act in a Court that has been abolished may be continued and completed in such other Court as the Governor, by order published in the Gazette, may specify.
- (2) Any judgment or order of a Court that has been abolished may be enforced in the same manner as if it had been given, entered or made by the specified Court.
- (3) An order under this section may direct that the records of the Court that has been abolished be removed at or within a time stated in the order to the specified Court.
- (4) An order under this section may be included in an order abolishing a Court, in an order under section 78 or may be published separately.



**78 Governor may deprive Court of civil jurisdiction** (cf Act No 11 1970, section 77 (3))

- (1) The Governor may, by order published in the Gazette, declare that the jurisdiction conferred by this Part may not be exercised by any Court specified in the order.
- (2) A Court in respect of which an order is in force under this section, and the registrar of such a Court, do not have and may not exercise any of the jurisdiction or functions conferred or imposed on a Court or registrar by or under this Part.
- (3) Section 77 applies to a Court in respect of which an order is made under this section if that Court had been abolished.

**79 Rules** (cf Act No 11 1970, section 84)

- (1) The rules may make provision for or with respect to the following matters:
  - (a) the practice and procedure in a court and in proceedings before a registrar,
  - (b) the transfer of proceedings between Divisions,
  - (c) the assignment of proceedings to Divisions,
  - (d) the referral of matters to Community Justice Centres,
  - (e) the functions of registrars,
  - (f) the filing and serving of notices under this Act,
  - (g) the times for doing any matter or thing for the purposes of this Act,
  - (h) the excusal of non-compliance with the rules,
  - (i) costs in relation to proceedings in a Court's Small Claims Division,
  - (j) the manner of doing any matter or thing for the purposes of this Act.
- (2) In this section, a reference to a court includes a reference to a Division of a court.
- (3) This section does not give power to make rules with respect to any matter relating to costs that is regulated by Part 11 of the *Legal Profession Act 1987*.
- (4) This section does not give power to make rules in terms inconsistent with those of the uniform rules under the *Civil Procedure Act 2005* unless the uniform rules expressly permit rules under this section to be made in those terms.

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- (5) The rules made under this section may authorise or require the use of an electronic case management system established under section 14B of the *Electronic Transactions Act 2000* in relation to any proceedings in a court in respect of which the use of such a system is authorised by an order in force under section 14C of that Act.
- (6) The rules made under this section may provide for the exercise by a registrar or other officer of a court of any of the court's administrative or judicial functions under this or any other Act and for the review by a court of the exercise by a registrar or other such officer of any such function.

**[8] Section 79 (as inserted by item [7])**

Omit "Part 11 of the *Legal Profession Act 1987*" from section 79 (3).

Insert instead "Division 11 of Part 3.2 of the *Legal Profession Act 2004*".

**[9] Schedule 1 Savings and transitional provisions**

Insert after clause 16 (2):

- (3) This clause ceases to have effect on the commencement of section 18 of the *Civil Procedure Act 2005*.

**[10] Schedule 2**

Insert after Schedule 1:

## **Schedule 2 Provisions relating to Assessors**

(Section 76)

### **1 Term of office**

Subject to this Schedule, an Assessor holds office, for such period (not exceeding 7 years) as may be specified in the Assessor's instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

### **2 Remuneration**

An Assessor is entitled to be paid:

- (a) remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*, and
- (b) such travelling and subsistence allowances as the Minister may from time to time determine in respect of the Assessor.

**3 Effect of certain other Acts**

- (1) The provisions of the *Public Sector Employment and Management Act 2002* do not apply to or in respect of the appointment of an Assessor and an Assessor is not, as an Assessor, subject to that Act.
- (2) If by or under any Act provision is made:
  - (a) requiring a person who is the holder of a specified office to devote the whole of his or her time to the duties of that office, or
  - (b) prohibiting a person from engaging in employment outside the duties of that office,that provision does not operate to disqualify the person from holding that office and also the office of an Assessor appointed on a part-time basis or, subject to subclause (3), from accepting and retaining any remuneration payable to the person under this Act as an Assessor appointed on a part-time basis.
- (3) Subclause (2) does not operate to authorise an officer of a Local Court to accept or retain any remuneration payable to the officer as an Assessor.

**4 Leave**

- (1) An Assessor, if appointed on a full-time basis, is entitled to such leave:
  - (a) as is determined by the Minister, or
  - (b) as may be specified in respect of the Assessor in the Assessor's instrument of appointment.
- (2) Leave may be determined or specified as referred to in subclause (1) by reference to the leave entitlement of the holder of any other office or class of office.

**5 Removal from office**

The Minister may remove an Assessor from office for incapacity, incompetence or misbehaviour.

**6 Vacation of office**

An Assessor vacates office if the Assessor:

- (a) completes a term of office and is not re-appointed, or
- (b) dies, or

- (c) resigns the office by instrument in writing addressed to the Minister, or
- (d) becomes a mentally incapacitated person, or
- (e) is removed from office by the Minister under clause 5.

### **5.31 Meat Industry (Meat Industry Levy) Regulation 1999**

#### **Clause 10 Overdue levies**

Omit “section 95 (1) of the *Supreme Court Act 1970*” from clause 10 (2) (b).  
Insert instead “section 101 of the *Civil Procedure Act 2005*”.

### **5.32 Motor Accidents Act 1988 No 102**

#### **Section 73 Payment of interest**

Omit “section 95 of the *Supreme Court Act 1970*” from section 73 (6).  
Insert instead “section 101 of the *Civil Procedure Act 2005*”.

### **5.33 Motor Accidents Compensation Act 1999 No 41**

#### **Section 137 Payment of interest**

Omit “section 95 of the *Supreme Court Act 1970*” from section 137 (6).  
Insert instead “section 101 of the *Civil Procedure Act 2005*”.

### **5.34 Motor Dealers Act 1974 No 52**

#### **[1] Section 38 Rescission of sale**

Omit “under the *Local Courts (Civil Claims) Act 1970*” wherever occurring.  
Insert instead “under Part 7 of the *Local Courts Act 1982*”.

#### **[2] Section 38 (1) (a)**

Omit “the amount for the time being specified in section 12 (1) of that Act”.  
Insert instead “the jurisdictional limit of a Local Court when sitting in its General Division within the meaning of the *Local Courts Act 1982*”.

#### **[3] Section 38 (8)**

Omit “the amount for the time being specified in section 12 (1) of the *Local Courts (Civil Claims) Act 1970*”.  
Insert instead “the jurisdictional limit of a Local Court when sitting in its General Division within the meaning of the *Local Courts Act 1982*”.

### 5.35 National Parks and Wildlife Regulation 2002

#### Clause 93 Interest on overdue money

Omit “section 95 (1) of the *Supreme Court Act 1970*”.

Insert instead “section 101 of the *Civil Procedure Act 2005*”.

### 5.36 Oaths Act 1900 No 20

#### [1] Section 24A

Insert after section 24:

##### 24A Declarations by persons unable to read

If it appears to the person before whom a statutory declaration is taken and received (*the authorised person*) that the person making the declaration (*the deponent*) is blind or illiterate, the authorised person must certify, in or below the jurat:

- (a) that the declaration was read to the deponent in the presence of the authorised person, and
- (b) that it appeared to the authorised person that the deponent understood the declaration, and
- (c) that the deponent subscribed the declaration (by signature or mark) in the presence of the authorised person.

#### [2] Section 27A

Insert after section 27:

##### 27A Affidavits by persons unable to read

If it appears to the person before whom an affidavit is made (*the authorised person*) that the person making the affidavit (*the deponent*) is blind or illiterate, the authorised person must certify, in or below the jurat:

- (a) that the affidavit was read to the deponent in the presence of the authorised person, and
- (b) that it appeared to the authorised person that the deponent understood the affidavit, and
- (c) that the deponent subscribed the affidavit (by signature or mark) in the presence of the authorised person.

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**[3] Section 28 Fees**

Omit “rule of the Supreme Court”.

Insert instead “the rules made under the *Civil Procedure Act 2005*”.

**5.37 Occupational Health and Safety Act 2000 No 40**

**Section 116 Orders to undertake OHS projects**

Omit “the maximum amount for which the General Division of a Local Court has jurisdiction under section 12 of the *Local Courts (Civil Claims) Act 1970*” from section 116 (3).

Insert instead “the jurisdictional limit of a Local Court when sitting in its General Division within the meaning of the *Local Courts Act 1982*”.

**5.38 Pawnbrokers and Second-hand Dealers Act 1996 No 13**

**Section 32I Role of courts**

Omit “referred to in section 28A of the *Local Courts (Civil Claims) Act 1970*” from section 32I (1).

Insert instead “for the detention of goods”.

**5.39 Property (Relationships) Act 1984 No 147**

**[1] Section 10 Limit of jurisdiction of Local Courts**

Omit “the amount prescribed for the time being by section 12 of the *Local Courts (Civil Claims) Act 1970*”.

Insert instead “the jurisdictional limit of a Local Court when sitting in its General Division within the meaning of the *Local Courts Act 1982*”.

**[2] Section 12 Transfer of proceedings from Local Courts in certain cases**

Omit “the amount prescribed for the time being by section 12 of the *Local Courts (Civil Claims) Act 1970*” from section 12 (1).

Insert instead “the jurisdictional limit of a Local Court when sitting in its General Division within the meaning of the *Local Courts Act 1982*”.

**[3] Section 58 Enforcement of certain orders for payment of money**

Omit “The provisions of Division 6 of Part 4 of the *Local Courts (Civil Claims) Act 1970*, and of Parts 5 and 7 of that Act”.

Insert instead “The provisions of section 101 and Part 8 of the *Civil Procedure Act 2005*, and of Division 3 of Part 7 of the *Local Courts Act 1982*”.

## 5.40 Real Property Act 1900 No 25

### [1] Section 3 Definitions

Omit the definition of *Writ* from section 3 (1) (a). Insert instead:

*Writ*—A writ for the levy of property within the meaning of Part 8 of the *Civil Procedure Act 2005*, including any such writ issued pursuant to an Act of the Commonwealth.

**Note.** See, for example, section 77M of the *Judiciary Act 1903* of the Commonwealth and other similar provisions of Commonwealth legislation.

### [2] Section 105 Recording of writ in Register

Insert after section 105 (1):

- (1A) An estate or interest in land under the provisions of this Act, being an estate or interest arising under a contract of sale under a writ, is not extinguished or otherwise affected merely because the writ subsequently expires.

**Note.** Completion of the sale, including execution of the transfer, is authorised by section 116 of the *Civil Procedure Act 2005*.

### [3] Section 105 (2) (b)

Omit “an office”. Insert instead “a sealed”.

### [4] Section 105 (2) (d)

Omit the paragraph. Insert instead:

- (d) is lodged before the date shown on the writ as the date on which the writ expires.

### [5] Section 105A Effect of recording writ

Omit section 105A (1) (b). Insert instead:

- (b) a dealing on which is endorsed a consent under section 113 (6) (b) of the *Civil Procedure Act 2005*,

### [6] Section 105A (1) (c)

Omit “section 28M (4)”. Insert instead “Part 4A”.

### [7] Section 105A (1) (j)

Omit “(a)–(n)”.

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- [8] **Section 105A (2)**  
Omit “the period of three months that next succeeds the recording of the writ”.  
Insert instead “the protected period”.
- [9] **Section 105A (2)**  
Omit “that period of three months”. Insert instead “the protected period”.
- [10] **Section 105A (3) (c)**  
Omit the paragraph. Insert instead:  
(c) is accompanied by an associated agreement for sale endorsed with the relevant consent under section 113 (6) (b) of the *Civil Procedure Act 2005*,
- [11] **Section 105A (4) (c)**  
Omit the paragraph. Insert instead:  
(c) is accompanied by an associated agreement for sale endorsed with the relevant consent under section 113 (6) (b) of the *Civil Procedure Act 2005*,
- [12] **Section 105A (6)**  
Omit “the period of three months that next succeeds that recording”.  
Insert instead “the protected period”.
- [13] **Section 105A (7)**  
Omit “the period of three months that next succeeds the recording”.  
Insert instead “the protected period”.
- [14] **Section 105A (8) (a)**  
Omit “the period of three months that next succeeds the recording”.  
Insert instead “the protected period”.
- [15] **Section 105A (9)**  
Insert after section 105A (8):  
(9) In this section, *protected period*, in relation to a writ, means the period:  
(a) that begins when the writ is recorded in the Register, and  
(b) that ends at the expiration of 6 months after the writ is recorded in the Register, or on the expiration of the writ, whichever first occurs.



**[16] Section 105C Lapsing of writ in relation to land**

Omit section 105C (3).

**[17] Section 105D Cancellation of recording of writ**

Omit “and has been returned to the court out of which it issued” from section 105D (a) (ii).

**[18] Section 105D (b)**

Omit the paragraph.

**[19] Section 105D (c)**

Omit the paragraph. Insert instead:

- (c) the application incorporates or is accompanied by evidence that satisfies the Registrar-General that the writ has been satisfied otherwise than by sale of the land to which the application relates, or

**[20] Section 105D (2)**

Insert at the end of the section:

- (2) The Registrar-General, on his or her own motion or on an application made in the approved form, may cancel a recording in the Register of a writ in relation to any land, or any estate or interest in land, if:
  - (a) the Registrar-General registers a transfer of the land, estate or interest pursuant to a sale under the writ, as referred to in section 105B (1), or
  - (b) the writ lapses in respect of that land, estate or interest, as referred to in section 105C, or
  - (c) the writ expires.

## **5.41 Retirement Villages Regulation 2000**

### **Clause 23**

Omit the clause. Insert instead:

#### **23 Interest on recurrent charges: section 155 (3)**

For the purposes of section 155 (3) of the Act, the prescribed rate of interest is the rate prescribed under section 101 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

## **5.42 Sale of Goods Act 1923 No 1**

### **Section 29 Effect of writs of execution**

Omit the section.

## **5.43 Sheriff Act 1900 No 16**

### **Section 9 Fees**

Omit the section.

## **5.44 Sheriff Act 2005 No 6**

### **Schedule 2 Savings, transitional and other provisions**

Omit clause 6.

## **5.45 Statutory and Other Offices Remuneration Act 1975 (1976 No 4)**

### **Schedule 2 Public offices**

Omit “(under the *Local Courts (Civil Claims) Act 1970*)” wherever occurring in the matter relating to Full-time Assessor and Part-time Assessor.

Insert instead “(under Part 7 of the *Local Courts Act 1982*)”.

## **5.46 Suitors’ Fund Act 1951 No 3**

### **Section 3 Suitors’ Fund**

Omit “the *Arbitration (Civil Actions) Act 1983*” from section 3 (2B) (b).

Insert instead “Part 5 of the *Civil Procedure Act 2005*”.

## **5.47 Supreme Court Act 1970 No 52**

### **[1] Sections 10 and 21**

Omit the sections.

### **[2] Section 19 Definitions generally**

Omit the definitions of *party* and *plaintiff* from section 19 (1).

### **[3] Sections 76–76C**

Omit the sections.

- [4] Part 5, Division 2**  
Omit the Division.
- [5] Sections 78–82**  
Omit the sections.
- [6] Section 85 Trial without jury unless jury required in interests of justice**  
Omit “section 130” from section 85 (2) (a) (ii).  
Insert instead “section 18 of the *Civil Procedure Act 2005*”.
- [7] Section 87 Questions of fact**  
Omit the section.
- [8] Section 91 Judgment**  
Omit section 91 (2).
- [9] Sections 92–95 and 97**  
Omit the sections.
- [10] Section 96 Effect of judgment or order**  
Omit section 96 (2) and (3).
- [11] Part 6, Division 4**  
Omit the Division.
- [12] Part 7B Mediation**  
Omit the Part.
- [13] Section 124 Rule-making power**  
Omit section 124 (1) (i) and (p).
- [14] Section 124 (10A)–(10C)**  
Insert after section 124 (10):
- (10A) This section does not give power to make rules in terms inconsistent with those of the uniform rules under the *Civil Procedure Act 2005* unless the uniform rules expressly permit rules under this section to be made in those terms.
  - (10B) The rules made under this section may authorise or require the use of an electronic case management system established under section 14B of the *Electronic Transactions Act 2000* in relation

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to any proceedings in a court in respect of which the use of such a system is authorised by an order in force under section 14C of that Act.

- (10C) The rules made under this section may provide for the exercise by a registrar or other officer of the Court of any of the Court's administrative or judicial functions under this or any other Act and for the review by the Court of the exercise by a registrar or other such officer of any such function.

#### **5.48 Victims Support and Rehabilitation Act 1996 No 115**

**[1] Section 32 Persons to whom compensation may be made payable**

Insert after section 32 (2):

- (3) Sections 77, 78 and 79 of the *Civil Procedure Act 2005* apply to money recovered under an award of statutory compensation in the same way as they apply to money recovered as referred to in section 77 (1) of that Act.

**[2] Section 52 Procedural and evidentiary provisions relating to recovery proceedings**

Omit “in the same way as the determination by a Local Court of an action commenced by way of an ordinary statement of claim (within the meaning of the *Local Courts (Civil Claims) Act 1970*)” from section 52 (1).

Insert instead “in the same way as proceedings on a statement of claim are determined by a Local Court in its General Division”.

**[3] Section 54 Order for restitution to be a judgment enforceable by Tribunal**

Omit section 54 (1). Insert instead:

- (1) An order for restitution may be enforced under Part 8 of the *Civil Procedure Act 2005* as if it were a judgment debt arising from proceedings under Part 7 of the *Local Courts Act 1982*.

#### **5.49 Water (Part 2—General) Regulation 1997**

**Clause 15**

Omit the clause. Insert instead:

**15 Interest on overdue charges**

For the purposes of section 22C (6A) (a) of the Act, the prescribed rate of interest is the rate prescribed under section 101 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

## **5.50 Water (Part 5—Bore Licences) Regulation 1995**

### **Clause 10 Water charges: sec 117B**

Omit clause 10 (3). Insert instead:

- (3) For the purposes of section 117B (8A) (a) of the Act, the prescribed rate of interest is the rate prescribed under section 101 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

## **5.51 Wild Dog Destruction Regulation 2004**

### **Clause 5 Interest on overdue rates**

Omit clause 5 (2). Insert instead:

- (2) For the purposes of section 12A (2) of the Act, the prescribed rate of interest is the rate prescribed under section 101 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

## **5.52 Wine Grapes Marketing Board (Reconstitution) Act 2003 No 100**

### **Section 5 Board may make order as to terms and conditions of payment**

Omit section 5 (4). Insert instead:

- (4) The rate at which interest is to accrue must not exceed the prescribed rate of interest under section 101 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt, plus 5 per cent.

## **5.53 Workers Compensation Act 1987 No 70**

### **Section 151M Payment of interest**

Omit “section 95 of the *Supreme Court Act 1970*” from section 151M (6).

Insert instead “section 101 of the *Civil Procedure Act 2005*”.

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## **5.54 Workers' Compensation (Dust Diseases) Act 1942 No 14**

### **Schedule 1A Reimbursement of compensation from negligent third parties**

Omit clause 5 (1). Insert instead:

- (1) Interest is payable on an amount that the second person is liable to pay under section 8E (3) (e) at the rate prescribed for the time being under section 101 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

## **5.55 Workplace Injury Management and Workers Compensation Act 1998 No 86**

### **[1] Section 110 Interest after order for payment**

Omit "section 95 (1) of the *Supreme Court Act 1970*" from section 110 (2) (b).

Insert instead "section 101 of the *Civil Procedure Act 2005*".

### **[2] Section 111 Interest on agreed payment of lump sum compensation**

Omit "section 95 (1) of the *Supreme Court Act 1970*" from section 111 (2) (b).

Insert instead "section 101 of the *Civil Procedure Act 2005*".

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## Schedule 6 Savings, transitional and other provisions

(Section 6 (3))

### Part 1 General

#### 1 Regulations

- (1) The Governor may make regulations of a savings or transitional nature consequent on the enactment of the following Acts:  
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### Part 2 Provisions consequent on enactment of this Act

#### 2 Definition

In this Part:

*the old legislation* means the *Supreme Court Act 1970*, the *District Court Act 1973* and the *Local Courts (Civil Claims) Act 1970*, and the rules of court made under those Acts, as in force immediately before the commencement of this clause.

#### 3 Rules under the Local Courts (Civil Claims) Act 1970

The *Local Courts (Civil Claims) Rules 1988* are taken to have been made under the *Local Courts Act 1982*, and may be amended and repealed accordingly.

#### 4 Regulations

The following regulations are taken to have been made under section 18, and may be amended and repealed accordingly:

- 
- (a) the *Supreme Court Regulation 2000*,
  - (b) the *District Court Regulation 2000*,
  - (c) the *Local Courts (Civil Claims) Regulation 2000*.

**5 Pending proceedings**

- (1) Subject to subclause (2), this Act and the uniform rules apply to proceedings commenced before the commencement of this Act in the same way as they apply to proceedings commenced on or after that commencement.
- (2) A court before which proceedings have been commenced before the commencement of this Act may make such orders dispensing with the requirements of the uniform rules in relation to the proceedings, and such consequential orders (including orders as to costs), as are appropriate in the circumstances.

**6 Right to claim set-off**

- (1) Subject to subclause (2), section 21 extends to:
  - (a) any debt arising under an agreement entered into before the commencement of that section, and
  - (b) any other debt arising before the commencement of that section.
- (2) The court may order that section 21 does not apply to a debt referred to in subclause (1) (a) if it is satisfied that it would be in the interests of justice to make such an order.

**7 Amendment of originating process after expiry of limitation period**

Section 65 extends to any proceedings commenced before the commencement of that section.

**8 Delegations**

Any delegation that was in force immediately before the commencement of this Act under a provision of the old legislation for which there is a corresponding provision in this Act is taken to be a delegation in force under the corresponding provision of this Act.

**9 Construction of references**

Subject to this Schedule and the regulations, in any Act or instrument:

- (a) a reference to a provision of the old legislation for which there is a corresponding provision in this Act extends to the corresponding provision of this Act or the uniform rules, and



- (b) a reference to any act, matter or thing referred to in a provision of the old legislation for which there is a corresponding provision in this Act or the uniform rules extends to the corresponding act, matter or thing referred to in the corresponding provision of this Act or the uniform rules, as the case requires.

#### 10 General saving

Subject to this Schedule and the regulations:

- (a) anything begun before the commencement of this Act under a provision of the old legislation for which there is a corresponding provision in this Act or the uniform rules may be continued and completed under the old legislation as if this Act had not been enacted, and
- (b) subject to paragraph (a), anything done under a provision of the old legislation for which there is a corresponding provision in this Act or the uniform rules (including anything arising under paragraph (a)) is taken to have been done under the corresponding provision of this Act or the uniform rules, as the case requires.

#### 11 Motor accident claims

- (1) In the definition of *motor accident claim* in section 3 (1), the reference to a claim within the meaning of the *Motor Accidents Compensation Act 1999* includes a reference to a claim within the meaning of Part 5 of the *Motor Accidents Act 1988*.
- (2) In section 81 (2), the reference to an award of damages to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies includes a reference to an award of damages to which Part 6 of the *Motor Accidents Act 1988* applies.

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## Schedule 7 Uniform Civil Procedure Rules 2005

(Section 9)

### Part 1 Preliminary

#### Division 1 General

##### 1.1 Name of rules

These rules are the *Uniform Civil Procedure Rules 2005*.

##### 1.2 Definitions

- (1) Words and expressions that are defined in the Dictionary at the end of these rules have the meanings set out in the Dictionary.
- (2) Notes included in these rules do not form part of these rules.

**Note.** In the notes, **DCR** means the *District Court Rules 1973*, **LCR** means the *Local Courts (Civil Claims) Rules 1988* and **SCR** means the *Supreme Court Rules 1970*.

##### 1.3 References to barristers and solicitors

For the purposes of these rules and section 18 of the *Legal Profession Act 1987*:

- (a) a reference in these rules to a **barrister** is a reference to a legal practitioner who practises as a barrister, and
- (b) a reference in these rules to a **solicitor** is a reference to a legal practitioner who practises as a solicitor.

**Note.** The rights of a person to practise as a barrister or to practise as a solicitor are regulated by the *Legal Profession Act 1987*.

##### 1.4 Saving as to discovery (cf SCR Part 1, rule 14)

These rules do not affect the right of any person to commence proceedings for discovery.

##### 1.5 Application of these rules

- (1) Subject to subrule (2), these rules apply to each court referred to in Column 1 of Schedule 1 in relation to civil proceedings of a kind referred to in Column 2 of that Schedule.
- (2) In respect of each court referred to in Column 1 of Schedule 1, civil proceedings of a kind referred to in Column 2 of that Schedule are excluded from the operation of each provision of these rules referred to in Column 4 of that Schedule in respect of those proceedings.

**1.6 Exclusion of provisions of Civil Procedure Act 2005**

In respect of each court referred to in Column 1 of Schedule 1:

- (a) civil proceedings of a kind referred to in Column 2 of that Schedule are excluded from the operation of the provisions of Parts 3–9 of the *Civil Procedure Act 2005* referred to in Column 3 of that Schedule in respect of those proceedings, and
- (b) the following proceedings, to the extent to which they are civil proceedings, are excluded from all of Parts 3–9 of the *Civil Procedure Act 2005*:
  - (i) proceedings under the *Mental Health (Criminal Procedure) Act 1990*,
  - (ii) proceedings under the *Habitual Criminals Act 1957*,
  - (iii) proceedings under the *Bail Act 1978*,
  - (iv) proceedings under Part 15A of the *Crimes Act 1900*,
  - (v) proceedings under Part 4 of the *Victims Support and Rehabilitation Act 1996*.

**1.7 Local rules that prevail over these rules**

The rules of court specified in Schedule 2 prevail over these rules.

**1.8 Determination of questions arising under these rules** (cf SCR Part 23, rule 4 (b) and (d))

The court may determine any question arising under these rules (including any question of privilege) and, for that purpose:

- (a) may inspect any document in relation to which such a question arises, and
- (b) if the document is not before the court, may order that the document be produced to the court for inspection.

**1.9 Objections to production of documents founded on privilege** (cf SCR Part 36, rule 13; DCR Part 28, rule 16)

- (1) This rule applies in circumstances in which the court orders a person, by subpoena or otherwise, to produce to the court any document or thing but the person objects to its production on the ground of privilege.
- (2) For the purpose of ruling on the objection, the court:
  - (a) may compel the person objecting to produce the document or thing, and
  - (b) may permit evidence in relation to the claim of privilege to be given by any other person by affidavit or otherwise, and

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- (c) may permit cross-examination on any affidavit used in support of the claim.
  - (3) If the person objecting makes and substantiates sufficient lawful objection to production on grounds of privilege, the court:
    - (a) if the document or thing has been produced to the court under subrule (2) (a), must return the document or thing to the person objecting, and
    - (b) must not make any further order for the production of the document or thing in the proceedings.
  - (4) This rule does not affect any law that authorises or requires the withholding of any document or thing or the refusal to answer any question on the ground that the disclosure of the document or thing or the answering of the question would be injurious to the public interest.

**1.10 Powers of the judicial registrar** (DCR Part 43A, rule 1)

- (1) For the purposes of section 18FB (1) of the *District Court Act 1973*, all of the powers of the District Court are conferred on the judicial registrar of that Court other than:
  - (a) the powers of the Court in its criminal jurisdiction, or
  - (b) the power of the Court to deal with contempt of court.
- (2) Subrule (1) (b) does not prevent the judicial registrar from reporting to the District Court constituted by a Judge any allegation of contempt of the Court.

**Division 2 Time**

**1.11 Reckoning of time** (cf SCR Part 2, rule 2; DCR Part 3, rule 1; LCR Part 4, rule 1)

- (1) Any period of time fixed by these rules, or by any judgment or order of the court or by any document in any proceedings, is to be reckoned in accordance with this rule.
- (2) If a time of one day or longer is to be reckoned by reference to a given day or event, the given day or the day of the given event is not to be counted.
- (3) If, apart from this subrule, the period in question, being a period of 5 days or less, would include a day or part of a day on which the registry is closed, that day is to be excluded.
- (4) If the last day for doing a thing is, or a thing is to be done on, a day on which the registry is closed, the thing may be done on the next day on which the registry is open.

- (5) Section 36 of the *Interpretation Act 1987* (which relates to the reckoning of time) does not apply to these rules.

**1.12 Extension and abridgment of time** (cf SCR Part 2, rule 3; DCR Part 3, rule 2; LCR Part 4, rule 2)

- (1) The court may, by order, extend or abridge any time fixed by these rules or by any judgment or order of the court.
- (2) The court may extend time under this rule, either before or after the time expires, and may do so after the time expires even if an application for extension is made after the time expires.

**1.13 Fixing times** (cf SCR Part 2, rule 4; DCR Part 3, rule 3; LCR Part 4, rule 3)

If no time is fixed by these rules, or by any judgment or order of the court, for the doing of any thing in or in connection with any proceedings, the court may, by order, fix the time within which the thing is to be done.

### **Division 3 Fees and other amounts**

**1.14 Prescribed fees and other amounts**

The fees and other amounts prescribed by these rules are set out in Schedule 3.

**1.15 Fees chargeable under the Oaths Act 1900**

The fees chargeable under section 28 of the *Oaths Act 1900* are set out in item 1 of Schedule 3.

## **Part 2 Case management generally**

**2.1 Directions and orders** (cf SCR Part 26, rule 1)

The court may, at any time and from time to time, give such directions and make such orders for the conduct of any proceedings as appear convenient (whether or not inconsistent with these rules or any other rules of court) for the just, quick and cheap disposal of the proceedings.

**Note.** See also the guiding principles in relation to the conduct of court proceedings (set out in Division 1 of Part 6 of the *Civil Procedure Act 2005*) and the general powers of the court to give directions (set out in Division 2 of that Part).

**2.2 Appointment for hearing** (cf SCR Part 26, rule 2)

The court may, at any time and from time to time, of its own motion, appoint a date for a hearing at which it may give or make the directions or orders referred to in rule 2.1.

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**2.3 Case management by the court** (cf SCR Part 26, rule 3)

Without limiting the generality of rule 2.1, directions and orders may relate to any of the following:

- (a) the filing of pleadings,
- (b) the defining of issues, including requiring the parties, or their legal practitioners, to exchange memoranda in order to clarify questions,
- (c) the provision of any essential particulars,
- (d) the filing of “Scott Schedules” referred to in rule 15.2,
- (e) the making of admissions,
- (f) the filing of lists of documents, either generally or with respect to specific matters,
- (g) the delivery or exchange of experts’ reports and the holding of conferences of experts,
- (h) the provision of copies of documents, including their provision in electronic form,
- (i) the administration and answering of interrogatories, either generally or with respect to specific matters,
- (j) the service and filing of affidavits, witness statements or other documents to be relied on,
- (k) the giving of evidence at any hearing, including whether evidence of witnesses in chief must be given orally, or by affidavit or witness statement, or both,
- (l) the use of telephone or video conference facilities, video tapes, film projection, computer and other equipment and technology,
- (m) the provision of evidence in support of an application for an adjournment or amendment,
- (n) a timetable with respect to any matters to be dealt with, including a timetable for the conduct of any hearing,
- (o) the filing of written submissions.

**Part 3 Electronic case management**

**3.1 Definitions**

- (1) In this Part:

**ECM system** means an electronic case management system established under section 14B of the *Electronic Transactions Act 2000*.

**registered user** means a person who is registered as a user of the ECM system under rule 3.3.

- (2) In this Part, a reference to *filing* a document in the court includes a reference to any other method of sending a document to the court.

### **3.2 Application of Part**

This Part applies to those courts, and for those purposes, for which the use of an ECM system is authorised by an order in force under section 14C of the *Electronic Transactions Act 2000*.

### **3.3 Registration of users**

- (1) The registrar of the court may register any person as a user of the ECM system in relation to the court, either generally or for particular proceedings, and may specify the level of access to which the person is entitled, and the conditions of use applicable to the person, as a registered user of the system.
- (2) Subject to any order of the court, a person may not be registered as a user of the ECM system for particular proceedings unless the person is:
- (a) a party to the proceedings, or
  - (b) a legal practitioner representing a party to the proceedings, or
  - (c) a person authorised to use the ECM system in relation to the proceedings by a legal practitioner representing a party to the proceedings.
- (3) The senior judicial officer of the court may establish a protocol for the registration of persons as users of the ECM system, either generally or for particular proceedings.
- (4) Such a protocol may provide for the automatic registration of particular classes of persons as users of the ECM system, and for the automatic specification of the level of access to which persons of such a class are entitled and the conditions of use applicable to persons of such a class as registered users of the system.
- (5) In relation to any proceedings before the court, the level of access to the ECM system to which a registered user is entitled, and the conditions of use applicable to a registered user, are subject to any order of the court.

### **3.4 Electronic filing of documents**

- (1) This rule applies to documents of a kind specified in Schedule 4.
- (2) A registered user for any proceedings may, by means of the ECM system, file documents in the court in relation to those proceedings.
- (3) A document that is filed by means of the ECM system is to be given initial acceptance as soon as it is received by the court, and is to be given final acceptance as soon as it is validated by the court.

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- (4) Without limiting any other ground on which it may be refused, validation is to be refused if any fee payable with respect to the filing of a document is not received by the court within 24 hours after the document's initial acceptance.
  - (5) A document that is filed by means of the ECM system is taken to have been filed when it is given final acceptance and, when given final acceptance, is taken to have been filed at the time it was given initial acceptance.
  - (6) Notice of the initial and final acceptance of a document, and of the dates of those acceptances, is to be given, by means of the ECM system, to the registered user by whom the document was filed.
  - (7) The date and time at which initial or final acceptance was given must be set out in the notice referred to in subrule (6).

### **3.5 Filing of affidavits**

- (1) This rule applies to an affidavit that is filed in the court by means of the ECM system.
- (2) In the case of an affidavit filed by a legal practitioner, the legal practitioner is taken:
  - (a) to have affirmed to the court that he or she has possession of the original affidavit, and
  - (b) to have undertaken to the court that, if the court so directs, he or she will file the original affidavit in accordance with the court's directions.
- (3) In the case of an affidavit filed otherwise than by a legal practitioner, the original affidavit must be filed in the court:
  - (a) if a practice note so requires or the court so directs, and
  - (b) if so required or directed, within the time limited by the relevant practice note or direction.
- (4) Any document referred to in an affidavit that cannot be filed by means of the ECM system is taken to be an exhibit, and not an annexure, regardless of the terms of the affidavit.

### **3.6 Filing of wills**

- (1) This rule applies to a will that is required to be filed in the court together with an application for probate of the will, or for administration of a person's estate with the will annexed, if the application is, but the will is not, filed by means of the ECM system.



- (2) A will to which this rule applies must be filed in the court:
  - (a) at least 2 days before the date of the next hearing in the proceedings in which the will is intended to be used, or
  - (b) within 7 days after the date on which the application is filed by means of the ECM system, or
  - (c) within such earlier time as the court may by order direct, whichever first occurs.
- (3) If the application is filed by a legal practitioner, the legal practitioner is taken:
  - (a) to have affirmed to the court that he or she has possession of the will, and
  - (b) to have undertaken to the court that, if the court so directs, he or she will file the will in accordance with the court's directions.

### **3.7 Electronic issuing of a document**

- (1) The court may, by means of the ECM system, issue a document to any party who is a registered user for the proceedings.
- (2) The date and time at which the document was issued must be set out in the document.

### **3.8 Electronic service of a document**

A party to any proceedings before the court may use electronic mail to serve a document on any other party to the proceedings, whether by means of the ECM system or otherwise, but only with the consent of the other party.

### **3.9 Use of ECM system in business conducted in the absence of the public**

Any business that, pursuant to section 71 of the *Civil Procedure Act 2005*, may be conducted in the absence of the public may be conducted by electronic communication sent and received by means of the ECM system, as provided by section 14I of the *Electronic Transactions Act 2000*.

## **Part 4 Preparation and filing of documents**

### **Division 1 Preparation of documents generally**

#### **4.1 Application of Division**

This Division applies to and in respect of any document that is prepared by or on behalf of a person (whether or not a party) for use in proceedings.

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**4.2 Documents to be filed to contain certain information** (cf SCR Part 1, rule 10, Part 7, rule 2, Part 11, rule 4, Part 65, rule 1; DCR Part 5, rule 2; LCR Part 36, rule 7)

- (1) Originating process filed on behalf of a party in any proceedings must contain the following information:
  - (a) the name of the court in which the proceedings are to be commenced,
  - (b) if relevant, the division or list, or division and list, in which the proceedings are intended to be heard,
  - (c) the venue at which the proceedings are intended to be heard,
  - (d) the title of the proceedings,
  - (e) the nature of the process (summons or statement of claim),
  - (f) if the process is filed by a person who is neither the party nor the party's solicitor or solicitor's agent, the capacity in which the person acts when filing the document,
  - (g) the party's address for service,
  - (h) the address for service, if known, of any defendant.
- (2) A document filed on behalf of a party in any proceedings (other than originating process) must contain the following information:
  - (a) the title of the proceedings, as appearing on the originating process for the proceedings,
  - (b) if relevant, the division or list, or division and list, in which the proceedings are to be heard,
  - (c) the case number for the proceedings, as appearing on the originating process for the proceedings,
  - (d) the nature of the document,
  - (e) if the document is filed by a person who is neither the party nor the party's solicitor or solicitor's agent, the capacity in which the person acts when filing the document,
  - (f) the party's address for service.

**Note.** In relation to paragraph (c), see rule 9.1 (4) and (5) which require cross-claims to be numbered.
- (3) The originating process and any such document may also contain the DX address, fax number or electronic mail address of the party, the party's solicitor or the party's solicitor's agent.

**4.3 Paper and writing** (cf SCR Part 65, rule 2; DCR Part 47, rule 3; LCR Part 36, rule 4)

- (1) A document must be on standard A4 paper of durable quality, capable of receiving ink writing.

- (2) Subject to the rules:
  - (a) a document may be one-sided (that is, with writing on one side of each sheet) or two-sided (that is, with writing on both sides of each sheet), but not partly one-sided and partly two-sided, and
  - (b) the sheets of a document must be securely fastened:
    - (i) if the document is one-sided, at the top left hand corner, or
    - (ii) if the document is two-sided, along the left hand side, without obscuring the writing or the margin, and
  - (c) a left margin of at least 25 millimetres must be kept clear on each sheet of a document that bears writing, and
  - (d) the pages of a document (that is, the sides of the sheets that bear writing) must be consecutively numbered.
- (3) The spacing between the lines of writing in a document must be at least 3 millimetres.
- (4) A document must bear writing that is clear, sharp, legible and permanent, must not be a carbon copy and must not bear any blotting, erasure or alteration that causes material disfigurement.
- (5) This rule does not apply to a document to the extent to which the nature of the document renders compliance impracticable.

**4.4 Signing documents** (cf SCR Part 65, rule 8, Part 66, rule 9; DCR Part 47, rule 5; LCR Part 36, rule 6)

- (1) In any proceedings, a document prepared on behalf of a party who is represented by a solicitor must be signed:
  - (a) by the party's solicitor in the proceedings, or
  - (b) by a solicitor acting as agent for the party's solicitor in the proceedings, or
  - (c) by some other solicitor belonging to the same firm or organisation (whether as partner or employee) as the party's solicitor, or the party's solicitor's agent, in the proceedings.
- (2) In any proceedings, a document prepared on behalf of a party who is not represented by a solicitor must be signed:
  - (a) by the party, or
  - (b) by some other person authorised by these rules to commence proceedings on behalf of the party.
- (3) Despite subrules (1) and (2), a document prepared on behalf of a party in proceedings in a Local Court may instead be signed:

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- (a) by a commercial agent or subagent (within the meaning of the *Commercial Agents and Private Inquiry Agents Act 1963*), in relation only to proceedings on an application for:
    - (i) an instalment order, or
    - (ii) an order for examination, or
    - (iii) a writ of execution, or
    - (iv) a garnishee order, or
  - (b) by a person holding a licence as a real estate agent, strata managing agent or on-site residential property manager within the meaning of the *Property, Stock and Business Agents Act 2002* in relation only to:
    - (i) proceedings on an application referred to in paragraph (a), or
    - (ii) the filing of a certificate under section 51 of the *Consumer, Trader and Tenancy Tribunal Act 2001*.

**4.5 Address for service** (cf SCR Part 9, rule 6; DCR Part 8, rule 8; LCR Part 7, rule 8)

- (1) Subject to subrule (2), a person's address for service is to be the address of a place in New South Wales (other than a DX address):
  - (a) at which documents in the proceedings may be left for the person during ordinary business hours, and
  - (b) to which documents in the proceedings may be posted for the person.
- (2) The address for service of a person who is represented by a solicitor is to be the office of the solicitor or, if the solicitor has another solicitor acting as agent, the office of the agent.
- (3) Despite subrules (1) and (2):
  - (a) the address for service of a defendant who is served with originating process outside New South Wales, but in Australia, may be any address in Australia, whether inside or outside New South Wales, and
  - (b) the address for service of a person who files a notice under section 19 (1) of the *Mutual Recognition Act 1992* of the Commonwealth (other than a person who is represented by a solicitor) may be any address in Australia, whether inside or outside New South Wales, and
  - (c) the address for service contained in an application to set aside a subpoena made under section 13 of the *Evidence and Procedure (New Zealand) Act 1994* of the Commonwealth (other than a person who is represented by a solicitor) may be:

- (i) any address in Australia, whether inside or outside New South Wales, or
- (ii) any address in New Zealand, and
- (d) the address for service of a person who has entered an appearance under the *Service and Execution of Process Act 1992* of the Commonwealth is to be the address for service stated in relation to the appearance.

**4.6 Changing address for service** (cf SCR Part 9, rule 6; DCR Part 8, rule 8; LCR Part 7, rule 8)

- (1) A person may change his or her address for service by filing a notice of the change showing his or her new address for service and serving the notice on all other active parties.
- (2) Any document that is filed in the proceedings and served on all other active parties is taken to be sufficient notice for the purposes of this rule.

**4.7 Numbers** (cf SCR Part 65, rule 4; DCR Part 47, rule 4; LCR Part 36, rule 5)

- (1) All dates, sums and other numbers in a document are to be expressed in figures, rather than words.
- (2) Despite subrule (1):
  - (a) months may be expressed in words, rather than numbers, and
  - (b) if dates are expressed wholly in numbers, they must be expressed in the form DD/MM/YY or DD/MM/YYYY.

**4.8 Separate documents for separate process**

Separate process (such as a defence and a statement of cross-claim or a cross-summons, or a reply and a defence to a statement of cross-claim) are to be dealt with in separate documents.

**4.9 Delegation by Protective Commissioner** (cf SCR Part 63, rule 16)

- (1) If, in connection with any proceedings involving a person under legal incapacity, a delegate under section 5A of the *Protected Estates Act 1983* signs a document in the exercise of a function delegated under that section, the delegate must include in the document a statement:
  - (a) of the delegate's name and position, and
  - (b) that the document is signed in exercise of a function delegated under that section, and
  - (c) if the delegate has not previously signed such a document in the proceedings, as to whether or not he or she has an interest in the proceedings adverse to that of the person under legal incapacity.

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- (2) On request by the court, the registrar or any party to the proceedings, the delegate must furnish to the person making the request a photocopy of the delegation, certified by the delegate as being a true copy.

## **Division 2 Filing of documents**

### **4.10 Filing generally** (cf SCR Part 1, rule 9A)

- (1) A person may lodge a document for filing in relation to any proceedings:
- (a) by delivering it to an officer of the court in the registry, or
  - (b) by sending it by post to the registry's business address, or
  - (c) by sending it to the registry's DX address.
- (2) Any person may lodge a document with an officer of the court for the purpose of its being filed in relation to proceedings, or proposed proceedings, in the court.
- (3) Unless acceptance of the document is subsequently refused by the court or by an officer of the court, a document is taken to have been filed when it is lodged for filing.
- (4) The court may refuse to accept a document for filing whether or not an officer of the court has accepted the document for filing.
- (5) An officer of the court may refuse to accept a document for filing in the following circumstances:
- (a) in the case of originating process:
    - (i) if the location specified in the document as the venue at which the proceedings are to be heard is a location at which the court does not sit, or
    - (ii) if the person on whose behalf the originating process is sought to be filed is the subject of an order of the Supreme Court declaring the person to be a vexatious litigant,
  - (b) in the case of a document for which a filing fee is payable, if the fee has not been paid or arrangements satisfactory to the officer of the court have not been made for its payment.

**Note.** See also rule 3.4 in relation to the electronic filing of documents.

### **4.11 Case number or other unique identifier to be assigned to originating process** (cf SCR Part 1, rule 10; DCR Part 5, rule 3; LCR Part 5, rule 3)

- (1) When originating process is accepted for filing, a case number or other unique identifier is to be assigned to the proceedings commenced by the process.

- (2) On accepting originating process for filing, an officer of the court must endorse on the process the case number or other unique identifier assigned to the proceedings commenced by the process.

**4.12 Lodgment of additional copies of originating process for service** (cf SCR Part 7, rule 6; DCR Part 5, rule 3; LCR Part 5, rule 3)

- (1) When filing originating process, a person may lodge additional copies for sealing.
- (2) On receiving such copies, an officer of the court:
  - (a) must seal with the court's seal a sufficient number of copies of the process for service on the other parties, and
  - (b) if the process was filed by post or by use of an authorised DX system, must forward the sealed copies to the lodging party.
- (3) This rule does not apply in relation to originating process that is filed by means of an electronic case management system referred to in Part 3.

**4.13 Place for filing** (cf SCR Part 1, rule 10A)

Subject to Part 3, a document (other than originating process) that is filed in relation to any proceedings must be filed:

- (a) in the same registry as the originating process was filed, or
- (b) if the court has ordered a change of venue, in the registry for the new venue, or
- (c) if the proceedings have been transferred to another court, in the registry for that other court, or
- (d) if the court has ordered that documents are to be filed at some other registry, at that other registry.

**4.14 Filing of notices on behalf of multiple parties** (cf SCR Part 11, rule 3)

Two or more persons filing the same notice of appearance, notice of motion or other notice in the same proceedings, by the same solicitor and on the same day, may do so by a single notice.

**4.15 Court's power to deal with scandalous matter in documents** (cf SCR Part 38, rule 8, Part 65, rule 5; DCR Part 30, rule 8, Part 47, rule 7; LCR Part 25, rule 8, Part 36, rule 8)

- (1) If any matter contained in a document on the court file is scandalous, frivolous, vexatious, irrelevant or oppressive, the court may order:
  - (a) that the matter to be struck out of the document, or
  - (b) that the document be placed in a sealed envelope on the court file, or
  - (c) that the document be taken off the court file.

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- (2) A sealed envelope referred to in subrule (1) (b) may not be opened except by order of the court.

## **Part 5 Preliminary discovery and inspection**

### **5.1 Definitions**

In this Part:

*applicant* means an applicant for an order under this Part.

*identity or whereabouts* includes the name and (as applicable) the place of residence, registered office, place of business or other whereabouts, and the occupation and sex, of the person against whom the applicant desires to bring proceedings, and also whether that person is an individual or a corporation.

### **5.2 Discovery to ascertain prospective defendant's identity or whereabouts**

- (1) This rule applies if it appears to the court that:
- (a) the applicant, having made reasonable inquiries, is unable to sufficiently ascertain the identity or whereabouts of a person (*the person concerned*) for the purpose of commencing proceedings against the person, and
  - (b) some person other than the applicant (*the other person*) may have information, or may have or have had possession of a document or thing, that tends to assist in ascertaining the identity or whereabouts of the person concerned.
- (2) The court may make either or both of the following orders against the other person:
- (a) an order that the other person attend the court to be examined as to the identity or whereabouts of the person concerned,
  - (b) an order that the other person must give discovery to the applicant of all documents that are or have been in the other person's possession and that relate to the identity or whereabouts of the person concerned.
- (3) A court that makes an order for examination under subrule (2) (a) may also make either or both of the following orders:
- (a) an order that the other person must produce to the court on the examination any document or thing that is in the other person's possession and that relates to the identity or whereabouts of the person concerned,
  - (b) an order that the examination be held before a registrar.



- (4) An order under this rule with respect to any information, document or thing held by a corporation may be addressed to any appropriate officer or former officer of the corporation.
- (5) A person need not comply with the requirements of an order under subrule (2) (a) unless conduct money has been handed or tendered to the person a reasonable time before the date on which attendance is required.
- (6) If the other person incurs expense or loss in complying with an order under subrule (2) (a), and the expense or loss exceeds the amount paid to the person under subrule (5), the court may order the applicant to pay to that person an amount sufficient to make good the expense or loss.
- (7) Unless the court orders otherwise, an application for an order under this rule:
  - (a) must be supported by an affidavit stating the facts on which the applicant relies and specifying the kinds of information, documents or things in respect of which the order is sought, and
  - (b) must, together with a copy of the supporting affidavit, be served personally on the other person.
- (8) An application for an order under this rule is to be made:
  - (a) if it is made in relation to proceedings in which the applicant is a party, by notice of motion in the proceedings, or
  - (b) in any other case, by summons.
- (9) This rule applies, with any necessary modification, where the applicant, being a party to proceedings, wishes to claim or cross-claim against a person who is not a party to the proceedings.

### **5.3 Discovery of documents from prospective defendant**

- (1) If it appears to the court that:
  - (a) the applicant may be entitled to make a claim for relief from the court against a person (*the prospective defendant*) but, having made reasonable inquiries, is unable to obtain sufficient information to decide whether or not to commence proceedings against the prospective defendant, and
  - (b) the prospective defendant may have or have had possession of a document or thing that can assist in determining whether or not the applicant is entitled to make such a claim for relief, and
  - (c) inspection of such a document would assist the applicant to make the decision concerned,

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the court may order that the prospective defendant must give discovery to the applicant of all documents that are or have been in the person's possession and that relate to the question of whether or not the applicant is entitled to make a claim for relief.

- (2) An order under this rule with respect to any document held by a corporation may be addressed to any officer or former officer of the corporation.
- (3) Unless the court orders otherwise, an application for an order under this rule:
  - (a) must be supported by an affidavit stating the facts on which the applicant relies and specifying the kinds of documents in respect of which the order is sought, and
  - (b) must, together with a copy of the supporting affidavit, be served personally on the person to whom it is addressed.
- (4) This rule applies, with any necessary modification, where the applicant, being a party to proceedings, wishes to decide whether or not to claim or cross-claim against a person who is not a party to the proceedings.

#### **5.4 Discovery of documents from other persons**

- (1) The court may order that a person who is not a party to proceedings, but in respect of whom it appears to the court that the person may have or have had possession of a document that relates to any question in the proceedings, must give discovery to the applicant of all documents that are or have been in the person's possession and that relate to that question.
- (2) Unless the court orders otherwise, an application for an order under this rule:
  - (a) must be supported by an affidavit stating the facts on which the applicant relies and specifying the kinds of documents in respect of which the order is sought, and
  - (b) must, together with a copy of the supporting affidavit, be served personally on the person to whom it is addressed.

#### **5.5 Discovery and inspection generally**

Division 1 of Part 21 applies to and in respect of the discovery and inspection of documents the subject of an order for discovery under this Part in the same way as it applies to the discovery and inspection of documents the subject of an order for discovery under that Division.

**Note.** See also rule 23.8 with respect to inspection of property.

### **5.6 Security for costs**

An order under this Part may be made subject to a condition requiring the applicant to give security for the costs of the person against whom the order is made.

### **5.7 Privilege**

An order under this Part does not operate so as to require the person against whom it is made to produce any privileged document that the person could not be required to produce:

- (a) if the applicant had commenced proceedings against that person, or
- (b) if that person had otherwise become a party to proceedings to which the applicant is a party, or
- (c) if the person had been served with a subpoena for production of the document in proceedings to which the applicant is a party.

### **5.8 Costs and other expenses** (cf SCR Part 52A, rule 26; DCR Part 39A, rule 5)

- (1) On any application for an order under this Part, the court may make orders for the costs of the applicant, of the person against whom the order is made or sought and of any other party to the proceedings.
- (2) The costs in respect of which such an order may be made include:
  - (a) payment of conduct money, and
  - (b) payments made on account of any expense or loss in relation to the proceedings, and
  - (c) the costs of making and serving any list of documents, and
  - (d) the costs of producing any documents for inspection, and
  - (e) the costs of otherwise complying with the requirements of any order under Division 1 of Part 21, as applying to the discovery and inspection of documents the subject of an order for discovery under this Part.

## **Part 6 Commencing proceedings and appearance**

### **Division 1 General**

#### **6.1 No step without originating process or notice of appearance** (cf SCR Part 11, rule 2)

- (1) Except by leave of the court, a party may not take any step in proceedings unless the party has filed a statement of claim or summons in the proceedings or has entered an appearance in the proceedings.

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- (2) Subrule (1) does not apply to any application for an order of the kind referred to in:
    - (a) Part 5 (Preliminary discovery and inspection), or
    - (b) rule 12.11 (Setting aside originating process etc), or
    - (c) rule 25.2 (Order in urgent case before commencement of proceedings).
  - (3) In any proceedings, a person (not being a plaintiff, not having entered an appearance and not having filed a notice of motion) may not make any application in the proceedings unless he or she has filed a notice of address for service.

## **Division 2      Originating process**

### **6.2 How proceedings commenced** (cf SCR Part 4, rules 1 and 3, Part 7, rule 7; DCR Part 5, rules 5 and 6; LCR Part 5, rule 1)

- (1) Subject to these rules, the practice notes and any other rules of court, a person may commence proceedings in the court by filing a statement of claim or a summons.
- (2) Subject to these rules, the practice notes and any other Act or law, the plaintiff may choose whether to commence proceedings by statement of claim or by summons.
- (3) Originating process must be served on each defendant.
- (4) Subject to subrule (5), originating process is valid for service:
  - (a) in the case of proceedings in the Supreme Court or a Local Court, for 6 months after the date on which it is filed, or
  - (b) in the case of proceedings in the District Court:
    - (i) except as provided by subparagraph (ii), for one month after the date on which it is filed, or
    - (ii) if the defendant (or at least one of the defendants) is to be served outside New South Wales, for 6 months after the date on which it is filed.
- (5) Failure to serve originating process within the time limited by these rules does not prevent the plaintiff from commencing fresh proceedings by filing another originating process.

### **6.3 Where statement of claim required** (cf SCR Part 4, rule 2)

Proceedings of the following kinds must be commenced by statement of claim:

- (a) proceedings on a claim for relief in relation to a debt or other liquidated claim,

- (b) proceedings on a claim for relief in relation to a tort,
- (c) proceedings on a claim based on an allegation of fraud,
- (d) proceedings on a claim for damages for breach of duty (however arising) and the damages claimed consist of or include:
  - (i) damages in respect of the death of any person, or
  - (ii) damages in respect of personal injuries to any person, or
  - (iii) damages in respect of damage to any property,
- (e) proceedings on a claim for relief in relation to a trust, other than an express trust wholly in writing,
- (f) proceedings on a claim for possession of land,
- (g) proceedings on a claim for relief under the *Property (Relationships) Act 1984*.

**6.4 Where summons required** (cf SCR Part 4, rule 2A)

- (1) Proceedings of the following kinds must be commenced by summons:
  - (a) proceedings in which there is no defendant,
  - (b) proceedings on an appeal or application for leave to appeal, other than proceedings assigned to the Court of Appeal,
  - (c) proceedings for preliminary discovery or inspection under Part 5,
  - (d) proceedings on a stated case,
  - (e) proceedings on an application for approval under section 75 of the *Civil Procedure Act 2005* of an agreement for the compromise or settlement of a claim,
  - (f) proceedings on an application for a transfer order under Part 9 of the *Civil Procedure Act 2005*,
  - (g) proceedings on an application for the removal or transfer of proceedings to the court under any Act, other than an application for a transfer order under Part 9 of the *Civil Procedure Act 2005*,
  - (h) proceedings (other than proceedings on a claim for damages) on any application made under any Act (other than the *Civil Procedure Act 2005*),
  - (i) proceedings on an application to the court under any Act, other than:
    - (i) proceedings on an application under the *Supreme Court Act 1970*, the *District Court Act 1973* or the *Local Courts Act 1982*, and
    - (ii) proceedings on an application that may properly be made in existing proceedings.

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- (2) Proceedings of the following kinds may also be commenced by summons, except where the application is made in relation to proceedings that have been commenced in the court:
- (a) proceedings on an application for a writ of habeas corpus ad subjiciendum,
  - (b) proceedings on an application for an order for the custody of a minor,
  - (c) proceedings on an application for an order for the appointment of a tutor of a person under legal incapacity, otherwise than in relation to proceedings that have been commenced by or against the person,
  - (d) proceedings on an application for a declaration of right,
  - (e) proceedings on an application for an injunction,
  - (f) proceedings on an application for the appointment of a receiver,
  - (g) proceedings on an application for an order for the detention, custody or preservation of property,
  - (h) proceedings on a claim for relief for trespass to land.
- Note.** If proceedings have already been commenced, the application should be made by motion: see rule 18.1.
- (3) Proceedings in the Supreme Court that the plaintiff intends to be entered in the Commercial List or the Technology and Construction List are to be commenced by summons.

**6.5 Proceedings wrongly commenced by statement of claim** (cf SCR Part 4, rule 2B)

- (1) Proceedings that have been commenced by statement of claim when they should have been commenced by summons are nevertheless, and for all purposes, taken to have been duly commenced as from the date of the filing of the statement of claim, and may be continued accordingly.
- (2) Despite subrule (1), the court may order the proceedings to be continued, as if they had been commenced by summons and as if any pleadings filed in the proceedings had been filed as affidavits, and may also make such orders as it thinks fit for the future conduct of the proceedings.

**6.6 Proceedings wrongly commenced by summons** (cf SCR Part 5, rule 11)

- (1) Proceedings that have been commenced by summons when they should have been commenced by statement of claim are nevertheless, and for all purposes, taken to have been duly commenced as from the date of the filing of the summons.

- (2) Despite subrule (1), the court may order that the proceedings continue on pleadings.
- (3) On or after making such an order, the court:
  - (a) may order that any affidavits stand as pleadings, or
  - (b) may make orders for the filing of a statement of claim or other pleadings.
- (4) After a statement of claim is filed pursuant to an order referred to in subrule (3) (b), the proceedings are to continue, subject to any other order of the court, as if commenced by statement of claim.

**6.7 Determination** (cf SCR Part 5, rule 8)

The court may, on the first or any later day of hearing:

- (a) hear and determine the proceedings or any claim in the proceedings, and
- (b) make such order or give such judgment as the nature of the case requires.

**6.8 Originating process for recovery of land to be served on occupier** (cf SCR Part 7, rule 8)

- (1) If, when proceedings for possession of land are commenced, a person (the *occupier*) not joined as a defendant is in occupation of the whole or any part of the land, the plaintiff:
  - (a) must state in the originating process that the plaintiff does not seek to disturb the occupier's occupation of the land, or
  - (b) must serve the originating process on the occupier together with a notice to the effect that:
    - (i) the occupier may apply to the court for an order that the occupier be added as a defendant, and
    - (ii) if the occupier does not so apply within 10 days after service, the occupier may be evicted under a judgment entered in the occupier's absence.
- (2) For the purposes of subrule (1), documents may be served on the occupier personally or by leaving the documents on the land concerned addressed to the occupier by name or addressed simply "to the occupier".
- (3) If originating process is amended by the addition of a claim for possession of land, the time at which proceedings for possession of that land are commenced is taken, for the purposes of subrule (1), to be the time at which the amendment is made.

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### **Division 3 Defendant to proceedings to enter appearance**

#### **6.9 How appearance entered** (cf SCR Part 11, rule 3)

- (1) A defendant may enter an appearance in proceedings by filing a notice of appearance.
- (2) A defendant who files a defence in proceedings is taken to have entered an appearance in the proceedings.

**Note.** Appearance may be withdrawn: see rule 12.5.

#### **6.10 Time for appearance** (cf SCR Part 7, rule 5, Part 11, rule 6)

For the purposes of these rules, the time limited for a defendant to enter an appearance (whether by filing a notice of appearance in accordance with this Division or by filing a defence in accordance with Division 4) is:

- (a) in the case of proceedings commenced by statement of claim:
  - (i) 28 days after service on the defendant of the statement of claim or such other time as the court directs for the filing of a defence, or
  - (ii) if the defendant makes an unsuccessful application to have the statement of claim set aside, 7 days after the refusal of the application,whichever is the later, or
- (b) in the case of proceedings commenced by summons:
  - (i) on or before the return day stated in the summons, or
  - (ii) if the defendant makes an unsuccessful application to have the summons set aside, 7 days after the refusal of the application,whichever is the later.

#### **6.11 Defendant may submit to judgment by notice of appearance** (cf SCR Part 11, rule 4 (3), (4) and (5))

- (1) A defendant who intends to take no active part in proceedings may include in the defendant's notice of appearance a statement to the effect that the defendant submits to the making of all orders sought and the giving or entry of judgment in respect of all claims made, to which may be added the words “, save as to costs”.
- (2) Except by leave of the court, a defendant who has filed a notice of appearance containing a statement referred to in subrule (1) may not file a defence or affidavit or take any other step in the proceedings.

**Note.** See rule 20.34 which allows the defendant in proceedings on a liquidated claim to file a statement acknowledging the whole of the amount of the claim.



## Division 4 Contents of statement of claim and summons

### 6.12 Relief claimed (cf SCR Part 7, rule 1; DCR Part 5, rules 6 and 6A; LCR Part 5, rules 1 and 2)

- (1) A statement of claim or summons must specifically state the relief claimed by the plaintiff.
- (2) If the relief claimed requires the determination or direction of the court on any question, the statement of claim or summons must state the question.
- (3) Costs referred to in section 196 (1) (b) of the *Legal Profession Act 1987* or section 329 (1) (c) of the *Legal Profession Act 2004* (costs payable for the enforcement of a lump sum debt or liquidated sum for damages) must be specifically claimed.
- (4) Costs, other than those referred to in section 196 (1) (b) of the *Legal Profession Act 1987* or section 329 (1) (c) of the *Legal Profession Act 2004*, need not be specifically claimed.
- (5) Exemplary damages and aggravated compensatory damages must be specifically claimed.
- (6) An order for interest up to judgment must be specifically claimed.
- (7) In the case of a liquidated claim, a claim for an order for interest up to judgment:
  - (a) must specify the period or periods for which interest is claimed, and
  - (b) may specify the rate or rates at which interest is claimed.
- (8) If no rate of interest is specified under subrule (7) (b), the rate at which interest is claimed is taken to be the relevant rate of interest prescribed by Schedule 5 for the purposes of section 101 of the *Civil Procedure Act 2005*.

**Note.** See Part 46 as to the additional matters to be included in a summons relating to an appeal.

### 6.13 Notice to defendant in statement of claim (cf SCR Part 7, rule 3)

A statement of claim:

- (a) must state that, unless a defence is filed in the registry, the proceedings may result in a judgment or order against the defendant, and
- (b) must give the address of the registry where the statement of claim is filed (which will consequently be the address where any further pleadings and other documents are to be filed), and

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(c) must specify the time limited by these rules for filing a defence.

**Note.** See rule 6.8 in relation to claims for the possession of land.

**6.14 Notice to defendant in summons** (cf SCR Part 7, rule 3)

A summons filed in proceedings in which there is a defendant:

- (a) must state that:
  - (i) the proceedings may be heard, and
  - (ii) the defendant is liable to suffer judgment or an order against the defendant,unless there is attendance before the court by the defendant or his or her barrister or solicitor at the time and place stated in the summons, and
- (b) must further state that, before any such attendance, the defendant must file a notice of appearance in the registry, and
- (c) must give the address of the registry at the place named as the place for attendance.

**6.15 Summons to specify return day** (cf SCR Part 5, rule 3)

- (1) A summons must state a return day.
- (2) The return day may be fixed by the court or, if not fixed by the court, is to be obtained from the registry.
- (3) If there is a defendant, the summons is to be served on the defendant not less than 5 days before the return day unless the court orders otherwise.
- (4) A summons is to bear a note stating the terms of any order made under subrule (3).
- (5) If a return day is obtained from the registry and the summons is to be served outside New South Wales, the return day is to be not less than one month after the date of filing of the summons.

**6.16 Alteration of return day in summons** (cf SCR Part 5, rule 5A)

The court may, by notice given to the parties by telephone or otherwise, postpone the return day for a summons to a later day, and may authorise the parties' solicitors to make corresponding alterations to the copies of the summonses held by them.

**6.17 Payment towards liquidated claim stays proceedings on claim** (cf SCR Part 7, rule 4; DCR Part 14, rule 2; LCR Part 12, rule 2)

- (1) This rule applies to proceedings in which the plaintiff makes a liquidated claim, but makes no claim of any other kind.

- (2) The defendant in any such proceedings may, within the time limited for appearance, pay to the plaintiff the sum of:
  - (a) the amount claimed (other than costs), including any interest claimed, and
  - (b) an amount for costs equal to the amount fixed in relation to such a claim by the regulations under the *Legal Profession Act 1987*, and
  - (c) if the amount so fixed does not include the fee paid on filing the originating process, an amount equal to that fee.
- (3) Having made such a payment, the defendant may file a notice of payment.
- (4) The filing of a notice of payment operates as a permanent stay of the proceedings unless the court orders otherwise.
- (5) A statement of claim commencing proceedings to which this rule applies must bear a note to the effect of this rule and must specify the amounts for costs referred to in subrule (2) (b) and (c).

## **Division 5 Joinder of causes of action and joinder of parties**

### **6.18 Joinder of causes of action** (cf SCR Part 8, rule 1; DCR Part 7, rule 1; LCR Part 6, rule 1)

- (1) In any originating process, the plaintiff may claim relief against the defendant in respect of more than one cause of action in any of the following circumstances:
  - (a) if the plaintiff sues in the same capacity, and claims the defendant to be liable in the same capacity, in respect of each cause of action,
  - (b) if the plaintiff sues:
    - (i) in his or her capacity as executor of the will of a deceased person, or administrator of the estate of a deceased person, in respect of one or more of the causes of action, and
    - (ii) in his or her personal capacity, but with reference to the estate of the same deceased person, in respect of the remaining causes of action,
  - (c) if the plaintiff claims the defendant to be liable:
    - (i) in his or her capacity as executor of the will of a deceased person, or administrator of the estate of a deceased person, in respect of one or more of the causes of action, and
    - (ii) in his or her personal capacity, and in relation to the estate of the same deceased person, in respect of the remaining causes of action,

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(d) if the court grants leave for all of the causes of action to be dealt with in the same proceedings.

(2) Leave under subrule (1) may be granted before or after the originating process is filed.

**6.19 Proceedings involving common questions of law or fact** (cf SCR Part 8, rule 2; DCR Part 7, rule 2; LCR Part 6, rule 2)

(1) Two or more persons may be joined as plaintiffs or defendants in any originating process if:

(a) separate proceedings by or against each of them would give rise to a common question of law or fact, and

(b) all rights of relief claimed in the originating process are in respect of, or arise out of, the same transaction or series of transactions, or if the court gives leave for them to be joined.

(2) Leave under subrule (1) may be granted before or after the originating process is filed.

**6.20 Proceedings affecting persons having joint entitlement** (cf SCR Part 8, rules 3 and 4; DCR Part 7, rules 3 and 4; LCR Part 6, rules 3 and 4)

(1) Unless the court orders otherwise, all persons jointly entitled to the same relief must be joined as parties in any claim for that relief that is made by any one or more of them.

(2) Unless the court orders otherwise, any other such person is to be joined:

(a) as a plaintiff, if he or she consents to being a plaintiff, or

(b) as a defendant, if he or she does not consent to being a plaintiff.

(3) Despite subrule (1), a person may not be joined as a party to proceedings in contravention of any other Act or law.

**Note.** See, for example, section 62 of the *Bankruptcy Act 1966* of the Commonwealth.

**6.21 Proceedings affecting persons having joint or several liability** (cf SCR Part 8, rule 5; DCR Part 7, rule 5; LCR Part 6, rule 5)

(1) A person who is jointly and severally liable with some other person in relation to any act, matter or thing need not be a defendant in proceedings with respect to that act, matter or thing merely because the other person is a defendant in those proceedings.

(2) In any proceedings in which a defendant is one of a number of persons who are jointly, but not severally, liable in contract or tort, or under an Act or statutory instrument, the court may order that the other persons be joined as defendants and that the proceedings be stayed until those other persons have been so joined.

**6.22 Court may order separate trials if joinder of party or cause of action inconvenient** (cf SCR Part 8, rule 6; DCR Part 7, rule 6; LCR Part 6, rule 6)

If the court considers that the joinder of parties or causes of action in any proceedings may embarrass, inconvenience or delay the conduct of the proceedings, the court:

- (a) may order separate trials, or
- (b) may make such other order as it thinks fit.

**6.23 Effect of misjoinder or non-joinder of parties** (cf SCR Part 8, rule 7 (1); DCR Part 7, rule 7 (1); LCR Part 6, rule 7 (1))

Proceedings are not defeated merely because of the misjoinder or non-joinder of any person as a party to the proceedings.

**6.24 Court may join party if joinder proper or necessary** (cf SCR Part 8, rule 8 (1); DCR Part 7, rule 8 (1); LCR Part 6, rule 8 (1))

- (1) If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party.
- (2) Without limiting subrule (1), in proceedings for the possession of land, the court may order that a person (not being a party to the proceedings) who is in possession of the whole or any part of the land (whether in person or by a tenant) be added as a defendant.

**6.25 Joinder as plaintiff requires party's consent** (cf SCR Part 8, rule 8 (2); DCR Part 7, rule 8 (2); LCR Part 6, rule 8 (2))

A person is not to be joined as a plaintiff in any proceedings except with his or her consent.

**6.26 Joinder to recover costs** (cf SCR Part 52A, rule 4 (3) and (4))

- (1) Except to the extent to which these rules expressly provide, a party may not join another person as a party to any proceedings for the purpose of making an application for costs against the other person.
- (2) This rule does not apply:
  - (a) if the other person would otherwise be a proper party to the proceedings, or
  - (b) if the party joins the other person by means of a cross-claim in respect of a claim for costs against the party.

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**6.27 Joinder on application of third party** (cf SCR Part 8, rule 8; DCR Part 7, rule 8; LCR Part 6, rule 8)

A person who is not a party may apply to the court to be joined as a party, either as a plaintiff or defendant.

**6.28 Date of commencement of proceedings in relation to parties joined** (cf SCR Part 8, rule 11 (3) and (4); DCR Part 7, rule 11 (3); LCR Part 6, rule 11 (3))

If the court orders that a person be joined as a party, the date of commencement of the proceedings, in relation to that person, is taken to be the date on which the order is made or such later date as the court may specify in the order.

**Division 6 Removal of parties**

**6.29 Removal of parties by order** (cf SCR Part 8, rule 9; DCR Part 7, rule 9; LCR Part 6, rule 9)

The court may order that a person:

- (a) who has been improperly or unnecessarily joined, or
  - (b) who has ceased to be a proper or necessary party,
- be removed as a party.

**6.30 Effect of certain changes on proceedings** (cf SCR Part 8, rule 10; DCR Part 7, rule 10; LCR Part 6, rule 10)

- (1) Proceedings do not abate as a result of a party's death or bankruptcy if a cause of action in the proceedings survives.
- (2) If a cause of action survives, and the interest or liability of a party to any proceedings passes from the party to some other person, the court may make such orders as it thinks fit for the joinder, removal or re-arrangement of parties.

**6.31 Court may dismiss proceedings not prosecuted following death of party** (cf SCR Part 8, rule 12; DCR Part 7, rule 12; LCR Part 6, rule 12)

- (1) This rule applies to any proceedings in which:
  - (a) a party dies, but a cause of action in the proceedings survives his or her death, and
  - (b) an order for the joinder of a party to replace the deceased party is not made within 3 months after the death.
- (2) The court may order that, unless an application to join a party to replace the deceased party is made within a specified time, the proceedings in relation to the cause of action concerned be dismissed.

- (3) An application for such an order may be made by any person to whom the deceased party's liability in relation to the cause of action concerned has passed (whether or not a party to the proceedings).
- (4) On making an order under this rule, the court may give such directions as it thinks fit for service of the order on any person (whether or not a party to the proceedings) who is interested in continuing the proceedings.

## **Division 7 Orders as to future conduct of proceedings**

### **6.32 Orders as to the future conduct of proceedings** (cf SCR Part 8, rule 11; DCR Part 7, rule 11; LCR Part 6, rule 11)

- (1) If in any proceedings the court makes an order under Division 5 or 6, it may also make such orders as it thinks fit for the future conduct of the proceedings, including orders with respect to the following:
  - (a) the service of the order, and other documents,
  - (b) the amendment of documents,
  - (c) the entering of an appearance, or the filing of a defence, by persons who are joined as defendants,
  - (d) the substitution of one party for another party or former party.
- (2) If the court orders the substitution of one party for another party or former party, all things previously done in the proceedings have the same effect in relation to the new party as they had in relation to the old, subject to any other order by the court.

**Note.** See rule 6.28 as to when proceedings are taken to have commenced in relation to a new party.

## **Part 7 Parties to proceedings and representation**

### **Division 1 General**

#### **7.1 By whom proceedings may be commenced and carried on** (cf SCR Part 4, rules 4 and 4A, Part 66, rule 1; Act No 9 1973, section 43; Act No 11 1970, section 11)

- (1) A natural person may commence and carry on proceedings in any court, either by a solicitor acting on his or her behalf or in person.
- (2) A company within the meaning of the *Corporations Act 2001* of the Commonwealth:
  - (a) may commence and carry on proceedings in any court by a solicitor or by a director of the company, and

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- (b) may commence and, unless the court orders otherwise, carry on proceedings in a Local Court by a duly authorised officer or employee of the company.
  - (3) In the case of proceedings in the Supreme Court, subrule (2) (a) authorises a company to commence proceedings by a director only if the director is also a plaintiff in the proceedings.
  - (4) A corporation (other than a company within the meaning of the *Corporations Act 2001* of the Commonwealth):
    - (a) may commence and carry on proceedings in any court by a solicitor, and
    - (b) may commence and carry on proceedings in any court (other than a Local Court) by a duly authorised officer of the corporation, and
    - (c) may commence and, unless the court orders otherwise, carry on proceedings in a Local Court by a duly authorised officer or employee of the corporation.
  - (5) Despite subrules (1)–(4), any person may commence and, unless the court orders otherwise, carry on proceedings in a Local Court:
    - (a) by a commercial agent or subagent (within the meaning of the *Commercial Agents and Private Inquiry Agents Act 1963*), in relation only to proceedings on an application for:
      - (i) an instalment order, or
      - (ii) an order for examination, or
      - (iii) a writ of execution, or
      - (iv) a garnishee order, or
    - (b) by a person holding a licence as a real estate agent, strata managing agent or on-site residential property manager within the meaning of the *Property, Stock and Business Agents Act 2002* in relation only to:
      - (i) proceedings on an application referred to in paragraph (a), or
      - (ii) the filing of a certificate under section 51 of the *Consumer, Trader and Tenancy Tribunal Act 2001*.

**7.2 Affidavit as to authority to commence and carry on proceedings in Supreme Court or District Court** (cf SCR Part 4, rule 4A, Part 11, rule 1A)

- (1) A person who commences or carries on proceedings in the Supreme Court or District Court:
  - (a) as the director of a company within the meaning of the *Corporations Act 2001* of the Commonwealth, or



- (b) as the authorised officer of a corporation (other than a company within the meaning of the *Corporations Act 2001* of the Commonwealth),
- must file with the originating process, notice of appearance or defence, as the case may be, an affidavit as to his or her authority to act in that capacity, together with a copy of the instrument evidencing that authority.
- (2) The affidavit made by the director of a company within the meaning of the *Corporations Act 2001* of the Commonwealth must contain:
- (a) a statement to the effect that:
- (i) the director is a director of the company, and
  - (ii) the director has been authorised by a resolution of the directors duly passed at a meeting of directors held on a specified date (which must not be earlier than 21 days before the date of the affidavit) to commence and carry on the proceedings, as the case requires, and
  - (iii) the authority has not been revoked, and
  - (iv) the director is aware that he or she may be liable to pay some or all of the costs of the proceedings, or
- (b) a statement to the effect that:
- (i) the director is the managing or governing director of the company and has authority to exercise the powers of the directors, and
  - (ii) the director is aware that he or she may be liable to pay some or all of the costs of the proceedings.
- (3) The affidavit made by the authorised officer of a corporation (other than a company within the meaning of the *Corporations Act 2001* of the Commonwealth) must contain a statement to the effect that:
- (a) the officer is the holder of a specified office within the corporation, and
  - (b) the officer has been authorised by the corporation to commence and carry on the proceedings, and
  - (c) the authority has not been revoked, and
  - (d) the officer is aware that he or she may be liable to pay some or all of the costs of the proceedings.

**7.3 Issue of subpoena in certain circumstances requires leave** (cf SCR Part 66, rule 1A)

- (1) A subpoena may not be issued, except by leave of the court, unless the party at whose request the subpoena is to be issued is represented by a solicitor in the proceedings.

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- (2) Leave under subrule (1) may be given either generally or in relation to a particular subpoena or subpoenas.
  - (3) Despite subrule (1), a subpoena may not be issued in relation to proceedings in the Small Claims Division of a Local Court, except by leave of the court, in any circumstances.

## **Division 2 Representation**

### **7.4 Representation of concurrent interests** (cf SCR Part 8, rule 13; DCR Part 7, rule 15)

- (1) This rule applies to any matter in which numerous persons have the same interest or same liability in any proceedings.
- (2) Unless the court orders otherwise, the proceedings may be commenced and carried on by or against any one or more persons as representing any one or more of them.
- (3) At any stage of the proceedings, the plaintiff may apply to the court for an order appointing one or more of the defendants or one or more of the other persons to represent any one or more of them.
- (4) If a person who is not a party to the proceedings is appointed as referred to in subrule (3), that person must be joined as a party under rule 6.24.
- (5) This rule does not apply to proceedings concerning:
  - (a) the administration of a deceased person's estate, or
  - (b) property the subject of a trust.

### **7.5 Judgments and orders in proceedings bind represented persons** (cf SCR Part 8, rule 13; DCR Part 7, rule 15)

- (1) A judgment or order made in proceedings in which a party has, by an order under rule 7.4, been appointed to represent a number of persons binds all of those persons, but is not enforceable against any of those persons who is not a party except by leave of the court.
- (2) Notice of motion for an application for leave under subrule (1) must be personally served on the person against whom the judgment or order is sought to be enforced.
- (3) Subrule (1) does not prevent a person against whom the judgment or order is sought to be enforced from disputing liability by reference to circumstances peculiar to his or her case.

**7.6 Representation in cases concerning administration of estates, trust property or statutory interpretation** (cf SCR Part 8, rule 14)

- (1) In relation to proceedings concerning:
  - (a) the administration of a deceased person's estate, or
  - (b) property the subject of a trust, or
  - (c) the construction of an Act, instrument or other document,where a person or class of persons is or may be interested in or affected by the proceedings, the court may appoint one or more of those persons to represent any one or more of them.
- (2) A person or persons may not be appointed under subrule (1) unless the court is satisfied of one or more of the following:
  - (a) that the person or class, or a member of the class, cannot, or cannot readily, be ascertained,
  - (b) that the person or class, or a member of the class, although ascertained, cannot be found,
  - (c) that, although the person or class, or a member of the class, has been ascertained and found, it is expedient for the purpose of saving expense (having regard to all of the circumstances, including the amount at stake and the degree of difficulty of the issue or issues to be determined) for a representative to be appointed to represent any one or more of them.
- (3) For the purposes of this rule, persons may be treated as having an interest or liability:
  - (a) even if, in relation to one or more of them, the interest or liability is a contingent or future interest or liability, or
  - (b) even if one or more of those persons is an unborn child.
- (4) This rule does not limit the operation of rule 7.10.

**7.7 Judgments and orders bind represented persons in estate and trust property proceedings** (cf SCR Part 8, rule 14)

A judgment or order made in proceedings in which a party has, by an order under rule 7.6, been appointed to represent a number of persons, or members of a class of persons, binds all such persons, and all members of such a class, as if they had been parties to the proceedings.

**7.8 Court may determine who has conduct of proceedings** (cf SCR Part 8, rule 17; DCR Part 7, rule 14; LCR Part 6, rule 15)

The court may give the conduct of the whole or any part of any proceedings to such person as it thinks fit.

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**7.9 Judgments and orders bind beneficiaries** (cf SCR Part 8, rule 15)

- (1) This rule applies to proceedings that have been commenced by or against a trustee, executor or administrator, including proceedings to enforce a security by way of foreclosure or otherwise.
- (2) It is not necessary to join as a party any of the persons having a beneficial interest under the trust, or in the estate, concerned.
- (3) Subject to subrule (4), any judgment that is given, and any order that is made, is as binding on a person having a beneficial interest under the trust, or in the estate, as it is binding on the trustee, executor or administrator.
- (4) If, in relation to proceedings in which such a judgment or order has been made, the court is satisfied that the representative, trustee, executor or administrator did not in fact represent some or all of the persons having a beneficial interest under the trust, or in the estate, the court may order that the judgment or order does not bind those persons.
- (5) This rule does not limit the power of the court to order that a party be joined under rule 6.24.

**7.10 Interests of deceased person** (cf SCR Part 8, rule 16; DCR Part 7, rule 13; LCR Part 6, rule 14)

- (1) This rule applies to any proceedings in which it appears to the court:
  - (a) that a deceased person's estate has an interest in the proceedings, but is not represented in the proceedings, or
  - (b) that the executors or administrators of a deceased person's estate have an interest in the proceedings that is adverse to the interests of the estate.
- (2) The court:
  - (a) may order that the proceedings continue in the absence of a representative of the deceased person's estate, or
  - (b) may appoint a representative of the deceased person's estate for the purposes of the proceedings, but only with the consent of the person to be appointed.
- (3) Any order under this rule, and any judgment or order subsequently entered or made in the proceedings, binds the deceased person's estate to the same extent as the estate would have been bound had a personal representative of the deceased person been a party to the proceedings.
- (4) Before making an order under this rule, the court may order that notice of the application be given to such of the persons having an interest in the estate as it thinks fit.

### **Division 3 Executors, administrators and trustees**

#### **7.11 Executors, administrators and trustees** (cf SCR Part 68, rule 4)

- (1) In proceedings relating to an estate, all executors of the will of the deceased, or all administrators of the estate, must be parties unless an order has been made under rule 7.4 appointing one or more of them to represent the others.
- (2) In proceedings relating to a trust, all trustees must be parties.
- (3) In proceedings commenced by executors, administrators or trustees, any executor, administrator or trustee who does not consent to being joined as a plaintiff must be made a defendant.

#### **7.12 Beneficiaries and claimants** (cf SCR Part 68, rule 5)

- (1) In proceedings relating to an estate, all persons having a beneficial interest in or claim against the estate need not be parties, but the plaintiff may make parties of such of those persons as he or she thinks fit.
- (2) In proceedings relating to a trust, all persons having a beneficial interest under the trust need not be parties, but the plaintiff may make parties of such of those persons as he or she thinks fit.
- (3) This rule has effect despite rule 6.20 (Proceedings affecting persons having joint entitlement).

### **Division 4 Persons under legal incapacity**

#### **7.13 Definition**

In this Division, *person under legal incapacity* includes a person who is incapable of managing his or her affairs.

#### **7.14 Proceedings to be commenced or carried on by tutor** (cf SCR Part 63, rules 2 and 3 (2); DCR Part 45, rules 2 and 3; LCR Part 34, rules 3 and 4)

- (1) A person under legal incapacity may not commence or carry on proceedings except by his or her tutor.
- (2) Unless the court orders otherwise, the tutor of a person under legal incapacity may not commence or carry on proceedings except by a solicitor.

#### **7.15 Tutors generally** (cf SCR Part 63, rules 4 and 5; DCR Part 45, rules 4 and 5; LCR Part 34, rules 5 and 6)

- (1) Subject to this Division, a person may become the tutor of a person under legal incapacity without the need for any formal instrument of appointment or any order of a court.

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- (2) Any person (other than a corporation) is eligible to be the tutor of a person under legal incapacity, in respect of any proceedings, unless the person is:
    - (a) a person under legal incapacity, or
    - (b) a judicial officer, a registrar or any other person involved in the administration of a court, or
    - (c) a person who has an interest in the proceedings adverse to the interests of the person under legal incapacity.
  - (3) In the case of proceedings with respect to the estate of a person whose estate is subject to management under the *Protected Estates Act 1983*, the tutor of that person is to be the person who has the management of the person's estate under that Act.
  - (4) Subrule (3) does not apply if the person concerned declines to act as tutor or is unable to act as tutor, or if the court orders otherwise.
  - (5) A person may not replace another person as tutor of a person under legal incapacity except by order of the court.
  - (6) Anything that these rules authorise or require a party to do in relation to the conduct of proceedings may, if the party is a person under legal incapacity, be done on his or her behalf by his or her tutor.

**7.16 Tutor to file certain documents** (cf SCR Part 63, rule 4; DCR Part 45, rule 4; LCR Part 34, rule 5)

A tutor may not commence or carry on proceedings on behalf of a person under legal incapacity unless there have been filed:

- (a) the tutor's consent to act as tutor, and
- (b) a certificate, signed by the tutor's solicitor in the proceedings, to the effect that the tutor does not have any interest in the proceedings adverse to the interests of the person under legal incapacity.

**7.17 Non-appearance of person under legal incapacity** (cf SCR Part 63, rule 6; DCR Part 45, rule 6; LCR Part 34, rules 3A and 7)

- (1) Subject to subrule (2), the plaintiff in proceedings against a defendant who is a person under legal incapacity may take no further step in the proceedings following service of the originating process until a tutor has entered an appearance on behalf of the defendant.

**Note.** If no such appearance is entered, the plaintiff may apply to the court under rule 7.18 for the appointment of a tutor of the defendant, or for the removal and appointment of such a tutor.

- (2) In the case of proceedings in a Local Court against a defendant who appears to be a person under legal incapacity by reason only of his or her minority:
  - (a) the plaintiff may serve on the defendant a notice requiring a tutor of the defendant to enter an appearance in the proceedings, and
  - (b) unless the court orders otherwise, the plaintiff may continue the proceedings as if the defendant were not a person under legal incapacity if such an appearance is not entered within 28 days after service of the notice.

**7.18 Court may appoint and remove tutors** (cf SCR Part 63, rules 5, 7 and 8; DCR Part 45, rules 7 and 8; LCR Part 34, rules 8 and 9)

- (1) In any proceedings in which a party is or becomes a person under legal incapacity:
  - (a) if the person does not have a tutor, the court may appoint a tutor, or
  - (b) if the person has a tutor, the court may remove the party's tutor and appoint another tutor.
- (2) In any proceedings concerning a person under legal incapacity who is not a party, the court may appoint a tutor of the person and join the person as a party to the proceedings.
- (3) If the court removes a party's tutor, it may also stay the proceedings pending the appointment of a new tutor.
- (4) Subject to any order of the court, notice of any motion under this rule is to be served on the person under legal incapacity and, if it proposes removal of the person's tutor, on the tutor.
- (5) In proceedings on a motion for the appointment of a tutor, evidence in support of the motion must include:
  - (a) evidence that the party for whom a tutor is to be appointed is a person under legal incapacity, and
  - (b) evidence that the proposed tutor consents to being appointed and does not have any interest in the proceedings adverse to the interests of the person under legal incapacity.
- (6) An application for appointment as tutor under this rule may be made by the court of its own motion or on the motion of any other person, including the proposed tutor.

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## **Division 5 Business names**

### **7.19 Persons to sue and be sued in own name** (cf SCR Part 64, rule 4)

Subject to this Division, persons are to sue and be sued in their own names, and not under any business name.

### **7.20 Proceedings against defendant operating under unregistered business name** (cf SCR Part 64, rule 2; DCR Part 46, rule 2; LCR Part 35, rule 2)

- (1) Proceedings against a person in respect of anything done or omitted to be done by the person in the course of, or in relation to, a business carried on under an unregistered business name may be commenced against that person, as defendant, under that name.
- (2) For the purposes of any such proceedings, the unregistered business name is taken to be a sufficient description of that person.
- (3) Any judgment or order arising from any such proceedings may be enforced against that person.

### **7.21 Defendant sued in business name to respond in own name** (cf SCR Part 64, rule 4; DCR Part 46, rule 3; LCR Part 35, rule 3)

- (1) In any proceedings in which a defendant is sued under a business name, the defendant must not enter an appearance or file a defence otherwise than in his or her own name.
- (2) When entering an appearance or filing a defence, the defendant must also file a statement of the names and residential addresses of all persons who were carrying on business under the business name concerned when the proceedings were commenced.
- (3) The court may order that a defendant's notice of appearance or defence be struck out if the defendant has failed to comply with subrule (2).

### **7.22 Plaintiff to amend documents in the proceedings to replace business name with defendant's own name** (cf SCR Part 64, rule 5; DCR Part 46, rule 4; LCR Part 35, rule 4)

- (1) In any proceedings in which a defendant is sued under a business name, the plaintiff must take such steps as are reasonably practicable:
  - (a) to ascertain the name and residential address of the defendant, and
  - (b) to amend such documents in the proceedings as will enable the proceedings to be continued against the defendant in his or her own name.
- (2) In any such proceedings, the plaintiff may not, except by leave of the court, take any step in the proceedings other than:



- (a) the steps of filing and serving originating process, and
  - (b) steps to ascertain the name and residential address of the defendant,
- until the documents in the proceedings have been amended as referred to in subrule (1) (b).

## **Division 6 Relators**

### **7.23 Relators** (cf SCR Part 4, rule 5)

- (1) A relator must act by a solicitor.
- (2) A solicitor may not act for a relator in any proceedings unless:
  - (a) the relator has authorised the solicitor to act in that regard, and
  - (b) a copy of the instrument authorising the solicitor to act in that regard has been filed.

## **Division 7 Appointment and removal of solicitors**

### **7.24 Power to act by solicitor** (cf SCR Part 66, rule 1; DCR Part 48, rule 1; LCR Part 37, rule 1)

- (1) Every act, matter or thing which, by or under the *Civil Procedure Act 2005* or these rules or otherwise by law, is required or allowed to be done by a party may be done by his or her solicitor.
- (2) Subrule (1) does not apply where the context or subject-matter otherwise indicates or requires.

### **7.25 Adverse parties** (cf SCR Part 66, rule 2; DCR Part 48, rule 2; LCR Part 37, rule 2)

If a solicitor or a partner of the solicitor is a party to any proceedings, or acts as solicitor for a party to any proceedings, that solicitor may not act for any other party in the proceedings, not in the same interest, except by leave of the court.

### **7.26 Change of solicitor or agent** (cf SCR Part 66, rules 3 and 4; DCR Part 48, rule 4; LCR Part 37, rule 4)

- (1) A party having a solicitor in any proceedings may change solicitors.
- (2) A solicitor who has another solicitor acting as his or her agent in relation to a party may change agents.
- (3) A party who changes solicitors, or whose solicitor changes agents, must file notice of the change.
- (4) A copy of the notice of change, as filed, must be served on all other active parties and, if practicable, on the former solicitor or agent.

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- 7.27 Removal of solicitor** (cf SCR Part 66, rule 6; DCR Part 48, rule 4; LCR Part 37, rule 4)
- (1) A party that terminates the authority of a solicitor to act on the party's behalf must file notice of the termination.
  - (2) A copy of the notice of termination, as filed, must be served on all other active parties and, if practicable, on the former solicitor.
  - (3) Filing and service of the notice of termination on the other parties may be effected by the former solicitor.
  - (4) This rule does not apply to a change of solicitor referred to in rule 7.26.
- 7.28 Appointment of solicitor by previously unrepresented party** (cf SCR Part 66, rule 5; DCR Part 48, rule 3; LCR Part 37, rule 3)
- (1) A party that acts for himself or herself in any proceedings may afterwards appoint a solicitor to act in the proceedings on the party's behalf.
  - (2) A party that appoints a solicitor as referred to in subrule (1) must file and serve notice of the appointment.
- 7.29 Withdrawal of solicitor** (cf SCR Part 66, rule 7; DCR Part 48, rule 4; LCR Part 37, rule 4)
- (1) A solicitor who ceases to act for a party in any proceedings may file notice of the change and serve the notice on the parties.
  - (2) Except by leave of the court, a solicitor may not file or serve notice of the change unless he or she has served on the client and the registrar a notice of intention to file and serve the notice of change:
    - (a) in the case of proceedings for which a date for trial has been fixed, at least 28 days before doing so, or
    - (b) in any other case, at least 7 days before doing so.
  - (3) Unless notice of the change is filed with the leave of the court, a solicitor filing such a notice must include in the notice a statement as to the date on which service of the notice of intention required by subrule (2) was effected.
  - (4) A solicitor may serve a notice of change or notice of intention under this rule on the former client by posting it to the former client at the residential or business address of the former client last known to the solicitor.
- 7.30 Effect of change** (cf SCR Part 66, rule 8; DCR Part 48, rule 5; LCR Part 37, rule 5)
- A change for which notice is required or permitted to be given under this Division does not take effect:

- (a) as regards the court, until the notice is filed, and
- (b) as regards any person on whom it is required or permitted to be served, until a copy of the notice, as filed, is served on that person.

**7.31 Actions by a solicitor corporation** (cf SCR Part 66, rule 10)

Where, by or under the *Civil Procedure Act 2005* or these rules or otherwise by law:

- (a) any act, matter or thing is authorised or required to be done by a solicitor for a person, and
- (b) the solicitor is a solicitor corporation, and
- (c) the act, matter or thing can, in the circumstances of the case, only be done by a natural person,

the act, matter or thing may be done by a solicitor who is a director, officer or employee of the corporation.

## Part 8 Venue

**Note.** In the case of proceedings in a Local Court, a change of venue may involve the transfer of proceedings between Local Courts. Such transfers are dealt with by Division 3 of Part 9 of the *Civil Procedure Act 2005* and by Division 1 of Part 44 of these rules.

**8.1 Venue at which proceedings to be heard** (cf Act No 9 1973, section 4; DCR Part 2A, rule 1; LCR Part 1, rule 3, Part 3, rule 2)

- (1) Unless the court orders otherwise, the venue at which proceedings are to be heard is the venue specified by the plaintiff in the originating process.
- (2) The venue so specified must be a venue at which the court sits.

**8.2 Change of venue generally** (cf Act No 9 1973, section 40; DCR Part 2A, rule 4)

- (1) If it appears to the court:
  - (a) that a fair or unprejudiced trial of a question arising or likely to arise in or in connection with any proceedings cannot otherwise be had, or
  - (b) for any other reason it is appropriate for the venue of any proceedings to be changed,the court may, subject to this Part, make an order changing the venue of the proceedings.
- (2) The judicial officer before whom proceedings are being heard by the court may direct that proceedings commenced at one location be continued at another location at which he or she is authorised to hear those proceedings.

### **8.3 Part not to apply to orders for examination**

This Part does not apply to the examination of a judgment debtor under an order for examination.

## **Part 9 Cross-claims**

### **9.1 Making of cross-claim** (cf SCR Part 6, rule 10; DCR Part 20, rule 10; LCR Part 18, rule 1)

- (1) A party (*the cross-claimant*) may make a cross-claim within the time limited for the party to file a defence or within such further time as the court may allow.
- (2) A cross-claim is to be made:
  - (a) by statement of cross-claim, in the case of a cross-claim in proceedings commenced by statement of claim, or
  - (b) by cross-summons, in the case of a cross-claim in proceedings commenced by summons.
- (3) Subject to this Part, these rules apply to a statement of cross-claim and cross-summons in the same way as they apply to a statement of claim and summons, respectively.
- (4) In any proceedings, each cross-claim is to be numbered (“first cross-claim”, “second cross-claim” and so on) in the order in which the cross-claims are filed.
- (5) For the purposes of rule 4.2 (2) (d), the identification of a document as a cross-claim must include the number given to the cross-claim under this rule.

### **9.2 Existing parties need not enter separate appearance**

A party against whom a cross-claim is made (*the cross-defendant*) is not required to enter an appearance if he or she:

- (a) is a party to the proceedings in which the cross-claim is made, and
- (b) has entered an appearance in those proceedings.

### **9.3 Cross-claimant may rely on previous pleadings** (cf SCR Part 6, rule 11; DCR Part 20, rule 11; LCR Part 18, rule 1)

A cross-claimant may, in the cross-claim, plead all or any of the facts on which he or she relies by reference to the previous pleadings in the proceedings from which the cross-claim arises.

**9.4 Defence**

The cross-defendant must include in his or her defence to the cross-claim any grounds on which he or she disputes the claim made by the cross-claimant.

**9.5 Default of cross-defendant to cross-claim** (cf SCR Part 6, rule 7; DCR Part 20, rule 7)

If a cross-defendant does not file a defence to the cross-claim in accordance with these rules or an order of the court:

- (a) any judgment (including summary judgment, judgment by default or judgment by consent) on any claim, question or issue in the proceedings, so far as it is relevant to the cross-claim, and
- (b) any decision (including any decision by consent) on any claim, question or issue in the proceedings, so far as it is relevant,

is binding, as between the parties to the cross-claim, unless the court orders otherwise.

**9.6 Service on active parties** (cf SCR Part 6, rule 5; DCR Part 20, rule 5)

- (1) If a cross-defendant is an active party, personal service of a statement of cross-claim or cross-summons on that party is not required.
- (2) Rule 10.16 (Service by filing) does not apply to service of a statement of cross-claim or cross-summons.

**9.7 Service on new parties** (cf SCR Part 6, rule 5; DCR Part 20, rule 5; LCR Part 18, rule 1)

- (1) This rule applies to the service of a statement of cross-claim or cross-summons on a person who is not already a party to the proceedings from which the cross-claim arises.
- (2) When serving the statement of cross-claim or cross-summons, the cross-claimant must serve on the cross-defendant both the originating process in the proceedings from which the cross-claim arises and such of the following documents as have been filed by or served on the cross-claimant:
  - (a) in proceedings commenced by statement of claim or in which a statement of claim has been filed, any other pleadings,
  - (b) in proceedings commenced by summons, any other cross-summonses,
  - (c) any notices of motion not finally disposed of,
  - (d) any affidavits, other than affidavits that are not relevant to the questions arising on the cross-claim,

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- (e) any other documents that have been served by the plaintiff on the defendant, or by the defendant on the plaintiff, and are intended to be relied on,
  - (f) any amendments to any of the documents referred to in paragraphs (a)–(e).
- (3) Service of a statement of cross-claim or cross-summons must be effected in accordance with the provisions of these rules with respect to service of originating process.

**9.8 Directions** (cf SCR Part 6, rule 4; DCR Part 20, rule 4; LCR Part 18, rule 4)

The court, at any stage of the proceedings:

- (a) may order that any cross-claim, or any question in or arising on any cross-claim, is to be separately tried, and
- (b) may direct generally the extent to which the usual procedures at a trial or hearing are to be modified because of the joinder of the cross-defendant.

**9.9 Proceedings to continue together** (cf SCR Part 6, rule 6 (1); DCR Part 20, rule 6 (1); LCR Part 18, rule 3 (1))

Unless the court orders otherwise, proceedings on a cross-claim are to be carried on together with the proceedings from which the cross-claim arises.

**9.10 Cross-claim may be separately prosecuted** (cf SCR Part 6, rule 8; DCR Part 20, rule 8; LCR Part 18, rule 3 (5))

- (1) A cross-claim may proceed even if:
  - (a) judgment has been entered on the originating process in the proceedings from which the cross-claim arises or any other cross-claim in the proceedings, or
  - (b) the proceedings on the originating process or any other cross-claim have been stayed, dismissed, withdrawn or discontinued.
- (2) Proceedings on the originating process in the proceedings from which the cross-claim arises may proceed even if:
  - (a) judgment has been entered on any cross-claim in the proceedings, or
  - (b) the proceedings on any such cross-claim have been stayed, dismissed, withdrawn or discontinued.

- 9.11 Contribution or indemnity** (cf SCR Part 6, rule 9; DCR Part 20, rule 9; LCR Part 19, rule 1)
- (1) If a defendant makes a cross-claim for contribution or indemnity in respect of a claim made against the defendant in the proceedings, judgment on the cross-claim:
    - (a) is not to be entered except by leave of the court, and
    - (b) is not to be enforced until any judgment in the proceedings against the defendant has been satisfied.
  - (2) If a cross-claim in any proceedings includes a claim for contribution under section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* in respect of a claim made in the proceedings against the party by whom it is filed, a defence to the cross-claim, or subsequent pleadings on the cross-claim, may not be filed unless the court so directs.

## **Part 10 Service of documents generally**

### **Division 1 Service generally**

- 10.1 Service of filed documents** (cf SCR Part 15, rule 28)
- (1) Unless the court orders otherwise, a party that files a document must as soon as practicable serve copies of the document on each other active party.
  - (2) In the case of proceedings in a Local Court, an originating process may, and a defence must, be served on the other parties, on behalf of the party by whom it was filed, by an officer of the Local Court.  
**Note.** See rules 10.7 and 10.8 as to how service is to be effected by a court.
- 10.2 Service of affidavits** (cf SCR Part 38, rule 7; DCR Part 30, rule 7; LCR Part 25, rule 7)
- (1) A party intending to use an affidavit that has not been filed must serve it on each other interested party not later than a reasonable time before the occasion for using it arises.
  - (2) A party who fails to serve an affidavit as required by subrule (1) may not use the affidavit except by leave of the court.
- 10.3 Service of originating process in Australia** (cf SCR Part 10, rule 2B)
- (1) This rule applies to proceedings in the Supreme Court.
  - (2) Subject to this Part, originating process may be served anywhere in Australia, whether in New South Wales or elsewhere.

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- (3) An originating process for service in Australia, but outside New South Wales, must bear a statement either that the plaintiff intends to proceed under the *Service and Execution of Process Act 1992* of the Commonwealth or that the plaintiff intends to proceed under the *Uniform Civil Procedure Rules 2005*.
  - (4) The plaintiff may proceed otherwise than in accordance with the intention stated under subrule (3), but only with the leave of the court.

**10.4 Operation of Service and Execution of Process Act 1992 of the Commonwealth** (cf SCR Part 9, rule 1A)

This Part does not limit the operation of the *Service and Execution of Process Act 1992* of the Commonwealth or any other law of the Commonwealth.

**Division 2 Manner of service**

**10.5 The various methods of service** (cf SCR Part 9, rules 3 and 4; DCR Part 8, rules 3, 9 and 12; LCR Part 7, rules 3, 9 and 12)

- (1) Subject to these rules, a document may be served on a person:
  - (a) by means of personal service, or
  - (b) by posting a copy of the document, addressed to the person:
    - (i) to the person's address for service, or
    - (ii) if the person is not an active party, to the person's business or residential address, or
  - (c) by leaving a copy of the document, addressed to the person:
    - (i) at the person's address for service, or
    - (ii) if the person is not an active party, at the person's business or residential address,with a person who is apparently of or above the age of 16 years and apparently working or residing at that address, or
  - (d) in the case of service on a corporation, by serving the document on the corporation in any manner in which service of such a document may, by law, be served on the corporation.
- (2) In the case of a person having an address for service that is a solicitor's office address, service of a document on the person may also be effected:
  - (a) if the notice advising the address for service includes a DX address, by leaving a copy of the document, addressed to the solicitor, in that DX box at that address or in another DX box for transmission to that DX box, or



- (b) if the notice advising the address for service includes a fax number, by faxing a copy of the document to that number, or
  - (c) if the notice advising the address for service includes an electronic mail address, by transmitting an electronic copy of the document to that address.
- (3) Unless the contrary is proved, the time at which a document is taken to have been served is:
- (a) in the case of a document that is left in a DX box in accordance with subrule (2) (a), at the end of the second day following the day on which the copy is so left, or
  - (b) in the case of a copy of a document that is faxed in accordance with subrule (2) (b), at the end of the first day following the day on which the copy is so faxed.

**Note.** See section 14M of the *Electronic Transactions Act 2000* as to when an electronic copy of a document is taken to have been delivered to an electronic mail address. See also Division 3 of this Part as to how personal service is to be effected.

**10.6 Service in accordance with agreement between parties** (cf SCR Part 9, rule 9; DCR Part 8, rule 15; LCR Part 7, rule 15)

- (1) In any proceedings, any document (including originating process) may be served by one party on another (whether in New South Wales or elsewhere) in accordance with any agreement, acknowledgment or undertaking by which the party to be served is bound.
- (2) Service in accordance with subrule (1) is taken for all purposes (including for the purposes of any rule requiring personal service) to constitute sufficient service.

**10.7 Notice given or served by court** (cf SCR Part 9, rule 14)

Subject to any order of the court, any notice or other document that is required to be given to or served on any party by the court, or by any officer of the court, is taken to have been given or served if served in any manner in which a document not requiring personal service may be served under this Part.

**10.8 Service of defence by court** (cf LCR Part 9, rule 3)

- (1) This rule applies to proceedings in a Local Court.
- (2) When filing a defence, whether in person, by post or by use of an authorised DX system, a party must lodge additional copies of the defence for service on each of the other active parties.
- (3) On receiving such copies, an officer of the court:

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- (a) must mark each copy with the date of acceptance of the document, and
  - (b) must return one copy to the party by which it was filed, and
  - (c) must cause the remaining copies to be served on each of the other active parties.

**10.9 Service of process on defendant operating under unregistered business name** (cf SCR Part 64, rule 3; DCR Part 46, rule 2; LCR Part 35, rule 2)

- (1) This rule applies to any proceedings against a person in respect of anything done or omitted to be done by the person in the course of, or in relation to, a business carried on under an unregistered business name.
- (2) For the purposes of any such proceedings, any document may be served on the defendant, whether sued in his or her own name or under the unregistered business name:
  - (a) by leaving it with a person who is apparently engaged in the business, and apparently of or above the age of 16 years, at any place at which business is carried on under that name, or
  - (b) by sending it by post, addressed to the defendant, to any place at which business is carried on under that name,whether or not the place concerned is within New South Wales.
- (3) For the purposes of any such proceedings:
  - (a) service of a document in accordance with subrule (2) is taken to constitute personal service, and
  - (b) the place at which the document is left, or to which the document is sent by post, is taken to be the place of service of the document, and
  - (c) in the case of a document sent by post, the document is taken to have been served at the end of 7 days after the day on which it was sent.
- (4) This rule does not limit any other law with respect to the service of documents.

**10.10 Service of process on defendant operating under registered business name** (cf SCR Part 64, rule 3)

- (1) This rule applies to any proceedings against a person carrying on business under a registered business name in respect of anything done or omitted to be done by the person in the course of, or in relation to, business carried on under that name.

- (2) For the purposes of any such proceedings, any document may be served on the defendant, whether sued in his or her own name or under the registered business name:
- (a) by leaving it with a person who is apparently engaged in the business, and apparently of or above the age of 16 years, at any place at which business is carried on under that name, or
  - (b) by sending it by post, addressed to the defendant:
    - (i) to any place at which business is carried on under that name, or
    - (ii) to the address for service of any person in whose name the business name is registered under the *Business Names Act 2002*, whether or not the place concerned is within New South Wales.
- (3) For the purposes of any such proceedings:
- (a) service of a document in accordance with subrule (2) is taken to constitute personal service, and
  - (b) the place at which the document is left, or to which the document is sent by post, is taken to be the place of service of the document, and
  - (c) in the case of a document sent by post, the document is taken to have been served at the end of 7 days after the day on which it was sent.
- (4) This rule does not limit any other law with respect to the service of documents.

**10.11 Service of process on partner in limited partnership** (cf SCR Part 64, rule 3A)

- (1) This rule applies to any proceedings against a partner in a limited partnership (within the meaning of Part 3 of the *Partnership Act 1892*) in respect of anything done or omitted to be done by any person in the course of, or in relation to, a business carried on by the partnership.
- (2) For the purposes of any such proceedings, any document may be served on the defendant, whether sued in his or her own name or under the firm-name of the partnership:
- (a) by leaving it with a person who is apparently engaged in the business, and apparently of or above the age of 16 years, at the registered office of the partnership, or
  - (b) by sending it by post, addressed to the firm-name of the partnership, to the registered office of the partnership.
- (3) For the purposes of any such proceedings:

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- (a) service of a document in accordance with subrule (2) is taken to constitute personal service, and
  - (b) the place at which the document is left as referred to in subrule (2) (a), or to which the document is sent as referred to in subrule (2) (b), is taken to be the place of service of the document, and
  - (c) in the case of a document sent as referred to in subrule (2) (b), the document is taken to have been served at the end of 7 days after the day on which it was sent.
- (4) This rule does not limit any other law with respect to the service of documents.

**10.12 Service of process on person under legal incapacity** (cf SCR Part 63, rule 15)

- (1) This rule applies to any proceedings in which a document is required to be served personally on a person under legal incapacity.
- (2) Personal service on a person under legal incapacity may not be effected otherwise than in accordance with this rule.
- (3) If the person under legal incapacity has a tutor in the proceedings, the document may be served on the tutor.
- (4) The document may be served on any person (including the person under legal incapacity) whom the court may, before or after service, approve.
- (5) If the person to be served is a minor and has no tutor in the proceedings, the document may be served:
  - (a) on the person, but only if the person is aged 16 years or more, or
  - (b) on a parent or guardian of the person, or
  - (c) if the person has no parent or guardian, on a person with whom he or she resides or in whose care he or she is.
- (6) If the person to be served is a protected person (within the meaning of the *Protected Estates Act 1983*) and has no tutor in the proceedings, the document may be served:
  - (a) if the person has a manager in respect of his or her estate, on the manager, or
  - (b) if the person does not have a manager, on a person with whom he or she resides or in whose care he or she is.
- (7) Subject to subrule (8), a document served pursuant to this rule must be served in the manner required by these rules in relation to documents of the same kind.
- (8) In addition to any other service required by these rules:

- (a) a judgment or order requiring a person under legal incapacity to do, or refrain from doing, any act, and
  - (b) a notice of motion for the committal of a person under legal incapacity, and
  - (c) a subpoena addressed to a person under legal incapacity, must be served personally on the person.
- (9) Subrule (8) does not apply to an order for interrogatories or for discovery or inspection of documents.

**10.13 Acceptance of service by solicitor** (SCR Part 9, rule 7; DCR Part 8, rules 6 and 7; LCR Part 7, rules 6 and 7)

If a solicitor notes on a copy of:

- (a) any originating process, or
- (b) any other document required or permitted to be served in any proceedings, but not required to be personally served,

that he or she accepts service of the document on behalf of any person, the document is taken to have been duly served on that person on the date on which the note is made or on such earlier date of service as may be proved.

**10.14 Substituted and informal service generally** (cf SCR Part 9, rules 10 and 11; DCR Part 8, rules 5 and 16; LCR Part 7, rules 5 and 16)

- (1) If a document that is required or permitted to be served on a person in connection with any proceedings:
  - (a) cannot practicably be served on the person, or
  - (b) cannot practicably be served on the person in the manner provided by law,the court may, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the document to the notice of the person concerned.
- (2) An order under this rule may direct that the document be taken to have been served on the person concerned on the happening of a specified event or on the expiry of a specified time.
- (3) If steps have been taken, otherwise than under an order under this rule, for the purpose of bringing the document to the notice of the person concerned, the court may, by order, direct that the document be taken to have been served on that person on a date specified in the order.
- (4) Service in accordance with this rule is taken to constitute personal service.

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**10.15 Substituted and informal service of originating process in proceedings for possession of land** (cf SCR Part 9, rule 5)

- (1) This rule applies to originating process that is required to be served on a defendant in connection with proceedings for the possession of land but that cannot be served on the defendant without undue delay or expense.
- (2) The court may order that the plaintiff may serve the originating process on the defendant by affixing a copy of the originating process to a conspicuous part of the land.
- (3) An order under subrule (2) may direct that the originating process be taken to have been served on the defendant on the expiry of a specified time.
- (4) If a copy of the originating process has been affixed to a conspicuous part of the land, otherwise than under an order under subrule (2), the court may order that the originating process be taken to have been served on the defendant on a date specified in the order.
- (5) A party may apply for an order under this rule without filing or serving notice of motion.
- (6) Service in accordance with this rule is taken to constitute personal service.

**10.16 Service by filing** (cf SCR Part 9, rule 12)

- (1) If in any proceedings any document is required or permitted to be served on:
  - (a) a person who is in default of appearance, or
  - (b) a person who has entered an appearance but is not an active party in the proceedings,the filing of the document is taken to have the same effect as service of the document on the person unless the court orders otherwise.
- (2) This rule does not apply to any document that is required to be served personally.

**10.17 Service of injunctions** (cf SCR Part 9, rule 15)

If the court grants an interlocutory injunction, the party may serve notice of the injunction by letter signed by or on behalf of the registrar.

**10.18 Service at address for service in other court or tribunal** (cf SCR Part 9, rule 8)

If:

- (a) a decision is given or a case is stated in proceedings before any judicial officer or other person (*the proceedings below*), and
- (b) a party to the proceedings below (*the subject party*) has an address for service in New South Wales for the purposes of those proceedings at the office of a solicitor (*the address below*), and
- (c) proceedings (not being proceedings in relation to punishment for contempt) arising out of the proceedings below are commenced in the court (*the new proceedings*), and
- (d) the plaintiff in the new proceedings has not received notice that the address below has ceased to be applicable,

documents, including the originating process, may be served on the subject party at the address below, until the subject party has an address for service in the new proceedings, as if the address below were the subject party's address for service in the new proceedings.

**10.19 Waiver of objection to service** (cf DCR Part 8, rule 5 (3))

A party who files a document in reply to a document alleged to have been served on that party is taken to have waived any objection to the fact or manner of service unless he or she files and serves notice of the objection together with the document so filed.

**Division 3 Personal service**

**10.20 Personal service required only in certain circumstances** (cf SCR Part 9, rules 1 and 2; DCR Part 8, rule 3; LCR Part 7, rules 3 and 20)

- (1) Any document required or permitted to be served on a person in any proceedings may be personally served, but need not be personally served unless these rules so require or the court so orders.
- (2) Except as otherwise provided by these rules:
  - (a) any originating process, and any order for examination or garnishee order, in proceedings in the Supreme Court or the District Court must be personally served, and
  - (b) any originating process in a Local Court must be served in one of the following ways:
    - (i) it may be personally served on the defendant,
    - (ii) it may be left, addressed to the defendant, at the defendant's business or residential address, with a person

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who is apparently of or above the age of 16 years and apparently working or residing at that address,

- (iii) if served by a Local Court, it may be sent by post, addressed to the defendant, to the defendant's business or residential address in an envelope marked with a return address (being the address of the Local Court but not so identified), and
- (c) any subpoena for production in proceedings in the District Court, and any order for examination, garnishee order or subpoena for proceedings in a Local Court, must be served in one of the following ways:
  - (i) it may be personally served on the person to whom it is directed,
  - (ii) it may be left, addressed to the person to whom it is directed, at that person's business or residential address, with a person who is apparently of or above the age of 16 years and apparently working or residing at that address.

**Note.** As to service by post, see section 76 of the *Interpretation Act 1987*.

- (3) If the envelope containing the originating process, posted as referred to in subrule (2) (b) (iii), is returned to the court by the postal authority as not having been delivered to the addressee:
  - (a) service of the process is taken not to have been effected, and
  - (b) any judgment given or entered on the basis of that service is to be set aside,and the registrar must so advise the plaintiff.
- (4) Service of a subpoena in accordance with subrule (2) (c) (ii) is taken to be personal service for the purposes of rule 33.5 (1).
- (5) Unless an earlier date is proved, a defendant who enters an appearance is taken to have been personally served with the relevant originating process on the date on which appearance was entered.

**10.21 How personal service effected generally** (cf SCR Part 9, rule 3; DCR Part 8, rules 3 and 14; LCR Part 7, rules 3 and 14)

- (1) Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.



- (2) If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to that other person.
- (3) Service in accordance with subrule (2) is taken to constitute personal service.

**10.22 Personal service on corporation** (cf SCR Part 9, rule 3; DCR Part 8, rule 12; LCR Part 7, rule 12)

Personal service of a document on a corporation is effected:

- (a) by personally serving the document on a principal officer of the corporation, or
- (b) by serving the document on the corporation in any other manner in which service of such a document may, by law, be served on the corporation.

**10.23 Personal service on Crown Solicitor** (cf SCR Part 9, rule 3; DCR Part 8, rule 7A)

For the purposes of section 6 of the *Crown Proceedings Act 1988*, personal service of a document on the Crown Solicitor may be duly effected by leaving the document at the office of the Crown Solicitor with a person who is apparently a member of the Crown Solicitor's staff.

**10.24 Personal service on judicial officers** (cf SCR Part 9, rules 7A and 7B)

- (1) In proceedings against a judicial officer, personal service of any document may be effected by leaving a copy of the document:
  - (a) in the case of a judicial officer of the Supreme Court or District Court, at the office of the Principal Registrar of that Court, or
  - (b) in any other case, at the office of the senior judicial officer of the court at which the decision or determination was made,addressed, in either case, to the judicial officer on whom it is to be served.
- (2) In subrule (1), **judicial officer** includes an Assessor within the meaning of the *Local Courts Act 1982*.

**10.25 Personal service on inmate of correctional centre** (cf DCR Part 8, rule 11; LCR Part 7, rule 11)

- (1) Personal service of a document on an inmate (within the meaning of the *Crimes (Administration of Sentences) Act 1999*) is effected by leaving a

copy of the document, at the correctional centre at which the inmate is held in custody, with the governor of the correctional centre.

- (2) Personal service of a document on a detainee (within the meaning of the *Children (Detention Centres) Act 1987*) is effected by leaving a copy of the document, at the detention centre at which the detainee is held in custody, with the centre manager of the detention centre.

**10.26 Personal service on person who “keeps house”** (cf DCR Part 8, rule 13; LCR Part 7, rule 13)

- (1) If a person keeps house (that is, remains in premises to which a person attempting service cannot lawfully or practicably obtain access), the person attempting service may serve the document on the person keeping house:
- (a) by doing one of the following:
- (i) placing the document in the mail-box for the premises,
  - (ii) affixing the document to an outer door of the premises,
  - (iii) if the person attempting service cannot lawfully or practicably obtain access to any such mail-box or door, affixing the document to some part of the premises, or to some fence or wall surrounding the premises, as near as practicable to the principal door or entrance to the premises, and
- (b) within 24 hours after doing so, by posting a notice to the premises, addressed to the person keeping house, informing the person of the fact that the document has been so placed or affixed.
- (2) Service in accordance with subrule (1) is taken to constitute personal service.

**10.27 Proof of identity** (cf SCR Part 9, rule 4A; DCR Part 8, rule 17; LCR Part 7, rule 17)

For the purposes of proof of service, evidence of a statement by a person of his or her identity or of his or her holding some office is evidence of his or her identity or that he or she holds that office, as the case may be.

## **Part 11 Service of documents outside Australia**

### **Division 1 General**

#### **11.1 Application of Part**

- (1) This Part applies to proceedings in the Supreme Court.
- (2) For the purposes of this Part, a reference to Australia includes a reference to the external Territories.

**11.2 Cases for service of originating process** (cf SCR Part 10, rule 1A)

Originating process may be served outside Australia in the circumstances referred to in Schedule 6.

**11.3 Notice to the defendant served outside Australia** (cf SCR Part 10, rule 2A)

If originating process is intended to be served on a defendant outside Australia, a notice to that effect must be included in the originating process.

**11.4 Leave for plaintiff to proceed where no appearance by defendant** (cf SCR Part 10, rule 2)

- (1) If originating process is served on a defendant outside Australia, and the defendant does not enter an appearance, the plaintiff may not proceed against the defendant except by leave of the Supreme Court.
- (2) A motion for leave under subrule (1) may be made without serving notice of motion on the defendant.

**11.5 Service of documents other than originating process** (cf SCR Part 10, rule 3)

Service outside Australia of a document other than originating process is valid only if it is effected pursuant to the leave of the Supreme Court or is subsequently confirmed by the Supreme Court.

**11.6 Mode of service** (cf SCR Part 10, rule 5)

A document to be served outside Australia need not be personally served on a person so long as it is served on the person in accordance with the law of the country in which service is effected.

**11.7 Setting aside originating process served outside Australia** (cf SCR Part 10, rule 6A)

- (1) The Supreme Court may make an order of a kind referred to in rule 12.11 (Setting aside originating process etc) on application by a defendant on whom originating process is served outside Australia.
- (2) Without limiting subrule (1), the Supreme Court may make an order under this rule:
  - (a) on the ground that the service of the originating process is not authorised by these rules, or
  - (b) on the ground that the court is an inappropriate forum for the trial of the proceedings.

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**11.8 Operation of Commonwealth laws** (cf SCR Part 10, rule 6)

This Part does not require the leave of the Supreme Court for any service or other thing that may be effected or done under any law of the Commonwealth.

**Division 2 Service outside Australia in accordance with Attorney General's arrangements**

**11.9 Definitions** (cf SCR Part 10, rule 7)

In this Division:

***applicant*** means the person by whom an application is made under rule 11.10 (1) (a).

***participating country*** means:

- (a) any country that is a signatory to an international convention with respect to the service of documents in that country to which Australia is a signatory, or
- (b) in relation to particular proceedings, any other country declared by the Attorney General, by notice filed in the proceedings, to be a country to which this Division applies.

***undertaking as to expenses*** means an undertaking by an applicant or his or her solicitor to pay to the registrar an amount equal to the sum of all expenses incurred in consequence of the request for service.

**11.10 Filing of requisite documents** (cf SCR Part 10, rules 8, 9 and 10)

- (1) A person requiring a document to be served in a participating country may file the following documents in the Supreme Court:
  - (a) an application to the principal registrar of the Supreme Court that a sealed copy of a document be transmitted to that country for service on the person specified in the application as the person to be served,
  - (b) if the applicant requires service of the document under an international convention with respect to the service of documents to which that country and Australia are both signatories, a statement to that effect,
  - (c) the document to be served and (unless English is an official language of the country concerned) a translation of the document,
  - (d) if any special manner of service is required, a request for service in that manner and (unless English is an official language of the country concerned) a translation of the request,
  - (e) an undertaking as to expenses,

together with such further copies of those documents as the principal registrar may direct.

- (2) A translation of a document referred to in subrule (1):
  - (a) must be in an official language of the country in which service is required, and
  - (b) must bear a certificate by the translator, in that language, stating his or her qualifications and certifying that the translation is a correct translation of the document.

**11.11 Procedure on filing and lodgment** (cf SCR Part 10, rules 11 and 12)

- (1) After all relevant documents have been filed as referred to in rule 11.10, the principal registrar of the Supreme Court must seal them and send the lodged documents to the Director-General of the Attorney General's Department for transmission for service, together with such letter of request (if any) as may be necessary.
- (2) A certificate as to service, attempted service or non-service of any document so sent that is issued by:
  - (a) a judicial authority or other responsible person in the country concerned, or
  - (b) a British or Australian consular authority in the country concerned,is evidence of the matters stated in the certificate.

**11.12 Recovery of unpaid expenses** (cf SCR Part 10, rule 13)

If an applicant who has given an undertaking as to expenses does not, within 7 days after service on the applicant of an account of expenses incurred in relation to his or her application, pay to the principal registrar of the Supreme Court the amount of the expenses, the Supreme Court:

- (a) may order the applicant to pay the amount of the expenses to the principal registrar, and
- (b) may stay the proceedings, until payment is made, so far as concerns the whole or any part of any claim for relief by the applicant.

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## **Part 12 Discontinuance, withdrawal, dismissal and setting aside of originating process**

### **Division 1 Discontinuance of claim**

#### **12.1 Discontinuance of claim by consent** (cf SCR Part 21, rules 2 and 5; DCR Part 18, rule 1; LCR Part 17, rule 1)

- (1) The plaintiff in any proceedings may discontinue the proceedings, by filing a notice of discontinuance:
  - (a) so far as they concern the whole of the plaintiff's claim for relief, with the consent of:
    - (i) each party on whom originating process has been served, and
    - (ii) each party who has been joined in the proceedings, or
  - (b) so far as they concern any particular defendant, with the consent of that defendant.
- (2) A notice of discontinuance:
  - (a) must bear a certificate by the plaintiff, or by his or her solicitor, to the effect that the plaintiff does not represent any other person, and
  - (b) must be accompanied by a notice from each party whose consent is required by subrule (1) to the effect that the party consents to the proceedings being discontinued in accordance with the notice of discontinuance.
- (3) If any such consent is given on terms, those terms are to be incorporated in the notice of consent.
- (4) If any party has not been served with the originating process, the plaintiff must file an affidavit to that effect.
- (5) For the purposes of this rule, proceedings on a cross-claim are taken to be different proceedings to the proceedings on the originating process and to proceedings on any other cross-claim.

#### **12.2 Discontinuance of claim by leave** (cf SCR Part 21, rules 2 and 5; DCR Part 18, rule 1; LCR Part 17, rule 1)

The court may grant leave to a plaintiff to discontinue proceedings:

- (a) so far as they concern the whole of the plaintiff's claim for relief, or
- (b) so far as they concern a particular defendant.

**12.3 Effect of discontinuance** (cf SCR Part 21, rule 7; DCR Part 18, rule 7; LCR Part 17, rule 8)

- (1) A discontinuance of proceedings with respect to a plaintiff's claim for relief does not prevent the plaintiff from claiming the same relief in fresh proceedings.
- (2) Subrule (1) is subject to the terms of any consent to the discontinuance or of any leave to discontinue.

**12.4 Stay of further proceedings to secure costs of discontinued proceedings** (cf SCR Part 21, rule 8; DCR Part 18, rule 8; LCR Part 17, rule 9)

If:

- (a) as a consequence of the discontinuance of proceedings, a plaintiff is liable to pay the costs of another party in relation to those proceedings, and
- (b) before payment of the costs, the plaintiff commences further proceedings against that other party on the same or substantially the same cause of action as that on which the former proceedings were commenced,

the court may stay the further proceedings until those costs are paid and may make such consequential orders as it thinks fit.

**Note.** See also section 67 of the *Civil Procedure Act 2005* as to the terms on which a stay may be granted, and rule 42.19 as to costs payable in relation to discontinued proceedings.

## **Division 2 Withdrawal of appearance or pleading**

**12.5 Withdrawal of appearance** (cf SCR Part 21, rule 1)

An active party may withdraw an appearance by leave of the court.

**12.6 Withdrawal of matter in defence or subsequent pleading** (cf SCR Part 21, rules 3 and 5; DCR Part 18, rule 2; LCR Part 17, rule 2)

- (1) A party raising any matter in a defence or subsequent pleading may withdraw the matter at any time.
- (2) Despite subrule (1), a party may not withdraw any admission, or any other matter that operates for the benefit of another party, except with the consent of the other party or by leave of the court.
- (3) A withdrawal under this rule is to be made by filing a notice of withdrawal stating the extent of the withdrawal.
- (4) If the withdrawal is by consent, the notice under subrule (3) must be accompanied by a notice from each party whose consent is required by subrule (2) to the effect that the party consents to the admission or other matter being withdrawn in accordance with the notice of withdrawal.

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### **Division 3 Dismissal of proceedings etc for lack of progress**

- 12.7 Dismissal of proceedings etc for want of due despatch** (cf SCR Part 5, rule 12, Part 32A, rules 1, 2 and 3; DCR Part 18, rules 3 and 9; LCR Part 17, rule 4)
- (1) If a plaintiff does not prosecute the proceedings with due despatch, the court may order that the proceedings be dismissed or make such other order as the court thinks fit.
  - (2) If the defendant does not conduct the defence with due despatch, the court may strike out the defence, either in whole or in part, or make such other order as the court thinks fit.  
**Note.** See rule 42.20 as to the effect of dismissal with respect to costs.
- 12.8 Additional grounds for dismissal of proceedings by Supreme Court** (cf SCR Part 40, rule 8)
- (1) This rule applies to proceedings in the Supreme Court that have been commenced by statement of claim or in which a statement of claim has been filed.
  - (2) The Supreme Court may, of its own motion, make an order dismissing the proceedings if:
    - (a) a defence or cross-claim is not filed, or
    - (b) a default judgment is not entered, or
    - (c) the proceedings are not otherwise disposed of, within 6 months after the statement of claim is filed.
  - (3) Such an order may not be made unless the registrar has given at least one month's notice of the proposal to make such an order to the plaintiff and to each other active party.
  - (4) Such an order may not be made if:
    - (a) the proceedings, or any part of the proceedings, are listed for a future date, or
    - (b) there are any notices of motion or other applications in the proceedings that are yet to be determined, or
    - (c) a party satisfies the Supreme Court that, in the special circumstances of the case, such an order should not be made.
- 12.9 Additional grounds for dismissal of proceedings by District Court or Local Court**
- (1) This rule applies to proceedings in the District Court or a Local Court that have been commenced by statement of claim or in which a statement of claim has been filed.



- (2) The court may, of its own motion, make an order dismissing the proceedings if:
  - (a) a defence or cross-claim is not filed, or
  - (b) a default judgment is not entered, or
  - (c) the proceedings are not otherwise disposed of, within 9 months after the statement of claim is filed.
- (3) Such an order may be made without notice to the plaintiff or any other party.
- (4) Such an order may not be made if there are any notices of motion or other applications in the proceedings that are yet to be determined.

**12.10 Stay of further proceedings to secure costs of proceedings dismissed**

(cf SCR Part 40, rule 8 (2); DCR Part 18, rule 8; LCR Part 17, rule 9)

If:

- (a) as a consequence of the dismissal of proceedings, a party is liable to pay the costs of another party in relation to those proceedings, and
- (b) before payment of the costs, the party commences further proceedings against that other party on the same or substantially the same cause of action, or for the same or substantially the same relief, as that on or for which the former proceedings were commenced,

the court may stay the further proceedings until those costs are paid and make such consequential orders as it thinks fit.

**Note.** See also section 67 of the *Civil Procedure Act 2005* as to the terms on which a stay may be granted, and rule 42.20 as to costs payable in relation to proceedings that are dismissed.

**Division 4 Setting aside originating process**

**12.11 Setting aside originating process etc** (cf SCR Part 11, rule 8)

- (1) In any proceedings, the court may make any of the following orders on the application of a defendant:
  - (a) an order setting aside the originating process,
  - (b) an order setting aside the service of the originating process on the defendant,
  - (c) an order declaring that the originating process has not been duly served on the defendant,
  - (d) an order discharging:

- (i) any order giving leave to serve the originating process outside New South Wales, or
    - (ii) any order confirming service of the originating process outside New South Wales,
  - (e) an order discharging any order extending the validity for service of the originating process,
  - (f) an order protecting or releasing:
    - (i) property seized, or threatened with seizure, in the proceedings, or
    - (ii) property subject to an order restraining its disposal or in relation to which such an order is sought,
  - (g) an order declaring that the court has no jurisdiction over the defendant in respect of the subject-matter of the proceedings,
  - (h) an order declining to exercise jurisdiction in the proceedings,
  - (i) an order granting such other relief as the court thinks appropriate.
- (2) Such an order may not be made unless notice of motion to apply for the order is filed by the defendant within the time limited for the defendant to enter an appearance in the proceedings.
- (3) Notice of motion under subrule (2):
- (a) may be filed without entering an appearance, and
  - (b) must bear a note stating the applicant's address for service.
- (4) The making of an application for an order under subrule (1) does not constitute submission to the jurisdiction of the court.

## Part 13 Summary disposal

### 13.1 Summary judgment (cf SCR Part 13, rule 2; DCR Part 11A, rule 2; LCR Part 10A, rule 2)

- (1) If, on application by the plaintiff in relation to the plaintiff's claim for relief or any part of the plaintiff's claim for relief:
- (a) there is evidence of the facts on which the claim or part of the claim is based, and
  - (b) there is evidence, given by the plaintiff or by some responsible person, that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed,
- the court may give such judgment for the plaintiff, or make such order on the claim or that part of the claim, as the case requires.

- (2) Without limiting subrule (1), the court may give judgment for the plaintiff for damages to be assessed.
- (3) In this rule, a reference to *damages* includes a reference to the value of goods.

**13.2 Stay of judgment pending determination of cross-claim** (cf SCR Part 13, rule 3; DCR Part 11A, rule 2A)

If the court gives judgment against a party under rule 13.1, and that party has made a cross-claim against the party obtaining the judgment, the court may stay enforcement of the judgment until determination of the cross-claim.

**13.3 Continuation of proceedings following partial judgment** (cf SCR Part 13, rule 6; DCR Part 11A, rule 4; LCR Part 10A, rule 4)

If, in any proceedings:

- (a) a party applies for judgment, and
- (b) the proceedings are not wholly disposed of by the judgment, the proceedings may be continued as regards any claim or part of a claim not disposed of by the judgment.

**13.4 Frivolous and vexatious proceedings** (cf SCR Part 13, rule 5; DCR Part 11A, rule 3; LCR Part 10A, rule 3)

- (1) If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings:
  - (a) the proceedings are frivolous or vexatious, or
  - (b) no reasonable cause of action is disclosed, or
  - (c) the proceedings are an abuse of the process of the court, the court may order that the proceedings be dismissed generally or in relation to that claim.
- (2) The court may receive evidence on the hearing of an application for an order under subrule (1).

**13.5 Continuation of proceedings following partial dismissal** (cf SCR Part 13, rule 6; DCR Part 11A, rule 4; LCR Part 10A, rule 4)

If, in any proceedings:

- (a) a party applies for an order for dismissal of proceedings, and
- (b) the proceedings are not wholly disposed of by dismissal, the proceedings may be continued as regards any claim or part of a claim not disposed of by dismissal.

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## Part 14 Pleadings

### Division 1 Preliminary

#### 14.1 Application

This Part applies to proceedings commenced by statement of claim and to proceedings in which a statement of claim has been filed.

### Division 2 Defence and further pleadings

#### 14.2 Trial without further pleadings (cf SCR Part 15, rule 2)

- (1) If in the opinion of the court:
  - (a) the issues between the parties can be defined without further pleadings, or
  - (b) for any other reason the proceedings may properly be tried without further pleadings,the court may order that the proceedings be so tried.
- (2) A court that makes an order under subrule (1) may direct the parties to prepare a statement of the issues involved in the proceedings or, if the parties do not agree on a statement, may settle a statement itself.

#### 14.3 Defence (cf SCR Part 15, rule 3; DCR Part 10, rule 1; LCR Part 9, rule 1)

- (1) Subject to these rules, the time limited for a defendant to file a defence is 28 days after service on the defendant of the statement of claim or such other time as the court directs for the filing of a defence.
- (2) If, before the defendant files a defence, a notice of motion for summary judgment under rule 13.1 is served on the defendant, but the court does not on that motion dispose of all of the claims for relief against the defendant, the court may fix a time within which the defendant must file a defence.

**Note.** See rule 9.11 (2) under which a defence to a cross-claim for contribution under section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* may not be filed unless the court so directs.

#### 14.4 Reply (cf SCR Part 15, rule 4)

- (1) In proceedings in the Supreme Court or the District Court, a plaintiff may file a reply to a defence.
- (2) In proceedings in a Local Court, a plaintiff may file a reply to a defence only by leave of the Court.
- (3) The time limited for the plaintiff to file a reply is 14 days after service of the defence on the plaintiff.

**14.5 Further pleadings** (cf SCR Part 15, rule 5)

- (1) Except by leave of the court, a party to proceedings may not file any pleading subsequent to a reply.
- (2) The time limited for a party to seek leave to file a pleading subsequent to a reply (*the further pleading*) is 14 days after service on the party of the pleading to which further pleading responds.

**Division 3 Form of pleading generally**

**14.6 Pleadings to be divided into paragraphs** (cf SCR Part 15, rule 6; DCR Part 9, rule 2)

If a pleading alleges or otherwise deals with several matters:

- (a) the pleading must be divided into paragraphs, and
- (b) each matter must, so far as convenient, be put in a separate paragraph, and
- (c) the paragraphs must be numbered consecutively.

**14.7 Pleadings to contain facts, not evidence** (cf SCR Part 15, rule 7; DCR Part 9, rule 3)

Subject to this Part, Part 6 and Part 15, a party's pleading must contain only a summary of the material facts on which the party relies, and not the evidence by which those facts are to be proved.

**14.8 Pleadings to be brief** (cf SCR Part 15, rule 8; DCR Part 9, rule 4)

A pleading must be as brief as the nature of the case allows.

**14.9 References in pleadings to documents and spoken words** (cf SCR Part 15, rule 9; DCR Part 9, rule 5)

If any documents or spoken words are referred to in a pleading:

- (a) the effect of the document or spoken words must, so far as material, be stated, and
- (b) the precise terms of the document or spoken words must not be stated, except so far as those terms are themselves material.

**14.10 Certain facts need not be pleaded** (cf SCR Part 15, rule 10; DCR Part 9, rule 6)

A party need not plead a fact if:

- (a) the fact is presumed by law to be true, or
- (b) the burden of disproving the fact lies on the opposite party, except so far as may be necessary to meet a specific denial of that fact by another party's pleading.

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**14.11 Conditions precedent presumed to have been met** (cf SCR Part 15, rule 11; DCR Part 9, rule 7)

If it is a condition precedent necessary for a party's case in any pleading that:

- (a) a thing has been done, or
- (b) an event has happened, or
- (c) a state of affairs exists, or has existed at some time or times, or
- (d) the party is ready and willing, or was at all material times ready and willing, to perform an obligation,

a statement to the effect that the condition has been satisfied is taken to be implied in the party's pleading.

**14.12 Pleading of facts in short form in certain money claims** (cf SCR Part 15, rule 12; DCR Part 9, rule 8)

- (1) Subject to this rule, if the plaintiff claims money payable by the defendant to the plaintiff for any of the following:

- (a) goods sold and delivered by the plaintiff to the defendant,
- (b) goods bargained and sold by the plaintiff to the defendant,
- (c) work done or materials provided by the plaintiff for the defendant at the defendant's request,
- (d) money lent by the plaintiff to the defendant,
- (e) money paid by the plaintiff for the defendant at the defendant's request,
- (f) money had and received by the defendant for the plaintiff's use,
- (g) interest on money due from the defendant to the plaintiff, and forborne at interest by the plaintiff at the defendant's request,
- (h) money found to be due from the defendant to the plaintiff on accounts stated between them,

it is sufficient to plead the facts concerned in short form (that is, by using the form of words set out in the relevant paragraph above).

- (2) The defendant may file a notice requiring the plaintiff to plead the facts on which he or she relies in full (that is, in accordance with the provisions of this Part other than this rule).
- (3) Such a notice must be filed within the time limited for the filing of the defence.
- (4) If the defendant files a notice under this rule:
  - (a) the plaintiff must, within 28 days after service of the notice:

- (i) file an amended statement of claim pleading the facts on which he or she relies in full, and
  - (ii) include in the amended statement of claim a note to the effect that the statement has been amended in response to the notice, and
- (b) if a defence has not been filed, the time limited for the filing of defence is extended until 14 days after service on the defendant of the plaintiff's amended statement of claim.

**14.13 Pleading not to claim an amount for unliquidated damages** (cf SCR Part 15, rule 12A; LCR Part 5, rule 1)

- (1) A pleading must not claim an amount for unliquidated damages.
- (2) Despite subrule (1), a pleading in proceedings in the District Court or in a Local Court may claim an amount for unliquidated damages if:
  - (a) the claim is for the recovery of:
    - (i) the cost of repair to a motor vehicle, or
    - (ii) the value, less any salvage value, of a motor vehicle, or
    - (iii) the towing of a motor vehicle,where the repair, loss or towing is a consequence of damage alleged to have been sustained as a result of the negligence of the defendant or the defendant's servant or agent, or
  - (b) the claim is for the recovery of:
    - (i) the cost of repair to property other than a motor vehicle, or
    - (ii) the value, less any salvage value, of property other than a motor vehicle,where the repair or loss is a consequence of damage alleged to have been sustained as a result of the negligence of the defendant or the defendant's servant or agent in driving, riding or controlling a motor vehicle.
- (3) In subrule (2), a reference to a *motor vehicle* is a reference to a motor vehicle within the meaning of the *Motor Accidents Compensation Act 1999*, and includes a reference to a trailer within the meaning of that Act.

**14.14 General rule as to matters to be pleaded specifically** (cf SCR Part 15, rule 13; DCR Part 9, rule 9)

- (1) In a statement of claim, the plaintiff must plead specifically any matter that, if not pleaded specifically, may take the defendant by surprise.
- (2) In a defence or subsequent pleading, a party must plead specifically any matter:

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- (a) that, if not pleaded specifically, may take the opposite party by surprise, or
  - (b) that the party alleges makes any claim, defence or other case of the opposite party not maintainable, or
  - (c) that raises matters of fact not arising out of the preceding pleading.
- (3) Matters which must be pleaded pursuant to subrule (2) include (but are not limited to) fraud, performance, release, statute of limitation, extinction of right or title, voluntary assumption of risk, causation of accident by unknown and undiscoverable mechanical defect and facts showing illegality.

**14.15 Pleadings concerning possession of land** (cf SCR Part 15, rule 15)

- (1) This rule applies to proceedings on a claim for possession of land.
- (2) The plaintiff must plead specifically the following matters:
  - (a) the nature of any instrument (such as a certificate of title, conveyance, will, trust instrument, mortgage or lease) from which the plaintiff's claim is alleged to be derived,
  - (b) if any such instrument is alleged to impose an obligation on the defendant whose breach has given rise to the plaintiff's claim (such as an obligation to pay money to the plaintiff), the existence of that obligation and the occurrence of any such breach,
  - (c) if any such instrument is alleged to confer a right on the plaintiff that vests at a specified time or is contingent on the occurrence of a specified event, the existence of that right and the occurrence of any such time or event,
  - (d) if the plaintiff's right to possession arises from the defendant's failure to pay money to the plaintiff, particulars of the date on which the failure began, the amount of money currently unpaid and the method by which that amount has been calculated,
  - (e) if the plaintiff's right to possession arises from any other act or omission by the defendant, particulars of the date on which the act or omission occurred and the nature of the act or omission,
  - (f) if the plaintiff's right to possession is not exercisable until the plaintiff has given notice to the defendant of the plaintiff's intention to exercise that right, the date on which, and the terms in which, such notice was given.
- (3) The defendant must plead specifically every ground of defence on which he or she relies, including:
  - (a) any claim for relief against forfeiture, and



- (b) any claim for rectification, and
- (c) any claim for relief under the *Contracts Review Act 1980*,  
and it is not sufficient for a defendant to merely state that he or she is in possession of the land (whether personally or by a tenant) and relies on that possession.

- 14.16 Defendant's pleading of contributory negligence** (cf SCR Part 15, rule 14; DCR Part 9, rule 10)  
A defendant who relies on contributory negligence must plead specifically the contributory negligence.
- 14.17 New matter may be raised in pleading** (cf SCR Part 15, rule 16; DCR Part 9, rule 11)  
A party may plead any matter even if the matter has arisen after the commencement of the proceedings.
- 14.18 Pleadings to be consistent as to allegations of fact** (cf SCR Part 15, rule 17; DCR Part 9, rule 12)  
(1) A party must not in any pleading make an allegation of fact, or raise any ground or claim, inconsistent with any of his or her previous pleadings.  
(2) Subrule (1) does not affect the right of a party to make allegations of fact, or raise grounds or claims, in the alternative.
- 14.19 Pleadings may raise points of law** (cf SCR Part 15, rule 18; DCR Part 9, rule 13)  
A pleading may raise any point of law.
- 14.20 Pleading the general issue** (cf SCR Part 15, rule 27)  
A pleading may not plead the general issue.
- 14.21 Pleadings concerning claims under Property (Relationships) Act 1984**  
A pleading with respect to a claim for relief under section 20 (1) of the *Property (Relationships) Act 1984* must plead specifically any contribution referred to in that subsection on which the plaintiff relies.

#### **Division 4 Verification of pleadings**

- 14.22 Pleadings in proceedings for defamation, malicious prosecution, false imprisonment, death and personal injury** (cf SCR Part 15, rule 23 (16) and (17))  
(1) This Division does not apply to pleadings in proceedings for the recovery of damages for:  
(a) defamation, or

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- (b) malicious prosecution, or
  - (c) false imprisonment, or
  - (d) trespass to the person, or
  - (e) death, or
  - (f) personal injury.
- (2) Despite subrule (1), the court may order that this Division is to apply to any or all pleadings in any such proceedings (including pleadings filed before the order is made) with such variations (if any) as the court may direct.

**14.23 Verification of certain pleadings** (cf SCR Part 15, rule 23 (1)–(7); DCR Part 10, rule 2 (1)–(6))

- (1) This rule applies to proceedings in the Supreme Court and the District Court.
- (2) A party's pleading (including any amendment of the pleading) must be verified by affidavit.  
**Note.** See rule 35.3 as to who may make such an affidavit.
- (3) The affidavit verifying a pleading must state:
- (a) as to any allegations of fact in the pleading, that the deponent believes that the allegations are true, and
  - (b) as to any allegations of fact that the pleading denies, that the deponent believes that the allegations are untrue, and
  - (c) as to any allegations of fact that the pleading does not admit, that after reasonable inquiry the deponent does not know whether or not the allegations are true.
- (4) If the deponent is unable to make an affidavit that complies with subrule (3) in relation to all parts of a pleading, the affidavit may comply with so much of that subrule as can be complied with and state why the affidavit does not comply with the remainder of that subrule.
- (5) Subject to any order of the court, an affidavit made in accordance with subrule (4) is taken to comply with subrule (3).
- (6) The affidavit verifying a pleading must be filed with, or subscribed to, the pleading.

**14.24 Court may order pleadings to be further verified** (cf SCR Part 15, rule 23 (8)–(14); DCR Part 10, rule 2 (7)–(10))

- (1) Within 14 days after service of an affidavit under rule 14.23 in relation to a pleading, a party may apply to the court for a direction that the party pleading verify or further verify the pleading and for such other directions as may be appropriate.

- (2) If a party applies to the court under subrule (1), the court may direct the party pleading to file such further affidavit (if any), by such deponent and as to such facts as the court may determine.
- (3) The court may, by order, grant leave to a party to file, instead of an affidavit complying with rule 14.23 (3), an affidavit by such deponent and as to such facts as the court may determine.

## **Division 5 General**

### **14.25 Defence of tender** (cf SCR Part 15, rule 24; DCR Part 10, rule 1A; LCR Part 9, rule 1)

- (1) If, in proceedings on a liquidated claim, a defence of tender before commencement of the proceedings is pleaded, the tender is not available as a defence unless and until the amount has been paid into court.
- (2) In the case of a tender to which section 224 of the *Customs Act 1901* of the Commonwealth applies:
  - (a) subrule (1) does not apply to a defence that pleads the tender, and
  - (b) the amount tendered may be paid into court when the defence is filed.
- (3) On paying the money into court, the defendant must file notice of the payment into court and serve the notice on each other party to the proceedings.
- (4) The plaintiff may accept the money by filing a notice of acceptance.
- (5) If the plaintiff accepts the money, the proceedings are to be stayed in relation to the defence of tender.
- (6) Whether or not accepted, the money must not be paid out except by order of the court.

### **14.26 Admission and traverse from pleadings** (cf SCR Part 15, rule 20, Part 63, rule 9; DCR Part 9, rule 14, Part 45, rule 9)

- (1) An allegation of fact made by a party in a pleading is taken to be admitted by any opposite party required to plead in response unless:
  - (a) in the pleading in response, the opposite party traverses the allegation, or
  - (b) a joinder of issues under rule 14.27 operates as a denial of the allegation.
- (2) A traverse may be made by denial or by a statement of non-admission, either expressly or by necessary implication, and either generally or as to any particular allegation.

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- (3) Despite subrule (1), a pleading in response to a pleading that alleges the suffering of damage or an amount of damages is taken to traverse the allegation unless it specifically admits the allegation.
  - (4) This rule does not apply to a pleading by or on behalf of a party who is a person under legal incapacity.

**14.27 Joinder of issue** (cf SCR Part 15, rule 21; DCR Part 9, rule 15)

- (1) A pleading may expressly join issue on a previous pleading.
- (2) If there is no reply by a plaintiff to a defence, there is an implied joinder of issue on that defence.
- (3) If there is no answer by the opposite party to a reply or subsequent pleading, there is an implied joinder of issue on the reply or subsequent pleading.
- (4) There can be no joinder of issue, express or implied, on a statement of claim.
- (5) An implied joinder of issue on a pleading operates as a denial of every allegation of fact made in the pleading.
- (6) An express joinder of issue on a pleading operates as a denial of every allegation of fact made in the pleading other than an allegation that is expressly admitted.

**14.28 Circumstances in which court may strike out pleadings** (cf SCR Part 15, rule 26; DCR Part 9, rule 17; LCR Part 8, rule 3)

- (1) The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading:
  - (a) discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, or
  - (b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or
  - (c) is otherwise an abuse of the process of the court.
- (2) The court may receive evidence on the hearing of an application for an order under subrule (1).

**14.29 Defence of extinction of right or title** (cf SCR Part 5, rule 5B)

For the purposes of section 68A of the *Limitation Act 1969*, a claim by the defendant that a right or title has been extinguished under Division 1 of Part 4 of that Act may be made by affidavit or by notice.

## Part 15 Particulars

### Division 1 General

- 15.1 Pleadings must give all necessary particulars** (cf SCR Part 16, rules 1 and 1A; DCR Part 9, rule 19; LCR Part 8, rule 2)
- (1) Subject to this Part, a pleading must give such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.
  - (2) Subrule (1) does not require a pleading to give particulars of any claim for interest up to judgment other than those required by rule 6.12 (7).
- 15.2 Use of “Scott Schedule” in building, technical and other cases** (cf DCR Part 9, rule 19A; LCR Part 8, rule 7)
- (1) In proceedings involving a building, technical or other matter in which several items of a claim are in dispute as to liability or amount, or both, the party making the claim may, and if the court so orders must, prepare and file a “Scott Schedule” in the approved form.
  - (2) A party on whom a Scott Schedule is served must complete and file the Schedule.
- 15.3 Allegations of behaviour in the nature of fraud** (cf SCR Part 16, rule 2; DCR Part 9, rule 20)
- A pleading must give particulars of any fraud, misrepresentation, breach of trust, wilful default or undue influence on which the party relies.
- 15.4 Allegations as to condition of mind** (cf SCR Part 16, rule 3; DCR Part 9, rule 21)
- (1) A pleading that alleges any condition of mind must give particulars of the facts on which the party pleading relies.
  - (2) In subrule (1), *condition of mind* includes any disorder or disability of mind, any malice and any fraudulent intention, but does not include knowledge.
- 15.5 Allegations of negligence and breach of statutory duty in common law claims in tort** (cf SCR Part 16, rule 4; DCR Part 9, rule 22; LCR Part 8, rule 4)
- (1) The particulars to be given by a pleading that alleges negligence (whether contributory or otherwise):
    - (a) must state the facts and circumstances on which the party pleading relies as constituting the alleged negligent act or omission, and

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- (b) if the party pleading alleges more than one negligent act or omission, must, so far as practicable, state separately the facts and circumstances on which the party relies in respect of each alleged negligent act or omission.
  - (2) The particulars to be given by a pleading that alleges breach of statutory duty:
    - (a) must state the facts and circumstances on which the party pleading relies as constituting the alleged breach of statutory duty, and
    - (b) if the party pleading alleges more than one breach of statutory duty, must, so far as practicable, state separately the facts and circumstances on which the party relies in respect of each alleged breach of statutory duty.

**15.6 Claims for out of pocket expenses** (cf SCR Part 16, rule 5; DCR Part 9, rule 23; LCR Part 8, rule 5)

A party pleading who claims damages that include money that he or she has paid or is liable to pay must give particulars of that money.

**15.7 Claims for exemplary damages** (cf SCR Part 16, rule 5A)

The particulars to be given by a pleading that claims exemplary damages must state the facts and circumstances on which the party pleading relies to establish that claim.

**15.8 Claims for aggravated damages** (cf SCR Part 16, rule 5B)

The particulars to be given by a pleading that claims aggravated compensatory damages must state the facts and circumstances on which the party pleading relies to establish that claim.

**15.9 Manner of giving particulars** (cf SCR Part 16, rule 6; DCR Part 9, rule 25; LCR Part 8, rule 6)

The particulars to be given by a pleading must be set out in the pleading or, if that is inconvenient, must be set out in a separate document referred to in the pleading and filed with the pleading.

**15.10 Order for particulars** (cf SCR Part 16, rule 7; DCR Part 9, rule 26; LCR Part 8, rule 8)

- (1) The court may order a party to file:
  - (a) particulars of any claim, defence or other matter stated in the party's pleading or in any affidavit relevant to the proceedings, or
  - (b) a statement of the nature of the case on which the party relies, or

- (c) if the party claims damages, particulars relating to general or other damages.
- (2) Without limiting subrule (1), if a pleading alleges that a person had knowledge or notice of some fact, matter or thing, the court may order that party to file:
  - (a) if the pleading alleges knowledge, particulars of the facts on which that party relies, and
  - (b) if the pleading alleges notice, particulars of the notice.

**15.11 Particulars concerning claims under Property (Relationships) Act 1984**

The particulars to be given by a pleading with respect to a claim for relief under section 20 (1) of the *Property (Relationships) Act 1984* must include:

- (a) particulars of any payment on which the plaintiff relies as to any contribution referred to in that subsection, and
- (b) particulars of any document on which the plaintiff relies as evidence that any such payment has been made.

**Division 2 Personal injury cases**

**15.12 Particulars required for proceedings generally** (cf DCR Part 9, rule 27 (2)–(5))

- (1) This rule applies to a claim for damages in respect of personal injuries arising from any event (*the accident*), other than a claim that is the subject of proceedings under the *Compensation to Relatives Act 1897*.
- (2) On or as soon as practicable after serving the statement of claim, the plaintiff must serve on the defendant, or on the defendant's insurer or solicitor, a statement accompanied by the following documents:
  - (a) copies of all documents available to the plaintiff in support of a claim for special damage and economic loss, whether past, present or continuing, including:
    - (i) hospital, medical and similar accounts, and
    - (ii) letters from a workers' compensation insurer indicating moneys paid to or for the plaintiff, and
    - (iii) letters from employers, wage records, income records and group certificates, and
    - (iv) reports, award rates and correspondence relied on to support any claim in respect of domestic assistance or attendant care,

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- (b) copies of all hospital and medical reports available at the time of serving the statement on which the plaintiff intends to rely at the hearing.
  - (3) The statement must set out the following particulars:
    - (a) particulars of injuries received,
    - (b) particulars of continuing disabilities,
    - (c) particulars of out-of-pocket expenses.
  - (4) If the statement makes any claim in respect of domestic assistance or attendant care, it must also set out full particulars of the claim.
  - (5) If the statement makes any claim in respect of loss of income, it must also set out the following particulars:
    - (a) the name and address of each employer during the 12 months immediately before the accident, together with details of the periods of employment, capacity in which employed and net earnings during each period of employment,
    - (b) the name and address of each employer since the accident, together with details of the periods of employment, capacity in which employed and net earnings during each period of employment,
    - (c) the amount claimed in respect of loss of income to the date of the statement (by comparison between what the plaintiff has earned since the accident and what the plaintiff would have earned but for the accident) setting out, in respect of what the plaintiff would have earned but for the accident, including, where appropriate:
      - (i) particulars of the earnings of comparable employees and the identity of those employees, or
      - (ii) particulars of any payment that the plaintiff would have received under a relevant award or industrial agreement, together with the title of that award or industrial agreement,
    - (d) particulars of any alleged loss of earning capacity and future economic loss,
    - (e) if the plaintiff is self-employed or has been self-employed at any time during the 12 months immediately before the accident, such additional particulars as will achieve full disclosure of the basis of the claim for loss of income.
  - (6) If the statement makes any claim in respect of loss of income, it must also be accompanied by the following documents:



- (a) a letter from the employer or employers (if any) of the plaintiff immediately before the accident the subject of the proceedings, providing particulars of:
    - (i) the dates on which the plaintiff was absent from work due to the accident, and
    - (ii) the total net remuneration lost by the plaintiff in respect of that absence, including overtime, and
    - (iii) if the plaintiff returned to work for that employer, the plaintiff's classification and duties, and any alteration in the remuneration paid to the plaintiff, after that return, and
    - (iv) if that employment has been terminated, the date of and reason for the termination,
  - (b) if the plaintiff was self-employed immediately before the accident, copies of any accountants' reports or other documents on which the plaintiff intends to rely to establish his or her pre-accident income,
  - (c) copies of the plaintiff's income tax returns relating to income received during the period of 2 financial years ending immediately before the financial year that included the date of the accident, together with copies of any income tax returns lodged by the plaintiff since the date of the accident.
- (7) If any, or any part of, any document required to be served by subrule (6) cannot be served, a statement of the reasons why it cannot be served must be included in the documents served.

**15.13 Particulars required for proceedings under Compensation to Relatives Act 1897** (cf DCR Part 9, rule 27 (6) and (7))

- (1) This rule applies to a claim for damages in respect of personal injuries arising from any act, neglect or default (*the accident*) that is the subject of proceedings under the *Compensation to Relatives Act 1897*.
- (2) On or as soon as practicable after serving the statement of claim, the plaintiff must serve on the defendant, or on the defendant's insurer or solicitor, in respect of each person on whose behalf the proceedings are commenced, a statement accompanied by the following documents:
  - (a) a copy or extract of the person's birth certificate and, if the person has been married, a copy of the person's marriage certificate,
  - (b) a letter from the employer (if any) of the deceased person immediately before the accident, providing particulars of the deceased person's remuneration and prospects of promotion at the date of his or her death,

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- (c) copies of the deceased person's income tax returns relating to income received during the period of 2 financial years ending immediately before the financial year that included the date of his or her death,
  - (d) copies of any bank statements, financial records or other documents on which the plaintiff intends to rely to establish the extent of the support and other benefits provided to the person by the deceased person, covering a period of not less than 12 months immediately before the date of the death of the deceased person,
  - (e) copies of all documents, including accounts and receipts, in support of any claim for the cost of a funeral or headstone or for any other expenses relating to the deceased person's death,
  - (f) copies of documents evidencing the net value of the estate of the deceased person.
- (3) The statement must set out the following matters:
- (a) the person's name, address, relationship to the deceased person the subject of the proceedings, marital status and any anticipated alteration to that status,
  - (b) whether the dependency of the person on the deceased person, or the reliance by the person on services provided by the deceased person, is claimed to have been whole or partial, the circumstances in which the person received support or services from the deceased person, and the quantum of that support or those services during the 12-month period immediately before the death of the deceased person.
- (4) If any, or any part of, any document required to be served by subrule (2) cannot be served, a statement of the reasons why it cannot be served must be included in the documents served.

**15.14 Statements, documents and reports to be complete** (cf DCR Part 9, rule 27 (8)–(10))

- (1) The statement and documents required by rule 15.12 or 15.13 to be served:
- (a) must be as final and complete as to the plaintiff's case as they can, with the exercise of reasonable diligence, be made, and
  - (b) must contain such information as the plaintiff can then provide as to any medical examination of the plaintiff to be conducted after the date of service.

- (2) As soon as practicable after becoming aware that any information contained in a statement or document that has been served as required by rule 15.12 or 15.13 is no longer accurate and complete as regards the plaintiff's claim, the plaintiff must give to all active parties such advice as is necessary to make that information accurate and complete.
- (3) If the plaintiff gives advice as referred to in subrule (2), the court may direct the plaintiff to file an amended statement of particulars.
- (4) Unless the court orders otherwise, the plaintiff must file a copy of the final statement of particulars at least 42 days prior to the date fixed for hearing or arbitration of the proceedings.
- (5) Subject to subrules (3) and (4), an amended statement of particulars may not be filed except by leave of the court.

**15.15 Provision of schedule of documents and reports** (cf DCR Part 9, rule 27 (10A))

On the first occasion on which the parties are required to appear before the court, each party to the proceedings must provide to the court:

- (a) a schedule of all the documents served by the party as required under this Division (including the dates of service of the documents), and
- (b) a schedule of any documents that the party will seek the leave of the court to file in the future and the expected date of service of such documents or reports.

**15.16 Effect of failure to comply with Division** (cf DCR Part 9, rule 27 (11))

If, after conducting a review or status conference or otherwise, the court is of the opinion that the plaintiff has not sufficiently complied with the requirements of this Division, the court may dismiss the proceedings or make such other order as it thinks fit.

**15.17 Division not to apply in certain circumstances** (cf DCR Part 9, rule 27 (1))

This Division does not apply to a claim that is accompanied by:

- (a) a notice of motion seeking a separate trial on the question of liability, or
- (b) a notice of motion seeking an order to defer the application of this Division to the proceedings.

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### Division 3 Interim payments

#### 15.18 Interim payments (cf SCR Part 16, rule 8)

If an application for an order under section 82 of the *Civil Procedure Act 2005* is made in any proceedings, the plaintiff must serve on the defendant against whom the order is sought, no later than the date of filing of notice of the motion:

- (a) if the application relates to a claim for damages in respect of personal injuries, the statement and documents referred to in rule 15.12, or
- (b) if the application relates to a claim for damages under the *Compensation to Relatives Act 1897* that includes a claim for loss of maintenance and support, the statement and documents referred to in rule 15.13.

### Part 16 Default judgment

#### 16.1 Application of Part (cf SCR Part 17, rule 1; DCR Part 13, rule 1; LCR Part 11, rule 1)

This Part applies to proceedings commenced by statement of claim.

#### 16.2 Definition of “in default” (cf SCR Part 17, rule 2; DCR Part 13, rule 1; LCR Part 11, rule 1)

- (1) A defendant is *in default* for the purposes of this Part:
  - (a) if the defendant fails to file a defence within the time limited by rule 14.3 (1) or within such further time as the court allows, or
  - (b) if the defendant fails to file any affidavit verifying his or her defence in accordance with any requirement of these rules, or
  - (c) if, the defendant having duly filed a defence, the court orders the defence to be struck out.
- (2) Despite subrule (1), a defendant is not in default if the defendant:
  - (a) has made a payment towards a liquidated claim under rule 6.17, or
  - (b) has filed an acknowledgment of claim under rule 20.34, or
  - (c) has filed a defence after the time limited by these rules or allowed by the court, but before a default judgment is entered against the defendant.

**16.3 Procedure where defendant in default** (cf SCR Part 17, rule 3; DCR Part 13, rule 1)

- (1) If a defendant is in default, the plaintiff:
  - (a) may apply for judgment to be entered under this Part, according to the nature of his or her claim for relief, against the defendant in default, and
  - (b) may carry on the proceedings against any other party to the proceedings.
- (2) Unless the court orders otherwise, an application for judgment to be entered under this Part must be accompanied by:
  - (a) an affidavit of service of the statement of claim (*the affidavit of service*), and
  - (b) an affidavit in support of the application (*the affidavit in support*).
- (3) An affidavit of service is unnecessary in relation to a statement of claim whose service has been effected by a Local Court under rule 10.1 (2).
- (4) Unless the court orders otherwise, an affidavit in support is valid for the purposes of an application only if it has been sworn within 14 days before the date on which the application is filed.

**16.4 Default judgment on claim for possession of land** (cf SCR Part 17, rule 7)

- (1) Subject to rule 36.8, if the plaintiff's claim against a defendant in default is for possession of land only, judgment may be entered for the plaintiff for possession of land, as against the defendant, and for costs.
- (2) If, before entry of judgment, any person files notice of motion for the person's addition as a defendant, a plaintiff may not enter judgment under this rule until the motion is disposed of.
- (3) The relevant affidavit in support:
  - (a) must identify any persons (other than parties to the proceedings) who were in occupation of the whole or any part of the land:
    - (i) as at the time the originating process was filed, or
    - (ii) if the claim for possession arises from an amendment to the originating process, as at the time the amendment was made, and
  - (b) in relation to each such person:
    - (i) must state that the person's occupation of the land is not to be disturbed, or

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- (ii) must state that the person is no longer in occupation of any part of the land, or
  - (iii) must state that the person has been served with a notice pursuant to rule 6.8 and that the time allowed for the person to apply to the court to be joined as a defendant has now passed,  
as the case requires, and
  - (c) if the claim for possession of the land arises from a default in the payment of money, must give particulars of the default, and
  - (d) must state the source of the deponent's knowledge of the matters stated in the affidavit concerning the occupation of the land and any default in the payment of money referred to in paragraph (c), and
  - (e) must state whether costs are claimed and, if costs are claimed and the costs claimable are fixed by law, the amount (not exceeding the amount so fixed) that is claimed for costs.

**Note.** The costs fixed by law referred to in paragraph (e) include costs that are fixed under section 196 (1) (b) of the *Legal Profession Act 1987* or section 329 (1) (c) of the *Legal Profession Act 2004*, as the case may be.

**16.5 Default judgment on claim for detention of goods** (cf SCR Part 17, rule 6)

- (1) If the plaintiff's claim against a defendant in default relates to the detention of goods only, judgment may be entered for the plaintiff against the defendant, in accordance with the plaintiff's claim:
  - (a) for delivery of the goods to the plaintiff and for costs, or
  - (b) for payment to the plaintiff of the value of the goods (as assessed by or in accordance with the directions of the court) and for costs, at the plaintiff's option.

**Note.** See Part 30 for provisions as to assessment of value of goods.
- (2) The relevant affidavit in support:
  - (a) must state which goods have, and which have not, been delivered to the plaintiff since the time the originating process was filed, and
  - (b) must give particulars of any payments that the defendant has made to the plaintiff in respect of the goods or state that no such payments have been made, as the case may be, since the time the originating process was filed, and
  - (c) must state the source of the deponent's knowledge of the matters stated in the affidavit concerning the delivery or non-delivery of the goods, and

- (d) must state whether costs are claimed and, if costs are claimed and the costs claimable are fixed by law, the amount (not exceeding the amount so fixed) that is claimed for costs.

**Note.** The costs fixed by law referred to in paragraph (d) include costs that are fixed under section 196 (1) (b) of the *Legal Profession Act 1987* or section 329 (1) (c) of the *Legal Profession Act 2004*, as the case may be.

**16.6 Default judgment on debt or liquidated claim** (cf SCR Part 17, rule 4; DCR Part 13, rule 1; LCR Part 11, rule 1)

- (1) If the plaintiff's claim against a defendant in default is for a debt or liquidated claim or for a claim for unliquidated damages of the kind referred to in rule 14.13 (2), judgment may be entered for the plaintiff against the defendant for:
  - (a) a sum not exceeding the sum claimed, and
  - (b) interest up to judgment, and
  - (c) costs.
- (2) The relevant affidavit in support:
  - (a) must state the amount due to the plaintiff, in respect of the cause of action for which the proceedings were commenced, as at the time the originating process was filed, and
  - (b) must give particulars of any reduction of that amount, and costs, as a consequence of any payments made, or credits accrued, since the time the originating process was filed, and
  - (c) must state the source of the deponent's knowledge of the matters stated in the affidavit concerning the debt or debts, and
  - (d) must state the amount claimed by way of interest, and
  - (e) must state whether costs are claimed and, if costs are claimed and the costs claimable are fixed by law, the amount (not exceeding the amount so fixed) that is claimed for costs.

**Note.** The costs fixed by law referred to in paragraph (e) include costs that are fixed under section 196 (1) (b) of the *Legal Profession Act 1987* or section 329 (1) (c) of the *Legal Profession Act 2004*, as the case may be.

**16.7 Default judgment on claim for unliquidated damages** (cf SCR Part 17, rule 5)

- (1) If the plaintiff's claim against a defendant in default is for unliquidated damages only, judgment may be entered for the plaintiff against the defendant for damages to be assessed and for costs.

**Note.** See Part 30 for provisions as to assessment of damages.
- (2) The relevant affidavit in support:
  - (a) must state that the matter has not been settled with the defendant, and

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- (b) must state the source of the deponent's knowledge of the matters stated in the affidavit concerning the claim, and
  - (c) must state whether costs are claimed and, if costs are claimed and the costs claimable are fixed by law, the amount (not exceeding the amount so fixed) that is claimed for costs.

**Note.** The costs fixed by law referred to in paragraph (c) include costs that are fixed under section 196 (1) (b) of the *Legal Profession Act 1987* or section 329 (1) (c) of the *Legal Profession Act 2004*, as the case may be.

**16.8 Default judgment on mixed claims** (cf SCR Part 17, rule 8)

- (1) If the plaintiff's claim against a defendant in default includes any 2 or more of the claims referred to in this Part, and no other claim, judgment may be entered for the plaintiff against the defendant on any of those claims as if it were the plaintiff's only claim for relief against that defendant.
- (2) In the case of two or more such claims, the relevant affidavit in support must comply with the requirements of this Part in relation to each of those claims.

**16.9 Judgment for costs alone after other claims satisfied** (cf SCR Part 17, rule 10 (1); DCR Part 31, rule 13; LCR Part 26, rule 4)

- (1) If a plaintiff is entitled to have judgment entered under this Part against a defendant in default for any relief and for costs, but it appears by affidavit that, by reason of the defendant having satisfied the plaintiff's claims, it is unnecessary for the plaintiff to continue the proceedings against the defendant, judgment for the plaintiff may be entered under this Part against that defendant for costs alone.
- (2) Whatever the plaintiff's claims for relief against a defendant in default, if:
  - (a) the defendant satisfies the plaintiff's claims or complies with the plaintiff's demands, or
  - (b) it otherwise becomes unnecessary for the plaintiff to continue the proceedings against the defendant,the court may, on application by the plaintiff, give judgment against the defendant for costs.

**16.10 Judgment not limited by plaintiff's claims for relief** (cf SCR Part 17, rules 9 and 10 (2))

Whatever the plaintiff's claims for relief against a defendant in default, the court may, on application by the plaintiff, give such judgment against the defendant as the plaintiff appears to be entitled to on his or her statement of claim.



## Part 17 Admissions

### 17.1 Definitions

In this Part, other than rule 17.5:

*the admitting party* means a party who is admitting, or being asked to admit, any matter.

*the requesting party* means a party in whose favour another party is admitting, or being asked to admit, any matter.

### 17.2 Voluntary admissions of fact (cf SCR Part 18, rule 1; DCR Part 15, rule 1; LCR Part 14, rule 1)

- (1) The admitting party may, by a notice served on the requesting party, admit, in favour of the requesting party only and for the purposes of the proceedings only, the facts specified in the notice.
- (2) The admitting party may, with the leave of the court, withdraw any such admission.

### 17.3 Notice to admit facts (cf SCR Part 18, rule 2; DCR Part 15, rule 2; LCR Part 14, rule 2)

- (1) The requesting party may, by a notice served on the admitting party (*the requesting party's notice*), require the admitting party to admit, for the purposes of the proceedings only, the facts specified in the notice.
- (2) If, as to any fact specified in the requesting party's notice, the admitting party does not, within 14 days after service on the admitting party of the requesting party's notice, serve on the requesting party a notice disputing that fact, that fact is, for the purposes of the proceedings only, taken to have been admitted by the admitting party in favour of the requesting party only.
- (3) The admitting party may, with the leave of the court, withdraw any such admission.

### 17.4 Notice to admit documents (cf SCR Part 18, rule 5; DCR Part 15, rule 5; LCR Part 14, rule 3)

- (1) The requesting party may, by a notice served on the admitting party (*the requesting party's notice*), require the admitting party to admit the authenticity of the documents specified in the notice.
- (2) If, as to any document specified in the requesting party's notice, the admitting party does not, within 14 days after service on the admitting party of the requesting party's notice, serve on the requesting party a notice disputing the authenticity of that document, the authenticity of

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that document is, for the purposes of the proceedings only, taken to have been admitted by the admitting party in favour of the requesting party only.

- (3) The admitting party may, with the leave of the court, withdraw any such admission.

**17.5 Admission of documents discovered** (cf SCR Part 18, rule 4; DCR Part 15, rule 4)

- (1) In this rule:

*admitting party* means the person serving a list of documents under rule 21.3.

*requesting party* means the person served with a list of documents under rule 21.3.

- (2) If an admitting party allows inspection of any documents referred to in a list of documents under rule 21.5, the admitting party is taken to have made the following admissions in favour of the requesting party, unless the court orders otherwise:

- (a) in respect of each document described in the list as an original document, that the document is an original document and was printed, written, signed or executed as it purports to have been,  
(b) in respect of each document described in the list as a copy of an original document, that the document is a true copy.

- (3) Subrule (2) does not apply to a document referred to in the list of documents if the admitting party:

- (a) has, by his or her pleading, denied the authenticity of the document, or  
(b) has served on the requesting party, within 14 days after the time limited under rule 21.5 for inspection of a document, a notice to the effect that the admitting party disputes the authenticity of the document.

- (4) The admitting party and the requesting party are taken to be in the same position as they would have been had the requesting party, on the date of service of the list of documents, served on the admitting party a notice requiring production at the trial of such of the documents specified in the list as are in the possession of the admitting party.

**17.6 Restricted effect of admission** (cf SCR Part 18, rule 6; DCR Part 15, rule 6; LCR Part 14, rule 6)

An admission made under this Part in connection with any proceedings:

- (a) may not be used in those proceedings except in favour of the party in whose favour it was made, and

- (b) is taken to have been made for the purposes of those proceedings only.

**17.7 Judgment on admissions** (cf SCR Part 18, rule 3; DCR Part 15, rule 3; LCR Part 14, rule 5)

- (1) If admissions are made by a party, whether by his or her pleadings or otherwise, the court may, on the application of any other party, give any judgment or make any order to which the other party is entitled on the admissions.
- (2) The court may exercise its powers under this rule even if the other questions in the proceedings have not been determined.

## Part 18 Motions

**18.1 Applications for court orders to be made by motion** (cf SCR Part 19, rule 1; DCR Part 16, rule 1; LCR Part 15, rule 1)

An interlocutory or other application is to be made by motion unless these rules otherwise provide.

**18.2 Requirement for notice** (cf SCR Part 19, rule 2; DCR Part 16, rule 2; LCR Part 15, rule 2)

- (1) A person may not move the court to make any order unless notice of motion has been filed and served on each person affected by the proposed order.
- (2) Despite subrule (1), a person may move the court to make an order without notice of motion having been filed or served on a person if:
  - (a) that person consents to the making of the order, or
  - (b) the preparation, filing or service of the notice would cause undue delay or other prejudice to the person by whom the order is sought, or
  - (c) the court dispenses with the requirement for such notice to be filed or served, or
  - (d) under these rules or the practice of the court, the motion may be made without the prior filing or service (as the case may be) of notice of motion.

**18.3 Contents of notice of motion** (cf SCR Part 19, rule 2 (4) and (5); DCR Part 16, rule 2 (3) and (4); LCR Part 15, rule 2 (3) and (3A))

- (1) A notice of motion for an order:
  - (a) must identify the person by whom the order is sought:

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- (i) if the person is already a party to the proceedings, as that party (for example, as first plaintiff or second defendant), or
  - (ii) if the person is not yet a party to the proceedings, as the applicant, and
- (b) must identify each person affected by the order:
- (i) if that person is already a party to the proceedings, as that party (for example, as second plaintiff or first defendant), or
  - (ii) if that person is not yet a party to the proceedings, as the respondent, and
- (c) if the person by whom the order is sought is not already an active party, must state an address for service for that person, and
- (d) must state the date and time when, and the place where, the motion is to be moved, and
- (e) if the court makes an order as to the time by which the notice is to be served, must bear a note of the order made, and
- (f) must state concisely the nature of the proposed order.
- (2) Costs need not be specifically claimed in the notice of motion.
- (3) If a notice of motion is of a kind that, under any Act, any rules of court or any practice of the court, is dealt with in the absence of the public, the notice of motion must contain a statement to the effect that the motion is to be so dealt with.
- (4) If it becomes necessary for an application under subrule (3) to be dealt with in court, the registrar is to refer it to the court and give notice to the parties that the application has been so referred.

**18.4 Time for service of notice** (cf SCR Part 19, rule 3; DCR Part 16, rule 3; LCR Part 15, rule 3)

Unless the court orders otherwise, a notice of motion must be served at least 3 days before the date fixed for the motion.

**18.5 Notice to be personally served on persons who have not entered appearance** (cf SCR Part 19, rule 4; LCR Part 15, rule 2 (4))

A notice of motion must be personally served if the person on whom it is to be served:

- (a) is not a party to the proceedings, or
- (b) is a party to the proceedings, but is not an active party (otherwise than because the party has failed to comply with the requirements of these rules with respect to entering an appearance).

**18.6 Hearing of interlocutory applications** (cf LCR Part 15, rule 5)

- (1) A party's notice of motion in any proceedings must include, so far as practicable, all applications that the party desires to make in relation to the proceedings and that, having regard to the nature of the proceedings, can conveniently be dealt with at the one time.
- (2) On the hearing of a party's notice of motion, any other party may make any application in relation to the proceedings.
- (3) If on the hearing of a party's notice of motion, any other party makes an application under subrule (2), the court:
  - (a) may deal with both applications at the hearing, or
  - (b) may adjourn the hearing and, if appropriate, may direct any necessary notice of motion to be given to the other parties.

**18.7 Motion may be dealt with in party's absence** (cf SCR Part 19, rule 5; DCR Part 16, rule 5; LCR Part 15, rule 5 (2A))

If service of a notice of motion on any party is required by these rules, and notice of motion has been duly served on that party, the court may hear and dispose of the motion in the absence of that party.

**18.8 Further hearing** (cf SCR Part 19, rule 8)

- (1) If notice of a motion for any day has been filed or served, and the motion is not disposed of on that day:
  - (a) the court may hear and dispose of the notice of motion on any later day fixed by the court, and
  - (b) subject to subrule (2), filing or service of a further notice of motion is not required.
- (2) Subrule 1 (b) does not apply:
  - (a) if the court directs the filing or service of a further notice of motion, or
  - (b) if service is required on a person on whom notice of motion has not previously been served.

**18.9 Directions as to conduct of proceedings on notice of motion** (cf SCR Part 34, rule 6 (1))

In proceedings on a notice of motion, the court may give directions as to the order of evidence and address and generally as to the conduct of the proceedings.

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## Part 19 Amendment

- 19.1 Amendment of statement of claim** (cf SCR Part 15, rule 12, Part 20, rules 2 and 2A; DCR Part 17, rules 2 and 2A; LCR Part 16, rule 2)
- (1) Unless the court otherwise orders, a plaintiff may make one amendment to a statement of claim at any time within 28 days after the date on which the statement of claim was filed, but not after a date has been fixed for trial.
  - (2) If a plaintiff amends his or her statement of claim under subrule (1) after the defendant has filed a defence, the defendant may amend his or her defence at any time within 14 days after service of the amended statement of claim.
  - (3) A plaintiff's right to make an amendment under subrule (1) is not affected by any amendment the plaintiff has made under rule 7.22.
- 19.2 Amendments to add or remove parties** (cf SCR Part 20, rule 2 (4) and (5); DCR Part 17, rule 2 (4) and (5); LCR Part 16, rule 2 (3A) and (3B))
- (1) Subject to subrules (2) and (3), the amendments that may be made under rule 19.1 include an amendment that would have the effect of adding a party to, or removing a party from, the proceedings.
  - (2) An amendment that would have the effect of adding a person as a plaintiff in proceedings in which a solicitor is acting for the current plaintiff may not be made unless, at the time the amendment is made, the same solicitor:
    - (a) is acting for the person to be added, and
    - (b) certifies on the amended document:
      - (i) that he or she is acting for the person to be added, and
      - (ii) that the person to be added consents to being added as a plaintiff.
  - (3) An amendment that would have the effect of removing a party from the proceedings may not be made unless that party consents to being removed from the proceedings.
  - (4) If a person is added as a party under this rule, the date of commencement of the proceedings in relation to that person is taken to be the date on which the amended document is filed.
- 19.3 Duration of leave or consent** (cf SCR Part 20, rule 5 (1))
- An order giving leave to amend a document ceases to have effect:
- (a) at the expiration of the time specified in the order as the time within which the amendment must be made, or

- (b) if no such time is specified, at the expiration of 14 days after the date on which the order is made.

**19.4 Disallowance of amendment** (cf SCR Part 20, rule 3; DCR Part 17, rule 3; LCR Part 16, rule 3)

- (1) If a party amends a pleading, as referred to in rule 19.1 (1) or (2), the court may, by order, disallow the amendment.
- (2) Unless the court orders otherwise, notice of motion for such an order must be filed within 14 days after the date on which the amended document was served on the applicant.
- (3) If, on the hearing of an application for an order under this rule, the court is satisfied that, had an application for leave to make the amendment been made, it would not have granted leave to make the whole or some part of the amendment, the court must disallow the amendment or that part, as the case may be.

**19.5 Mode of amendment generally** (cf SCR Part 20, rules 7 and 8; DCR Part 17, rules 7 and 8; LCR Part 16, rules 7 and 8)

- (1) Subject to any directions referred to in rule 19.6, amendments to a filed document must be made by filing a fresh document.
- (2) A document amended under this rule must be marked with the following particulars:
  - (a) the date of the amendment,
  - (b) if the amendment is made pursuant to an order of the court, the date of the order,
  - (c) if the amendment is made otherwise than pursuant to an order of the court, a reference to the provision of these rules that authorises the amendment,and must include, or be accompanied by, a note that details the amendments.

**19.6 Court may give directions as to mode of amendment** (cf SCR Part 20, rule 6; DCR Part 17, rule 6; LCR Part 16, rule 6)

If the court orders, or grants leave for, the amendment of a filed document, the court may give such directions as it thinks fit concerning:

- (a) the mode of amendment, and
- (b) the mode of service of the amended document or of notice of the amendment, and
- (c) the time within which the amended document or notice of amendment is to be filed and served.

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## **Part 20 Resolution of proceedings without hearing**

### **Division 1 Mediation**

#### **20.1 Application of Division**

This Division applies to matters referred to mediation under Part 4 of the *Civil Procedure Act 2005*.

#### **20.2 Directions** (cf SCR Part 72C, rule 1)

The court may give directions regulating the practice and procedure to be followed in a mediation, including the preparation and service of documents.

#### **20.3 Statements as to proposed referral to mediation** (cf SCR Part 72C, rule 2; Act No 9 1973, section 164A; Act No 11 1970, section 21L)

On any occasion that proceedings are before the court for directions, the court may require each active party to state any of the following:

- (a) whether the party consents to referral of a matter arising in the proceedings for mediation,
- (b) whether the parties agree as to who is to be the mediator,
- (c) whether the parties agree as to the proportions in which the costs of mediation are to be borne, and the terms of any such agreement.

#### **20.4 Appointments by mediator** (cf SCR Part 72C, rule 3)

- (1) Within 7 days after being notified that a matter has been referred for mediation, the mediator to whom the matter is referred must appoint a time for the mediation and notify the parties, in writing, of the time appointed.
- (2) The mediator may also appoint a time for a preliminary meeting of the parties.

#### **20.5 Completion of mediation** (cf SCR Part 72C, rule 4)

The parties and the mediator must conduct the mediation with the object, so far as practicable, of completing the mediation within 28 days.

#### **20.6 Mediation session procedure** (cf SCR Part 72C, rule 6)

The following provisions apply to the conduct of a mediation session unless the mediator, or the court, otherwise directs:

- (a) the session must be attended:



- (i) subject to subparagraph (ii), by each party or, if a party is a corporation, by an officer of the corporation having authority to settle the proceedings, or
  - (ii) if the conduct of the proceedings by a party is controlled by an insurer, by an officer of the insurer having authority to settle the proceedings,
- (b) a party may be accompanied by that party's barrister or solicitor at the session.

**20.7 Notification of conclusion of mediation** (cf SCR Part 72C, rule 7)

Within 7 days after the conclusion of the mediation, the mediator must advise the court of the fact that the mediation has been concluded.

**Division 2 Arbitration**

**20.8 Proceedings that may not be referred to arbitration** (cf DCR Part 51A, rule 2; LCR Part 38, rule 12)

For the purposes of section 38 (3) (b) of the *Civil Procedure Act 2005*, the following proceedings may not be referred for arbitration unless the parties consent or the court finds there are special circumstances to justify their referral:

- (a) proceedings in which there is an allegation of fraud,
- (b) proceedings in the Small Claims Division of a Local Court.

**20.9 Reference to arbitration under Part 5 of the Civil Procedure Act 2005** (cf SCR Part 72B, rule 1; DCR Part 51A, rule 3; LCR Part 38, rule 3)

- (1) If an arbitrator is not prepared to hear or determine referred proceedings, whether before or after any hearing has commenced, the arbitrator must as soon as practicable inform the referring court of that fact, specifying his or her reasons.
- (2) If an arbitrator declines or fails to hear and determine referred proceedings, the referring court must revoke the order referring the proceedings to the arbitrator and may make another order referring the proceedings to another arbitrator.

**20.10 Medical reports** (cf SCR Part 72B, rule 2; DCR Part 51A, rule 6; LCR Part 38, rule 7)

- (1) In this rule, *medical expert* includes dentist, medical practitioner, occupational therapist, physiotherapist and psychologist.
- (2) A medical expert's written report as to a person's past, present or probable future physical or mental condition:
  - (a) is not admissible unless it has been served on each of the active parties no later than 28 days before the arbitration hearing, and

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(b) if so served, is admissible as evidence of the matters contained in it,  
unless the referring court or the arbitrator orders otherwise.

- (3) At any arbitration, a party is not entitled to adduce a medical expert's oral evidence as to a person's past, present or probable future physical or mental condition unless the referring court or the arbitrator so directs or unless each of the parties consent.

**20.11 Award of arbitrator** (cf SCR Part 72B, rule 3; DCR Part 51A, rule 9; LCR Part 38, rule 10)

- (1) An arbitrator's award, and his or her reasons for the award, are to be in or to the effect of the approved form.
- (2) An arbitrator's reasons for an award are to be specified so that, in his or her opinion, they make the parties aware of his or her view of the case made by each of them.
- (3) If a party fails to attend a hearing before an arbitrator, the arbitrator must include in his or her reasons for an award the fact that the party failed to attend and any information known to the arbitrator relating to the party's reasons for the failure to attend.
- (4) As soon as practicable after receiving an arbitrator's award, the registrar must send to each of the parties a copy of the award, with the date of sending set out in the award or in a notice accompanying the award.
- (5) For the purposes of subrule (4), *date of sending* means the date of leaving, sending, transmitting or otherwise serving copies of the award.

**20.12 Rehearing** (cf SCR Part 72B, rule 5; DCR Part 51A, rule 11; LCR Part 38, rule 12)

- (1) An application under section 42 of the *Civil Procedure Act 2005* for the rehearing of referred proceedings is to be made by notice of motion.
- (2) On the date fixed for the proceedings to be listed before the court, or any date to which the proceedings are adjourned, the court must make a determination as to whether the proceedings are to be a full rehearing or a limited rehearing.
- (3) Before the record of any proceedings is brought before the court for a rehearing, the registrar must seal within the record, or separate from the record, both the application for rehearing and all information as to the nature and quantum of the arbitrator's award.
- (4) Despite subrule (3), the court is not required to disqualify itself from rehearing the proceedings because it becomes aware in any manner of information as to the nature or quantum of the arbitrator's award.

- (5) Unless the court otherwise orders, matter that has been sealed within the record is not to be opened, and matter that has been separated from the record is not to be returned to the record, until after the rehearing has been determined.

### **Division 3 References to referees**

#### **20.13 Definitions** (cf SCR Part 72, rule 1)

In this Division:

*order of referral* means an order in force under rule 20.14.

*question* includes any question or issue arising in any proceedings, whether of fact or law, or both, and whether raised by pleadings, agreement of parties or otherwise.

#### **20.14 Orders of referral** (cf SCR Part 72, rule 2)

- (1) At any stage of the proceedings, the court may make orders for reference to a referee appointed by the court for inquiry and report by the referee on the whole of the proceedings or on any question arising in the proceedings.
- (2) The court must not make an order under subrule (1) in respect of a question to be tried with a jury.

#### **20.15 Appointment of referees** (cf SCR Part 72, rule 3)

- (1) Subject to this rule, the court may appoint any person as a referee.
- (2) A judicial officer or other officer of the court may not act as a referee otherwise than with the concurrence of the senior judicial officer.

#### **20.16 Two or more referees** (cf SCR Part 72, rule 4)

- (1) If the court appoints 2 referees and a decision to be made in the course of proceedings under the reference is not agreed, the decision that is binding is:
- (a) if a judicial officer is a referee, the decision of the judicial officer,  
or
- (b) in any other case, the decision of the referee appointed by the court to be senior referee.
- (2) If the court appoints 3 or more referees, any decision to be made in the course of proceedings under the reference may be made by a majority of the referees and, failing a majority, the decision that is binding is:
- (a) if a judicial officer is a referee, the decision of the judicial officer,  
or

- 
- (b) in any other case, the decision of the referee appointed by the court to be senior referee.

**20.17 Inquiry and report** (cf SCR Part 72, rule 5)

- (1) The court may, at any time and from time to time:
  - (a) authorise the referee to inquire into and report on any facts relevant to the inquiry and report on the matter referred, and
  - (b) direct the referee to make a further or supplemental report or inquiry and report, and
  - (c) give such instructions as the court thinks fit relating to the inquiry or report.
- (2) Instructions under subrule (1) (c) may include provision concerning any experiment or test for the purposes of any inquiry or report of a referee.

**20.18 Remuneration of referee** (cf SCR Part 72, rule 6)

- (1) The court:
  - (a) may determine the amount of the fees to be paid to a referee, and
  - (b) may direct how, when and by whom the whole or any part of any such fees are to be payable, and
  - (c) may determine the consequences of failure to comply with a direction under paragraph (b).
- (2) Subrule (1) does not affect the powers of the court as to costs.

**20.19 Court rooms** (cf SCR Part 72, rule 7)

The court may give directions for the provision:

- (a) of services of officers of the court, and
  - (b) of court rooms and other facilities,
- for the purpose of any reference under this Division.

**20.20 Conduct of proceedings under the reference** (cf SCR Part 72, rule 8)

- (1) The court may give directions with respect to the conduct of proceedings under the reference.
- (2) Subject to any direction under subrule (1):
  - (a) the referee may conduct the proceedings under the reference in such manner as the referee thinks fit, and
  - (b) in conducting proceedings under the reference, the referee is not bound by the rules of evidence but may inform himself or herself in relation to any matter in such manner as the referee thinks fit.

- (3) Evidence before the referee:
  - (a) may be given orally or in writing, and
  - (b) if the referee so requires, must, be given on oath or by affidavit.
- (4) A referee may take the examination of any person.
- (5) Each party must, within a time fixed by the referee but in any event before the conclusion of evidence on the inquiry, give to the referee and each other party a brief statement of the findings of fact and law for which the party contends.
- (6) The parties must at all times do all things which the referee requires to enable a just opinion to be reached and no party may wilfully do or cause to be done any act to delay or prevent an opinion being reached.

**20.21 Interlocutory directions** (cf SCR Part 72, rule 9)

The court may, at any time and from time to time, on application of the referee or of a party, give directions with respect to any matter arising in proceedings under the reference.

**20.22 Setting aside or variation of reference** (cf SCR Part 72, rule 10)

- (1) The court may, of its own motion or on application by a referee or a party, set aside or vary any order of referral.
- (2) Nothing in this rule affects any other power of the court to set aside or vary an order of referral.

**20.23 Report** (cf SCR Part 72, rules 11 and 12)

- (1) Unless the court orders otherwise, the referee must make a written report to the court on the matter referred to the referee, annexing the statements given under rule 20.20 (5) and stating:
  - (a) the referee's opinion on the matter, and
  - (b) the referee's reasons for that opinion.
- (2) On receipt of the report, the court must send it to the parties.

**20.24 Proceedings on the report** (cf SCR Part 72, rule 13)

- (1) If a report is made under rule 20.23, the court may on a matter of fact or law, or both, do any of the following:
  - (a) it may adopt, vary or reject the report in whole or in part,
  - (b) it may require an explanation by way of report from the referee,
  - (c) it may, on any ground, remit for further consideration by the referee the whole or any part of the matter referred for a further report,

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- (d) it may decide any matter on the evidence taken before the referee, with or without additional evidence, and must, in any event, give such judgment or make such order as the court thinks fit.
- (2) Evidence additional to the evidence taken before the referee may not be adduced before the court except by leave of the court.

#### **Division 4      Compromise**

##### **20.25    Definitions** (cf SCR Part 22, rule 3)

In this Division:

***final deadline*** for an offer means:

- (a) if the trial is before a jury, the time at which the judicial officer begins to sum up to the jury, or
- (b) if the proceedings have been referred for arbitration, the conclusion of the arbitration hearing, or
- (c) in any other case, the time at which the judicial officer begins to give his or her decision or his or her reasons for decision, whichever is the earlier, on a judgment (except an interlocutory judgment).

***offer*** means an offer of compromise referred to in rule 20.26.

***period for acceptance*** for an offer means the period from when the offer is made until:

- (a) the expiration of the time limited by the offer or, if no time is limited, the expiration of 28 days after the offer is made, or
- (b) the final deadline for offers in respect of the claim to which the offer relates,

whichever first occurs.

##### **20.26    Making of offer** (cf SCR Part 22, rules 1A, 2, 3 and 4; DCR Part 19A, rules 1, 2, 2A, 3 and 4; LCR Part 17A, rules 2 and 5)

- (1) In any proceedings, any party may, by notice in writing, make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms.
- (2) An offer must be exclusive of costs, except where it states that it is a verdict for the defendant and that the parties are to bear their own costs.
- (3) A notice of offer:
  - (a) must bear a statement to the effect that the offer is made in accordance with these rules, and

- (b) if the offeror has made or been ordered to make an interim payment to the offeree, must state whether or not the offer is in addition to the payment so made or ordered.
- (4) Despite subrule (1), a plaintiff may not make an offer unless the defendant has been given such particulars of the plaintiff's claim, and copies or originals of such documents available to the plaintiff, as are necessary to enable the defendant to fully consider the offer.
- (5) If a plaintiff makes an offer, no order may be made in favour of the defendant on the ground that the plaintiff has not supplied particulars or documents, or has not supplied sufficient particulars or documents, unless:
  - (a) the defendant has informed the plaintiff in writing of that ground within 14 days after receiving the offer, or
  - (b) the court orders otherwise.
- (6) An offer may be expressed to be limited as to the time it is open for acceptance.
- (7) The following provisions apply if an offer is limited as to the time it is open for acceptance:
  - (a) the closing date for acceptance of the offer must not be less than 28 days after the date on which the offer is made, in the case of an offer made 2 months or more before the date set down for commencement of the trial,
  - (b) the offer must be left open for such time as is reasonable in the circumstances, in the case of an offer made less than 2 months before the date set down for commencement of the trial.
- (8) Unless the notice of offer otherwise provides, an offer providing for the payment of money, or the doing of any other act, is taken to provide for the payment of that money, or the doing of that act, within 28 days after acceptance of the offer.
- (9) An offer is taken to have been made without prejudice, unless the notice of offer otherwise provides.
- (10) A party may make more than one offer in relation to the same claim.
- (11) Unless the court orders otherwise, an offer may not be withdrawn during the period of acceptance for the offer.
- (12) A notice of offer that purports to exclude, modify or restrict the operation of rule 42.14 or 42.15 is of no effect for the purposes of this Division.

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- 20.27 Acceptance of offer** (cf SCR Part 22, rule 3; DCR Part 19A, rule 3; LCR Part 17A, rule 5)
- (1) A party may accept an offer by serving written notice of acceptance on the offeror at any time during the period of acceptance for the offer.
  - (2) An offer may be accepted even if a further offer is made during the period of acceptance for the first offer.
  - (3) If an offer is accepted in accordance with this rule, any party to the compromise may apply for judgment to be entered accordingly.
- 20.28 Withdrawal of acceptance** (cf SCR Part 22, rule 5; DCR Part 19A, rule 5; LCR Part 17A, rule 7)
- (1) A party who accepts an offer may withdraw the acceptance in any of the following circumstances by serving written notice of withdrawal on the offeror:
    - (a) if the offer provides for payment of money, or the doing of any other act, and the sum is not paid to the offeree or into court, or the act is not done, within 28 days after acceptance of the offer or within such other time as the offer provides, or
    - (b) if the court grants the party leave to withdraw the acceptance.
  - (2) If acceptance of an offer is withdrawn:
    - (a) except as provided by paragraph (b), all steps in the proceedings that have been taken as a consequence of the offer having been accepted cease to have effect, and
    - (b) the court may give directions:
      - (i) to restore the parties as nearly as may be to their positions at the time of the acceptance, and
      - (ii) to give effect to any steps in the proceedings that have been taken as a consequence of the offer having been accepted, and
      - (iii) to provide for the further conduct of the proceedings, and may do so either after the offer is withdrawn or when granting leave to withdraw the offer.
- 20.29 Failure to comply with accepted offer** (cf SCR Part 22, rule 8; DCR Part 19A, rule 8; LCR Part 17A, rule 10)
- (1) If the plaintiff, being a party to an accepted offer, fails to comply with the terms of the offer, the defendant is entitled:
    - (a) to such judgment or order as is appropriate to give effect to the terms of the accepted offer, or



- (b) to an order that the proceedings be dismissed, and to judgment accordingly,  
as the defendant elects, unless the court orders otherwise.
- (2) If the defendant, being a party to an accepted offer, fails to comply with the terms of the offer, the plaintiff is entitled:
  - (a) to such judgment or order as is appropriate to give effect to the terms of the accepted offer, or
  - (b) to an order that the defence be struck out, and to judgment accordingly,  
as the plaintiff elects, unless the court orders otherwise.
- (3) If a party to an accepted offer fails to comply with the terms of the offer, and a defendant in the proceedings has made a statement of cross-claim or cross-summons that is not the subject of the accepted offer, the court:
  - (a) may make such order or give such judgment under this rule, and
  - (b) may make such order as to the further conduct of proceedings on the statement of cross-claim or cross-summons,  
as it thinks fit.

**20.30 Disclosure of offer to court or arbitrator** (cf SCR Part 22, rule 7; DCR Part 19A, rule 7; LCR Part 17A, rule 9)

- (1) No statement of the fact that an offer has been made may be contained in any pleading or affidavit.
- (2) If an offer is not accepted, no communication with respect to the offer may be made to the court at the trial or, as the case may require, to the arbitrator.
- (3) Despite subrule (2), an offer may be disclosed to the court or, as the case may require, to the arbitrator:
  - (a) if a notice of offer provides that the offer is not made without prejudice, or
  - (b) to the extent necessary to enable the offer to be taken into account for the purpose of determining an amount of interest up to judgment, or
  - (c) after all questions of liability and relief have been determined, to the extent necessary to determine questions as to costs, or
  - (d) to the extent necessary to enable the offer to be taken into account for the purposes of section 73 (4) of the *Motor Accidents Act 1988*, section 137 (4) of the *Motor Accidents Compensation Act 1999* or section 151M of the *Workers Compensation Act 1987*.

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**20.31 Compromises in certain Supreme Court proceedings** (cf SCR Part 8, rule 14)

- (1) This rule applies to proceedings in the Supreme Court concerning:
  - (a) the administration of a deceased person's estate, or
  - (b) property the subject of a trust, or
  - (c) the construction of an Act, instrument or other document, involving any matter in which one or more persons have the same interest or liability.
- (2) The court may approve a compromise:
  - (a) that one party has assented to, or
  - (b) that the court has sanctioned on behalf of one party, being in either case a compromise that affects other persons (not being parties) having the same interest or liability, but only if the court is satisfied that the compromise will be to the benefit of those other persons.
- (3) A compromise referred to in subrule (2) binds the absent persons unless the court's approval of the compromise has been obtained by fraud or non-disclosure of material facts.

**20.32 Offer to contribute** (cf SCR Part 22, rule 12; DCR Part 19A, rule 11; LCR Part 17A, rule 13)

- (1) If in any proceedings:
  - (a) one party (*the first party*) stands to be held liable to another party (*the second party*) to contribute towards any debt or damages which may be recovered against the second party in the proceedings, and
  - (b) the first party, at any time after entering an appearance, makes an offer to the second party to contribute to a specified extent to the debt or damages, and
  - (c) the offer is made without prejudice to the first party's defence, the offer must not be brought to the attention of the court or any arbitrator until all questions of liability or amount of debt or damages have been decided.
- (2) In subrule (1), *debt or damages* includes any interest up to judgment claimed on any debt or damages.

## **Division 5 Judgment by agreement**

### **20.33 Judgment by agreement** (cf DCR Part 14, rule 3; LCR Part 12, rule 3)

- (1) At any time before judgment:
  - (a) if there are parties joined otherwise than as plaintiff or defendant:
    - (i) all the parties, or
    - (ii) the plaintiff and the defendant, or
  - (b) if there are no parties joined otherwise than as plaintiff or defendant, the plaintiff and the defendant,may enter into an agreement as to the judgment to be entered in the proceedings (as between the parties to the agreement) and as to the terms and conditions (if any) on which the judgment is to be satisfied.
- (2) If such an agreement is filed before judgment, the registrar must enter judgment in accordance with the agreement.
- (3) Despite subrule (2), the registrar:
  - (a) must not enter any judgment arising from an agreement that contains a provision that constitutes, or purports to constitute, a declaration of right, and
  - (b) must not make any order that restricts disclosure, or purports to restrict disclosure, of any judgment or order of the court.
- (4) A provision of an agreement of the kind referred to in subrule (3) (b) is not binding on the court.
- (5) If:
  - (a) the registrar enters judgment under subrule (2), and
  - (b) a judgment debt arises by virtue of the judgment, and
  - (c) the agreement specifies by what instalments payable at what times the judgment debt or part of the debt is to be paid,the registrar must order that the judgment debt or part be paid by such instalments payable at such times as are so specified.
- (6) An order made under subrule (5) is taken to be an instalment order made under rule 37.1.
- (7) A judgment entered under subrule (2) pursuant to an agreement under subrule (1) may be set aside by the court on sufficient cause being shown on the application of any party to the proceedings who was not a party to the agreement.

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## Division 6 Acknowledgment of liquidated claim

### 20.34 Defendant may file acknowledgment (cf DCR Part 14, rule 2; LCR Part 12, rule 2)

- (1) In proceedings with respect to a liquidated claim, the defendant may file a statement acknowledging the whole of the amount of the claim.
- (2) Subrule (1) does not apply if the defendant has filed a defence or the plaintiff has, in accordance with these rules, filed an application for a default judgment.
- (3) On the filing of a statement under subrule (1), judgment is to be entered for the plaintiff for the whole of the amount of the claim.
- (4) Judgment entered as referred to in subrule (3) fully discharges all of the plaintiff's claims in the proceedings.
- (5) In proceedings in which a default judgment has been set aside under rule 36.15 or 36.16, the defendant may not file a statement referred to in subrule (1) except by leave of the court.

**Note.** See rule 6.11 which allows the defendant in proceedings on a liquidated claim to submit to judgment by his or her notice of appearance.

## Part 21 Discovery, inspection and notice to produce documents

### Division 1 Discovery and inspection

#### 21.1 Definitions (cf SCR Part 23, rule 1; DCR Part 22, rule 1)

- (1) In this Division:  
*excluded document*, in relation to proceedings the subject of an order for discovery, means any of the following documents:
  - (a) any document filed in the proceedings,
  - (b) any document served on party A after the commencement of the proceedings,
  - (c) any document that wholly came into existence after the commencement of the proceedings,
  - (d) any additional copy of a document included in the list of documents, being a document that contains no mark, deletion or other matter, relevant to a fact in question, not present in the document so included,

(e) any document comprising an original written communication sent by party B prior to the date of commencement of the proceedings of which a copy is included in the list of documents, but does not include any document that the court declares not to be an excluded document for the purposes of those proceedings.

**list of documents** means a list of documents referred to in rule 21.3.

**order for discovery** means an order referred to in rule 21.2.

**party A** means a party to whom another party is giving discovery, or being ordered to give discovery, of documents.

**party B** means a party who is giving discovery, or being ordered to give discovery, of documents.

**party B's affidavit** means an affidavit prepared in relation to the list of documents under rule 21.4.

**Note.** See the Dictionary for further definitions including, in particular, a definition of **possession**.

- (2) For the purposes of this Division, a document or matter is to be taken to be **relevant to a fact in issue** if it could, or contains material that could, rationally affect the assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness), regardless of whether the document or matter would be admissible in evidence.

**21.2 Order for discovery** (cf SCR Part 23, rule 3 (1), (2) and (3); DCR Part 22, rule 3 (1), (2) and (3))

- (1) The court may order that party B must give discovery to party A of:
- (a) documents within a class or classes specified in the order, or
  - (b) one or more samples (selected in such manner as the court may specify) of documents within such a class.
- (2) A class of documents must not be specified in more general terms than the court considers to be justified in the circumstances.
- (3) Subject to subrule (2), a class of documents may be specified:
- (a) by relevance to one or more facts in issue, or
  - (b) by description of the nature of the documents and the period within which they were brought into existence, or
  - (c) in such other manner as the court considers appropriate in the circumstances.

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**21.3 List of documents to be prepared** (cf SCR Part 23, rule 3 (5) and (6); DCR Part 22, rule 3 (5) and (6))

- (1) Party B must comply with an order for discovery by serving on party A a list of documents that deals with all of the documents referred to in the order.
- (2) The list of documents:
  - (a) must be divided into two parts:
    - (i) Part 1 relating to documents in the possession of party B, and
    - (ii) Part 2 relating to documents that are not, but that within the last 6 months prior to the commencement of the proceedings have been, in the possession of party B, and
  - (b) must include a brief description (by reference to nature and date or period) of each document or group of documents and, in the case of a group, the number of documents in that group, and
  - (c) must specify, against the description of each document or group in Part 2 of the list of documents, the person (if any) who party B believes to be in possession of the document or group of documents, and
  - (d) must identify any document that is claimed to be a privileged document, and specify the circumstances under which the privilege is claimed to arise.
- (3) Party B must comply with the requirements of subrule (1):
  - (a) within 28 days after an order for discovery is made, or
  - (b) within such other period (whether more or less than 28 days) as the order may specify.

**21.4 Affidavit and certificate supporting list of documents** (cf SCR Part 23, rule 3 (5), (6) and (7); DCR Part 22, rule 3 (5), (6) and (7))

- (1) The list of documents must be accompanied by:
  - (a) a supporting affidavit, and
  - (b) if party B has a solicitor, by a solicitor's certificate of advice.

**Note.** See rule 35.3 as to who may make such an affidavit.
- (2) The affidavit referred to in subrule (1) (a) must state that the deponent:
  - (a) has made reasonable inquiries as to the documents referred to in the order, and

- (b) believes that there are no documents (other than excluded documents) falling within any of the classes specified in the order that are, or that within the last 6 months before the commencement of the proceedings have been, in the possession of party B (other than those referred to in Part 1 or 2 of the list of documents), and
- (c) believes that the documents in Part 1 of the list of documents are within the possession of party B, and
- (d) believes that the documents in Part 2 of the list of documents are within the possession of the persons (if any) respectively specified in that Part, and
- (e) as to any document in Part 2 of the list of documents in respect of which no such person is specified, has no belief as to whose possession the document is in,

and must state, in respect of any document that is claimed to be a privileged document, the facts relied on as establishing the existence of the privilege.

- (3) The solicitor's certificate of advice referred to in subrule (1) (b) must state that the solicitor:
  - (a) has advised party B as to the obligations arising under an order for discovery (and if party B is a corporation, which officers of party B have been so advised), and
  - (b) is not aware of any documents within any of the classes specified in the order (other than excluded documents) that are, or that within the last 6 months before the commencement of the proceedings have been, in the possession of party B (other than those referred to in Part 1 or 2 of the list of documents).

**21.5 Documents to be made available** (cf SCR Part 23, rule 3 (9) and (10); DCR Part 22, rule 3 (9) and (10))

- (1) Party B must ensure that the documents described in Part 1 of the list of documents (other than privileged documents):
  - (a) at the time the list of documents is served on party A and for a reasonable time thereafter, are physically kept and arranged in a way that makes the documents readily accessible, and capable of convenient inspection by party A, and
  - (b) at the time the list of documents is served on party A and until completion of the trial of the proceedings, are identified in a way that enables particular documents to be readily retrieved.
- (2) Within 21 days after service of the list of documents, or within such other period or at such other times as the court may specify, party B must, on request by party A:

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- (a) produce for party A's inspection the documents described in Part 1 of the list of documents (other than privileged documents), and
  - (b) make available to party A a person who is able to, and does on party A's request, explain the way the documents are arranged and assist in locating and identifying particular documents or classes of documents, and
  - (c) provide facilities for the inspection and copying of such of the documents (other than privileged documents) as are not capable of being photocopied, and
  - (d) provide photocopies of, or facilities for the photocopying of, such of the documents as are capable of being photocopied, subject to:
    - (i) party A's solicitor undertaking to pay the reasonable costs of providing those photocopies or facilities, or
    - (ii) if party A has no solicitor, party A providing to party B an amount not less than a reasonable estimate of the reasonable costs of providing those photocopies or facilities.

**21.6 Subsequently found documents to be made available** (cf SCR Part 23, rule 3 (8); DCR Part 22, rule 3 (8))

If at any time after party B's affidavit is made, and before the end of the hearing, party B becomes aware:

- (a) that any document within the class or classes specified in the relevant order for discovery (not being an excluded document) but not included in Part 1 of the list of documents is within, or has come into, party B's possession, or
- (b) that any document included in Part 1 of the list of documents which was claimed to be a privileged document was not, or has ceased to be, a privileged document,

party B must forthwith give written notice to party A of that fact, and comply with rule 21.5 in respect of the document, as if the document had been included in Part 1 of the list of documents and the list had been served on the date of the giving of the notice.

**21.7 Discovered documents not to be disclosed** (cf SCR Part 23, rule 3 (11) and (12); DCR Part 22, rule 3 (11) and (12))

- (1) No copy of a document, or information from a document, obtained by party A as a result of discovery by party B is to be disclosed or used otherwise than for the purposes of the conduct of the proceedings, except by leave of the court, unless the document has been received into evidence in open court.



- (2) Nothing in subrule (1) affects the power of the court to make an order restricting the disclosure or use of any document, whether or not received into evidence, or the operation of any such order.

**21.8 Personal injury claims** (cf SCR Part 23, rule 5; DCR Part 22, rule 5)

In any proceedings on a common law claim:

- (a) for damages arising out of the death of, or bodily injury to, any person, or
- (b) for contribution in respect of damages so arising,
- an order for discovery may not be made in relation to any document unless the court, for special reasons, orders otherwise.

**Division 2 Notice to produce before hearing**

**21.9 Definitions**

- (1) In this Division:
- notice to produce* means a notice to produce referred to in rule 21.10.
- party A* means a party to whom another party is producing, or being asked to produce, documents or things for inspection.
- party B* means a party who is producing, or being asked to produce, documents or things for inspection.
- (2) For the purposes of this Division, a document or thing is to be taken to be *relevant to a fact in issue* if it could, or contains material that could, rationally affect the assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness), regardless of whether the document or thing would be admissible in evidence.

**21.10 Notice to produce for inspection by parties** (cf SCR Part 23, rule 2 (1); DCR Part 22, rule 2 (1), (1A) and (2))

- (1) Party A may, by notice served on party B, require party B to produce for inspection by party A:
- (a) any document or thing that is referred to in any originating process, pleading, affidavit or witness statement filed or served by party B, and
- (b) any other specific document or thing that is clearly identified in the notice and is relevant to a fact in issue.
- (2) A notice to produce may specify a time for production of all or any of the documents or things required to be produced.

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**21.11 Production under notice to produce** (cf SCR Part 23, rule 2 (3) and (4); DCR Part 22, rule 2 (3) and (4))

- (1) Unless the court orders otherwise, party B must, within a reasonable time after being served with a notice to produce:
  - (a) produce for party A's inspection such of the documents or things referred to in the notice (other than privileged documents) as are in party B's possession, and
  - (b) serve on party A, in respect of any document that is not produced, a notice stating:
    - (i) that the document is a privileged document, or
    - (ii) that the document is, to the best of party B's knowledge, information and belief, in the possession of a person identified in the notice, or
    - (iii) that party B has no knowledge, information or belief as to the existence or whereabouts of the document.
- (2) For the purposes of subrule (1):
  - (a) unless party B establishes to the contrary, 14 days or longer after service of the notice is to be taken to be a reasonable time, and
  - (b) unless party A establishes to the contrary, less than 14 days after service of the notice is to be taken to be less than a reasonable time.

**21.12 Personal injury claims** (cf SCR Part 23, rule 5, Part 24, rule 1 (3); DCR Part 22, rule 5)

In any proceedings on a common law claim:

- (a) for damages arising out of the death of, or bodily injury to, any person, or
- (b) for contribution in respect of damages so arising,

a party is not required to comply with a notice to produce in relation to a document or thing that has not been referred to in any originating process, pleading, affidavit or witness statement filed or served by that party unless the court, for special reasons, orders otherwise.

## **Part 22 Interrogatories**

**22.1 Interrogatories** (cf SCR Part 24, rules 1–6; DCR Part 22A, rules 1–6)

- (1) At any stage of the proceedings, the court may order any party to answer specified interrogatories.
- (2) An application for such an order must be accompanied by a copy of the proposed interrogatories.

- (3) In the case of proceedings on:
  - (a) a claim for damages arising out of the death of, or bodily injury to, any person, or
  - (b) a claim for contribution in relation to damages so arising,  
such an order is not to be made unless the court is satisfied that special reasons exist that justify the making of the order.
- (4) In any case, such an order is not to be made unless the court is satisfied that the order is necessary at the time it is made.
- (5) An order to answer interrogatories:
  - (a) may require the answers to be given within a specified time, and
  - (b) may require the answers, or any of them, to be verified by affidavit, and
  - (c) in circumstances in which rule 35.3 authorises someone other than the party to whom the order is addressed to make the relevant affidavit, may specify the person to make the affidavit, or the persons from whom the person to make the affidavit may be chosen, in relation to the interrogatories or any of them.

**22.2 Objections to specific interrogatories** (cf SCR Part 24, rule 6 (3))

A party may not object to being ordered to answer an interrogatory except on the following grounds:

- (a) the interrogatory does not relate to any matter in issue between that party and the party seeking the order,
- (b) the interrogatory is vexatious or oppressive,
- (c) the answer to the interrogatory could disclose privileged information.

**22.3 Answers to interrogatories** (cf SCR Part 24, rules 4 and 6; DCR Part 22A, rules 4 and 6)

- (1) A party who has been ordered to answer interrogatories must do so within the time required by the order by serving a statement of answers on all other active parties.
- (2) Such a statement:
  - (a) must deal with each interrogatory specifically, setting out each interrogatory followed by the answer to it, and
  - (b) must answer the substance of each interrogatory without evasion, and

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- (c) to the extent to which, and in the manner in which, the order so requires, must be verified by affidavit.

**Note.** See rule 22.6 as to the admission in evidence of answers to interrogatories.

**22.4 Insufficient answer** (cf SCR Part 24, rule 8; DCR Part 22A, rule 8)

- (1) If a party who has been ordered to answer interrogatories under rule 22.1 fails to answer an interrogatory sufficiently within the time specified in the order or, if no such time is specified, within 28 days after being served with the order, the court:
- (a) may order the party to make a further answer, and to verify that further answer by affidavit, or
  - (b) may order the party or, as the case requires, any person of the kind referred to in rule 35.3 (1), to attend to be orally examined.
- (2) This rule does not limit the power of the court under rule 22.5.

**22.5 Default** (cf SCR Part 24, rule 9)

- (1) If a party who has been ordered to answer interrogatories under rule 22.1 or 22.4 fails to answer an interrogatory sufficiently, the court may give or make such judgment or such order as it thinks fit, including:
- (a) if the party in default is a plaintiff, an order that the proceedings be stayed or dismissed as to the whole or any part of the relief claimed by the party in the proceedings, or
  - (b) if the proceedings were commenced by statement of claim and the party in default is a defendant, an order that the party's defence be struck out.
- (2) If a party has a solicitor, an order under rule 22.1 or 22.4 need not, for the purposes of enforcement of the order by committal or sequestration, be served personally.
- (3) If an order under rule 22.1 or 22.4 is not served personally on a party having a solicitor, the order may not be enforced by committal of any person, or by sequestration of any person's property, if that person shows that he or she did not have notice of the order within sufficient time to comply with the order.

**22.6 Answers to interrogatories as evidence** (cf SCR Part 24, rule 10; DCR Part 22A, rule 10)

- (1) A party:
- (a) may tender as evidence one or more answers to interrogatories without tendering the others, and

- (b) may tender as evidence part of an answer to an interrogatory without tendering the whole of the answer.
- (2) If the whole or part of an answer to an interrogatory is tendered as evidence, the court:
  - (a) may look at the whole of the answer, and
  - (b) if it appears to the court that any other answer or any part of an answer is so connected with the matter tendered that the matter tendered ought not to be used without that other answer or part, may reject the tender unless that other answer or part is also tendered.

## **Part 23 Medical examinations and inspection of property**

### **Division 1 Medical examination**

#### **23.1 Application and definitions** (cf SCR Part 25, rule 1; DCR Part 23, rule 1; LCR Part 20, rule 1)

- (1) This Division applies to proceedings in which:
  - (a) a person's physical or mental condition is relevant to a matter in question, and
  - (b) either:
    - (i) that person is a party, or
    - (ii) that person is a person for whose benefit a party is claiming relief under the *Compensation to Relatives Act 1897*.

- (2) In this Division:

**first party** means the party referred to in subrule (1) (b).

**medical examination** includes any examination by a medical expert but does not include tests referred to in Division 2.

**medical expert** includes dentist, medical practitioner, occupational therapist, optometrist, physiotherapist and psychologist.

**notice for medical examination** means a notice referred to in rule 23.2 (1).

**person concerned** means the person referred to in subrule (1) (a) (whether or not the first party) whose physical or mental condition is relevant to a matter in question.

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**23.2 Notice for medical examination** (cf SCR Part 25, rule 2; DCR Part 23, rule 2; LCR Part 20, rule 2)

- (1) Any party other than the first party may serve on the first party a notice for the medical examination of the person concerned.
- (2) A notice for medical examination is to be in the form of a request that the person concerned submit to examination by a specified medical expert at a specified time and place.

**23.3 Expenses** (cf SCR Part 25, rule 3; DCR Part 23, rule 3; LCR Part 20, rule 3)

A party who serves a notice for medical examination must, on request by the first party, pay to the first party a reasonable sum to meet the travelling and other expenses of the person concerned of and incidental to the medical examination, including the expenses of having a medical expert chosen by the person attend the examination.

**23.4 Order for examination** (cf SCR Part 25, rule 5; DCR Part 23, rule 5; LCR Part 20, rule 5)

- (1) The court may make orders for medical examination, including an order that the person concerned submit to examination by a specified medical expert at a specified time and place.
- (2) If the court orders that the person concerned submit to examination by a medical expert, the person must do all things reasonably requested, and answer all questions reasonably asked, by the medical expert for the purposes of the examination.

**23.5 Medical expert for person concerned** (cf SCR Part 25, rule 6; DCR Part 23, rule 6; LCR Part 20, rule 7)

The person concerned may have a medical expert of his or her choice attend a medical examination under this Division.

## **Division 2      Rehabilitation assessment**

**23.6 Application and definitions** (cf SCR Part 25, rule 7A; DCR Part 23, rule 7)

- (1) This Division applies to proceedings in which the extent of impairment of a party's earning capacity due to personal injuries to that party is relevant to any matter in question.
- (2) In this Division:  
*occupational rehabilitation service* has the same meaning as it has in section 59 of the *Workers Compensation Act 1987*.  
*party concerned* means the party referred to in subrule (1).

**23.7 Order for rehabilitation tests** (cf SCR Part 25, rule 7B; DCR Part 23, rule 8)

- (1) The court may make orders for testing the party concerned for the purpose of assessing the extent of impairment of the party's earning capacity, including an order to submit to a test, under the direction of a medical practitioner, during a specified period and at a specified place.
- (2) The specified place referred to in subrule (1) may be:
  - (a) a hospital, or
  - (b) a rehabilitation centre conducted by a hospital, or
  - (c) some other suitable place,at which treatment by way of rehabilitation, or an occupational rehabilitation service, is provided.
- (3) If the court makes an order under subrule (1) that the party concerned submit to a test, the party concerned must do all things reasonably requested, and answer all questions reasonably asked, by any medical practitioner, or by any person conducting the test, for the purposes of the test.
- (4) The terms on which the court may make orders under subrule (1) include terms for the payment by the party obtaining the order to the party concerned of any expense or loss incurred in complying with the order.

**Division 3 Inspection of property**

**23.8 Inspection of property** (cf SCR Part 25, rule 8; DCR Part 23, rule 9; LCR Part 20, rule 8)

- (1) For the purpose of enabling the proper determination of any matter in question in any proceedings, the court may make orders for any of the following:
  - (a) the inspection of any property,
  - (b) the taking of samples of any property,
  - (c) the making of any observation of any property,
  - (d) the trying of any experiment on or with any property,
  - (e) the observation of any process.
- (2) An order under subrule (1) may authorise any person to enter any land, or to do any other thing, for the purpose of getting access to the property.
- (3) A party applying for an order under this rule must, so far as practicable, serve notice of motion on each person who would be affected by the order if made.

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- (4) The court is not to make an order under this rule unless it is satisfied that sufficient relief is not available under section 169 of the *Evidence Act 1995*.
  - (5) This rule extends to proceedings on an application for an order under Part 5 (Preliminary discovery and inspection).
  - (6) In this rule, *property* includes any land and any document or other chattel, whether in the ownership or possession of a party or not.

#### **Division 4      Default**

##### **23.9      Default** (cf SCR Part 25, rule 10; DCR Part 23, rule 10; LCR Part 20, rule 10)

- (1) If a party makes default in compliance with this Part, or a notice or order under this Part, the court may give or make such judgment or such order as it thinks fit, including:
  - (a) if the party in default is a plaintiff, an order that the proceedings be dismissed as to the whole or any part of the relief claimed by the party in the proceedings, or
  - (b) if the proceedings were commenced by statement of claim and the party in default is a defendant, an order that the party's defence be struck out and that judgment be given accordingly.
- (2) If a person for whose benefit relief is being claimed, not being a party, makes default in compliance with this Part, or an order under this Part, the court may give such judgment, or make such order, as it thinks fit, including an order that the proceedings be dismissed as to the relief so claimed.
- (3) This rule does not limit the powers of the court to punish for contempt.

#### **Part 24    Taking evidence otherwise than at trial**

##### **24.1      Application of Part**

This Part applies to proceedings in the Supreme Court or the District Court.

##### **24.2      Construction of certain references** (cf SCR Part 27, rule 1)

In this Part, a reference to the *Evidence on Commission Act 1995*, or to a provision of that Act, includes a reference to the *Foreign Evidence Act 1994* of the Commonwealth, or to the corresponding provision of that Act.



**24.3 Order for examination of witness** (cf SCR Part 27, rule 1A; DCR Part 25, rule 1)

- (1) For the purposes of any proceedings, the court may make an order for the examination of a person, otherwise than at trial, at any place:
  - (a) in New South Wales, or
  - (b) outside New South Wales, but in Australia, or
  - (c) outside Australia.
- (2) An order under this rule:
  - (a) must nominate the person by whom the examination is to be conducted (*the examiner*), and
  - (b) may specify the time at which, or within which, the examination is to be conducted.

**24.4 Judicial officer or court officer as examiner** (cf SCR Part 27, rule 1C; DCR Part 25, rule 3)

- (1) A judicial officer or other officer of the court may not act as an examiner otherwise than with the concurrence of the senior judicial officer.
- (2) An applicant for an order for a person's examination, outside New South Wales, by a judicial officer or other officer of the court may request the proposed examiner to certify the amount which in his or her opinion should be paid into court as provision for expenses of the examination.
- (3) Such an order may be expressed to be conditional on the payment into court, by such person and within such time as the court may specify, of not less than the amount certified in accordance with subrule (2).
- (4) If satisfied that the amount paid or payable into court is or may be insufficient to provide for the expenses of the examination, the court, on application of the registrar:
  - (a) may make an order directing the party on whose application the order for examination was made to pay into court such further amount, and within such time, as the court may specify, and
  - (b) may make an order:
    - (i) staying the proceedings, so far as they concern the whole or any part of any claim for relief by that party, or
    - (ii) suspending the operation of the order for examination, until such payment is made.
- (5) The registrar must apply so much of the amount paid into court as may from time to time be required for the purpose in the payment, to or at the direction of the examiner, of:
  - (a) expenses incurred in relation to the examination, or

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- (b) advances for expenses to be incurred in relation to the examination.
  - (6) Any amount paid under subrule (5) that is not required for expenses in relation to the examination must be repaid into court.
  - (7) After the conclusion of the examination, on the examiner certifying that no expenses in relation to the examination remain unpaid or unrecouped from the money in court, the registrar must, subject to any order of the court, refund to the person by whom the money was paid into court (and, if more than one, in the same proportions as their respective payments into court) any money remaining in court.

**24.5 Letter of request** (cf SCR Part 27, rule 2; DCR Part 25, rule 5)

- (1) After an order is made under section 6 (1) (c) or 20 (1) (c) of the *Evidence on Commission Act 1995* for the issue of a letter of request, or an order of the same kind is made under section 9 or 23 of that Act, the party obtaining the order:
  - (a) must lodge with the principal registrar:
    - (i) a form of the appropriate letter of request, and
    - (ii) the interrogatories (if any) and cross-interrogatories (if any) to accompany the letter of request, and
    - (iii) if the letter of request is to be issued to the judicial authorities of a country in which English is not an official language appropriate to the place where the evidence is to be taken, and unless the court orders otherwise, a translation of the documents referred to in subparagraphs (i) and (ii) into an official language of that country appropriate to that place, and
  - (b) must file:
    - (i) a copy of each of the documents referred to in paragraph (a), and
    - (ii) an undertaking by the party obtaining the order, or his or her solicitor, to pay all expenses incurred by the court, or by any person at the request of the court, in respect of the letter of request.
- (2) A translation filed under subrule (1) (a) must be certified by the person making it to be a correct translation, and the certificate must state the person's full name and address and the office or qualification by reason of which the person so certifies.

**24.6 Evidence otherwise than on oath** (cf SCR Part 27, rule 2B; DCR Part 25, rule 7)

Unless the court orders otherwise:

- (a) a person may be examined outside Australia, otherwise than on oath, under an order under rule 24.3 (1) (c), and
- (b) evidence of a person may be taken outside Australia, otherwise than on oath, under an order under section 6 (1) (c) or 20 (1) (c) of the *Evidence on Commission Act 1995*, or under an order of the same kind made under section 9 or 23 of that Act,

if the person is examined or the evidence is taken in accordance with the procedure of the country concerned.

**24.7 Documents for examiner** (cf SCR Part 27, rule 3; DCR Part 25, rule 8)

- (1) The party obtaining an order for examination before an examiner must furnish the examiner with copies of such of the documents in the proceedings as are necessary to inform the examiner of the issues to which the examination is to relate.
- (2) If the documents in the proceedings are not sufficient to inform the examiner of the issues to which the examination is to relate, the court may, in the order for examination or in a later order, state the issues to which the examination is to relate.
- (3) This rule does not apply if the examiner is a judicial officer of the court by which the order for examination was made.

**24.8 Appointment for examination** (cf SCR Part 27, rule 4; DCR Part 25, rule 9)

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

**24.9 Conduct of examination** (cf SCR Part 27, rule 5; DCR Part 25, rule 10)

- (1) The examiner must permit the parties to attend the examination, together with their barristers and solicitors.
- (2) Subject to this Part, the proceedings before the examiner are to be in accordance with the procedure of the court.
- (3) Unless the court orders otherwise:

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- (a) a person who is examined before an examiner may be cross-examined and re-examined, and
  - (b) the examination, cross-examination and re-examination of such a person are to be conducted in the same way as at a trial.
  - (4) The examiner may put any question to a person being examined:
    - (a) as to the meaning of any answer made by that person, or
    - (b) as to any matter arising in the course of the examination.
  - (5) The examiner may adjourn the examination from time to time or from place to place.

**24.10 Examination of additional persons** (cf SCR Part 27, rule 6; DCR Part 25, rule 11)

- (1) On the application of a party to the proceedings, an examiner who is a judicial officer of the court may examine any person not named or provided for in the order for examination.
- (2) With the written consent of each party to the proceedings, an examiner who is not a judicial officer of the court may examine any person not named or provided for in the order for examination and, if he or she does so, must annex those consents to the transcript of that person's evidence.

**24.11 Objection** (cf SCR Part 27, rule 7; DCR Part 25, rule 12)

- (1) If a party objects to a question put to a person being examined, or a person being examined objects to answering such a question or to producing any document or thing:
  - (a) the examiner must state to the parties his or her opinion, but must not decide, on the validity of the objection, and
  - (b) the question, the ground for the objection, the examiner's opinion on the objection and the answer (if any) of the person being examined must be set out in the transcript of that person's evidence or in a statement attached to the transcript, and
  - (c) the court may, on motion by any party, decide the validity of the objection, and
  - (d) if the court decides against the objector, the court may order the objector to pay the costs occasioned by the objection.
- (2) This rule does not apply if the examiner is a judicial officer of the court.

**24.12 Recording of evidence generally** (cf SCR Part 27, rule 8; DCR Part 25, rule 13)

The evidence taken at an examination must be recorded in writing (whether longhand or shorthand) or by some other method (whether mechanical, electronic or otherwise) that is capable of making a permanent record of the evidence.

**24.13 Audio-visual recording of evidence** (cf SCR Part 27, rule 8A; DCR Part 25, rule 14)

The court or the examiner may give directions for the making of an audio-visual recording of the proceedings on an examination.

**24.14 Authentication and filing** (cf SCR Part 27, rule 9; DCR Part 25, rule 15)

- (1) A transcript of the evidence recorded in relation to an examination must be prepared and the person who prepares the transcript must certify that it is a correct transcript of the evidence so recorded.
- (2) The examiner must sign the transcript of the evidence and any document that constitutes an audio-visual recording under rule 24.13.
- (3) The examiner must certify on the transcript, or on a separate document annexed to the transcript, as to the time occupied in the examination and as to the fees received by the examiner in respect of the examination.
- (4) The examiner must send the transcript of the evidence, and any document that constitutes an audio-visual recording under rule 24.13, to the registrar and the registrar must file them in the proceedings.
- (5) Unless the court orders otherwise, the examiner must send the exhibits to the registrar, and the registrar must deal with the exhibits in such manner as the court may direct.
- (6) Subrules (1), (3) and (4) do not apply if the examiner is a judicial officer of the court.

**24.15 Special report** (cf SCR Part 27, rule 10; DCR Part 25, rule 16)

- (1) The examiner may furnish to the court a special report with regard to any examination conducted by the examiner and with regard to the absence of any person from, or the conduct of any person at, the examination.
- (2) The court may direct such proceedings to be taken, or make such order, on the report as the court thinks fit.

**24.16 Default of witness** (cf SCR Part 27, rule 11; DCR Part 25, rule 17)

- (1) If a person, required by subpoena to attend before an examiner who is not a judicial officer of the court:
  - (a) refuses to be sworn for the purposes of the examination, or

- (b) refuses to answer any lawful question, or
  - (c) refuses to produce any document or thing,
- the examiner must, at the request of any party, give to that party a certificate, signed by the examiner, of the refusal.
- (2) On the certificate being filed, and on motion by any party, the court:
    - (a) may order the person to be sworn, or to answer the question or to produce the document or thing, as the case may be, and
    - (b) may order the person to pay any costs occasioned by the refusal.

**24.17 Order for payment of expenses** (cf SCR Part 27, rule 12; DCR Part 25, rule 18)

If a party fails to comply with an undertaking referred to in rule 24.5 (1) (b) (ii) within 7 days after service on the party of notice of the amount of the expenses concerned, the court:

- (a) may order the party to pay the amount of the expenses to the registrar by a specified date, and
- (b) if the party fails to comply with that order by the specified date, may give such judgment, or make such order, as it thinks fit.

**24.18 Perpetuation of testimony** (cf SCR Part 27, rule 13; DCR Part 25, rule 19)

- (1) Witnesses may not be examined to perpetuate testimony unless proceedings to perpetuate that testimony have been commenced.
- (2) Any person may commence proceedings to perpetuate testimony that may be material for establishing any right or claim to any relief, which right or claim cannot be established before the happening of a future event.
- (3) If proceedings to perpetuate testimony touch any matter or thing in which the Crown may have an interest, the Attorney General may be made a defendant.
- (4) If, under subrule (3), the Attorney General is made a defendant to proceedings to perpetuate testimony, evidence taken in those proceedings is not inadmissible in other proceedings just because the Crown was not a party to the proceedings to perpetuate testimony.
- (5) Subrule (2) does not affect the right of any person to commence proceedings to perpetuate testimony in cases to which that subrule does not apply.

**24.19 Operation of directions under Evidence on Commission Act 1995** (cf SCR Part 27, rule 2A; DCR Part 25, rule 6)

To the extent to which they deal with matters arising under the *Evidence on Commission Act 1995*, the provisions of this Part are subject to any directions given by a superior court under section 7 or 21 of that Act.

**24.20 Witness expenses** (cf DCR Part 25, rule 21)

A witness attending before an examiner to be examined, or to produce a document, is entitled to payment of the same amount for conduct money expenses and loss of time as he or she would have been entitled to on attending to give evidence, or to produce a document, at the trial of the proceedings before the court.

## **Part 25 Interim preservation**

**25.1 Application**

This Part applies to proceedings in the Supreme Court or the District Court.

**25.2 Order in urgent case before commencement of proceedings** (cf SCR Part 28, rule 1)

- (1) In an urgent case, the court, on the application of a person who intends to commence proceedings, may do any of the following:
  - (a) it may make any order which the court might make in proceedings on an application for a writ of habeas corpus ad subjiciendum,
  - (b) it may make any order for the custody of a minor,
  - (c) it may grant any injunctive relief, including relief in the nature of Mareva relief or an Anton Piller order,
  - (d) it may make an order extending the operation of a caveat under:
    - (i) the *Real Property Act 1900*, or
    - (ii) the *Offshore Minerals Act 1999*, or
    - (iii) the *Offshore Minerals Act 1994* of the Commonwealth,
  - (e) it may appoint a receiver,
  - (f) it may make an order for the detention, custody or preservation of property under rule 25.3,

to the same extent as if the applicant had commenced the proceedings and the application were made in the proceedings.

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- (2) In relation to proceedings in the Supreme Court, an application under subrule (1) may be made in any division of the Court but must, so far as practicable, be made in the division to which the proceedings that are intended to be commenced would be assigned.
  - (3) A person making an application under subrule (1) must give an undertaking to the court to the effect that the applicant will file originating process commencing the proceedings within such time as the court may order or, if the court makes no such order, within 48 hours after the application is granted.

**25.3 Preservation of property** (cf SCR Part 28, rule 2)

- (1) In proceedings concerning property, or in which any question may arise as to property, the court may make orders for the detention, custody or preservation of the property.
- (2) An order under subrule (1) may authorise any person to enter any land or to do any other thing for the purpose of giving effect to the order.
- (3) In proceedings concerning the right of any party to a fund, the court may order that the fund be paid into court or otherwise secured.

**25.4 Disposal of personal property** (cf SCR Part 28, rule 3)

If, in proceedings concerning property (other than land) or in which any question may arise as to any property (other than land), it appears to the court that:

- (a) the property is of a perishable nature or is likely to deteriorate, or
- (b) for any other reason it is desirable that the property should be sold or otherwise disposed of,

the court may make an order for the sale or other disposal of the whole or any part of the property by such person, and in such manner, as the court may direct.

**25.5 Interim distribution** (cf SCR Part 28, rule 4)

If, in proceedings concerning property, it appears to the court that the property is more than sufficient to answer the claims on the property for which provision ought to be made in the proceedings, the court may allow any part of the property to be conveyed, transferred or delivered to any person having an interest in the property.

**25.6 Interim income** (cf SCR Part 28, rule 5)

If, in proceedings concerning property, it appears to the court that the whole or any part of the income of the property is not required to answer the claims on the property or its income for which provision ought to be



made in the proceedings, the court may allow that income or part to be paid, during such period as the court may determine, to all or any of the persons having an interest in the income.

**25.7 Payment before ascertainment of all persons interested** (cf SCR Part 28, rule 6)

If two or more persons are entitled to share in a fund, the court may order or allow immediate payment to any of those persons of his or her share without reserving any part of that share to meet the subsequent costs of ascertaining any other of those persons.

**25.8 Meaning of “usual undertaking as to damages”** (cf SCR Part 28, rule 7 (2))

The “usual undertaking as to damages”, if given to the court in connection with any interlocutory order or undertaking, is an undertaking to the court to submit to such order (if any) as the court may consider to be just for the payment of compensation (to be assessed by the court or as it may direct) to any person (whether or not a party) affected by the operation of the interlocutory order or undertaking or of any interlocutory continuation (with or without variation) of the interlocutory order or undertaking.

**25.9 Orders may be made at any stage of proceedings** (cf SCR Part 28, rule 7 (1))

Orders may be made under this Part at any stage of proceedings.

## **Part 26 Receivers**

**26.1 Application**

This Part applies to proceedings in the Supreme Court.

**26.2 Address for service** (cf SCR Part 29, rule 1)

A receiver must, within 7 days after appointment as such, file a notice specifying an address for service.

**26.3 Security** (cf SCR Part 29, rule 2)

- (1) If the court appoints a receiver, the court may give directions for the filing by the receiver of security in accordance with this rule.
- (2) If the court directs the appointment of a receiver, then, unless the court orders otherwise, a person must not be appointed receiver under the direction until security has been filed in accordance with this rule.
- (3) Subrules (1) and (2) have effect subject to any provision for the time being in force made by or under any Act.

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- (4) A security to be filed in accordance with this rule must be a security approved by the court that the receiver will account for what he or she receives as receiver and will deal with what he or she receives as the court may direct.
  - (5) If a security has been filed under this rule, the court may make orders for the vacation of the security.

**26.4 Remuneration** (cf SCR Part 29, rule 3)

A receiver is to be allowed such remuneration (if any) as may be fixed by the court.

**26.5 Accounts** (cf SCR Part 29, rule 4)

- (1) A receiver must file accounts at such intervals or on such dates as the court may direct.
- (2) On the day on which he or she files an account, a receiver must file a notice of motion applying for an order to pass the account.
- (3) Unless the court orders otherwise, the receiver must attend on the hearing of the application under subrule (2).

**26.6 Default** (cf SCR Part 29, rule 5)

- (1) If a receiver fails to comply with a requirement of these rules, or of an order or direction of the court:
  - (a) to file an account or affidavit, or
  - (b) to attend on the hearing of an application for an order to pass an account, or
  - (c) to do any other thing,the court may make such orders and give such directions as the court thinks fit.
- (2) Without limiting subrule (1), the orders and directions that may be made or given include orders and directions:
  - (a) for the discharge of the receiver, and
  - (b) for the appointment of another receiver, and
  - (c) for the payment of costs.
- (3) Without limiting subrule (1), if a receiver fails to comply with a requirement of these rules, or of an order or direction of the court, to pay into court any sum shown by an account as due from the receiver, the court may charge the receiver with interest on that sum, at the relevant rate set out in Schedule 5, while that sum is in his or her possession as receiver.

- (4) This rule does not limit the powers of the court as to the enforcement of orders or as to the punishment of contempt.

**26.7 Powers** (cf SCR Part 29, rule 6)

- (1) The court may authorise a receiver to do (either in the name of the receiver or in the name of the parties or any of them, and either generally or in any particular case) any act or thing that the parties or any of them might do if of full age and capacity.
- (2) Subrule (1) has effect even if the parties or any of them are not of full age and capacity.
- (3) This rule does not limit any power of the court apart from this rule to authorise a receiver to do any act or thing.

**26.8 Account on death** (cf SCR Part 29, rule 7)

- (1) If a receiver in any proceedings dies, the court may make such orders as the court thinks fit for the filing and passing of accounts by the representatives of the deceased receiver and for the payment into court of any amount shown to be due.
- (2) The court must not make any order under subrule (1) unless notice of motion has been served on the representatives.
- (3) A notice of motion under this rule must be served personally.

## **Part 27 Disposal of land**

**27.1 Power to order sale** (cf SCR Part 30, rule 2)

In proceedings in the Supreme Court in relation to land, other than proceedings in the Common Law Division for possession of land, the Court may, at any stage of the proceedings:

- (a) order that the whole or any part of the land be sold, and
- (b) order that any party in receipt of the rents or profits of the land, or otherwise in possession of the land, deliver possession to such person as the Court may direct.

**27.2 Manner of sale** (cf SCR Part 30, rule 3)

- (1) This rule applies if the Supreme Court makes an order under rule 27.1 that land be sold.
- (2) The Supreme Court may appoint a party or other person to have the conduct of the sale.
- (3) The Supreme Court may permit the person having the conduct of the sale to sell the land in such manner as he or she thinks fit.

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- (4) The Supreme Court may direct any party to join in the sale and conveyance or transfer or in any other matter relating to the sale.
  - (5) The Supreme Court may give such further directions as it thinks fit for the purpose of effecting the sale, including any one or more of the following:
    - (a) a direction fixing the manner of sale (that is, whether sale is to be by contract conditional on approval of the Court, by private treaty, by public auction, by tender, or by some other manner),
    - (b) a direction fixing a reserve or minimum price,
    - (c) a direction requiring payment of the purchase money into Court or to trustees or other persons,
    - (d) a direction for settling the particulars and conditions of sale,
    - (e) a direction for obtaining evidence of value,
    - (f) a direction fixing the remuneration to be allowed to any auctioneer, real estate agent or other person.

**27.3 Certificate of sale** (cf SCR Part 30, rule 4)

- (1) If, pursuant to this Part, land is sold by public auction, the auctioneer must, unless the Supreme Court orders otherwise, certify the result of the sale.
- (2) If, pursuant to this Part, land is sold otherwise than by public auction, the solicitor of the person having the conduct of the sale must, unless the Supreme Court orders otherwise, certify the result of the sale.
- (3) The Supreme Court may require that the certificate be verified by affidavit of the person certifying.
- (4) The person having the conduct of the sale must file the certificate and affidavit, if any.

**27.4 Mortgage, exchange or partition** (cf SCR Part 30, rule 5)

If the Supreme Court makes an order for the mortgage, exchange or partition of land, rules 27.2 and 27.3 apply to the mortgage, exchange or partition, so far as applicable and with any necessary modifications, in the same way as they apply to a sale of land under this Part.

## **Part 28 Separate decision of questions and consolidation**

### **Division 1 Preliminary**

#### **28.1 Definition** (cf SCR Part 31, rule 1)

In this Part, *question* includes any question or issue in any proceedings, whether of fact or law or partly of fact and partly of law, and whether raised by pleadings, agreement of parties or otherwise.

### **Division 2 Separation of questions**

#### **28.2 Order for decision** (cf SCR Part 31, rule 2)

The court may make orders for the decision of any question separately from any other question, whether before, at or after any trial or further trial in the proceedings.

#### **28.3 Record of decision** (cf SCR Part 31, rule 5)

If any question is decided under this Part, the court must, subject to rule 28.4, either:

- (a) cause the decision to be recorded, or
- (b) give or make such judgment or order as the nature of the case requires.

#### **28.4 Disposal of proceedings** (cf SCR Part 31, rule 6)

- (1) This rule applies if the decision of a question under this Division:
  - (a) substantially disposes of the proceedings or of the whole or any part of any claim for relief in the proceedings, or
  - (b) renders unnecessary any trial or further trial in the proceedings or on the whole or any part of any claim for relief in the proceedings.
- (2) In the circumstances referred to in subrule (1), the court may, as the nature of the case requires:
  - (a) dismiss the proceedings or the whole or any part of any claim for relief in the proceedings, or
  - (b) give any judgment, or
  - (c) make any other order.

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### **Division 3 Consolidation etc of proceedings**

#### **28.5 Consolidation etc of proceedings** (cf SCR Part 31, rule 7; DCR Part 12, rule 7)

If several proceedings are pending in the court and it appears to the court:

- (a) that they involve a common question, or
- (b) that the rights to relief claimed in them are in respect of, or arise out of, the same transaction or series of transactions, or
- (c) that for some other reason it is desirable to make an order under this rule,

the court may order those proceedings to be consolidated, or to be tried at the same time or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.

**Note.** See also Division 5 of Part 6 with respect to joinder of causes of action and joinder of parties.

### **Part 29 Trials**

#### **29.1 Beginning and opposite parties** (cf SCR Part 34, rule 1; DCR Part 26, rule 1A; LCR Part 21, rule 1A)

Subject to any directions given by the court, for the purposes of this Part:

- (a) if the burden of proof on any issue lies on the plaintiff, the plaintiff is to be the beginning party and the defendant the opposite party, and
- (b) if the burden of proof on all the issues lies on the defendant, the defendant is to be the beginning party and the plaintiff the opposite party.

#### **29.2 Requisition for jury** (cf SCR Part 34, rule 3; DCR Part 12, rule 5)

- (1) An application for proceedings to be tried by jury must be made, by notice of motion, not later than 2 months before the date fixed by the court for the first status conference in relation to the proceedings.
- (2) For the purposes of section 85 of the *Supreme Court Act 1970* and section 76A of the *District Court Act 1973*, a requisition for a jury must be filed at the same time as the application referred to in subrule (1) is filed.

#### **29.3 Time and place of trial** (cf SCR Part 34, rule 4)

The court may make such order as it thinks fit for fixing the time and place of trial.

**29.4 Trial to deal with all questions and issues** (cf SCR Part 33, rule 4)

Unless the court orders otherwise, proceedings are to be listed for trial generally, that is, for hearing of all questions and issues arising on every claim for relief in the proceedings.

**29.5 Conduct of trials generally** (cf SCR Part 34, rule 6 (1))

The court may give directions as to the order of evidence and addresses and generally as to the conduct of the trial.

**29.6 Order of evidence and addresses** (cf SCR Part 34, rule 6; DCR Part 26, rule 6; LCR Part 21, rule 4)

- (1) Subject to these rules and to any direction of the court:
  - (a) if the only parties are one plaintiff and one defendant, and there is no statement of cross-claim or cross-summons, the order of evidence and addresses is to be as provided by this rule, and
  - (b) in any other case, the order of evidence and addresses is to be as provided by this rule, subject to any modifications that the nature of the case requires.
- (2) The beginning party may make an address opening his or her case and may then adduce evidence.
- (3) If, at the conclusion of the beginning party's evidence, no document or thing has been admitted in evidence on tender by the opposite party, the opposite party may elect to adduce evidence or not to adduce evidence.
- (4) If the opposite party elects to adduce evidence:
  - (a) the opposite party may make an opening address before adducing evidence, and
  - (b) after adducing evidence, the opposite party may make an address closing his or her case, and
  - (c) after the close of the opposite party's case, the beginning party may make an address closing his or her case.
- (5) If the opposite party elects not to adduce evidence:
  - (a) the beginning party may make an address closing his or her case, and
  - (b) after the close of the beginning party's case, the opposite party may make an address stating his or her case.

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- 29.7 Procedure to be followed if party is absent** (cf SCR Part 5, rule 9, Part 13, rule 5A, Part 34, rule 5; DCR Part 26, rule 5A; LCR Part 21, rule 2)
- (1) If, when a trial is called on, any party is absent, the court:
    - (a) may proceed with the trial generally or so far as concerns any claim for relief in the proceedings, or
    - (b) may adjourn the trial.
  - (2) If, in relation to a liquidated claim, the plaintiff appears, but a defendant does not appear, the court may, without proceeding to trial, give judgment against that defendant on evidence of:
    - (a) the amount then due to the plaintiff in respect of the cause of action for which the proceedings were commenced, and
    - (b) any payments made or credits accrued since the commencement of the proceedings in reduction of the amount of the plaintiff's claim or costs.
- 29.8 Dismissal of proceedings on plaintiff's application** (cf SCR Part 34, rule 6A; DCR Part 26, rule 6A; LCR Part 21, rule 5 (1))
- (1) On the application of the plaintiff in any proceedings, the court may make an order for the dismissal of the proceedings to the extent to which they concern:
    - (a) the whole or any part of the plaintiff's claim for relief, and
    - (b) any cause of action relevant to that claim or part of the claim.
  - (2) Subject to subrule (3), such an order may be made at any time.
  - (3) In the case of a trial with a jury, such an order may be made only if the application for the order is made before the jury gives a verdict.
- 29.9 Dismissal of proceedings on defendant's application** (cf SCR Part 34, rule 7; DCR Part 26, rule 7; LCR Part 21, rule 5 (2)–(7))
- (1) A defendant in proceedings in which the plaintiff is the beginning party may apply to the court for an order:
    - (a) for the dismissal of the proceedings, or
    - (b) for the dismissal of the proceedings to the extent to which they concern any cause of action relevant to the plaintiff's claim for relief against that defendant,on the ground that, on the evidence given, a judgment for the plaintiff could not be supported.
  - (2) Such an application may be made at any time after the conclusion of the evidence for the plaintiff in his or her case in chief.



- (3) The plaintiff may argue, or decline to argue, the question raised by the application.
- (4) The court may not make an order under this rule unless the plaintiff argues the question raised by the application and the defendant satisfies the court that, on the evidence given, a judgment for the plaintiff could not be supported.
- (5) If the plaintiff declines to argue the question raised by the application, or if the defendant fails to satisfy the court that, on the evidence given, a judgment for the plaintiff could not be supported, the defendant:
  - (a) may adduce evidence or further evidence, or
  - (b) may make an application under rule 29.10.
- (6) If fewer than all defendants apply to the court under subrule (1), the court must not deal with any such application before the conclusion of the evidence given for all parties.

**29.10 Judgment for want of evidence** (cf SCR Part 34, rule 8; DCR Part 26, rule 8; LCR Part 21, rule 6)

- (1) An opposite party may apply to the court to give judgment for the opposite party, either generally or on any claim for relief in the proceedings, on the ground that, on the evidence given, a judgment for the beginning party could not be supported.
- (2) Such an application may be made at any time after the conclusion of the evidence for the beginning party in his or her case in chief.
- (3) The court may not give judgment under this rule unless the opposite party satisfies the court that, on the evidence given, a judgment for the beginning party could not be supported.
- (4) If the opposite party fails to satisfy the court that, on the evidence given, a judgment for the beginning party could not be supported, the opposite party may not adduce evidence or further evidence in the proceedings generally or on the claim for relief concerned, as the case may be, except by leave of the court.
- (5) If not all opposite parties apply to the court under subrule (1), the court must not deal with any such application before the conclusion of the evidence given for all parties.

**29.11 Judgment despite verdict, finding or assessment** (cf SCR Part 34, rule 8A)

If, at a trial with a jury, a verdict is given or a finding or assessment is made, the court may give judgment as it thinks fit despite the verdict, finding or assessment.

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**29.12 Death of party before judgment** (cf SCR Part 34, rule 10)

- (1) If a party dies after the verdict or finding on the questions of fact, the court may give judgment, and judgment may be entered, despite the death.
- (2) Subrule (1) does not limit the court's power to make orders for the joinder, removal or re-arrangement of parties under Part 6.

**29.13 Record of trial to be kept** (cf SCR Part 34, rule 9; DCR Part 26, rule 8A)

The associate, or other officer of the court present at the trial, is to maintain and complete a record of the trial.

**29.14 Court may refuse to hear proceedings if fees unpaid**

The court may refuse to hear, or to continue to hear, proceedings in respect of which a hearing allocation fee or hearing fee remains due and unpaid.

## **Part 30 Assessment of damages and value of goods**

**30.1 Damages under judgment** (cf SCR Part 35, rule 1; DCR Part 11A, rule 2 (2); LCR Part 10A, rule 2 (2))

- (1) This rule applies to proceedings in which judgment against a party has been given for damages to be assessed.
- (2) Subject to subrule (3), the proceedings are to proceed to trial for assessment of damages.
- (3) If the proceedings are carried on against the party on any claim for relief not determined by the judgment, or against any other party, the trial for assessment of damages is to be held together with any other trial in the proceedings.

**30.2 Value of goods under judgment** (cf SCR Part 35, rule 2)

Rule 30.1 applies to proceedings in which judgment is given for the value of goods to be assessed (with or without damages to be assessed) in the same way as it applies to a judgment for damages to be assessed.

**30.3 Damages to time of assessment** (cf SCR Part 35, rule 3; DCR Part 27, rule 2, LCR Part 22, rule 2)

- (1) If damages are to be assessed in respect of:
  - (a) a continuing cause of action, or
  - (b) repeated breaches of recurring obligations, or
  - (c) intermittent breaches of a continuing obligation,

the damages are to be assessed up to the time of assessment, including damages for breaches occurring after the commencement of the proceedings.

- (2) Subrule (1) applies to the assessment of damages under this Part or otherwise.

## Part 31 Evidence

### Division 1 Evidence at hearing

**31.1 Manner of giving evidence at trial** (cf SCR Part 36, rule 2; DCR Part 28, rule 2; LCR Part 25, rule 9)

- (1) This rule applies to a trial of proceedings commenced by statement of claim, or in which a statement of claim has been filed.
- (2) Subject to subrules (3) and (4) and to the provisions of the *Evidence Act 1995*, a witness's evidence at a trial must be given orally before the court.
- (3) The court may order that all or any of a witness's evidence at a trial must be given by affidavit or, subject to rule 31.4, by witness statement.
- (4) Unless the court orders otherwise, evidence of facts must be given by affidavit if the only matters in question are:
  - (a) interest up to judgment in respect of a debt or liquidated claim, or
  - (b) the assessment of damages or the value of goods under Part 30, or
  - (c) costs.

**31.2 Evidence of witnesses at interlocutory hearings** (cf SCR Part 36, rule 3; DCR Part 28, rule 3)

Subject to rule 31.1, evidence in chief of any witness at an interlocutory hearing must be given by affidavit unless the court orders otherwise.

**31.3 Evidence by telephone, video link or other communication** (cf SCR Part 36, rule 2A; DCR Part 28, rule 2A; LCR Part 23, rule 1C)

- (1) If the court so orders, evidence and submissions may be received by telephone, video link or other form of communication.
- (2) This rule does not apply to circumstances in which directions could be sought under section 25 of the *Evidence and Procedure (New Zealand) Act 1994* of the Commonwealth.

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**31.4 Court may direct party to furnish witness statement** (cf SCR Part 36, rule 4A)

- (1) The court may direct any party to serve on each other active party a written statement of the oral evidence that the party intends to adduce in chief on any questions of fact to be decided at any hearing (a *witness statement*).
- (2) A direction under subrule (1):
  - (a) may make different provision with regard to different questions of fact or different witnesses, and
  - (b) may require that notice be given of any objection to any of the evidence in a witness statement and of the grounds of any such objection.
- (3) Each witness statement must be signed by the intended witness unless the signature of the witness cannot be procured or the court orders otherwise.
- (4) If an intended witness to whose evidence a witness statement relates does not give evidence, no party may put the statement in evidence at the hearing except by leave of the court.
- (5) If the party serving the statement calls as a witness at the hearing any person whose witness statement has been served pursuant to a direction under subrule (1):
  - (a) that person's witness statement is to stand as the whole of his or her evidence in chief, so long as that person testifies to the truth of the statement, and
  - (b) except by leave of the court, the party may not adduce from that person any further evidence in chief.
- (6) A party who fails to comply with a direction given under this rule may not adduce evidence to which the direction relates, except by leave of the court.
- (7) This rule does not deprive any party of the right to treat any communication as privileged and does not make admissible any evidence that is otherwise inadmissible.
- (8) An application by a party for an order that the party not be required to comply with a direction under this rule in respect of any proposed witness or witnesses (whether or not such a direction has been given) may be made without serving notice of motion.

**31.5 Notice under s 67 or s 99 of the Evidence Act 1995** (cf SCR Part 36, rule 13D; DCR Part 28, rule 9A; LCR Part 23, rule 3A)

Unless the court orders otherwise, notice for the purposes of section 67 or 99 of the *Evidence Act 1995* must be given:

- (a) in any case where the court by notice to the parties fixes a date for determining the date for hearing, not later than 21 days before the date fixed by that notice, and
- (b) in any other case where the place of hearing is a place other than Sydney, not later than 21 days before the first call-over held in respect of the sittings at that place, and
- (c) in any other case, not later than 21 days before the date on which the court determines the date for hearing.

**31.6 Evidence on commission** (cf SCR Part 36, rule 6; DCR Part 28, rule 7)

- (1) The court may permit a party to any proceedings the subject of an order under rule 24.3 (relating to the taking of evidence otherwise than at trial) to tender in the proceedings the evidence of a person examined under the order.
- (2) The evidence is not admissible in the proceedings if:
  - (a) it appears to the satisfaction of the court that the person examined is in New South Wales and is able to attend the hearing, or
  - (b) the evidence would not have been admissible had it been given orally at the hearing of the proceedings.
- (3) If it is in the interests of justice to do so, the court may exclude from the proceedings any evidence of the person examined even though the evidence is otherwise admissible.
- (4) Unless the court orders otherwise, evidence in any proceedings that a case falls within:
  - (a) subrule (2) (a), or
  - (b) section 8 (2) (a) or 22 (2) (a) of the *Evidence on Commission Act 1995*, or
  - (c) section 9 (2) (a) of the *Foreign Evidence Act 1994* of the Commonwealth,may be given by affidavit on information and belief, but the person making the affidavit must give the source of and ground for the information and belief.
- (5) The judicial officer presiding at the trial may make any necessary observations and findings as to demeanour and credibility of the person examined, and act on them for the determination of the issues at the trial, if:

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- (a) the examination has been conducted by the same judicial officer, or
  - (b) an audio-visual recording under rule 24.13 is tendered in evidence at the trial,
- except where the trial is before a jury.
- (6) In this rule, *evidence* includes:
    - (a) any document or thing produced at the examination, and
    - (b) any answers made (whether in writing, or orally and reduced to writing) to any written interrogatories presented at the examination, and
    - (c) any audio-visual recording made in accordance with rule 24.13.

**31.7 Foreign material** (cf SCR Part 36, rule 6B)

- (1) Unless the court orders otherwise, a party who adduces foreign material under section 24 or 32 of the *Foreign Evidence Act 1994* of the Commonwealth as evidence:
  - (a) must give at least 14 days' written notice to each other active party of:
    - (i) the intention to adduce evidence under that section, and
    - (ii) the nature of the foreign material, and
  - (b) must adduce all relevant evidence available to that party:
    - (i) as to whether the person who gave the testimony that is the subject of the foreign material is in Australia and is able to attend the hearing, and
    - (ii) if the foreign material is adduced under section 24 of the *Foreign Evidence Act 1994* of the Commonwealth, of the matters to which section 25 (2) (a) or (c) of that Act refer, and
    - (iii) if the foreign material is adduced under section 32 of the *Foreign Evidence Act 1994* of the Commonwealth, of the matters to which section 33 (2) (a) or (c) of that Act refer.
- (2) In this rule *foreign material* has the same meaning as it has in the *Foreign Evidence Act 1994* of the Commonwealth.

**31.8 Earlier evidence in the same proceedings** (cf SCR Part 36, rule 5; DCR Part 28, rule 6)

- (1) Evidence taken at a trial with respect to a question that is ordered to be tried separately may be used in any subsequent trial in the same proceedings, saving all just exceptions and unless the court orders otherwise.

- (2) Evidence taken at a trial may be used for any subsequent trial for the assessment of damages or of the value of goods in the same proceedings, saving all just exceptions and unless the court orders otherwise.
- (3) Subject to subrules (1) and (2), evidence taken at a hearing may not be used as evidence in any subsequent hearing in the same proceedings except by leave of the court.

**31.9 Earlier evidence in other proceedings** (cf SCR Part 36, rule 7; DCR Part 28, rule 10)

- (1) In any proceedings, evidence taken, or an affidavit filed, in other proceedings may not be used as evidence, saving all just exceptions and unless the court orders otherwise.
- (2) Leave may not be granted under subrule (1) except to allow the evidence taken, or affidavit filed, in the other proceedings to be used in relation to the proof of particular facts.

**31.10 Plans, photographs and models** (cf SCR Part 36, rule 8; DCR Part 28, rule 11; LCR Part 23, rule 4)

- (1) At least 7 days before the commencement of a hearing, a party who intends to tender any plan, photograph or model at the hearing must give the other parties an opportunity to inspect it and to agree to its admission without proof.
- (2) A party who fails to comply with subrule (1) may not tender the plan, photograph or model in evidence except by leave of the court.

**31.11 Production of court documents** (cf SCR Part 36, rule 10; DCR Part 28, rule 13; LCR Part 23, rule 6)

Unless the court orders otherwise, the registrar must produce to the court any document in the registrar's custody that, by notice in writing, any party to proceedings requests the registrar to produce to the court for the purposes of the proceedings.

**31.12 Proof of court documents** (cf SCR Part 36, rule 9; DCR Part 28, rule 12; LCR Part 23, rule 5)

A document purporting to be marked with the seal of any court or tribunal is admissible in evidence without further proof.

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- 31.13 Unstamped documents: arrangements under section 304 of the Duties Act 1997** (cf SCR Part 36, rule 10B)
- (1) The “usual undertaking by person liable” if given to the court by a party in relation to an instrument referred to in section 304 (2) of the *Duties Act 1997* is an undertaking that the party will, within a time specified by the court, transmit the instrument to the Chief Commissioner of State Revenue.
  - (2) The “usual undertaking by person not liable” if given to the court by a party in relation to an instrument referred to in section 304 (2) of the *Duties Act 1997* is an undertaking that the party will, within a time specified by the court, forward to the Chief Commissioner of State Revenue the name and address of the person liable to pay duty on the instrument under that Act together with the instrument.
- 31.14 Unstamped documents: undertaking in respect of section 29 of the Stamp Duties Act 1920** (cf SCR Part 36, rule 10A; DCR Part 28, rule 13A)
- (1) The “solicitor’s usual undertaking as to stamp duty”, if given to the court by a solicitor in relation to an instrument referred to in section 29 of the *Stamp Duties Act 1920*, or an unexecuted copy referred to in that section, is an undertaking that the solicitor will cause the instrument or copy to be presented to the Chief Commissioner of State Revenue for assessment in accordance with that Act and cause any duty and fine to which the instrument or copy is liable to be paid.
  - (2) The “party’s usual undertaking as to stamp duty”, if given to the court by a party in relation to an instrument referred to in section 29 (4) of the *Stamp Duties Act 1920*, is an undertaking that the party will, within 28 days, inform the Chief Commissioner of State Revenue of the name of the person primarily liable to duty in respect of the instrument and lodge the instrument or a copy of the instrument with the Chief Commissioner.
- 31.15 Evidence of consent to act as tutor, trustee, receiver or other office** (cf SCR Part 36, rule 11)
- (1) A document:
    - (a) purporting to contain a person’s written consent to act as tutor of a person under legal incapacity, to act as trustee, to act as receiver or to act in any other office on appointment by the court, and
    - (b) purporting to have been duly executed and authenticated,is evidence of the consent.
  - (2) A document is duly executed and authenticated for the purposes of subrule (1):



- (a) in the case of a consenting person who is a natural person, if the document is signed by the consenting person and the signature is verified by some other person, or
- (b) in the case of a consenting person that is a corporation, if the seal of the corporation is affixed to the document in accordance with the law regulating the use of the seal.

**31.16 Evidence of published research concerning maintenance of children** (cf SCR Part 36, rule 13E)

If the proper needs of a minor are relevant, the court may have regard, to the extent to which it considers appropriate, to any relevant findings of published research in relation to the maintenance of minors.

**Division 2 Experts called by parties**

**31.17 Definitions** (cf SCR Part 36, rules 13A and 13C; DCR Part 28, rule 8; LCR Part 23, rule 1D)

In this Division:

*code of conduct* means the expert witness code of conduct in Schedule 7.

*expert*, in relation to any question, means a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his or her opinion on that question would be admissible in evidence.

*expert witness* means an expert engaged for the purpose of:

- (a) providing a report as to his or her opinion for use as evidence in proceedings or proposed proceedings, or
- (b) giving opinion evidence in proceedings or proposed proceedings.

*expert's report* means a written statement by an expert (whether or not an expert witness in the proceedings concerned) that sets out the expert's opinion, and the facts on which the opinion is formed, and contains the substance of the expert's evidence that the party serving the statement intends to adduce in chief at the trial.

*hospital report* means a written statement concerning a patient, made by or on behalf of a hospital, that the party serving the statement intends to adduce in evidence in chief at the trial.

**31.18 Disclosure of experts' reports and hospital reports** (cf SCR Part 36, rule 13A; DCR Part 28, rule 8; LCR Part 23, rule 3)

- (1) Each party must serve experts' reports and hospital reports on each other active party:
  - (a) in accordance with any order of the court, or

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- (b) if no such order is in force, in accordance with any relevant practice note, or
  - (c) if no such order or practice note is in force, not later than 28 days before the date of the hearing at which the report is to be used.
- (2) An application to the court for an order under subrule (1) (other than an order solely for abridgment or extension of time) may be made without serving notice of motion.
- (3) Except by leave of the court, or by consent of the parties:
- (a) an expert's report or hospital report is not admissible unless it has been served in accordance with this rule, and
  - (b) without limiting paragraph (a), an expert's report or hospital report, when tendered under section 63, 64 or 69 of the *Evidence Act 1995*, is not admissible unless it has been served in accordance with this rule, and
  - (c) the oral expert evidence in chief of any expert is not admissible unless an expert's report or hospital report served in accordance with this rule contains the substance of the matters sought to be adduced in evidence.
- (4) Leave is not to be given as referred to in subrule (3) unless the court is satisfied:
- (a) that there are exceptional circumstances that warrant the granting of leave, or
  - (b) that the report concerned merely updates an earlier version of a report that has been served in accordance with subrule (1).

**31.19 Expert's report admissible in trial without a jury** (cf SCR Part 36, rule 13B; DCR Part 28, rule 9; LCR Part 23, rule 2)

- (1) If an expert's report is served in accordance with rule 31.18 or an order made under that rule, the report is admissible:
  - (a) as evidence of the expert's opinion, and
  - (b) if the expert's direct oral evidence of a fact on which the opinion was formed would be admissible, as evidence of that fact, without further evidence, oral or otherwise.
- (2) Unless the court orders otherwise:
  - (a) it is the responsibility of the party requiring the attendance for cross-examination of the expert by whom an expert's report has been prepared to procure that attendance, and
  - (b) the party requiring the expert's attendance must notify the expert at least 28 days before the date on which attendance is required.

- (3) Except for the purpose of determining any liability for conduct money or witness expenses, an expert does not become the witness for the party requiring his or her attendance merely because his or her attendance at court has been procured by that party.
- (4) A party who requires the attendance of a person as referred to in subrule (2):
  - (a) must inform all other parties to the proceedings that the party has done so at least 28 days before the date fixed for hearing, and
  - (b) pay to the person whose attendance is required (whether before or after the attendance) an amount sufficient to meet the person's reasonable expenses (including any standby fees) in complying with the requirement.
- (5) If the attendance of an expert is required under subrule (2), the report may not be tendered under section 63, 64 or 69 of the *Evidence Act 1995* or otherwise used unless the expert attends or is dead or the court grants leave to use it.
- (6) Unless the court orders otherwise, a party may not in any hearing object to:
  - (a) the qualifications of the expert by whom an expert's report has been prepared, or
  - (b) the facts on which the expert's opinion, as set out in the report, is based,unless a notice, detailing the grounds of the objection, has been served on the party by whom the expert's report was served at least 14 days before the date fixed for the hearing.
- (7) The party using an expert's report may re-examine an expert who attends for cross-examination under a requirement under subrule (2).
- (8) This rule does not apply to proceedings on a trial with a jury.

**31.20 Fees for medical expert for compliance with subpoena** (cf SCR Part 36, rule 13BA)

- (1) If a subpoena is served on a medical expert who is to give evidence of medical matters but is not called as a witness, the expert is, unless the court orders otherwise, entitled to be paid, in addition to any other amount payable to the expert, the amount specified in item 2 of Schedule 3.
- (2) The amount payable under subrule (1) must be paid to the expert by the issuing party within 28 days after the date for the expert's attendance.

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- (3) A party that requires an expert's attendance under rule 31.19 (2), but subsequently revokes it, must pay to the issuing party any amount paid by the issuing party under subrule (2), but otherwise such an amount is not recoverable by the issuing party from any other party unless the court so orders.
  - (4) In this rule, *issuing party* means the party at whose request a subpoena is issued.

**31.21 Service of subpoena on medical expert** (cf SCR Part 36, rule 13BB)

- (1) Service of a subpoena on a medical expert may be effected, at any place at which the expert's practice is carried on, by handing it over to a person who is apparently engaged in the practice (whether as an employee or otherwise) and is apparently of or above the age of 16 years.
- (2) If a person refuses to accept a subpoena when it is handed over, the subpoena may be served by putting it down in the person's presence after he or she has been told of its nature.
- (3) If a subpoena requires a medical expert to attend court on a specified date for the purpose of giving evidence on medical matters, it must be served on the expert not later than 21 days before the date so specified unless the court orders otherwise.
- (4) The parties may not by consent abridge the time fixed by or under subrule (3).

**31.22 Subpoena requiring production of medical records** (cf SCR Part 36, rule 13BC)

- (1) A subpoena for production may require a medical expert to produce medical records or copies of them.
- (2) A person is not required to comply with a subpoena for production referred to in subrule (1) unless the amount specified in item 3 of Schedule 3 is paid or tendered to the person at the time of service of the subpoena or a reasonable time before the date on which production is required.
- (3) Rule 33.6 (Compliance with subpoena) does not apply to a subpoena to which subrule (1) applies.
- (4) Rule 33.7 (Production otherwise than on attendance) applies to the photocopies in the same way as it applies to the records.

- (5) If, after service of a subpoena for production referred to in subrule (1), the party who requested the issue of the subpoena requires production of the original medical records without the option of producing copies of them, the party must request the issue of, and serve, another subpoena requiring production of the original medical records.

**31.23 Expert witnesses to agree to be bound by code** (cf SCR Part 36, rule 13C; DCR Part 28, rule 9C; LCR Part 23, rule 1D)

- (1) As soon as practicable after engaging an expert as a witness, whether to give oral evidence or to provide an expert's report, the party engaging the expert must provide the expert with a copy of the code of conduct.
- (2) Oral evidence may not be received from an expert witness unless:
  - (a) he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it, and
  - (b) a copy of the acknowledgment has been served on all parties affected by the evidence.
- (3) If an expert's report does not contain an acknowledgment by the expert witness who prepared it that he or she has read the code of conduct and agrees to be bound by it:
  - (a) service of the report by the party who engaged the expert witness is not valid service, and
  - (b) the report is not admissible in evidence.
- (4) This rule applies unless the court orders otherwise.

**31.24 Supplementary reports by expert witness** (cf SCR Part 36, rule 13C; DCR Part 28, rule 9C; LCR Part 23, rule 1D)

- (1) If an expert witness provides a supplementary report to the party by whom he or she has been engaged, neither the engaging party nor any other party having the same interest as the engaging party may use the earlier report on the question to which the earlier report relates unless the engaging party has served the supplementary report on all parties on whom the engaging party served the earlier report.
- (2) For the purposes of this rule, *supplementary report*, in relation to an earlier report provided by an expert witness, includes any report by the expert witness that indicates that he or she has changed his or her opinion on a material matter expressed in the earlier report.

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**31.25 Conference between expert witnesses** (cf SCR Part 36, rule 13CA; DCR Part 28, rule 9D; LCR Part 23, rule 1E)

- (1) The court may direct expert witnesses:
  - (a) to confer, either generally or in relation to specified matters, and
  - (b) to endeavour to reach agreement on outstanding matters, and
  - (c) to provide the court with a joint report, specifying matters agreed and matters not agreed and reasons for any failure to reach agreement.
- (2) An expert so directed may apply to the court for further directions.
- (3) The court may direct that a conference be held:
  - (a) with or without the attendance of the parties affected or their legal representatives, or
  - (b) with or without the attendance of the parties or their legal representatives, at the option of the parties.
- (4) The content of the conference between the expert witnesses must not be referred to at the hearing unless the parties affected agree.
- (5) If the parties have agreed to be bound on any specified matter dealt with by the joint report, the report may be tendered at the trial as evidence of the matters agreed.
- (6) If the parties have not agreed to be bound on any matter dealt with by the joint report, the report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court.
- (7) If expert witnesses have conferred and provided a joint report agreeing on any matter, a party affected may not, except by leave of the court, adduce expert evidence inconsistent with the matter agreed.

**31.26 Opinion evidence by expert witnesses** (cf Federal Court Rules, Order 34A, rule 3)

In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same question or similar questions, or indicate to the court an intention to call expert witnesses for that purpose, the court may give any one or more of the following directions:

- (a) a direction that:
  - (i) the expert witnesses give evidence at trial after all factual evidence relevant to the question or questions concerned, or such evidence as may be specified by the court, has been adduced, or

- (ii) each party intending to call one or more expert witnesses close that party's case in relation to the question or questions concerned, subject only to adducing evidence of the expert witnesses later in the trial,
- (b) a direction that, after all factual evidence relevant to the question, or such evidence as may be specified by the court, has been adduced, each expert witness file an affidavit or statement indicating:
  - (i) whether the expert witness adheres to any opinion earlier given, or
  - (ii) whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given,
- (c) a direction that the expert witnesses:
  - (i) be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined, in accordance with paragraphs (d), (e), (f), (g) and (h)), and
  - (ii) when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence,
- (d) a direction that each expert witness give an oral exposition of his or her opinion, or opinions, on the question or questions concerned,
- (e) a direction that each expert witness give his or her opinion about the opinion or opinions given by another expert witness,
- (f) a direction that each expert witness be cross-examined in a particular manner or sequence,
- (g) a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:
  - (i) by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another, or
  - (ii) by putting to each expert witness, in turn, each question relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete,
- (h) a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witness together with whom he or she is giving evidence as so referred to,

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- (i) such other directions as to the giving of evidence in the circumstances referred to in paragraph (c) as the court thinks fit.

**31.27 Service of experts' reports in professional negligence claims** (cf SCR Part 14C, rules 1 and 6; DCR Part 28, rule 9B)

- (1) Unless the court orders otherwise, a person commencing a professional negligence claim (other than a claim against a legal practitioner) must file and serve, with the statement of claim commencing the professional negligence claim, an expert's report that includes an opinion supporting:
- (a) the breach of duty of care, or contractual obligation, alleged against each person sued for professional negligence, and
  - (b) the general nature and extent of damage alleged (including death, injury or other loss or harm and prognosis, as the case may require), and
  - (c) the causal relationship alleged between such breach of duty or obligation and the damage alleged.
- (2) In the case of a professional negligence claim against a legal practitioner, the court may order the plaintiff to file and serve an expert's report or experts' reports supporting the claim.
- (3) If a party fails to comply with subrule (1) or (2), the court may by order made on the application of a party or of its own motion dismiss the whole or any part of the proceedings, as may be appropriate.
- (4) In this rule:
- professional negligence*** means the breach of a duty of care or of a contractual obligation in the performance of professional work or in the provision of professional services by a medical practitioner, an allied health professional (such as dentist, chemist, physiotherapist), a hospital, a solicitor or a barrister.
- professional negligence claim*** means a claim in the court for damages, indemnity or contribution based on an assertion of professional negligence.

**Division 3 Experts appointed by the court**

**31.28 Definitions**

In this Division:

***code of conduct*** means the expert witness code of conduct in Schedule 7.



*expert*, in relation to any question, means a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his or her opinion on that question would be admissible in evidence.

*party affected* means a party who may be affected by the court's decision with respect to a question that the court has referred to an expert for inquiry and report.

**31.29 Selection and appointment** (cf SCR Part 39, rule 1; DCR Part 28A, rule 1; LCR Part 38B, rule 1)

- (1) If a question for an expert arises in any proceedings the court may, at any stage of the proceedings:
  - (a) appoint an expert to inquire into and report on the question, and
  - (b) authorise the expert to inquire into and report on any facts relevant to the inquiry and report on the question, and
  - (c) direct the expert to make a further or supplemental report or inquiry and report, and
  - (d) give such instructions (including instructions concerning any examination, inspection, experiment or test) as the court thinks fit relating to any inquiry or report of the expert.
- (2) The court may appoint as an expert a person selected by the parties affected, a person selected by the court or a person selected in a manner directed by the court.

**31.30 Code of conduct** (cf SCR Part 39, rule 2; DCR Part 28A, rule 2; LCR Part 38B, rule 2)

- (1) A copy of the code of conduct must be provided to the expert by the registrar or as the court may direct.
- (2) A report by an expert may not be admitted into evidence unless the report contains an acknowledgment by the expert that he or she has read the code of conduct and agrees to be bound by it.
- (3) Oral evidence may not be received from an expert unless the court is satisfied that he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it.

**31.31 Expert's report to be sent to registrar** (cf SCR Part 39, rule 3; DCR Part 28A, rule 3; LCR Part 38B, rule 3)

- (1) The expert must send his or her report to the registrar.
- (2) The registrar must send a copy of the report to each party affected.

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- (3) Subject to rule 31.30 and unless the court orders otherwise, the report is taken to have been admitted in evidence in the proceedings when it is received by the court.

**31.32 Cross-examination of expert** (cf SCR Part 39, rule 4; DCR Part 28A, rule 4; LCR Part 38B, rule 4)

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

**31.33 Prohibition of other expert evidence** (cf SCR Part 39, rule 6; DCR Part 28A, rule 6; LCR Part 38B, rule 6)

Except by leave of the court, a party to proceedings may not adduce evidence of any expert on any question arising in proceedings if an expert has been appointed under this Division in relation to that question.

**31.34 Remuneration of expert** (cf SCR Part 39, rule 5; DCR Part 28A, rule 5; LCR Part 38B, rule 5)

- (1) The remuneration of an expert is to be fixed by the court.
- (2) Subject to subrule (3), the parties specified by the court are jointly and severally liable to an expert to pay the amount fixed by the court for his or her remuneration.
- (3) The court may direct when and by whom an expert is to be paid.
- (4) Subrules (2) and (3) do not affect the powers of the court as to costs.

**31.35 Assistance to court by other persons** (cf SCR Part 39, rule 7; DCR Part 28A, rule 7; LCR Part 38B, rule 7)

- (1) In any proceedings, the court may obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings and may act on the adviser's opinion.
- (2) Rule 31.34 applies to and in respect of a person referred to in subrule (1) in the same way as it applies to and in respect of an expert appointed under this Division.
- (3) This rule does not apply to proceedings in the Admiralty List of the Supreme Court or to proceedings that are tried before a jury.

## **Part 32 Evidence and Procedure (New Zealand) Act 1994 (Commonwealth)**

### **32.1 Definitions** (cf SCR Part 36A, rule 1)

- (1) In this Part:
  - another court* means an inferior court.
  - the Commonwealth Act* means the *Evidence and Procedure (New Zealand) Act 1994* of the Commonwealth.
- (2) Expressions used in this Part have the same meanings as they have in the Commonwealth Act.

### **32.2 Leave to serve subpoena** (cf SCR Part 36A, rule 3)

- (1) Application for leave under the Commonwealth Act to serve a subpoena in New Zealand must be made:
  - (a) if the subpoena is issued in proceedings in the Supreme Court, by motion in the proceedings, or
  - (b) in any other case, by summons in the Common Law Division joining as defendant the person to whom the subpoena is addressed.
- (2) The application must be supported by an affidavit annexing a copy of the subpoena and setting out the following:
  - (a) the name, designation or occupation, and address of the person named and whether that person is over 18 years of age,
  - (b) the nature and significance of the evidence to be required from the person named, or of the document or thing required to be produced by that person,
  - (c) details of the steps taken to ascertain whether the evidence, document or thing could be obtained by other means without significantly greater expense, and with less inconvenience, to the person named,
  - (d) the date by which it is intended to serve the subpoena,
  - (e) details of:
    - (i) the calculation of the sum sufficient to meet reasonable expenses in complying with the subpoena, and
    - (ii) how and when those expenses are to be paid, or tendered, to that person in money or in vouchers,
  - (f) if the subpoena requires the person named to give evidence, an estimate of the time that person will be required to attend to give evidence,

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- (g) details of any facts or matters known to the deponent which may provide cause for the subpoena to be set aside under section 14 (2) and (3) of the Commonwealth Act.
  - (3) Unless the Supreme Court orders otherwise, the applicant for leave may proceed without serving the summons or notice of motion on any person.
  - (4) Before granting leave under the Commonwealth Act to serve a subpoena, the Supreme Court may require the applicant for leave to undertake to meet the expenses or loss reasonably incurred by the person named, not being a party to the proceedings, in complying with the subpoena, if those expenses or loss exceed the allowances and travelling expenses to be provided to that person at the time of service of the subpoena.

**32.3 Production of document or thing under subpoena** (cf SCR Part 36A, rule 4)

If the court receives a fax under section 17 of the *Evidence Amendment Act 1994* of New Zealand, the registrar may confirm with the registry that issued the receipt in New Zealand that the document or thing produced is able to be transported to the Supreme Court as soon as practicable so that the document or thing may be produced in the Supreme Court on the date the person named in the subpoena was to have attended.

**32.4 Failure to comply with subpoena issued by the Supreme Court** (cf SCR Part 36A, rule 5)

- (1) A person may apply to the Supreme Court for a certificate under section 16 of the Commonwealth Act by filing a notice of motion together with:
  - (a) an affidavit of service of the subpoena and order and notice referred to in section 10 (3) of the Commonwealth Act, and
  - (b) an affidavit stating:
    - (i) particulars of the order granting leave to serve the subpoena, and
    - (ii) whether application was made to set aside the subpoena and, if so, particulars of the application and of its outcome, and
    - (iii) that the subpoena was not complied with, and
  - (c) a draft certificate.
- (2) Despite subrule (1), application for a certificate may be made orally if the proceedings in which the certificate is sought are then before the Supreme Court.

- (3) Unless the Supreme Court orders otherwise, the applicant need not serve notice of motion for the issue of the certificate.
- (4) An application under subrule (1) may be determined or dealt with by the Supreme Court in the absence of the public and without any attendance by or on behalf of any person.

**32.5 Setting aside subpoena** (cf SCR Part 36A, rule 6)

- (1) A person may apply to the Supreme Court to set aside a subpoena under section 13 of the Commonwealth Act by filing a notice of motion together with an affidavit setting out the facts and grounds on which the application is based.
- (2) The notice of motion must be filed at, or faxed for filing to, the Sydney registry of the Supreme Court.
- (3) If the Supreme Court receives a notice of motion by post or fax, it must acknowledge receipt and advise the applicant whether or not the notice of motion has been accepted for filing and, if it has not been accepted, the reasons for its rejection.
- (4) The registrar must serve the notice of motion and affidavit on the party who obtained leave to serve the subpoena, and may do so by faxing them to that party's fax number.
- (5) An application under this rule is to be determined in such manner as the Supreme Court may direct.

**32.6 Evidence by video-link or telephone** (cf SCR Part 36A, rule 7)

- (1) A person may apply to the Supreme Court for a direction under section 25 of the Commonwealth Act (being a direction that evidence be taken, or submissions made, by video-link or telephone from New Zealand) by filing a notice of motion together with an affidavit stating the following:
  - (a) the reasons why such a procedure is desirable,
  - (b) the nature of the evidence to be taken,
  - (c) the number of witnesses to be examined,
  - (d) the expected duration of the evidence,
  - (e) whether issues of character are likely to be raised,
  - (f) in the case of submissions, the expected duration of the submissions,
  - (g) the facilities available for such a procedure or that can reasonably be made available,
  - (h) that the requirements of section 26 or 27 of the Commonwealth Act are able to be met.

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- (2) In deciding whether to grant the application, the Supreme Court may take account of the matters set out in the applicant's affidavit in addition to any other matters considered to be material, including cost and convenience to the witness and all parties.
  - (3) If the Supreme Court makes a direction under section 25 (1) of the Commonwealth Act that evidence be taken, or submissions made, by video-link or telephone from New Zealand, it may direct the registrar to arrange and co-ordinate the appropriate facilities in Australia and New Zealand.
  - (4) Without limiting the generality of subrule (3), the Supreme Court may direct:
    - (a) that the registrar arrange for the evidence to be given, or the submissions to be made, at the High Court of New Zealand or at another place approved by that court, and
    - (b) that an officer of the High Court of New Zealand, or another person approved by the Supreme Court, be requested to be present to assist in the transmission of the evidence or submissions and, in particular, to:
      - (i) introduce witnesses to be called and legal representatives, and
      - (ii) assist with the administration of oaths, if necessary, and
      - (iii) assist with the implementation of any directions or requests given or made by the judicial officer or other officer hearing the evidence or submissions.

**32.7 Fax copies** (cf SCR Part 36A, rule 8)

- (1) Part 6 of the Commonwealth Act is taken to apply to a fax of a document in the same way as it applies to the original of the document (whether or not that original is itself a copy or an extract of a document).
- (2) If a fax of a document is adduced in evidence under Part 6 of the Commonwealth Act, the party adducing that evidence must file in the registry a copy of the fax.

## **Part 33 Subpoenas**

**33.1 Definitions** (cf SCR Part 37, rule 1)

- (1) In this Part:  
*addressee* means the person who is the subject of the order expressed in a subpoena.

**conduct money** means a sum of money or its equivalent, such as pre-paid travel, sufficient to meet the reasonable expenses of the addressee of attending court as required by the subpoena and returning after so attending.

**issuing officer** means an officer of the court who is empowered to issue a subpoena on behalf of the court.

**issuing party** means the party at whose request a subpoena is issued.

**registrar**, in relation to proceedings in respect of which a subpoena is sought or issued, means:

- (a) in relation to the Supreme Court, the Principal Registrar, and
- (b) in relation to the District Court:
  - (i) the Principal Registrar, or
  - (ii) the registrar of the District Court for the proclaimed place (within the meaning of the *District Court Act 1973*) where the subpoena was issued, or where the subpoena is returnable, whichever is applicable, and
- (c) in relation to a Local Court, the registrar of the Local Court where the subpoena was issued.

**subpoena** means an order in writing requiring the addressee:

- (a) to attend to give evidence, or
  - (b) to produce the subpoena or a copy of it and a document or thing, or
  - (c) to do both of those things.
- (2) To the extent that a subpoena requires the addressee to attend to give evidence, it is called a **subpoena to attend to give evidence**.
- (3) To the extent that a subpoena requires the addressee to produce the subpoena or a copy of it and a document or thing, it is called a **subpoena to produce**.

**Note.** See also rules 7.3, 10.12, 10.20, 31.20, 31.22 and 31.23 with respect to the issue and service of subpoenas.

### 33.2 Issuing of subpoena (cf SCR Part 37, rule 2)

- (1) The court may, in any proceeding, by subpoena order the addressee:
  - (a) to attend to give evidence as directed by the subpoena, or
  - (b) to produce the subpoena or a copy of it and any document or thing as directed by the subpoena, or
  - (c) to do both of those things.
- (2) An issuing officer must not issue a subpoena:

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- (a) if the court has made an order, or there is a rule of the court, having the effect of requiring that the proposed subpoena:
    - (i) not be issued, or
    - (ii) not be issued without the leave of the court and that leave has not been given, or
  - (b) requiring the production of a document or thing in the custody of the court or another court.
- (3) The issuing officer must seal with the seal of the court, or otherwise authenticate, a sufficient number of copies of the subpoena for service and proof of service.
  - (4) A subpoena is taken to have been issued on its being sealed or otherwise authenticated in accordance with subrule (3).

**33.3 Form of subpoena** (cf SCR Part 37, rule 3)

- (1) A subpoena must be in the approved form.
- (2) A subpoena must not be addressed to more than one person.
- (3) Unless the court orders otherwise, a subpoena must identify the addressee by name or by description of office or position.
- (4) A subpoena to produce must:
  - (a) identify the document or thing to be produced, and
  - (b) specify the date, time and place for production.
- (5) A subpoena to attend to give evidence must specify the date, time and place for attendance.
- (6) The date specified in a subpoena must be the date of trial or any other date as permitted by the court.
- (7) The place specified for production may be the court or the address of any person authorised to take evidence in the proceeding as permitted by the court.
- (8) A subpoena must specify the last date for service of the subpoena, being a date not earlier than:
  - (a) 5 days, or
  - (b) any shorter or longer period as ordered by the court and specified in the subpoena,before the date specified in the subpoena for compliance with it.
- (9) If the addressee is a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.



**33.4 Setting aside or other relief** (cf SCR Part 37, rule 4)

- (1) The court may, on the application of a party or any person having a sufficient interest, set aside a subpoena in whole or in part, or grant other relief in respect of it.
- (2) An application under subrule (1) must be made on notice to the issuing party.
- (3) The court may order that the applicant give notice of the application to any other party or to any other person having a sufficient interest.

**33.5 Service** (cf SCR Part 37, rule 5)

- (1) A subpoena must be served personally on the addressee.
- (2) The issuing party must serve a copy of a subpoena to produce on each other party as soon as practicable after the subpoena has been served on the addressee.

**33.6 Compliance with subpoena** (cf SCR Part 37, rule 6)

- (1) An addressee need not comply with the requirements of a subpoena to attend to give evidence unless conduct money has been handed or tendered to the addressee a reasonable time before the date on which attendance is required.
- (2) An addressee need not comply with the requirements of a subpoena unless it is served on or before the date specified in the subpoena as the last date for service of the subpoena.
- (3) Despite rule 33.5 (1), an addressee must comply with the requirements of a subpoena even if it has not been served personally on that addressee if the addressee has, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.
- (4) The addressee must comply with a subpoena to produce:
  - (a) by attending at the date, time and place specified for production and producing the subpoena or a copy of it and the document or thing to the court or to the person authorised to take evidence in the proceeding as permitted by the court, or
  - (b) by delivering or sending the subpoena or a copy of it and the document or thing to the registrar at the address specified for the purpose in the subpoena, so that they are received not less than 2 clear days before the date specified in the subpoena for attendance and production.

- (5) In the case of a subpoena that is both a subpoena to attend to give evidence and a subpoena to produce, production of the subpoena or a copy of it and of the document or thing in any of the ways permitted by subrule (4) does not discharge the addressee from the obligation to attend to give evidence.

**33.7 Production otherwise than on attendance** (cf SCR Part 37, rule 7)

- (1) This rule applies if an addressee produces a document or thing in accordance with rule 33.6 (4) (b).
- (2) The registrar must, if requested by the addressee, give a receipt for the document or thing to the addressee.
- (3) If the addressee produces more than one document or thing, the addressee must, if requested by the registrar, provide a list of the documents or things produced.
- (4) The addressee may, with the consent of the issuing party, produce a copy, instead of the original, of any document required to be produced.
- (5) The addressee may at the time of production inform the registrar in writing that any document or copy of a document produced need not be returned and may be destroyed.

**33.8 Removal, return, inspection, copying and disposal of documents and things** (cf SCR Part 37, rule 8)

The court may give directions in relation to the removal from and return to the court, and the inspection, copying and disposal, of any document or thing that has been produced to the court in response to a subpoena.

**33.9 Inspection of, and dealing with, documents and things produced otherwise than on attendance** (cf SCR Part 37, rule 9)

- (1) This rule applies if an addressee produces a document or thing in accordance with rule 33.6 (4) (b).
- (2) On the request in writing of a party, the registrar must inform the party whether production in response to a subpoena has occurred, and, if so, include a description, in general terms, of the documents and things produced.
- (3) Subject to this rule, no person may inspect a document or thing produced unless the court has granted leave and the inspection is in accordance with that leave.
- (4) Unless the court orders otherwise, the registrar may permit the parties to inspect at the office of the registrar any document or thing produced unless the addressee, a party or any person having sufficient interest objects to the inspection under this rule.

- (5) If the addressee objects to a document or thing being inspected by any party to the proceeding, the addressee must, at the time of production, notify the registrar in writing of the objection and of the grounds of the objection.
- (6) If a party or person having a sufficient interest objects to a document or thing being inspected by a party to the proceeding, the objector may notify the registrar in writing of the objection and of the grounds of the objection.
- (7) On receiving notice of an objection under this rule, the registrar:
  - (a) must not permit any, or any further, inspection of the document or thing the subject of the objection, and
  - (b) must refer the objection to the court for hearing and determination.
- (8) The registrar must notify the issuing party of the objection and of the date, time and place at which the objection will be heard, and the issuing party must notify the addressee, the objector and each other party accordingly.
- (9) The registrar must not permit any document or thing produced to be removed from the office of the registrar except on application in writing signed by the solicitor for a party.
- (10) A solicitor who signs an application under subrule (9) and removes a document or thing from the office of the registrar, undertakes to the court by force of this rule that:
  - (a) the document or thing will be kept in the personal custody of the solicitor or a barrister briefed by the solicitor in the proceeding, and
  - (b) the document or thing will be returned to the registry in the same condition, order and packaging in which it was removed, as and when directed by the registrar.
- (11) The registrar may, in the registrar's discretion, grant an application under subrule (9) subject to conditions or refuse to grant the application.

**33.10 Disposal of documents and things produced** (cf SCR Part 37, rule 10)

- (1) Unless the court orders otherwise, the registrar may, in the registrar's discretion, return to the addressee any document or thing produced in response to a subpoena.
- (2) Unless the court orders otherwise, the registrar must not return any document or thing under subrule (1) unless the registrar has given to the issuing party at least 14 days' notice of the intention to do so and that period has expired.

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- (3) If the addressee has informed the court that a document or a copy of a document produced need not be returned and may be destroyed, the registrar may, unless the court orders otherwise, destroy the document or copy instead of returning it.
  - (4) Unless the court orders otherwise, the registrar must not destroy a document or a copy of a document unless the registrar has given to the issuing party at least 14 days' notice of the intention to do so and that period has expired.

**33.11 Costs and expenses of compliance** (cf SCR Part 37, rule 11)

- (1) The court may order the issuing party to pay the amount of any reasonable loss or expense incurred in complying with the subpoena.
- (2) If an order is made under subrule (1), the court must fix the amount or direct that it be fixed in accordance with the court's usual procedure in relation to costs.
- (3) An amount fixed under this rule is separate from and in addition to:
  - (a) any conduct money paid to the addressee, and
  - (b) any witness expenses payable to the addressee.

**33.12 Failure to comply with subpoena—contempt of court** (cf SCR Part 37, rule 12)

- (1) Failure to comply with a subpoena without lawful excuse is a contempt of court and the addressee may be dealt with accordingly.
- (2) Despite rule 33.5 (1), if a subpoena has not been served personally on the addressee, the addressee may be dealt with for contempt of court as if the addressee had been so served if it is proved that the addressee had, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.
- (3) Subrules (1) and (2) are without prejudice to any power of the court under any rules of the court (including any rules of the court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

**33.13 Documents and things in the custody of a court** (cf SCR Part 37, rule 13)

- (1) A party who seeks production of a document or thing in the custody of the court or of another court may inform the registrar in writing accordingly, identifying the document or thing.
- (2) If the document or thing is in the custody of the court, the registrar must produce the document or thing:
  - (a) in court or to any person authorised to take evidence in the proceeding, as required by the party, or

- (b) as the court directs.
- (3) If the document or thing is in the custody of another court, the registrar must, unless the court has otherwise ordered:
  - (a) request the other court to send the document or thing to the registrar, and
  - (b) after receiving it, produce the document or thing:
    - (i) in court or to any person authorised to take evidence in the proceeding as required by the party, or
    - (ii) as the court directs.

## Part 34 Notices to produce at hearing

### 34.1 Production on notice (cf SCR Part 36, rule 16; DCR Part 28, rule 18; LCR Part 23, rule 9)

A party may, by notice served on another party, require the other party to produce to the court, or to any examiner:

- (a) at any hearing in the proceedings or before any such examiner, or
- (b) by leave of the court, at some other specified time, any specified document or thing.

### 34.2 Production under notice to produce at trial (cf SCR Part 36, rule 16; DCR Part 28, rule 18; LCR Part 23, rule 9)

- (1) Unless the court orders otherwise, the other party must produce the document or thing in accordance with the notice to produce, without the need for any subpoena for production, if the document or thing is in his or her possession.
- (2) If there is a registrar of the court at the place for production, the other party may produce the document or thing to the registrar, either by hand or by post, in either case so that the registrar receives it at least 2 days before the date on which it is required to be produced.
- (3) Except by leave of the court, a party may not search for, or inspect, any document or thing that has been produced by another party under this rule but not admitted into evidence.

## Part 35 Affidavits

### 35.1 Irregularity does not invalidate affidavit (cf SCR Part 38, rule 5; DCR Part 30, rule 5; LCR Part 25, rule 5)

An affidavit may, with the leave of the court, be used despite any irregularity in form.

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**35.2 Cross-examination of deponent** (cf SCR Part 38, rule 9; DCR Part 30, rule 9; LCR Part 25, rule 10)

- (1) A party may, by written notice served on the party serving or proposing to use an affidavit, require the attendance for cross-examination of the person by whom the affidavit has been made.
- (2) Such notice is to be given a reasonable time before the time at which the person is required to attend for cross-examination.
- (3) If reasonable notice of such a requirement has been given in respect of an affidavit, and the deponent does not attend for examination, the affidavit may not be used unless the deponent is dead or unless the court orders otherwise.
- (4) If a person making an affidavit is cross-examined, the party using the affidavit may re-examine the person.

**35.3 Persons who may make affidavit** (cf SCR Part 38, rule 2; DCR Part 22A, rule 7)

- (1) If a party is required by these rules to file an affidavit or to verify any matter by affidavit, such an affidavit may be made by the party or:
  - (a) if the party is a person under legal incapacity, by the party's tutor, or
  - (b) if the party is a corporation, by a member or officer of the corporation or (if it is in liquidation) by its liquidator, or
  - (c) if the party is a body of persons lawfully suing or being sued:
    - (i) in the name of the body, or
    - (ii) in the name of any member or officer of the body, or
    - (iii) in the name of any other person associated with the body, by a member or officer of the body, or
  - (d) if the party is the Crown or an officer of the Crown suing or being sued in his or her official capacity, by an officer of the Crown.
- (2) Such an affidavit may also be made, in relation to proceedings in a Local Court:
  - (a) by the party's solicitor, or by a commercial agent or subagent (within the meaning of the *Commercial Agents and Private Inquiry Agents Act 1963*), in relation only to proceedings on:
    - (i) an application for an instalment order, or
    - (ii) an application for an order for examination, or
    - (iii) an application for a writ of execution, a garnishee order or a charging order, or

- (b) by a person holding a licence as a real estate agent, strata managing agent or on-site residential property manager within the meaning of the *Property, Stock and Business Agents Act 2002*, in relation only to the recovery of an amount the subject of a certificate under section 51 of the *Consumer, Trader and Tenancy Tribunal Act 2001*.
- (3) Subject to any order of the court, the person by whom an affidavit is made must be a person having knowledge of the facts deposed to in the affidavit.
- (4) If an affidavit is made by a person other than the party required to file or verify the affidavit, the affidavit must set out the facts that qualify the person to make the affidavit.
- (5) Subject to subrule (1), a requirement of these rules for an affidavit as to any matter may be satisfied by separate affidavits made by separate persons in relation to separate aspects of that matter.

**35.4 Format of affidavit dealing with more than one matter** (cf SCR Part 38, rule 2; DCR Part 30, rule 2; LCR Part 25, rule 2)

If the body of an affidavit alleges or otherwise deals with more than one matter:

- (a) it must be divided into paragraphs, and
- (b) each matter must, so far as convenient, be put in a separate paragraph, and
- (c) the paragraphs must be numbered consecutively.

**35.5 Alterations** (cf SCR Part 38, rule 3; DCR Part 30, rule 3; LCR Part 25, rule 3)

If there is any interlineation, erasure or other alteration in the jurat or body of an affidavit, the affidavit may not be used, except by leave of the court, unless the person before whom the affidavit is sworn initials the alteration and, in the case of an erasure, rewrites in the margin of the affidavit any words or figures written on the erasure and signs or initials them.

**35.6 Annexures and exhibits** (cf SCR Part 38, rule 4; DCR Part 30, rule 4; LCR Part 25, rule 4)

- (1) A document to be used in conjunction with an affidavit may be made:
  - (a) an annexure to the affidavit, or
  - (b) an exhibit to the affidavit.
- (2) An annexure to an affidavit must be identified as such by a certificate endorsed on the annexure (and not on a page separate from the annexure) signed by the person before whom the affidavit is made.

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- (3) The pages of an affidavit, together with any annexures, must be consecutively numbered in a single series of numbers.
  - (4) An exhibit to an affidavit must be identified as such by a certificate attached to the exhibit entitled in the same manner as the affidavit and signed by the person before whom the affidavit is made.
  - (5) An exhibit to an affidavit must not be filed.
  - (6) If any other party so requires, a party who serves an affidavit to which a document is an exhibit:
    - (a) must produce the document for inspection by that other party, or
    - (b) must provide a photocopy of the document to that other party, or
    - (c) must produce the document at some convenient place to enable it to be photocopied by that other party.

**35.7 Affidavits by persons who cannot read**

An affidavit made by a blind or illiterate person may not be used unless:

- (a) the affidavit bears a certificate referred to in section 27A of the *Oaths Act 1900*, or
- (b) the court is otherwise satisfied:
  - (i) that the affidavit was read to the deponent in the presence of the person before whom it was made, and
  - (ii) that it appeared to that person that the deponent understood the affidavit.

**35.8 Affidavit of service not to annex document served** (cf SCR Part 38, rule 7A; DCR Part 30, rule 10; LCR Part 25, rule 11)

- (1) An affidavit of service of a document that has been served must clearly identify the document, but must not annex a copy of the document.
- (2) An affidavit of service must contain:
  - (a) a statement as to when, where, how and by whom service was effected, and
  - (b) a statement, using as nearly as practicable the actual words used by the person to whom the process was delivered, as to what, if anything, that person said, on the occasion of service, concerning the service or the subject matter of the proceedings, and
  - (c) a statement that the deponent is over the age of 16 years, or is of a named class of persons who by virtue of their status, occupation or otherwise must be over that age.



**35.9 Filing of affidavits** (cf SCR Part 38, rule 6; DCR Part 30, rule 6; LCR Part 25, rule 6)

Except by leave of the court, an affidavit must not be filed unless it is filed:

- (a) in accordance with these rules, or
- (b) in accordance with other rules of court applicable to the court in which it is filed, or
- (c) in accordance with a practice note applicable to the court in which it is filed.

## **Part 36 Judgments and orders**

### **Division 1 General**

**36.1 General relief** (cf SCR Part 40, rule 1; DCR Part 31, rule 8; LCR Part 26, rule 1)

At any stage of proceedings, the court may give such judgment, or make such order, as the nature of the case requires, whether or not a claim for relief extending to that judgment or order is included in any originating process or notice of motion.

**36.2 Written reasons for judgment** (cf SCR Part 40, rule 2; DCR Part 31, rule 9; LCR Part 26, rule 2)

- (1) If the court gives any judgment, or makes any order or decision, and its reasons for the judgment, order or decision are reduced to writing, it is sufficient for the court to state its judgment, order or decision orally, without stating the reasons.
- (2) After a judgment, order or decision has been stated orally under subrule (1), a written copy of it, including the court's reasons for it, must then be delivered to an associate, registrar or some other officer of the court for delivery to the parties or may instead be delivered directly to the parties.

**36.3 Reserved decision** (cf DCR Part 2A, rule 7, Part 31, rule 10)

- (1) If in any proceedings a judicial officer reserves his or her judgment or decision on any question, he or she:
  - (a) may give the judgment or decision, either in open court or in the absence of the public:
    - (i) at the venue for those proceedings, or
    - (ii) at any other place at which he or she is authorised to hear or dispose of those proceedings, or
  - (b) may reduce the judgment or decision to writing, sign it and forward it to the registrar at the venue for the proceedings.

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- (2) If a registrar receives a judgment or decision forwarded under subrule (1) (b):
    - (a) the registrar must appoint a time for the judgment or decision to be read, and
    - (b) the registrar must give at least 24 hours' notice to the parties, in writing or otherwise, of the appointed time, and
    - (c) at the appointed time, the judgment or decision must be read by another judicial officer of the court, or by the registrar, whether or not the court is sitting at that time.
  - (3) A judgment or decision given under subrule (1) (a) or read under subrule (2) (c) takes effect on the day on which it is so given or read and is as valid as if given by the judicial officer at the hearing of the proceedings to which the judgment or decision relates.
  - (4) Rule 36.2 applies to a judgment or decision referred to in this rule in the same way as it applies to a judgment or decision referred to in that rule.

**36.4 Date of effect of judgments and orders** (cf SCR Part 40, rule 3; DCR Part 31, rule 13A (2))

- (1) A judgment or order takes effect:
  - (a) as of the date on which it is given or made, or
  - (b) if the court orders that it not take effect until it is entered, as of the date on which it is entered.
- (2) Despite subrule (1), if an order of the court directs the payment of costs, and the costs are to be assessed, the order takes effect as of the date when the relevant cost assessor's certificate is filed.
- (3) Despite subrules (1) and (2), the court may order that a judgment or order is to take effect as of a date earlier or later than the date fixed by those subrules.

**36.5 Time for compliance with judgments and orders** (cf SCR Part 40, rule 4; DCR Part 31, rule 12)

- (1) If a judgment or order requires a person to do an act within a specified time, the court may, by order, require the person to do the act within another specified time.
- (2) If a judgment or order requires a person:
  - (a) to do an act forthwith or forthwith on a specified event, or
  - (b) to do an act but does not specify a time within which he or she is required to do the act,the court may, by order, require the person to do the act within a specified time.

**36.6 Judicial notice to be taken of orders and undertakings** (cf SCR Part 40, rule 10; DCR Part 31, rule 14; LCR Part 26, rule 5)

- (1) In any proceedings, the court may take judicial notice of:
  - (a) any order made by the court, or by any other court, and
  - (b) any undertaking given to the court, or to any other court.
- (2) In any proceedings, the court may be informed of an order or undertaking by (among other things) reference to:
  - (a) a note made by the judicial officer making the order or accepting the undertaking, or by his or her associate or by any other proper officer, or
  - (b) a note made by the registrar or other officer making the order or accepting the undertaking.

**36.7 Payment of interest** (cf SCR Part 40, rule 7)

The prescribed rates at which interest is payable under section 101 of the *Civil Procedure Act 2005* are as set out in Schedule 5.

**36.8 Possession of land** (cf SCR Part 40, rule 11)

Unless the court orders otherwise, judgment for possession of land may not be given or entered against a defendant in his or her absence unless the plaintiff files an affidavit:

- (a) stating that, when the originating process was filed or (if the claim for possession arises from an amendment to the originating process) when the amendment was made:
  - (i) specified persons (other than parties to the proceedings) had been in occupation of the whole or any part of the land, or
  - (ii) no persons (other than parties to the proceedings) had been in occupation of the whole or any part of the land, and
- (b) stating that, as to each person specified in accordance with paragraph (a) (i) (other than a person whose occupation the plaintiff does not seek to disturb):
  - (i) the originating process has been duly served on the person, or
  - (ii) the person has, since the time referred to in paragraph (a), ceased to be in occupation of any part of the land, and
- (c) in relation to a claim for possession by reason of default in the payment of money, stating particulars of the default.

**36.9 Arrest warrants**

An arrest warrant issued by order of the court must be signed by a judicial officer or by a registrar.

**36.10 Filing of cost assessors' certificates** (cf SCR Part 40, rule 12)

- (1) A cost assessor's certificate:
  - (a) may be filed in the proceedings to which it relates, or
  - (b) may be filed in fresh proceedings, whether in the same court or another court.
- (2) If, in relation to proceedings in which a cost assessor's certificate is filed, there is also filed an affidavit, sworn not earlier than 14 days before it is filed, stating:
  - (a) if the affidavit is filed with the certificate, how much of the amount of costs included in the certificate has not been paid, and
  - (b) otherwise, the amount of the costs included in the certificate that, at the time the certificate was filed, had not been paid,the registrar may enter judgment for the amount of the costs that have not been paid, without a direction of the court or request of a party.

**Division 2 Entry of judgments and orders**

**36.11 Entry of judgments and orders** (cf SCR Part 41, rule 11)

- (1) Any judgment or order of the court is to be entered.
- (2) Unless the court orders otherwise, a judgment or order is taken to be entered:
  - (a) in the case of a court that uses a computerised court record system, when it is recorded in that system, or
  - (b) in any other case, when it is recorded, in accordance with the practice of the court, as having been entered.
- (3) In this rule, a reference to a judgment or order of the court includes a reference to any judgment, order, determination, decree, adjudication or award that has been filed or registered in the court, or of which a certificate has been filed or registered in the court, as referred to in section 133 (2) of the *Civil Procedure Act 2005*.

### Division 3 Copies and service

- 36.12 Registrar to furnish copies of judgments and other documents** (cf SCR Part 41, rule 15; DCR Part 31, rule 16; LCR Part 26, rule 7)
- (1) Unless the court orders otherwise, on payment of the fee prescribed by the regulations under the *Civil Procedure Act 2005*, the registrar must furnish a sealed copy of any judgment or order that has been entered in the proceedings to any person who applies for such a copy.
  - (2) Unless the court orders otherwise, on payment of the fee prescribed by the regulations under the *Civil Procedure Act 2005*, the registrar:
    - (a) must furnish to any party to any proceedings, and
    - (b) may furnish to any other person appearing to have a sufficient interest in the proceedings,  
a copy of any pleading or other document that has been filed in the proceedings.
  - (3) Despite subrules (1) and (2), the registrar must not furnish a copy of an adoption order made in proceedings under the *Adoption Act 2000* to any person, except the plaintiff in those proceedings, unless the court orders otherwise.
- 36.13 Registrar to furnish copies of external judgments** (cf SCR Part 41, rule 15A)
- (1) In this rule:

***external judgment***, in relation to a court, means:

    - (a) a judgment or order of any other court that is registered or filed in the court under any Act (including any Commonwealth Act),  
or
    - (b) a cost assessor's certificate issued otherwise than in relation to proceedings in the court.

***judgment or order*** includes:

    - (a) an amendment of or to a judgment or order, and
    - (b) a certificate of a judgment or order.

***section 21B certificate*** means a certificate filed in the court under section 21B (3) of the *Crimes Act 1914* of the Commonwealth.
  - (2) On payment of the prescribed fee, the registrar:
    - (a) must furnish a certified copy of an external judgment or section 21B certificate:
      - (i) if the external judgment is registered or filed under an order of the court, to any party to the proceedings in which the order for registration was made, and

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- (ii) if the external judgment is registered otherwise than under an order of the court, to the person on whose application registration was effected, and
    - (iii) if the external judgment or section 21B certificate is filed in the court, to any person who filed the judgment or certificate, and
  - (b) may furnish a certified copy of an external judgment or section 21B certificate to any other person appearing to have a sufficient interest in the judgment or certificate.
  - (3) On the certified copy of the external judgment or section 21B certificate concerned, the registrar must endorse a statement that indicates the following matters:
    - (a) the provision under which registration or filing was effected,
    - (b) the date of registration or filing,
    - (c) if registration or filing was effected by means of a faxed copy, that registration or filing was so effected,
    - (d) if registration or filing has been cancelled or has ceased to have effect, the date of cancellation or cessation.

**36.14 Service of judgment or order not required** (cf SCR Part 41, rule 16; DCR Part 31, rule 17; LCR Part 26, rule 8)

A sealed copy of a judgment or order need not be served unless these rules expressly so require or the court so directs.

**Division 4 Setting aside and variation of judgments**

**36.15 General power to set aside judgment or order** (cf DCR Part 13, rule 1, Part 31, rule 12A; LCR Part 11, rule 1, Part 26, rule 3)

- (1) A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.
- (2) A judgment or order of the court in any proceedings may be set aside by order of the court if the parties to the proceedings consent.

**36.16 Further power to set aside or vary judgment or order** (cf SCR Part 40, rule 9)

- (1) The court may set aside or vary a judgment or order if notice of motion for the setting aside or variation is filed before entry of the judgment or order.
- (2) The court may set aside or vary a judgment or order after it has been entered if:

- (a) the judgment or order has been entered under Part 16 (Default judgment), or
  - (b) the judgment or order has been given or made in the absence of a party, whether or not the absent party had notice of the relevant hearing or of the application for the judgment or order, or
  - (c) in the case of proceedings for possession of land, the judgment or order has been given or made in the absence of a person whom the court has ordered to be added as a defendant, whether or not the absent person had notice of the relevant hearing or of the application for the judgment or order.
- (3) Without limiting subrules (1) and (2), the court may set aside or vary any order (whether or not part of a judgment) except so far as the order:
- (a) determines any claim for relief, or determines any question (whether of fact or law or both) arising on any claim for relief, or
  - (b) dismisses proceedings, or dismisses proceedings so far as concerns the whole or any part of any claim for relief.
- (4) Nothing in this rule affects any other power of the court to set aside or vary a judgment or order.

**36.17 Correction of judgment or order (“slip rule”)** (cf SCR Part 20, rule 10; DCR Part 17, rule 10; LCR Part 16, rule 10)

If there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on the application of any party or of its own motion, may, at any time, correct the mistake or error.

**36.18 Variation of judgment or order against party operating under unregistered business name** (cf SCR Part 64, rule 7; DCR Part 46, rule 6; LCR Part 35, rule 6)

- (1) In any proceedings in which judgment has been given, or an order made, against a person under a business name, the court may vary the judgment or order so as to make it a judgment or order against the person in the person’s own name.
- (2) Notice of motion for a direction under subrule (1) must be personally served on the person.

## **Part 37 Time to pay and payment by instalments**

**37.1 Instalment order made pursuant to agreement between judgment creditor and judgment debtor** (cf DCR Part 31A, rule 2; LCR Part 27, rule 2)

- (1) A judgment creditor and judgment debtor may enter into an agreement (an *instalment agreement*):

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- (a) specifying the amount agreed by them to be owing under the judgment debt, and
  - (b) specifying by what instalments, payable at what times, that amount is to be paid.
- (2) An instalment agreement may be entered into whether or not an instalment order is already in force in respect of the judgment debt.
  - (3) An instalment agreement may be entered into on behalf of a judgment creditor or judgment debtor by his or her solicitor or barrister.
  - (4) An instalment agreement has no effect for the purposes of this rule unless the signature of each person executing it (other than a solicitor or barrister) is witnessed by a registrar or other officer of the court or by a solicitor or barrister.
  - (5) As soon as practicable after an instalment agreement is filed, the court must make an instalment order that gives effect to the agreement.

**37.2 Application for instalment order by judgment debtor** (cf DCR Part 31A, rule 2; LCR Part 27, rule 2)

- (1) A judgment debtor may apply to the court for an instalment order with respect to the amount owing under the judgment debt.
- (2) Such an application:
  - (a) may be made whether or not some other instalment order is in force in relation to the judgment debt, and
  - (b) must be supported by an affidavit as to the judgment debtor's financial circumstances, and
  - (c) must be dealt with as soon as practicable after it is made.
- (3) An application under this rule:
  - (a) except as provided by paragraph (b), is to be dealt with by the registrar under rule 37.3, or
  - (b) if it is made during a hearing before the court, is to be dealt with by the court under rule 37.4.
- (4) Notice of motion of an application under this rule does not have to be filed or served if the application is made during the hearing at which the judgment debtor is being examined pursuant to an order for examination.
- (5) An application under this rule may be made not only to the court in which judgment was entered but also, in the case of a judgment entered in a Local Court, to any other Local Court by which an examination is being conducted as referred to in rule 38.5 (2).



**37.3 Instalment order made by registrar**

- (1) The registrar may deal with an application for an instalment order:
  - (a) by making an instalment order in relation to the amount owing under the judgment debtor, or
  - (b) by making an order refusing the application.
- (2) As soon as practicable after making an instalment order under this rule, the registrar:
  - (a) must give notice of the order to the judgment creditor and the judgment debtor, and
  - (b) must also give to the judgment creditor a copy of the affidavit referred to in rule 37.2 (2) (b).
- (3) Either party may file an objection to an order made under subrule (1) (a) or (b) at any time within 14 days after the order is made.

**37.4 Instalment order made by court** (cf DCR Part 31A, rule 2; LCR Part 27, rule 2)

- (1) This rule applies if the court is dealing with:
  - (a) an application for an instalment order pursuant to rule 37.2 (3) (b), or
  - (b) an objection against an order made under rule 37.3 (1) (a) or (b).
- (2) On receiving the application or objection, the court:
  - (a) must set the matter down for hearing, and
  - (b) must give notice of the time, date and place of the hearing to the judgment creditor and the judgment debtor, and
  - (c) if it has not already been done, must also give to the judgment creditor a copy of the affidavit referred to in rule 37.2 (2) (b).
- (3) The court may determine an application for an instalment order, or an objection against an order refusing such an application:
  - (a) by making an instalment order in relation to the amount owing under the judgment debt, or
  - (b) by dismissing the application.
- (4) The court may determine an objection against the making of an instalment order:
  - (a) by varying or rescinding the instalment order, or
  - (b) by dismissing the objection.

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- (5) As soon as practicable after making its determination, the court must give notice of the determination, and (if it makes or varies an instalment order) of the terms of the order or the order as varied, to the judgment creditor and the judgment debtor.

**37.5 Stay of execution pending determination of application for instalment order**

- (1) Execution of the judgment to which an application for an instalment order relates is stayed:
- (a) from the time the application is made until the time the application is determined, and
  - (b) if the application is refused by an order under rule 37.3 (1) (b) and an objection against the order is filed under rule 37.3 (3), from the time the objection is filed until the time the objection is determined.
- (2) Subrule (1) does not apply if the applicant has previously made an application under this rule with respect to the same judgment debt.

**Note.** See also section 107 (2) of the *Civil Procedure Act 2005* which provides for stay of execution of the judgment while an instalment order is in force.

**37.6 Variation or rescission of instalment order on proof of improvement in judgment debtor's financial circumstances** (cf DCR Part 31A, rule 3; LCR Part 27, rule 3)

- (1) A judgment creditor may apply to the court for the variation or rescission of an instalment order.
- (2) Such an application must be supported by an affidavit as to the judgment debtor's financial circumstances, indicating the extent to which they appear to have improved since the instalment order was made.
- (3) On receiving the application, the registrar:
- (a) must set the matter down for hearing, and
  - (b) must give notice of the time, date and place of the hearing to the judgment creditor and the judgment debtor.
- (4) The court may determine the application:
- (a) by varying or rescinding the instalment order to which it relates, or
  - (b) by dismissing the application.
- (5) As soon as practicable after making its determination, the court must give notice of the determination and, if it varies the instalment order, of the terms of the order as varied:

- (a) to the judgment creditor and the judgment debtor, and
- (b) if the determination relates to an instalment order to which a garnishee order is subject, to the garnishee.

**37.7 Effect of instalment order on judgment debt** (cf DCR Part 31A, rule 3; LCR Part 27, rule 3)

Subject to any agreement referred to in rule 37.1, an instalment order ceases to have effect if the judgment debtor fails to comply with the order.

## **Part 38 Examination of judgment debtor etc**

**38.1 Examination notice** (cf Act No 11 1970, section 43A)

- (1) The person in whose favour a judgment or order has been given or made may, by notice in writing served on the person bound by the judgment or order (an *examination notice*), require that person to do either or both of the following:
  - (a) to provide answers to specified material questions,
  - (b) to produce for inspection by the judgment creditor specified documents in relation to material questions.
- (2) An examination notice must specify the period (being not less than 28 days) within which its requirements must be complied with.

**38.2 Applications for orders for examination**

An application for an order for examination with respect to the enforcement of a judgment or order must be supported by an affidavit as to the following matters:

- (a) that the judgment or order remains unsatisfied,
- (b) that the applicant has served an examination notice on the person bound by the judgment or order but that person has failed, within the time limited by the notice:
  - (i) to provide any or sufficient answers to the questions specified in the notice, or
  - (ii) to produce any or sufficient documents for inspection by the applicant,as to any material questions,
- (c) that the person bound by the judgment or order has not, within the previous 3 months, provided any or sufficient answers, or produced any or sufficient documents, in response to any previous examination notice,

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- (d) in the case of a judgment or order for the payment of money, whether or not an instalment order has previously been made in relation to the amount payable under the judgment or order and, if such an order has been made, that the person bound by the judgment or order has failed to comply with the instalment order.

**38.3 Orders for examination** (cf DCR Part 25, rules 1 and 3; LCR Part 28, rules 1 and 2)

- (1) In the case of a judgment or order of any court other than the Supreme Court, the court may not make an order for examination against the person bound by the judgment or order unless it is satisfied that the person:
  - (a) has been served with an examination notice in accordance with rule 38.1, and
  - (b) has failed, within the time limited by the notice:
    - (i) to provide any or sufficient answers to the questions specified in the notice, or
    - (ii) to produce any or sufficient documents for inspection by the judgment creditor,as to any material questions.
- (2) An order for examination must specify the time, date and place at which the person bound by the judgment or order is required to attend for examination.
- (3) An order for examination must be served on the person bound by the judgment or order at least 14 days before the day on which he or she is required to attend for examination.
- (4) A court that has made an order for examination may not, within 3 months after the order is made, make a further order for examination of the same person, on the application of the same person and in relation to the same judgment or order.
- (5) A person may refuse to produce a document or thing in response to an order for examination if the person could lawfully refuse to produce that document or thing on a subpoena for production.

**38.4 Venue of examination**

- (1) Subject to this rule, the examination of a person in respect of a judgment or order is to be conducted at the same venue as that where the judgment or order was entered.
- (2) If, in the case of proceedings before the District Court, the Court is satisfied that the person neither resides nor carries on business within 30 kilometres of the proclaimed place where the judgment or order was

entered, then the examination is to be conducted at the proclaimed place nearest to where the person resides or carries on business, as the Court may determine.

- (3) If, in the case of proceedings before a Local Court, the Court is satisfied that the person neither resides nor carries on business within 30 kilometres of the Local Court where the judgment or order was entered, then the examination is to be conducted at the Local Court nearest to where the person resides or carries on business, as the Court may determine.

**38.5 Examination** (cf DCR Part 32, rules 1 and 5; LCR Part 28, rules 1 and 3)

- (1) Unless the court orders otherwise, examination of a person under an order for examination is to be conducted by the person on whose application the order was made.
- (2) Examination of a person under an order for examination may be conducted by the court if:
  - (a) the person attends for examination following his or her arrest pursuant to a section 97 arrest warrant, or
  - (b) the person attends for examination otherwise than at the time specified in the order, or
  - (c) the court is satisfied for any other reason that the circumstances so warrant.
- (3) If the examination of a person under an order for examination is conducted by the court:
  - (a) the person may be required to answer questions on oath, and
  - (b) the examination may be conducted in open court or in the absence of the public, as the court directs, and
  - (c) the court must notify the person on whose application the order was made of the person's answers to the questions asked at the examination.
- (4) An examination under this rule may be adjourned from time to time, as occasion requires.
- (5) In this rule, **section 97 arrest warrant** means a warrant issued under section 97 of the *Civil Procedure Act 2005* as a consequence of a person's failure to comply with an order for examination.

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**38.6 Section 97 arrest warrants** (cf Act No 9 1973, section 92; Act No 11 1970, section 42; DCR Part 32, rule 6; LCR Part 28, rule 7)

- (1) A section 97 arrest warrant:
  - (a) may be issued or revoked by the court of its own motion or on the application of the person in whose favour a judgment or order has been given or made, and
  - (b) must be expressed to expire no later than 3 months after the date on which it is issued.
- (2) A section 97 arrest warrant may not be issued in relation to a person's failure to comply with an order for examination earlier than 14 days, nor later than 3 months, after the court has served notice on the person to whom the order for examination is addressed that failure to attend for examination may result in the person's arrest.
- (3) In this rule, **section 97 arrest warrant** means a warrant issued under section 97 of the *Civil Procedure Act 2005* as a consequence of a person's failure to comply with an order for examination.

**38.7 Application of Part to persons that are corporations**

- (1) In the case of a person that is a corporation:
  - (a) any examination notice under this Part may be addressed to an officer or former officer of the corporation, and
  - (b) any order for examination under this Part may be made against an officer or former officer of the corporation,and any such officer or former officer is bound by the requirements of this Part in respect of that notice or order as if he or she were the corporation.
- (2) If an examination notice is addressed to an officer or former officer of a corporation in relation to a judgment or order, any subsequent order for examination in respect of the same judgment or order must, unless the court orders otherwise, be made against the same officer or former officer.

## **Part 39 Enforcement of judgments**

### **Division 1 Enforcement of writs of execution generally**

**39.1 Circumstances in which issue of writ requires leave** (cf SCR Part 44, rule 2)

- (1) A writ of execution may not be issued in the following circumstances except by leave of the court:

- (a) if there has been any change in the persons entitled or liable to execution under the judgment, whether by assignment, death or otherwise,
- (b) if the judgment is against the assets of a deceased person coming to the hands of an executor or administrator after the judgment took effect, and the writ is against those assets or any of them,
- (c) if a person's entitlement under the judgment is subject to fulfilment of a condition,
- (d) if the writ is a writ for the possession of land,
- (e) if the writ is against property in the hands of a receiver appointed by the court,
- (f) if the writ is against property in the hands of a sequestrator,
- (g) if the writ is in aid of another writ of execution.

**Note.** See also section 134 of the *Civil Procedure Act 2005* with respect to stale judgments.

- (2) If leave is required, it may be applied for in the notice of motion for the issue of the writ of execution.
- (3) The motion for leave must be supported by the following evidence:
  - (a) evidence that the applicant is entitled to proceed to execution on the judgment,
  - (b) evidence that the person against whom execution is sought to be issued is liable to execution on the judgment,
  - (c) if the judgment is for the payment of money, evidence as to the amount due on the date of the motion,
  - (d) if subrule (1) (a) applies, evidence as to the change which has taken place,
  - (e) if subrule (1) (b) or (c) applies, evidence that a demand to satisfy the judgment has been made on the person liable to satisfy it and that the person has not satisfied it.
- (4) Subrule (1) does not limit the operation of any other Act or law that requires leave for the issue of a writ of execution.

### **39.2 Application for writ of execution**

- (1) An application for a writ of execution in respect of a judgment is to be made by way of notice of motion.
- (2) Unless the court orders otherwise, a notice of motion under this rule:
  - (a) may be dealt with in the absence of the parties, and
  - (b) need not be served on the judgment debtor.

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- (3) The application must indicate the extent (if any) to which the judgment debt has been satisfied under any writ of execution, garnishee order or charging order issued by the court.

**39.3 Affidavit in support of application for writ of execution** (cf DCR Part 34, rule 13)

- (1) Unless the court orders otherwise, an applicant for a writ of execution must file an affidavit in support of the application, being an affidavit sworn not more than 14 days before the date of filing.
- (2) In the case of a writ for the possession of land, the affidavit in support:
- (a) must identify any persons (other than parties to the proceedings) who were in occupation of the whole or any part of the land:
    - (i) as at the time the originating process was filed, or
    - (ii) if the claim for possession arises from an amendment to the originating process, as at the time the amendment was made, and
  - (b) in relation to each such person:
    - (i) must state that the person's occupation of the land is not to be disturbed, or
    - (ii) must state that the person is no longer in occupation of any part of the land, or
    - (iii) must state that the person has been served with a notice pursuant to rule 6.8 and that the time allowed for the person to apply to the court to be joined as a defendant has now passed,  
as the case requires, and
  - (c) if the claim for possession of the land arises from a default in the payment of money, must give particulars of the default, and
  - (d) must state the source of the deponent's knowledge of the matters stated in the affidavit concerning the occupation of the land and any default in the payment of money referred to in paragraph (c), and
  - (e) must state whether costs are claimed and, if costs are claimed and the costs claimable are fixed by law, the amount (not exceeding the amount so fixed) that is claimed for costs.
- Note.** The costs fixed by law referred to in paragraph (e) include costs that are fixed under section 196 (1) (b) of the *Legal Profession Act 1987* or section 329 (1) (c) of the *Legal Profession Act 2004*, as the case may be.
- (3) In the case of a writ for the delivery of goods, the affidavit in support:
- (a) must state which goods have, and which have not, been delivered to the plaintiff since the time the judgment was given, and



- (b) must give particulars of any payments that the defendant has made to the plaintiff in respect of the goods or state that no such payments have been made, as the case may be, since the time the judgment was given, and
  - (c) must state the address at which the goods are alleged to be located.
- (4) In the case of a writ for the levy of property, the affidavit in support:
- (a) must state the amount payable under the judgment, together with any costs and interest payable in relation to the judgment, as at the date of swearing of the affidavit, and
  - (b) must state the address or addresses at which property belonging to the judgment debtor may be located, and
  - (c) if the judgment was entered as a result of the filing of a cost assessor's certificate, must include a statement to that effect, together with a statement that the determination which the certificate sets out:
    - (i) is not subject to any suspension under section 208N (1) of the *Legal Profession Act 1987* that has not been ended under section 208N (2) of that Act, and
    - (ii) is not subject to any suspension under section 208KE (1) of the *Legal Profession Act 1987* that has not been ended under section 208KE (2) of that Act.
- (5) Any application by the judgment creditor for a writ of execution in relation to a judgment debt that has been the subject of an instalment order that has ceased to have effect may not be granted unless the judgment creditor has filed an affidavit as to the judgment debtor's failure to comply with the order.

**39.4 Order in which writs for the levy of property to be dealt with** (cf SCR Part 44, rule 8; Act No 9 1973, section 108)

Writs for the levy of property against the same judgment debtor are to be enforced by the Sheriff in the order in which they are received by the Sheriff, regardless of the order in which they were issued.

**39.5 Property to be sold promptly** (cf SCR Part 45, rule 5)

Subject to this Division, any property to be sold under a writ for the levy of property must be put up for sale as soon as practicable, having due regard to the interests of each of the parties and to the need to avoid of the sacrifice of the reasonable value of the property.

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**39.6 Order in which property to be sold** (cf SCR Part 45, rule 4; Act No 9 1973, section 110; Act No 11 1970, section 62A)

- (1) If it appears to the Sheriff that the value of the property affected by a writ for the levy of property is greater than the amount outstanding under the judgment debt, the Sheriff may not cause to be sold any more of the property than is sufficient to satisfy the judgment.
- (2) Subject to subrule (3), property is to be sold:
  - (a) in such order as seems to the Sheriff best for the speedy satisfaction of the judgment without undue expense, and
  - (b) subject to paragraph (a), in such order as the judgment debtor may direct, and
  - (c) subject to paragraphs (a) and (b), in such order as seems to the Sheriff best for minimising hardship to the judgment debtor or any other person.
- (3) Land must not be sold before any other property unless:
  - (a) the judgment debtor so requests, or
  - (b) the Sheriff is satisfied that the land should be sold before the other property in order to minimise hardship to the judgment debtor or some other person.

**39.7 Sale to be by public auction** (cf DCR Part 35, rule 5; LCR Part 30, rule 15)

- (1) Subject to rule 39.13, property sold under a writ for the levy of property must be sold by public auction, by the Sheriff or by an auctioneer appointed under rule 39.8, to the highest bidder.
- (2) Property must not be sold by public auction for a price substantially below its approximate market value, as fixed by the Sheriff under rule 39.10.

**39.8 Auctioneer** (cf DCR Part 35, rule 3A; LCR Part 30, rule 13A)

- (1) If the nature and apparent value of property to be sold under a writ for the levy of property is such that it is reasonable to do so, the Sheriff may appoint a duly qualified auctioneer to sell the property.
- (2) An auctioneer appointed to sell any property under a writ for the levy of property must, as soon as practicable after the Sheriff advises that the auctioneer's services will not be required in respect of the writ, or otherwise requests an account of the auctioneer's charges, advise the Sheriff of the amount of those charges to date.

- (3) An auctioneer appointed by the Sheriff to sell property under a writ for the levy of property must as soon as practicable after receiving any money under the writ pay the money to the Sheriff, less the amount of any charges payable to the auctioneer in respect of the writ.

**39.9 Sale to be arranged so as to obtain highest prices** (cf SCR Part 45, rules 5, 7 and 8; Act No 11 1970, section 59)

For the purpose of obtaining the highest prices for the property, the Sheriff:

- (a) must ascertain what appears to the Sheriff to be the best place for the sale to be held, and
- (b) must cause the sale to be held at the place so ascertained.

**39.10 Approximate market value** (cf SCR Part 45, rule 7; DCR Part 35, rule 8; LCR Part 30, rule 6)

- (1) Before selling property under a writ for the levy of property, the Sheriff must fix the approximate market value of the property, having regard to all the circumstances of the case, but need not disclose that value to any other person before the sale.
- (2) For the purpose of fixing such a value, the Sheriff:
  - (a) may require the judgment creditor to furnish the Sheriff with any information known to, or reasonably capable of ascertainment by, the judgment creditor in respect of the property, and
  - (b) may engage a suitably qualified and experienced valuer to provide the Sheriff with an opinion as to the value of the property if the nature and apparent value of the property so warrant.
- (3) If the judgment creditor unreasonably fails to furnish any information referred to in subrule (2) (a), the Sheriff must report the failure to the court, and may refuse to proceed further towards the sale of the property.

**39.11 Postponement** (cf DCR Part 35, rule 6; LCR Part 30, rule 16)

- (1) The Sheriff may from time to time postpone the sale of property under a writ for the levy of property, or require any auctioneer appointed to sell the property to postpone any such sale, if the Sheriff thinks it proper to postpone the sale:
  - (a) to avoid a sacrifice of the reasonable value of the property, or
  - (b) to comply with a request by the judgment creditor for the postponement.

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- (2) If the date to which the sale of property is postponed under subrule (1) falls after the date on which the writ would otherwise expire, the date of expiry of the writ is postponed to the date of the postponed sale.

**39.12 Suspension of execution by judgment creditor** (cf DCR Part 34, rule 8; LCR Part 30, rule 7)

- (1) If, at any time before property is seized under a writ for the levy of property, the judgment creditor:
- (a) requires the Sheriff, by notice in writing, to suspend execution of the writ, or
  - (b) requires the Sheriff, by a subsequent notice in writing, to resume execution of the writ,
- the Sheriff must comply with the requirement.
- (2) If, at any time after property is seized under a writ for the levy of property, the judgment creditor (having entered into an arrangement with the judgment debtor with respect to the Sheriff's withdrawal and re-entry into possession of the property and notified the Sheriff of the arrangement):
- (a) requires the Sheriff, by notice in writing, to withdraw from possession of the property and suspend execution of the writ, or
  - (b) requires the Sheriff to re-enter into possession of the property and resume execution of the writ,
- the Sheriff must comply with the requirement.
- (3) If, at any time after property is seized under a writ for the levy of property, the judgment creditor (not having notified the Sheriff of an arrangement referred to in subrule (2)) requires the Sheriff, by notice in writing, to withdraw from possession of the property and suspend execution of the writ, the judgment creditor is taken to have abandoned the execution, and the Sheriff must withdraw from possession of the property.
- (4) For the purposes of subrule (3), a request to postpone the sale of property under a writ for the levy of property is not a request to withdraw from possession of the property or to suspend execution of the writ.
- (5) The Sheriff's duty under this rule to resume execution of a writ for the levy of property (*the original writ*) is subject to the Sheriff's duties under this Part with respect to any other writ for the levy of property that had been issued against the same judgment debtor when execution of the original writ was suspended and, for that purpose, any other such writ is to be executed, and the proceeds of sale dealt with, as if that other writ had been received by the Sheriff before the original writ.

**39.13 Sale by private treaty** (cf SCR Part 45, rule 11; DCR Part 35, rule 8; LCR Part 30, rule 18)

- (1) If, at a public auction, the highest bid of property to be sold under a writ for the levy of property is substantially below their approximate market value, as fixed by the Sheriff, the Sheriff or (if the Sheriff so approves) the auctioneer may sell the property by private treaty.
- (2) The Sheriff must not approve a sale of property by private treaty at a price substantially below a fair value determined by the Sheriff.
- (3) In determining a fair value for the property for the purposes of subrule (2), the Sheriff:
  - (a) must take into account all the relevant circumstances, including but not limited to:
    - (i) the approximate market value of the property fixed by the Sheriff, and
    - (ii) the amount of the highest bid for the property at the public auction, and
    - (iii) the likelihood or otherwise of there being a higher bid if the property were again put up for sale by public auction, and
  - (b) must not determine a fair value that is substantially below the amount of the highest bid for the property at the public auction.

**39.14 Conditions of sale** (cf DCR Part 35, rule 9; LCR Part 30, rule 19)

- (1) The Sheriff may sell property under a writ for the levy of property, or require any auctioneer appointed to sell such property:
  - (a) on terms as to payment that the purchaser must pay:
    - (i) an amount equal to at least 10% of the purchase price by way of deposit forthwith on the sale, and
    - (ii) the balance of the purchase price within such period, not exceeding 2 days after the sale (in the case of goods) and 6 weeks after the sale (in the case of land), as the Sheriff may determine prior to the sale, or
  - (b) on terms as to payment that the purchaser must pay the whole of the purchase price forthwith on the sale.
- (2) If a sale of property is partly of goods and partly of land, the goods may be sold on the same terms as to payment as the land.
- (3) The Sheriff may require payment to be in cash, by bank draft or, if the Sheriff so approves, by credit card.

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- (4) If payment is made by credit card, any charge made to the Sheriff or auctioneer in respect of the payment is to form part of the costs of the execution.

**39.15 How proceeds of enforcement to be applied** (cf Act No 8 1901, sections 9 and 17; LCR Part 30, rule 20)

- (1) The proceeds of enforcement of a writ for the levy of property are to be applied as follows:
- (a) firstly, to the Sheriff to cover the Sheriff's fees and expenses in executing the writ,
  - (b) secondly, to the judgment creditor to satisfy the judgment debt,
  - (c) thirdly, to the judgment debtor as to any amount remaining.
- (2) If the Sheriff receives writs for the levy of property (whether from the same or from different courts) in relation to more than one judgment creditor, the judgment creditors are to be paid from the proceeds of enforcement of the writs in the order in which the writs were received by the Sheriff.

**39.16 Account** (cf DCR Part 34, rule 9; LCR Part 30, rule 8)

On the request of the judgment creditor, or of any person who claims that his or her property has been sold by the Sheriff under a writ for the levy of property, the Sheriff must give that judgment creditor or person:

- (a) a report of any sale under the writ, and
- (b) an account of:
  - (i) the proceeds of the sale and any other money received under the writ, and
  - (ii) the Sheriff's fees and expenses in relation to the writ, and
  - (iii) the manner of disposal of the proceeds or other money.

**39.17 Sheriff may require security for costs of execution** (cf DCR Part 34, rule 7; LCR Part 30, rule 5)

- (1) At any time after receiving a writ of execution, the Sheriff may require the judgment creditor:
- (a) to lodge such security for payment of the Sheriff's costs in relation to the execution of the writ, or
  - (b) to give such undertaking as to payment of the Sheriff's costs in relation to the execution of the writ,
- as the Sheriff considers appropriate.
- (2) If the judgment creditor fails to comply with such a requirement, the Sheriff:

- (a) may refuse to execute the writ, and
- (b) may withdraw from any possession into which the Sheriff may have entered under the writ.

**39.18 Sheriff to serve copy of writ when executing or attempting to execute writ** (cf DCR Part 34, rule 5)

On executing a writ of execution, the Sheriff must cause a copy of the writ to be served on the judgment debtor or left in a conspicuous position at the place where the writ was executed.

**39.19 When writ may not be executed** (cf DCR Part 34, rule 10)

- (1) A writ of execution may not be executed on Christmas Day or Good Friday.
- (2) The Sheriff is not required to execute a writ of execution on any day on which court registries need not be open.

**39.20 Expiry and renewal of writ of execution** (cf SCR Part 44, rule 8; DCR Part 34, rule 2; LCR Part 30, rule 1, Part 30A, rule 2)

A writ of execution has effect for 12 months but may, subject to these rules, be renewed.

## **Division 2 Enforcement of writs against land**

**39.21 Judgment creditor's notice to judgment debtor** (cf DCR Part 36, rule 2; LCR Part 30A, rule 3)

- (1) A judgment creditor may file an affidavit verifying:
  - (a) the registration of a writ for the levy of property:
    - (i) in the Register kept under the *Real Property Act 1900*, pursuant to section 105 of that Act, or
    - (ii) in the General Register of Deeds kept under the *Conveyancing Act 1919*, pursuant to section 186 of that Act, and
  - (b) the receipt by the judgment creditor of advice from the Sheriff to the effect that the Sheriff cannot obtain satisfaction of the writ by proceeding further against the goods of the judgment debtor.
- (2) On filing an affidavit referred to in subrule (1) the judgment creditor may lodge with the registrar in duplicate, and the registrar must seal, a notice (the **judgment creditor's notice**) advising the judgment debtor of the following:
  - (a) that a writ for the levy of property has been registered as referred to in subrule (1) (a),

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- (b) that the judgment creditor intends that land of the judgment debtor be sold after the lapse of 4 weeks,
  - (c) that the judgment debtor is entitled to sell the land, but only in accordance with section 113 of the *Civil Procedure Act 2005*,
  - (d) that the judgment debtor is entitled to apply for an instalment order under section 107 of the *Civil Procedure Act 2005*.
- (3) A sealed copy of the judgment creditor's notice is to be served on the judgment debtor.

**39.22 Judgment creditor's application for sale** (cf DCR Part 36, rules 4 and 6; LCR Part 30A, rules 5 and 7)

- (1) Land may not be sold under a writ for the levy of property until the following steps have been completed:
- (a) the judgment creditor has filed an affidavit of service of a judgment creditor's notice under rule 39.21,
  - (b) the judgment creditor has filed a notice of sale in the approved form (the *notice of sale*) and lodged 6 copies of it with the registrar,
  - (c) the registrar has sealed each copy of the notice of sale so lodged and returned them to the judgment creditor,
  - (d) the judgment creditor has given the 6 sealed copies of the notice of sale to the Sheriff,
  - (e) the Sheriff has fixed a date for the sale of the land, being a date occurring not less than 4 weeks after the date on which the judgment creditor's notice was served on the judgment debtor,
  - (f) the Sheriff has inserted the date so fixed in each copy of the notice of sale,
  - (g) the Sheriff has returned 2 copies of the notice of sale, in which the date for the sale of the land has been inserted, to the judgment creditor,
  - (h) at least one week before the date for the sale of the land, the judgment creditor has served a copy of the notice of sale, in which the date for the sale of the land has been inserted, on the judgment debtor,
  - (i) the judgment creditor has furnished to the Sheriff such information as in his or her possession, or as he or she can reasonably obtain, that is relevant to the ascertainment of the value of the interest to be sold, including:
    - (i) particulars of the value most recently assigned by the Valuer-General to the land the subject of the interest, and



(ii) particulars of the title to that land as revealed by a recent search at the office of the Registrar-General.

(2) The approved form referred to in subrule (1) (b) must contain a statement reminding the judgment debtor of his or her right to apply for an instalment order under section 107 of the *Civil Procedure Act 2005*.

**39.23 Sale to be publicly advertised** (cf DCR Part 36, rule 8; LCR Part 30A, rule 9)

(1) The Sheriff, or the auctioneer appointed by the Sheriff, must cause an advertisement of any sale of land, including a full description of the land, to be published in the Gazette, and in a newspaper circulating in the district in which the land is situated, at least one week before the date fixed for the sale.

(2) The sale of any land under a writ for the levy of property may, in addition to being advertised under subrule (1), be further advertised by the Sheriff, or the auctioneer appointed to sell the land, if the further advertisement is approved by the Sheriff.

**39.24 Proof of service and publication** (cf DCR Part 36, rule 9; LCR Part 30A, rule 10)

Before the sale of any land takes place under a writ for the levy of property, the judgment creditor must lodge with the Sheriff an affidavit as to:

- (a) the service on the judgment debtor of the notice of sale under rule 39.22, and
- (b) the date and particulars of publication of each advertisement published under rule 39.23 in relation to the sale.

**39.25 Satisfaction by judgment debtor** (cf DCR Part 36, rule 7; LCR Part 30A, rule 8)

If, before or at the time fixed for the sale of land under a writ for the levy of property, the judgment debtor indicates to the Sheriff, or to the auctioneer appointed to sell the land, that the judgment debtor intends to satisfy the writ, the judgment debtor must pay to the Sheriff or auctioneer:

- (a) the amount due under the judgment, including interest, and
- (b) the costs of the execution then known to the Sheriff or auctioneer, including any fees payable in respect of the execution to an auctioneer, and
- (c) an amount determined by the Sheriff as security for the judgment creditor's costs of the execution other than those referred to in paragraph (b),

and, on receipt of the money, the Sheriff or auctioneer must cancel the sale.

**39.26 Documents giving effect to sale**

- (1) If land is sold at auction under a writ for the levy of property, the Sheriff and the purchaser must each sign an appropriate contract of sale forthwith after the auction is completed.
- (2) As soon as practicable after receiving payment in full for land sold under a writ for the levy of property, an appropriate conveyance or transfer (to be prepared by the purchaser) must be executed by the Sheriff and delivered to the purchaser for the purpose of giving effect to the sale.

**39.27 Sheriff or auctioneer to report** (cf DCR Part 36, rule 12; LCR Part 30A, rule 15)

As soon as practicable after the sale of land under a writ for the levy of property has been completed, the Sheriff or auctioneer appointed to sell land must make a report to the registrar as to:

- (a) the approximate market value of the land fixed by the Sheriff, and
- (b) the amount of the highest bid at the sale, and
- (c) whether or not the judgment debtor was identified to the Sheriff or auctioneer as being present at the sale, and
- (d) the amount of the auctioneer's charges, and
- (e) any other matter which the Sheriff or auctioneer considers should be reported to the registrar.

**39.28 Payment to judgment debtor** (cf DCR Part 36, rule 13; LCR Part 30A, rule 16)

- (1) A judgment creditor at whose request a writ for the levy of property has been issued may file:
  - (a) evidence of an agreement with the judgment debtor as to the amount of the judgment creditor's costs of the execution, or
  - (b) a notice of motion for the assessment of those costs.
- (2) Any evidence or notice of motion referred to in subrule (1) must be filed within 2 months after the receipt by the issuing registrar of:
  - (a) the proceeds of sale of any land, or
  - (b) any money under section 113 (5) of the *Civil Procedure Act 2005*, or
  - (c) any money under rule 39.25,or within such further time as may be consented to in writing by the judgment debtor.

- (3) If the judgment creditor files any evidence or notice in accordance with subrule (2), the registrar must as soon as practicable pay to the judgment debtor any money held by the registrar over and above the amount necessary to satisfy the writ for the levy of property.
- (4) If the judgment creditor:
  - (a) does not file any evidence or notice in accordance with subrule (2), and
  - (b) does not within the time allowed in that regard advise the registrar of any consent by the judgment debtor to extend that time,the registrar may pay to the judgment debtor any money mentioned in subrule (2) and held by the registrar over and above the total of the amount necessary to satisfy the judgment (including interest) and the costs of the execution (other than solicitor's profit costs) then known to the registrar.
- (5) The registrar must pay to the judgment creditor any money referred to in this rule that the registrar is not by this rule required to pay to the judgment debtor.
- (6) Nothing in this rule affects the right of the judgment creditor to recover against the judgment debtor the costs of execution of the writ for the levy of property.

### **Division 3 Enforcement of writs against goods etc**

#### **39.29 Removal of goods** (cf DCR Part 35, rule 2; LCR Part 30, rule 12)

- (1) If any goods are seized under a writ for the levy of property, the Sheriff may remove them:
  - (a) to a place where, in his or her judgment, the highest prices for the goods are most likely to be obtained, or
  - (b) to a place of safe keeping.
- (2) As soon as practicable after removing any such goods, the Sheriff must notify the judgment debtor of their removal and give the judgment debtor an inventory of the goods so removed.

#### **39.30 Time of sale** (cf DCR Part 35, rule 3; LCR Part 30, rule 13)

- (1) Goods must not be sold under a writ for the levy of property before the sixth day after they were seized under the writ.
- (2) Despite subrule (1):
  - (a) goods of a perishable nature may be sold forthwith after they are seized, and

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(b) if the judgment debtor so requests in writing, other goods may be sold at any time.

(3) Goods seized under a writ for the levy of property are to remain in such custody as the Sheriff may appoint pending their sale under the writ.

**39.31 Sale to be publicly advertised** (cf DCR Part 35, rule 4; LCR Part 30, rule 14)

(1) The Sheriff must cause notice of the intended sale of any goods under a writ for the levy of property to be affixed:

(a) at or near the entrance to the place where the sale is to be held, or

(b) if the sale is not to be held in a city or town, at the court-house or some convenient public place,

at least 5 days before the date appointed for the sale.

(2) If goods are removed from a place in a city or town under rule 39.29 (1)

(a), the Sheriff must cause notice of the intended sale of the goods to be affixed on or near the entrance to that place at least 5 days before the date appointed for the sale.

(3) At least 5 days before the date appointed for the sale of any equity of redemption or other equitable interest in any goods, the Sheriff must cause notice of the intended sale, and particulars of the interest to be sold:

(a) to be affixed at or near the entrance to the place where the sale is to be held, and

(b) to be advertised in a newspaper circulating in the district in which the sale is to take place.

(4) In addition to any other notice of a sale that he or she is required to give, the Sheriff must give such notice, by advertisement in a newspaper or otherwise, as appears necessary to give due publicity to the sale.

(5) If an auctioneer has been appointed by the Sheriff to sell the goods, the notice referred to in subrule (4) may, with the approval of the Sheriff, be given by the auctioneer.

**39.32 Sheriff or auctioneer to report** (cf DCR Part 36, rule 12; LCR Part 30A, rule 15)

As soon as practicable after the sale of land under a writ for the levy of property has been completed, the Sheriff or auctioneer appointed to sell goods must make a report to the registrar as to results of the sale.

**39.33 Possession fees** (cf DCR Part 35, rule 1; LCR Part 30, rule 11)

- (1) No fees for keeping possession of any goods under a writ for the levy of property are payable to any person, or chargeable against the judgment debtor as costs of the execution, if the amount due under the writ is paid to the Sheriff within one hour after they are seized under the writ.
- (2) Subject to subrule (1), if more than one person is necessarily engaged in keeping possession of any goods under a writ for the levy of property, the fees payable to each such person are, unless the court orders otherwise, chargeable against the judgment debtor as part of the costs of the execution.
- (3) This rule does not affect any amount that may be payable to the Sheriff, by way of fees, out of money paid to the Sheriff by the judgment debtor.

**Division 4 Garnishee orders**

**39.34 Application for garnishee order**

- (1) An application for a garnishee order in respect of a judgment is to be made by way of notice of motion.
- (2) Unless the court orders otherwise, a notice of motion under this rule:
  - (a) may be dealt with in the absence of the parties, and
  - (b) need not be served on the judgment debtor or the proposed garnishee.
- (3) The application must indicate the extent (if any) to which the judgment debt has been satisfied under any writ of execution, garnishee order or charging order issued by the court.

**39.35 Affidavit in support of application for garnishee order**

- (1) Unless the court orders otherwise, an applicant for a garnishee order must file an affidavit in support of the application, being an affidavit sworn not more than 14 days before the date of filing.
- (2) The affidavit in support:
  - (a) must identify the garnishee, and any debts that appear to be owed by the garnishee to the judgment debtor, and
  - (b) must state the amount payable under the judgment, together with any costs and interest payable in relation to the judgment, as at the date of swearing of the affidavit, and
  - (c) if the judgment was entered as a result of the filing of a cost assessor's certificate, must include a statement to that effect, together with a statement that the determination which the certificate sets out:

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- (i) is not subject to any suspension under section 208N (1) of the *Legal Profession Act 1987* that has not been ended under section 208N (2) of that Act, and
    - (ii) is not subject to any suspension under section 208KE (1) of the *Legal Profession Act 1987* that has not been ended under section 208KE (2) of that Act.
  - (3) Any application by the judgment creditor for a garnishee order in relation to a judgment debt that has been the subject of an instalment order that has ceased to have effect may not be granted unless the judgment creditor has filed an affidavit as to the judgment debtor's failure to comply with the order.

**39.36 Form of garnishee order for debts** (cf SCR Part 46, rule 3; Act No 9 1973, section 97; Act No 11 1970, section 47)

- (1) A garnishee order for debts must direct the garnishee to pay to the judgment creditor, to the extent of the amount outstanding under the judgment, all money:
  - (a) held by the garnishee for or on behalf of the judgment debtor, or
  - (b) owed by the garnishee to the judgment debtor.
- (2) The amount outstanding under the judgment must be specified in the order.

**39.37 Form of garnishee order for wage or salary** (cf SCR Part 46, rule 3; Act No 9 1973, section 97; Act No 11 1970, section 47)

- (1) A garnishee order for wage or salary must direct the garnishee to pay to the judgment creditor:
  - (a) during the period for which the order is in force, and
  - (b) to the extent of the amount outstanding under the judgment, such amounts, from the wages or salary payable by the garnishee to the judgment debtor, as are specified in the order.
- (2) The amount outstanding under the judgment must be specified in the order.

**39.38 Court may refuse to make garnishee order** (cf Act No 9 1973, section 97; Act No 11 1970, section 47)

- (1) The court may refuse to make a garnishee order if of the opinion that such an order is inappropriate.
- (2) Without limiting subrule (1), the reasons that may lead the court into forming such an opinion may include:
  - (a) the smallness of the amount recoverable under the judgment debt, and

- (b) the smallness of the debt, wage or salary to be attached.

**39.39 When garnishee order takes effect**

A garnishee order takes effect when it is served on the garnishee.

**39.40 Affidavit that no debt due or accruing** (cf Act No 9 1973, section 97A; Act No 11 1970, section 47A)

- (1) A garnishee who believes that:
- (a) no debt from the garnishee to the judgment debtor was due or accruing when the garnishee order was served on the garnishee, or
  - (b) no wage or salary will become payable by the garnishee to the judgment debtor during the period for which the order will be in force,

may serve on the judgment creditor a statement to that effect, verified by affidavit, being a statement that contains a summary of the grounds on which the garnishee's belief is based.

- (2) A disclosure of any information in an affidavit under subrule (1) does not, if the disclosure was reasonable in the circumstances, subject the garnishee to any action, liability, claim or demand.

**39.41 Lien or claim of third person** (cf Act No 9 1973, section 104)

- (1) This rule applies in circumstances in which the garnishee claims that some person, other than the judgment debtor, is or may be entitled to:
- (a) any money paid under a garnishee order, or
  - (b) any debt, wage or salary attached by a garnishee order, or
  - (c) any charge or lien on, or other interest in, any such money, debt, wage or salary.
- (2) In these circumstances, the court may hear and determine the garnishee's claim and give such judgment or make such order in respect of the claim (including an order barring the claim and an order for the payment into court by a judgment creditor of money received under the garnishee order) as the nature of the case requires.

**39.42 Amounts garnishee may retain**

For the purposes of section 123 (2) (a) of the *Civil Procedure Act 2005*, the prescribed amount that may be retained by the garnishee out of money deducted under a garnishee order is as specified in item 4 of Schedule 3.

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**39.43 Notice required for certain attached debts yet to accrue** (cf Act No 9 1973, section 97C; Act No 11 1970, section 47C)

- (1) If a garnishee order attaches a debt that is due for payment to the judgment debtor more than 28 days after service of the order on the garnishee, the garnishee must, within that period of 28 days, cause notice of that fact to be served on the judgment creditor.
- (2) The notice must specify:
  - (a) the date on which the debt is, or is likely to be, due for payment to the judgment debtor, and
  - (b) if the amount of the debt is less than the unpaid amount of the judgment debt specified in the garnishee order, the amount of the debt.

**Note.** The giving of false or misleading information in such a notice constitutes an offence under section 307B of the *Crimes Act 1900*.

## **Division 5 Charging orders**

### **39.44 Application for charging order**

- (1) An application for a charging order in respect of a judgment is to be made by way of notice of motion.
- (2) Unless the court orders otherwise, a notice of motion under this rule:
  - (a) may be dealt with in the absence of the parties, and
  - (b) need not be served on the judgment debtor or the proposed chargee.
- (3) The application must indicate the extent (if any) to which the judgment debt has been satisfied under any writ of execution, garnishee order or charging order issued by the court.

### **39.45 Affidavit in support of application for charging order**

- (1) Unless the court orders otherwise, an applicant for a charging order must file an affidavit in support of the application, being an affidavit sworn not more than 14 days before the date of filing.
- (2) The affidavit in support:
  - (a) must state the amount payable under the judgment, together with any costs and interest payable in relation to the judgment, as at the date of swearing of the affidavit, and
  - (b) if the judgment was entered as a result of the filing of a cost assessor's certificate, must include a statement to that effect, together with a statement that the determination which the certificate sets out:



- (i) is not subject to any suspension under section 208N (1) of the *Legal Profession Act 1987* that has not been ended under section 208N (2) of that Act, and
  - (ii) is not subject to any suspension under section 208KE (1) of the *Legal Profession Act 1987* that has not been ended under section 208KE (2) of that Act.
- (3) Any application by the judgment creditor for a charging order in relation to a judgment debt that has been the subject of an instalment order that has ceased to have effect may not be granted unless the judgment creditor has filed an affidavit as to the judgment debtor's failure to comply with the order.

## **Division 6 General**

### **39.46 Value below which Sheriff may not seize tools of trade**

For the purposes of section 106 (3) (c) of the *Civil Procedure Act 2005*, the aggregate value below which tools of trade may not be seized and sold by the Sheriff in execution of a judgment is \$2,000.

### **39.47 Costs of prior execution not enforceable without costs assessor's certificate** (cf SCR Part 44, rule 10)

Except by leave of the court, the costs referred to in section 137 (2) (a) of the *Civil Procedure Act 2005* must not be included in the amount for which a writ for the levy of property, garnishee order or charging order may be issued if a cost assessor's certificate has been issued in respect of the costs of the prior writ or order but has not been filed.

### **39.48 Charge on partnership interest** (cf SCR Part 47, rule 2)

- (1) An application to the Supreme Court under section 23 of the *Partnership Act 1892* (which relates to procedure against partnership property by a judgment creditor of a partner) is to be made:
  - (a) if the judgment is a judgment in proceedings in the Supreme Court, by notice of motion in the proceedings, or
  - (b) if the judgment is not a judgment in proceedings in the Supreme Court, by summons joining the judgment debtor and his or her partners as defendants.
- (2) An application under section 23 of the *Partnership Act 1892* made by a partner of the judgment debtor in consequence of an application under that section made by the judgment creditor is to be made by notice of motion in the proceedings in which the judgment creditor applies.

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- (3) A summons or notice of motion filed under this rule, and an order made on an application under section 23 of the *Partnership Act 1892*, must be served on the following persons (other than the applicant):
- (a) the judgment creditor,
  - (b) the judgment debtor,
  - (c) such of the judgment debtor's partners as are within New South Wales,
- and, if so served, has effect as if it had been served on all of the partners.

**39.49 Enforcement by or against non-party** (cf SCR Part 42, rule 10)

- (1) If, in any proceedings, a person who is not a party obtains an order, or an order is made in favour of a person who is not a party, that person may enforce the order as if that person were a party.
- (2) If, in any proceedings, a judgment or order may be enforced against a person who is not a party, the judgment or order may be enforced against that person by the same means as if that person were a party.
- (3) If, in any proceedings, compliance with a judgment or order may be enforced against a corporation that is not a party, any senior officer of the corporation is liable to the same process of enforcement as if the corporation were a party.

**39.50 Non-performance of condition** (cf SCR Part 42, rule 11)

If a person is entitled under a judgment or order subject to the fulfilment of a condition, but the condition is not fulfilled, then, unless the court orders otherwise:

- (a) the person loses the benefit of the judgment or order, and
- (b) any other person interested may take any steps:
  - (i) that are warranted by the judgment or order, or
  - (ii) that might have been taken had the judgment not been given or entered or the order not been made.

## **Part 40 Additional measures for enforcing judgments and orders of the Supreme Court and District Court**

### **Division 1 Provisions applicable to the Supreme Court only**

#### **40.1 Application of Division**

This Division applies to judgments and orders of the Supreme Court (in this Division referred to simply as *judgments*), and so applies in addition to the provisions of Part 8 of the *Civil Procedure Act 2005*.

#### **40.2 Payment of money** (cf SCR Part 42, rule 2)

- (1) A judgment for the payment of money (including a judgment for the payment of money into court) may be enforced by one or more of the following means:
  - (a) appointment of a receiver of the income of the property of the person bound by the judgment,
  - (b) sequestration of the property of the person bound by the judgment.
- (2) Subrule (1) does not affect any other means for enforcement of a judgment for the payment of money.

#### **40.3 Leave for issue: sequestration** (cf SCR Part 44, rule 3)

- (1) A writ of sequestration may not be issued except by leave of the court.
- (2) An applicant for leave under this rule:
  - (a) must file notice of motion, and
  - (b) must serve the notice, and any affidavit in support of the motion, personally on the person whose property is sought to be sequestered.
- (3) The court may dispense with service under subrule (2) (b).

#### **40.4 Security for future conduct** (cf SCR Part 53, rule 6)

- (1) If, for the purpose of security for future conduct, the court:
  - (a) requires any person to pay money into court or otherwise to deposit money, or
  - (b) puts any person on terms of payment into court or other deposit of money, or
  - (c) puts any person on terms of procuring payment into court or other deposit of money by some other person,

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the court must, by order, specify the circumstances in which the money so paid or deposited is to be forfeited, returned or otherwise disposed of.

- (2) If, for the purpose of security for future conduct, the court:
- (a) requires any person to submit to an order for the payment of money, or
  - (b) puts any person on terms of submitting to an order for the payment of money, or
  - (c) puts any person on terms of procuring some other person to submit to an order for the payment of money,

the court must, by order, specify the circumstances in which the order for the payment of money may be made and may, by order, specify the manner in which the submission is to be made.

## **Division 2 Provisions applicable to the Supreme Court and District Court**

### **40.5 Application of Division**

This Division applies to judgments and orders of the Supreme Court or the District Court (in this Division referred to simply as *judgments*), and so applies in addition to the provisions of Part 8 of the *Civil Procedure Act 2005*.

**Note.** Under the *District Court Act 1973*, the powers conferred on the Supreme Court by this Division may also be exercised by the District Court in relation to certain judgments and orders of the District Court.

### **40.6 Doing or abstaining from doing an act** (cf SCR Part 42, rule 6)

- (1) This rule applies in the following circumstances:
- (a) if:
    - (i) a judgment requires a person to do an act within a time specified in the judgment, and
    - (ii) the person fails to do the act within that time or, if that time is extended or abridged, within that time as extended or abridged,
  - (b) if:
    - (i) a judgment requires a person to do an act forthwith, or forthwith on a specified event, and
    - (ii) the person fails to do the act as so required,
  - (c) if:
    - (i) a judgment requires a person to abstain from doing an act, and
    - (ii) the person disobeys the judgment,

but does not apply to a judgment for the payment of money (including a judgment for the payment of money into court).

- (2) In circumstances to which this rule applies, a judgment may be enforced by one or more of the following means:
  - (a) committal of the person bound by the judgment,
  - (b) sequestration of the property of the person bound by the judgment,
  - (c) if the person bound by the judgment is a corporation:
    - (i) committal of any officer of the corporation, and
    - (ii) sequestration of the property of any officer of the corporation.

**40.7 Service of copy of judgment before committal or sequestration** (cf SCR Part 42, rule 8)

- (1) A judgment is not enforceable by committal or sequestration unless:
  - (a) a sealed copy of the judgment is served personally on the person bound by the judgment, and
  - (b) if the judgment requires the person to do an act within a specified time, the sealed copy is so served within that time or, if that time is extended or abridged, within that time as extended or abridged.
- (2) If the person is a corporation, the judgment is not enforceable by committal of an officer of the corporation or by sequestration of the property of an officer of the corporation unless, in addition to service under subrule (1):
  - (a) a sealed copy of the judgment is served personally on the officer, and
  - (b) if the judgment requires the corporation to do an act within a specified time, the sealed copy is so served before that time expires.
- (3) The sealed copy of the judgment must bear a notice (naming the persons concerned) that the person served is liable to imprisonment or to sequestration of property:
  - (a) where the judgment requires the person to do an act within a specified time, if the person fails to do the act within that time, or
  - (b) where the judgment requires the person to do an act forthwith or forthwith on a specified event, if the person fails to do the act as so required, or
  - (c) where the judgment requires the person to abstain from doing an act, if the person disobeys the judgment.

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- (4) If a person liable to committal or sequestration by way of enforcement of a judgment has notice of the judgment:
- (a) by being present when the judgment is directed to be entered, or
  - (b) by being notified of the terms of the judgment, whether by telephone, telegram or otherwise,
- the judgment may be enforced against that person by committal or sequestration without service having been effected in accordance with this rule.
- (5) The court may dispense with service under this rule.

**40.8 Substituted performance** (cf SCR Part 42, rule 9)

If a judgment requires a person to do an act and the person does not do the act, the court:

- (a) may direct that the act be done by a person appointed by the court, and
- (b) may order the person to pay the costs incurred pursuant to the direction.

## **Part 41 Funds in court**

### **41.1 Definitions**

In this Part:

*deposited funds* means money that has been deposited in a bank in accordance with rule 41.2.

*funds in court* means money that has been paid into court.

### **41.2 Deposit** (cf SCR Part 50, rule 1)

- (1) Within one day after the money is paid into court, the registrar must deposit the money to the credit of the Treasurer in such bank as the Governor may appoint.
- (2) Deposited funds are to bear interest at such rate of interest (if any) as may be arranged between the senior judicial officer of the court and the Treasurer.
- (3) Different rates of interest may apply to different classes of deposited funds.

### **41.3 Withdrawal of deposited funds** (cf SCR Part 50, rules 2 and 3)

- (1) Deposited funds may not be withdrawn or paid except by the authority of these rules or of a judgment or order.

- (2) Deposited funds, including interest, may not be withdrawn or paid except by means of a cheque:
  - (a) made payable to or to the order of a specified person, and
  - (b) signed by two officers of the court nominated by the registrar.
- (3) No person is bound to inquire whether the requirements of this rule have been satisfied.

**41.4 Registrar to keep accounts** (cf SCR Part 50, rule 4)

The registrar must, in relation to any deposited funds, keep an account of the deposit and of all withdrawals (including withdrawals of interest).

**41.5 Investment** (cf SCR Part 50, rule 5)

The court may direct that any deposited funds be invested in any manner in which a trustee is authorised to invest trust money under the *Trustee Act 1925*.

**41.6 Interest not payable on certain funds in court** (cf SCR Part 50, rule 5A)

- (1) Money that is paid into court as security for costs or as security on an appeal, or in relation to an offer of compromise under the *Commercial Arbitration Act 1984*, does not bear interest.
- (2) Subrule (1) does not apply to interest accruing on money paid to the Public Trustee.

**41.7 Payment to the Public Trustee** (cf SCR Part 50, rule 6A)

- (1) The registrar may, and if the court so directs, must:
  - (a) pay funds in court to the Public Trustee for payment into the Public Trustee's common fund, or
  - (b) demand repayment by the Public Trustee to the registrar of money so paid.
- (2) When making a payment under section 36G (1) of the *Public Trustee Act 1913*, the registrar must give particulars of the payment.
- (3) When making a repayment under section 36G (2) of the *Public Trustee Act 1913*, the Public Trustee must give particulars of the repayment and any interest.

**41.8 Interest on funds in court to abide the decision in proceedings** (cf SCR Part 50, rule 6)

- (1) This rule applies if money is paid into court pursuant to an order to abide the decision in the proceedings, and is either invested or paid to the Public Trustee.

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- (2) The court may, on application by a party or by its own motion, order the payment of interest to any party.
  - (3) Despite subrule (2), if:
    - (a) the court makes an order that the whole of the money be paid to one or more parties, and
    - (b) the order does not expressly provide for the payment (or non-payment) of any interest accruing on the money, any interest accruing on the money is to be paid to the party or parties.
  - (4) Unless the court orders otherwise, the interest paid to a party under subrule (3) is to bear the same proportion to the total interest accruing on the total amount of money paid into court as the money paid to the party bears to the total amount of money paid into court.
  - (5) In this rule, *interest* accruing on money means interest accruing on the money as a result of its investment under rule 41.5 or payment to the Public Trustee under rule 41.7.

**41.9 Non-attendance of parties following notice by court** (cf SCR Part 50, rule 6AA)

If the court gives notice to parties of its intention to order the payment to a party of funds in court, or of any interest accruing on those funds, and the party fails to attend court as directed in the notice, the court:

- (a) may order the payment of the funds or any interest accruing on those funds (or both) to one or more of the parties, in such proportions as the court thinks fit, or
- (b) may direct the registrar to pay the funds or any interest accruing on the funds (or both) to the Treasurer for payment into the Consolidated Fund, or
- (c) may decide not to make any such order.

**41.10 Unclaimed funds** (cf SCR Part 50, rule 6B)

- (1) In this rule, *unclaimed funds* means funds that have been paid into court in relation to any matter, including any interest accruing on those funds, other than funds or interest that have been paid to the Treasurer pursuant to a direction under rule 41.9 (b), where:
  - (a) judgment has been entered on the matter, and
  - (b) the whole or any part of the funds or interest remains unclaimed after 6 years from either of the following:
    - (i) the making of an order for the payment of the whole of the funds or interest (or any part that is unclaimed),
    - (ii) if no such order is made, the date of the judgment.



- (2) Any matter in respect of which there are unclaimed funds must be referred to the court by the registrar for a direction under subrule (3).
- (3) The court may direct the registrar to pay the unclaimed funds to the Treasurer for payment into the Consolidated Fund.
- (4) On the application of a person entitled to unclaimed funds paid to the Treasurer under subrule (3), the court may direct the Treasurer to pay the funds into court for payment to the person so entitled.
- (5) If satisfied that a person's failure to make such an application was due to the fact that:
  - (a) the person was then a person under legal incapacity, or
  - (b) the unclaimed funds could not be dealt with until the happening of an event subsequent to the direction referred to in subrule (3),the court may also order the Treasurer to pay into court, for payment to the person, an amount equivalent to the interest (if any) that would have been payable had the unclaimed funds paid to the Treasurer been deposited funds during the period between the date of their payment to the Treasurer under subrule (3) and the date of their repayment by the Treasurer under subrule (4).

**41.11 Authority of recipient** (cf SCR Part 50, rule 7)

Subject to these rules, funds in court may not be paid out of court except to the party entitled or (on the party's written authority or by order of the court) to the party's solicitor.

**41.12 Death of payee** (cf SCR Part 50, rule 9)

- (1) If:
  - (a) by any judgment or order, the court directs payment of funds in court to any person, and
  - (b) it appears to the registrar:
    - (i) that the person has died since the date on which the judgment or order took effect, and that probate of the person's will or letters of administration of the person's estate have been granted to an executor or administrator, or
    - (ii) that the person had died on or before the date on which the judgment or order took effect, and that his or her entitlement to payment arose under a direction for payment to creditors, shareholders or debenture holders,

then, unless the judgment or order otherwise directs, the registrar may pay the money to the deceased person's executor or administrator.

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- (2) Subject to subrule (3), this rule does not authorise payment of the funds to a deceased person's executor or administrator if the deceased person appears to the registrar to have been entitled as trustee, executor or administrator, or otherwise not in his or her own right and for his or her own use.
  - (3) The registrar may, under this rule, pay the money to an executor of the will of the person to whom payment is directed if it appears to the registrar that the person was entitled as sole or sole surviving executor.

**41.13 Payment to partners** (cf SCR Part 50, rule 10)

If, by any judgment or order, the court directs payment of funds in court to any persons described in the judgment or order, or in a certificate of a master, as partners, or as trading or carrying on business in the name of a firm, then, unless the judgment or order otherwise directs, the registrar may pay the funds to any one or more of those persons or to their survivors.

**41.14 Payment to executors or administrators** (cf SCR Part 50, rule 11)

- (1) If:
  - (a) by any judgment or order, the court directs the payment of funds in court to any persons described in the judgment or order, or in a certificate of a master, as executors or administrators, and
  - (b) it appears to the registrar:
    - (i) that one or more of them has died since the date on which the judgment or order took effect, or
    - (ii) that one or more of them had died on or before the date on which the judgment or order took effect, but is described in the judgment, order or certificate as an executor of the will or administrator of the estate of a creditor, shareholder or debenture holder,

then, unless the judgment or order otherwise directs, the registrar may pay the funds to their survivors.

- (2) If:
  - (a) by any judgment or order, the court directs the payment of funds in court to any persons described in the judgment or order, or in a certificate of a master, as executors or administrators, and
  - (b) the funds in court total less than \$200,then, unless the judgment or order otherwise directs, the registrar may pay the funds to any of them.

**41.15 Discharge of registrar** (cf SCR Part 50, rule 8)

- (1) Any person entitled to payment of funds in court may request the registrar to send the person a cheque for the payment to a specified address.
- (2) Payment, by the bank on which it is drawn, of a cheque sent in accordance with such a request is taken to be a discharge to the registrar for the amount of the payment.
- (3) Subject to subrule (2), any direction, cheque or other document for the payment of money out of court is taken, when signed by the payee, to be a discharge to the registrar for the amount of the payment.
- (4) Nothing in subrule (2) or (3):
  - (a) prevents the registrar from requiring a receipt for any payment made by the registrar, or
  - (b) affects the operation of the *Stamp Duties Act 1920* or the *Duties Act 1997*.

**41.16 Stop orders** (cf SCR Part 47, rule 3)

- (1) This rule applies to funds in the Supreme Court.
- (2) If:
  - (a) the interest of any person in any funds in court has been mortgaged, charged or assigned, or
  - (b) a person having an interest in any funds in court is a debtor under a judgment or order of the court,the court may, on application by the mortgagee, chargee, assignee or creditor under the judgment or order, make an order prohibiting the transfer, sale, delivery out, payment or other dealing in respect of the whole or any part of the funds, or of any income derived from the funds, without notice to the applicant.
- (3) An application under subrule (2) is to be made:
  - (a) if there are proceedings in the court in relation to the funds, by notice of motion in the proceedings, or
  - (b) in any other case, by summons joining as defendants all persons whose interests may be affected by the application.
- (4) The notice of motion or summons must be served on each person whose interest may be affected by the application, but not on any other person.
- (5) The court may, on terms, dispense with the joinder of any person as defendant and dispense with service on any person.

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- (6) The court may order the applicant for an order under subrule (2) to pay the costs of any party to any proceedings in relation to which the funds are in court, or of any other person interested in the funds.
  - (7) Subrule (6) does not affect the general powers of the Supreme Court as to costs.

## Part 42 Costs

### Division 1 Entitlement to costs

#### 42.1 General rule that costs follow the event (cf SCR Part 52A, rule 11)

Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.

#### 42.2 General rule as to assessment of costs (cf SCR Part 52A, rule 32; DCR Part 39A, rule 10; LCR Part 31A, rule 6)

Unless the court orders otherwise or these rules otherwise provide, costs payable to a person under an order of the court or these rules are to be assessed on the ordinary basis.

#### 42.3 Powers of the court generally (cf SCR Part 52A, rule 4 (2) and (5))

- (1) Subject to rule 42.27, the court may not, in the exercise of its powers and discretions under section 98 of the *Civil Procedure Act 2005*, make any order for costs against a person who is not a party.
- (2) This rule does not limit the power of the court:
  - (a) to make an order for payment, by a relator in proceedings, of the whole or any part of the costs of a party to the proceedings, or
  - (b) to make an order for payment, by a person who:
    - (i) is bound by an order made, or judgment given, by the court in proceedings or is bound by an undertaking given to the court in proceedings, and
    - (ii) fails to comply with the order or the judgment or breaches the undertaking,of the whole or any part of the costs of a party to the proceedings occasioned by the failure or the breach, or
  - (c) to make an order for payment, by a person who has committed contempt of court or an abuse of process of the court, of the whole or any part of the costs of a party to proceedings occasioned by the contempt or abuse of process, or

- (d) to make an order for costs against a person who purports, without authority, to conduct proceedings in the name of another person, or
- (e) to make an order for costs against a person who commences or carries on proceedings, or purports to do so, as an authorised director of a corporation, or
- (f) to make an order of the kind referred to in rule 42.27, or
- (g) to make an order for costs in exercise of its supervisory jurisdiction over its own officers, including solicitors, barristers and court appointed liquidators.

**42.4 Power to order maximum costs** (cf SCR Part 52A, rule 35A)

- (1) The court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.
- (2) A maximum amount specified in an order under subrule (1) may not include an amount that a party is ordered to pay because the party:
  - (a) has failed to comply with an order or with any of these rules, or
  - (b) has sought leave to amend its pleadings or particulars, or
  - (c) has sought an extension of time for complying with an order or with any of these rules, or
  - (d) has otherwise caused another party to incur costs that were not necessary for the just, quick and cheap:
    - (i) progress of the proceedings to trial or hearing, or
    - (ii) trial or hearing of the proceedings.
- (3) An order under subrule (1) may include such directions as the court considers necessary to effect the just, quick and cheap:
  - (a) progress of the proceedings to trial or hearing, or
  - (b) trial or hearing of the proceedings.
- (4) If, in the court's opinion, there are special reasons, and it is in the interests of justice to do so, the court may vary the specification of maximum recoverable costs ordered under subrule (1).

**42.5 Indemnity costs** (cf SCR Part 52A, rule 37)

If the court determines that costs are to be paid on an indemnity basis:

- (a) in the case of costs payable out of property held or controlled by a person who is a party to the proceedings:
  - (i) in the capacity of trustee, executor, administrator or legal representative of a deceased estate, or

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- (ii) in any other fiduciary capacity, all costs (other than those that have been incurred in breach of the person's duty in that capacity) are to be allowed, and
  - (b) in any other case, all costs (other than those that appear to have been unreasonably incurred or appear to be of an unreasonable amount) are to be allowed.

**42.6 Amendment of pleading etc without leave** (cf SCR Part 52A, rule 15)

Unless the court orders otherwise, a party that amends a pleading or summons without leave must, after the conclusion of the proceedings, pay the costs of and occasioned by the amendment.

**42.7 Interlocutory applications and reserved costs** (cf SCR Part 52A, rule 16; DCR Part 39A, rule 22; LCR Part 31A, rule 17)

- (1) Unless the court orders otherwise, the costs of any application or other step in any proceedings, including:
  - (a) costs that are reserved, and
  - (b) costs in respect of any such application or step in respect of which no order as to costs is made,are to be paid and otherwise dealt with in the same way as the general costs of the proceedings.
- (2) Unless the court orders otherwise, costs referred to in subrule (1) do not become payable until the conclusion of the proceedings.

**42.8 Dispute of fact subsequently proved or admitted** (cf SCR Part 52A, rule 19; DCR Part 39A, rule 20)

- (1) In this rule:
  - admitting party* means the person serving a list of documents under rule 21.3.
  - requesting party* means the person served with a list of documents under rule 21.3.
- (2) This rule applies to proceedings in which:
  - (a) the admitting party disputes a fact that he or she has been required to admit by the requesting party, and
  - (b) the fact in dispute is subsequently proved or is subsequently admitted by the admitting party,as referred to in rule 17.3.
- (3) Unless the court orders otherwise, the admitting party must, after the conclusion of the proceedings, pay the requesting party's costs, assessed on an indemnity basis, occasioned by:

- (a) the requesting party's proof of the fact, or
  - (b) the requesting party's preparation for the purpose of proving the fact,  
as the case may be.
- (4) An entitlement to costs under this rule is not affected by any order as to costs unless that order makes particular reference in that regard.

**42.9 Dispute of authenticity of document subsequently proved or admitted**

(cf SCR Part 52A, rule 20; DCR Part 39A, rule 21)

- (1) In this rule:  
*admitting party* means the person serving a list of documents under rule 21.3.  
*requesting party* means the person served with a list of documents under rule 21.3.
- (2) This rule applies to proceedings in which:
- (a) the admitting party disputes the authenticity of any document that he or she has been required to admit by the requesting party, and
  - (b) the authenticity of the document in dispute is subsequently proved or is subsequently admitted by the admitting party,  
as referred to in rule 17.4.
- (3) Unless the court orders otherwise, the admitting party must, after the conclusion of the proceedings, pay the requesting party's costs, assessed on an indemnity basis, occasioned by:
- (a) the requesting party's proof of the authenticity of the document,  
or
  - (b) the requesting party's preparation for the purpose of proving the authenticity of the document,  
as the case may be.
- (4) An entitlement to costs under this rule is not affected by any order as to costs unless that order makes particular reference in that regard.

**42.10 Disobedience to rule, judgment, order or direction** (cf SCR Part 52A, rule 25; DCR Part 39A, rule 4)

If a party fails to comply with a requirement of these rules, or of any judgment or order of the court, the court may order the party to pay such of the other parties' costs as are occasioned by the failure.

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**42.11 Injunction** (cf SCR Part 52A, rule 27)

- (1) Unless the court orders otherwise, an order as to costs with respect to an interlocutory injunction that continues an earlier interlocutory injunction, with or without modification, is to include the costs of the earlier injunction.
- (2) In this rule, *interlocutory injunction* means an interlocutory injunction granted by the Supreme Court, and includes a temporary injunction granted by the District Court under section 140 of the *District Court Act 1973*.

**Division 2 Arbitration rehearings under Division 3 of Part 5 of Civil Procedure Act 2005**

**42.12 Rehearings under Division 3 of Part 5 of Civil Procedure Act 2005** (cf SCR Part 52A, rule 30)

- (1) In this rule:
  - party A* means the party on whose application a rehearing has been conducted.
  - party B* means any party to a rehearing other than party A.
  - rehearing* means a rehearing conducted under Division 3 of Part 5 of the *Civil Procedure Act 2005*.
- (2) If the determination of the court is not substantially more favourable to party A than is the determination of the arbitrator, the court:
  - (a) may not order party B to pay the costs incurred by party A by reason of the rehearing, and
  - (b) must order party A to pay the costs incurred by party B by reason of the rehearing.
- (3) Despite subrule (2), the court may certify that the special circumstances of the case require the court:
  - (a) to make an order referred to in subrule (2) (a), in which case the court may make that order, or
  - (b) to refrain from making an order referred to in subrule (2) (b), in which case the court may refrain from making that order.
- (4) If, by operation of section 45 of the *Civil Procedure Act 2005*, an order for rehearing of proceedings ceases to have effect, party A must pay the costs of party B incurred by reason of the order for rehearing, unless the court orders otherwise.
- (5) Unless the court orders otherwise, any application for an order for costs must be made forthwith after the court gives the judgment, or makes the order, giving rise to the entitlement to the order for costs.



### **Division 3 Offers of compromise**

#### **42.13 Application**

This Division applies to proceedings in respect of which an offer of compromise (the *offer concerned*) is made under rule 20.26 with respect to a plaintiff's claim (the *claim concerned*).

#### **42.14 Where offer not accepted and judgment no less favourable to plaintiff**

(cf SCR Part 52A, rule 22; DCR Part 39A, rule 25)

- (1) This rule applies if the offer concerned is made by the plaintiff, but not accepted by the defendant, and the plaintiff obtains an order or judgment on the claim concerned no less favourable to the plaintiff than the terms of the offer.
- (2) Unless the court orders otherwise, the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim:
  - (a) assessed on the ordinary basis up to the time from which those costs are to be assessed on an indemnity basis under paragraph (b), and
  - (b) assessed on an indemnity basis:
    - (i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and
    - (ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.

#### **42.15 Where offer not accepted and judgment as or less favourable to plaintiff**

(cf SCR Part 52A, rule 22; DCR Part 39A, rule 25; LCR Part 31A, rule 20)

- (1) This rule applies if the offer concerned is made by the defendant, but not accepted by the plaintiff, and the plaintiff obtains an order or judgment on the claim concerned as favourable to the plaintiff, or less favourable to the plaintiff, than the terms of the offer.
- (2) Unless the court orders otherwise:
  - (a) the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim, to be assessed on the ordinary basis, up to the time from which the defendant becomes entitled to costs under paragraph (b), and
  - (b) the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, assessed on an indemnity basis:

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- (i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and
  - (ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.

**42.16 Costs with respect to interest** (cf SCR Part 52A, rule 22; DCR Part 39A, rule 25; LCR Part 31A, rule 20)

- (1) If a plaintiff obtains an order or judgment for the payment of a debt or damages and:
  - (a) the amount payable under the order or for which judgment is given includes interest or damages in the nature of interest, or
  - (b) the court, by a separate order, awards the plaintiff interest or damages in the nature of interest in respect of the amount,then, for the purpose of determining the consequences as to costs referred to in rule 42.14 or 42.15, the court must disregard so much of the interest, or damages in the nature of interest, as relates to the period after the day on which the offer was made.
- (2) For the purpose only of this rule, the court may be informed of the fact that the offer was made, and of the date on which it was made, but must not be informed of its terms.

**42.17 Miscellaneous** (cf SCR Part 52A, rule 22 (10) and (11); DCR Part 39A, rule 25; LCR Part 31A, rule 20)

- (1) Before the court makes any order under rule 42.14 or 42.15, the party to whom the offer is made may request the party making the offer to satisfy the court that the party making the offer was at all material times willing and able to carry out the offer.
- (2) If the court is satisfied that the party making the offer was at all material times willing and able to carry out the offer, then, unless the court orders otherwise, the party making the request must pay such of the costs of the party to whom the request is made as have been occasioned by the request.
- (3) If the court is not satisfied that the party making the offer was at all material times willing and able to carry out the offer, then, unless the court orders otherwise:
  - (a) rules 42.14 and 42.15 do not apply, and
  - (b) the party to whom the request is made must pay the costs of the party making the request occasioned by the request.

- (4) Unless the court orders otherwise, any application for an order for costs under rule 42.14 or 42.15 must be made forthwith after the order or judgment giving rise to the entitlement to the order for costs is made or given.

#### **Division 4 Offers to contribute**

**42.18 Offer to contribute** (cf SCR Part 52A, rule 24; DCR Part 39A, rule 26; LCR Part 31A, rule 21)

If a party has made an offer to contribute, as referred to in rule 20.32, the court must take into account both the fact and the amount of the offer in exercising its discretion as to costs.

#### **Division 5 Proceedings discontinued or dismissed**

**42.19 Proceedings discontinued** (cf SCR Part 52A, rule 21; DCR Part 39A, rule 24; LCR Part 31A, rule 19)

- (1) This rule applies to proceedings that are discontinued by a plaintiff by means of a notice of discontinuance, as referred to in rule 12.1, in relation to a particular defendant.
- (2) Unless the court orders otherwise or the notice referred to in rule 12.1 (2) otherwise provides, the plaintiff must pay such of the defendant's costs as, at the date on which the notice of discontinuance was filed, had been incurred by the defendant in relation to the claim.

**42.20 Dismissal of proceedings etc** (cf SCR Part 40, rule 8)

- (1) If the court makes an order for the dismissal of proceedings, either generally or in relation to a particular cause of action or in relation to the whole or part of any claim, then, unless the court orders otherwise, the plaintiff must pay the defendant's costs of the proceedings to the extent to which they have been dismissed.
- (2) If the court makes an order striking out a defence, either generally or in relation to a particular cause of action or in relation to the whole or part of any claim, then, unless the court orders otherwise, the defendant must pay the plaintiff's costs of the proceedings in relation to those matters in respect of which the defence has been struck out.

#### **Division 6 Security for costs**

**42.21 Security for costs** (cf SCR Part 53, rules 2, 3 and 4; DCR Part 40, rule 1; LCR Part 31, rule 11A, Part 31A, rule 11)

- (1) If, in any proceedings, it appears to the court on the application of a defendant:

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- (a) that a plaintiff is ordinarily resident outside New South Wales, or
  - (b) that the address of a plaintiff is not stated or is mis-stated in his or her originating process, and there is reason to believe that the failure to state an address or the mis-statement of the address was made with intention to deceive, or
  - (c) that, after the commencement of the proceedings, a plaintiff has changed his or her address, and there is reason to believe that the change was made by the plaintiff with a view to avoiding the consequences of the proceedings, or
  - (d) that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so, or
  - (e) that a plaintiff is suing, not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so,

the court may order the plaintiff to give such security as the court thinks fit, in such manner as the court directs, for the defendant's costs of the proceedings and that the proceedings be stayed until the security is given.

- (2) Security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct.
- (3) If the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.

## **Division 7      General**

### **42.22    Money paid into court** (cf SCR Part 52A, rule 18)

If a party has paid money into court, the court may, in exercising its discretion as to costs, take into consideration both the fact and the amount of the payment.

### **42.23    Costs in account** (cf SCR Part 52A, rule 38)

If the court orders that an account be taken and the account consists in part of costs, the court may, by the same or a later order, direct the registrar to refer those costs for assessment.

### **42.24    Costs of solicitor appointed as tutor** (cf SCR Part 52A, rule 41)

If the court appoints a solicitor to be the tutor of a person under legal incapacity in connection with any proceedings, the court:

- (a) may order that the costs incurred by the solicitor in performance of the duties of tutor be paid:
  - (i) by the parties to the proceedings or any of them, or
  - (ii) out of any fund in court in which the person under legal incapacity is interested, and
- (b) may make orders for the repayment or allowance of the costs as the case requires.

**42.25 Costs of trustee or mortgagee** (cf SCR Part 52A, rule 42)

- (1) Subject to subrule (2), a person who is or has been a party to any proceedings in the capacity of trustee or mortgagee is entitled to be paid his or her costs in the proceedings, in so far as they are not paid by any other person, out of the fund held by the trustee or out of the mortgaged property, as the case may be.
- (2) The court may order that the person's costs not be so paid if:
  - (a) the trustee or mortgagee has acted unreasonably, or
  - (b) in the case of a trustee, the trustee has in substance acted for his or her own benefit rather than for the benefit of the fund.

**42.26 Order confirming rule as to payment of costs** (cf SCR Part 52A, rule 49; DCR Part 39A, rule 17; LCR Part 31A, rule 9)

If a party to proceedings in the court has become liable under these rules to pay any of the costs of the proceedings of any other party, the court may order the party so liable to pay those costs.

**42.27 Attendance** (cf SCR Part 42, rule 7)

- (1) If:
  - (a) a person is ordered by the court, by subpoena or otherwise, to attend court:
    - (i) for the purpose of giving evidence, or
    - (ii) for the production of any document or thing, or
    - (iii) to answer a charge of contempt, or
    - (iv) for any other purpose, and
  - (b) the person fails to attend in accordance with the order, the court may order the person in default to pay any costs occasioned by the default.
- (2) If:
  - (a) a corporation is ordered by the court, by subpoena or otherwise, to produce to the court any document or thing, and

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(b) the corporation fails to produce the document or thing in accordance with the order,

the court may order the corporation to pay any costs occasioned by the default.

(3) This rule does not limit the power of the court to punish for contempt.

**42.28 Orders as to costs in relation to instalment order** (cf DCR Part 31A, rule 2 (7A); LCR Part 27, rule 2 (11))

If the court is of the opinion that a party has acted unreasonably in respect of the application for an instalment order, or for the variation or rescission of an instalment order, the court may order the party to pay the other party's costs in relation to the application, or such part of those costs as the court thinks fit.

**42.29 Patents, trade marks and designs** (cf SCR Part 52A, rule 28)

(1) This rule applies to proceedings in the Supreme Court.

(2) If:

(a) an action or counter-claim for infringement of a patent, of a registered trade mark, or of the monopoly in a registered design, or

(b) an application or counter-claim for revocation of a patent, or

(c) an application for cancellation of the registration of a design or counter-claim for the rectification of the Register of Designs,

proceeds to hearing, costs are not to be allowed to the parties delivering any particulars of breaches, or of objections in respect of any questions raised in those particulars and relating to that patent, trade mark or design, except in so far as those questions or particulars are certified by the Supreme Court to have been proved or to have been reasonable and proper.

**42.30 Property (Relationships) Act 1984** (cf SCR Part 52A, rules 34 and 35)

(1) This rule applies to proceedings in the Supreme Court or the District Court in which the plaintiff commences proceedings for an order or relief under the *Property (Relationships) Act 1984* and the court:

(a) in relation to property, declares a right or adjusts an interest, or

(b) makes an order for maintenance,

of a value or amount that does not exceed the jurisdictional limit of a Local Court sitting in its General Division, as that limit was when the proceedings were commenced.

(2) Unless the court orders otherwise, the plaintiff is not entitled to payment of his or her costs of the proceedings.

- (3) On the application of any person, the court may order that this rule does not apply in respect of any proceedings, including proceedings yet to be commenced.
- (4) If an order is made under subrule (3) in respect of proceedings to be commenced, the originating process by which the proceedings are later commenced must bear a note of the order made.

**42.31 Recovery of assessed costs in Supreme Court** (cf SCR Part 52A, rule 46)

- (1) A person is not entitled to his or her costs of proceedings in the Supreme Court (including costs of execution) to recover payment of costs included in a cost assessor's certificate unless:
  - (a) at the time of filing the certificate the amount of unpaid costs included in the certificate exceeds \$150,000, or
  - (b) it appearing to the Court that the person had sufficient reason for filing the certificate in the Court, the Court orders otherwise.
- (2) A party may apply for an order under subrule (1) without serving notice of motion.
- (3) If the applicant for an order under subrule (1) adds to the motion a request that the application be granted in accordance with this subrule, the Supreme Court may make the order in the absence of the public and without any attendance by or on behalf of the applicant.
- (4) A person is not entitled to his or her costs of filing a cost assessor's certificate in the Supreme Court.

**Note.** See also rule 36.10 in relation to the filing of cost assessors' certificates.

## **Part 43 Interpleader proceedings**

### **Division 1 Preliminary**

**43.1 Definitions** (cf SCR Part 56, rule 1)

In this Part:

***claimant*** means a person by whom a stakeholder or the Sheriff is being sued, or expects to be sued, in proceedings before a court.

***disputed property*** means any debt or other personal property in respect of which a stakeholder or the Sheriff is being sued, or expects to be sued, by two or more persons in proceedings before a court.

***execution creditor*** means a person on whose behalf a writ of execution is issued.

***notice of admission*** means a notice referred to in rule 43.3 (4).

***notice of claim*** means a notice of claim referred to in rule 43.3 (1).

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*stakeholder* means a person (other than the Sheriff) who is under a liability in respect of a debt or other personal property.

## **Division 2 Stakeholder's interpleader**

### **43.2 Court may grant interpleader on application by stakeholder** (cf SCR Part 56, rules 2, 3 and 4; Act No 9 1973, section 115; DCR Part 42, rule 2; Act No 11 1970, sections 65 and 67)

- (1) If, in relation to disputed property, a stakeholder is sued, or expects to be sued, in any court by two or more claimants, the court may, on application by the stakeholder, grant relief by way of interpleader.
- (2) Such an application is to be made:
  - (a) if, in proceedings in the court, the stakeholder has been sued by a claimant in respect of the disputed property, by motion in the proceedings, or
  - (b) in any other case, by separate proceedings in the court, joining each claimant as a defendant.
- (3) With the application must be filed an affidavit to the effect that the applicant:
  - (a) claims no interest in the subject-matter in dispute other than for charges or costs, and
  - (b) is not in collusion with any claimant, and
  - (c) is willing to pay or transfer the subject-matter in dispute into court or, if the court so requires, to give security to the value of the subject-matter to the satisfaction of the court.
- (4) A stakeholder applying under subrule (2) (a) must serve notice of motion:
  - (a) on each party to the proceedings who claims an interest in the disputed property, and
  - (b) on each claimant who is not a party to the proceedings.
- (5) In relation to a claimant referred to in subrule (4) (b), the notice of motion must be served personally.

## **Division 3 Sheriff's interpleader**

### **43.3 Notice of claim by claimant** (cf SCR Part 56, rule 5; Act No 9 1973, section 116; Act No 11 1970, sections 65 and 66)

- (1) If the Sheriff takes or intends to take possession of any disputed property under a writ of execution, a claimant in respect of the property, or the proceeds of sale or value of the property, may give notice of his or her claim to the Sheriff.



- (2) A notice of claim:
  - (a) must specify the claim, and
  - (b) must state the claimant's name and residential address, and
  - (c) must state the claimant's address for service, and
  - (d) must be accompanied by a copy of the notice.
- (3) On receiving a notice of claim, the Sheriff must serve the notice on the execution creditor.
- (4) The execution creditor may serve on the Sheriff a notice to the effect that the execution creditor admits the claim set out in a notice of claim.

**43.4 Sheriff may apply for claimant's proceedings to be restrained or stayed**

(cf SCR Part 56, rules 5 and 6; Act No 9 1973, section 116; Act No 11 1970, section 67)

- (1) This rule applies if a claimant does not give a notice of claim within a reasonable time after becoming aware that the Sheriff has taken or intends to take possession of the disputed property.
- (2) On application by the Sheriff, the court may restrain the claimant from commencing or continuing proceedings against the Sheriff in respect of anything done, or omitted to be done, by the Sheriff in execution of any writ of execution after the time when the claimant might reasonably have given a notice of claim.
- (3) The Sheriff may apply for an order under this rule:
  - (a) if proceedings referred to in subrule (2) have been commenced against the Sheriff in the court, by motion in those proceedings, or
  - (b) in any other case, by motion in the proceedings in which the writ of execution was issued.
- (4) Notice of an application under this rule must be served personally on the claimant.

**43.5 Admission of claim** (cf SCR Part 56, rule 7; DCR Part 42, rule 1)

- (1) This rule applies if an execution creditor serves a notice of admission on the Sheriff with respect to any disputed property.
- (2) On receiving such a notice, the Sheriff must withdraw from possession of the disputed property.
- (3) On the application of the Sheriff, the court may make an order restraining the claimant from commencing or continuing proceedings in any court against the Sheriff in respect of anything done, or omitted to be done, by the Sheriff in execution of the writ of execution in relation to the disputed property.

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- (4) The Sheriff may apply for an order under this rule:
    - (a) if proceedings referred to in subrule (3) have been commenced against the Sheriff in the court, by motion in those proceedings, or
    - (b) in any other case, by motion in the proceedings in which the writ of execution was issued.
  - (5) Notice of an application under this rule must be served personally on the claimant.

**43.6 Interpleader motion** (cf SCR Part 56, rule 8; LCR Part 32, rules 2 and 3)

- (1) If an execution creditor on whom a notice of claim is served does not, within 4 days after service of the notice, serve a notice of admission on the Sheriff, and the claim is not withdrawn, the court may make an order granting relief by way of interpleader.
- (2) The Sheriff may apply for such an order by motion in the proceedings in which the writ of execution was issued.
- (3) Notice of an application under this rule must be served:
  - (a) on each party to the proceedings who claims an interest in the disputed property, and
  - (b) on each claimant who is not a party to the proceedings.
- (4) Service on a claimant referred to in subrule (3) (b) must be effected personally.

**Division 4 General**

**43.7 Powers generally** (cf SCR Part 56, rule 9; DCR Part 42, rule 4)

- (1) On application under Division 2 or 3 for relief by way of interpleader, the court may make such orders and directions as it thinks fit for the hearing and determination of all matters in dispute.
- (2) Without limiting subrule (1), the court may do any of the following:
  - (a) if proceedings in the court are pending in which the applicant is sued for or in respect of any of the disputed property, it may order that any claimant be added as a defendant in those proceedings in addition to or in substitution for the applicant, or order that those proceedings be stayed or dismissed,
  - (b) if proceedings in any other court are pending in which the applicant is sued for or in respect of any of the disputed property, it may order that further continuance of those proceedings be stayed,

- (c) it may order the applicant to pay or transfer any or all of the disputed property into court or otherwise to dispose of any or all of the disputed property,
  - (d) if a claimant claims to be entitled by way of security for debt to any or all of the disputed property, it may make orders for the sale of any or all of the disputed property and for the application of the proceeds of sale,
  - (e) on request by any party, it may summarily determine any or all questions of fact or law in which the requesting party is interested arising on the application,
  - (f) it may make orders for the settlement and trial of questions,
  - (g) it may make such other order, or give such other judgment, as the nature of the case requires.
- (3) A stay granted under subrule (2) (b) may be revoked by the court by which it was granted or by the court in which the stayed proceedings are pending.

**43.8 Default by claimant** (cf SCR Part 56, rule 10; DCR Part 42, rule 5; Act No 11 1970, section 67)

- (1) If a claimant:
- (a) has been given due notice of the hearing of an application for relief by way of interpleader and does not appear at the hearing, or
  - (b) does not comply with an order made in the proceedings on such an application,
- the court may order that the claimant, and those claiming under the claimant, be barred from prosecuting the claim against the applicant and those claiming under the applicant.
- (2) An order under subrule (1) does not affect the rights of the claimants as between themselves.

**43.9 Neutrality of applicant** (cf SCR Part 56, rule 11)

- (1) If a stakeholder applies for relief by way of interpleader, the court may dismiss the application or give judgment against the applicant unless the court is satisfied that the applicant:
- (a) claims no interest in the disputed property, except for charges or costs, and
  - (b) is not in collusion with any claimant.
- (2) If the Sheriff applies for relief by way of interpleader, the court:

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- (a) may require the Sheriff to satisfy the court as to the matters referred to in subrule (1), and
  - (b) if not satisfied on those matters, may dismiss the application.
  - (3) Nothing in this rule affects the power of the court in other cases to dismiss the application or to give judgment against the applicant.

**43.10 Order in multiple proceedings** (cf SCR Part 56, rule 12)

- (1) If an application for relief by way of interpleader is made, and multiple proceedings are pending in the court for or in respect of any or all of the disputed property, the court may make an order in any two or more of those proceedings.
- (2) An order under subrule (1) is binding on all of the parties to all of the proceedings in which it is made.

**43.11 Trial of questions arising in proceedings for interpleader** (cf SCR Part 56, rule 13)

- (1) Subject to any order or direction of the court, the provisions of Part 6 of the *Civil Procedure Act 2005* and of this Part, with any necessary modifications, extend to the trial of any question that the court directs to be tried in any proceedings for relief by way of interpleader.
- (2) The court before which a question is tried as referred to in subrule (1) may make such order, or give such judgment, as the case requires, including an order or judgment finally disposing of all questions arising in the proceedings.

## **Part 44 Transfer of proceedings**

### **Division 1 Transfers under Part 9 of the Civil Procedure Act 2005**

**44.1 Transfer of proceedings between Local Courts** (cf LCR Part 3, rule 4)

- (1) In this rule, *appropriate Local Court*, in relation to proceedings in a Local Court, means the Local Court held nearest to any of the following places:
  - (a) the place where the defendant is resident,
  - (b) the place where the defendant was resident at the time the cause of action in the proceedings arose,
  - (c) the place where the defendant has his or her place of business,
  - (d) the place where the defendant had his or her place of business at the time the cause of action in the proceedings arose,

- (e) the place where the defendant has his or her place of employment,
  - (f) the place where the defendant had his or her place of employment at the time the cause of action in the proceedings arose,
  - (g) the place where the cause of action in the proceedings arose.
- (2) A defendant in proceedings before a Local Court that is not an appropriate Local Court (the **current Local Court**) may apply to the current Local Court for the proceedings to be transferred to an appropriate Local Court.
- (3) Such an application:
- (a) must be supported by an affidavit:
    - (i) identifying each of the relevant places referred to in subrule (1) (a)–(g) and the appropriate Local Court in respect of that place, and
    - (ii) specifying one of the appropriate Local Courts as the Local Court at which the defendant prefers the proceedings to be heard (the **defendant's preferred Local Court**), and
  - (b) must be filed in the current Local Court at the same time as the defence is filed or within such further time as the current Local Court may allow.
- (4) Within 14 days after service of the defendant's application, any party may file in the current Local Court:
- (a) a notice specifying one of the other appropriate Local Courts identified in the application as the Local Court at which the plaintiff prefers the proceedings to be heard, or
  - (b) a notice opposing the application for reasons set out in the notice.
- (5) If within the time allowed by subrule (4) no party files a notice opposing the defendant's application, the proceedings are taken to have been transferred from the current Local Court to the defendant's preferred Local Court.
- (6) If within the time allowed by subrule (4) each party (other than the defendant who has applied for the transfer) files a notice under subrule (4) (a) specifying the same Local Court, the proceedings are taken to have been transferred from the current Local Court to the Local Court so specified.
- (7) If different parties file notices under subrule (4) (a) specifying different Local Courts, or if any party files a notice under subrule (4) (b), the registrar of the current Local Court must determine the defendant's application for the transfer of proceedings:
- (a) by refusing the application, or

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- (b) by directing that the proceedings be transferred to such Local Court (whether or not an appropriate Local Court) as it thinks fit, or
  - (c) by referring the matter for determination by the court.
- (8) Unless the court orders otherwise, proceedings on the application as a consequence of the filing of a notice under subrule (7) (c) are to be heard in the absence of the public.

## **Division 2 Cross-vesting laws**

### **44.2 Definitions** (cf SCR Part 74, rule 4)

- (1) In this Division, a ***cross-vesting Act*** means the *Jurisdiction of Courts (Cross-vesting) Act 1987* or the *Jurisdiction of Courts (Cross-vesting) Act 1987* of the Commonwealth.
- (2) Expressions used in this Division have, in relation to proceedings under a cross-vesting Act, the same meaning as in that Act.
- (3) In this Division, a reference to a provision of a cross-vesting Act is a reference to a provision of the *Jurisdiction of Courts (Cross-vesting) Act 1987*, and extends to the corresponding provision of the *Jurisdiction of Courts (Cross-vesting) Act 1987* of the Commonwealth.

### **44.3 Mode of application** (cf SCR Part 74, rule 5)

Any application for an order under any provision (except section 8) of the relevant cross-vesting Act is to be made by motion in the proceedings pending in the Supreme Court.

### **44.4 Attorney-General** (cf SCR Part 74, rule 7)

If an application for the transfer of proceedings pending in the Supreme Court is made by the Attorney-General of the Commonwealth, or of a State or Territory under the relevant cross-vesting Act, the Attorney-General does not, by reason of the application, become a party to those proceedings.

### **44.5 Application relating to transfer** (cf SCR Part 74, rule 8)

If a party to any proceedings in the Supreme Court intends to contend that:

- (a) the Court should exercise jurisdiction pursuant to any provision of a cross-vesting Act or of any other law of the Commonwealth or a State relating to cross-vesting of jurisdiction, or
- (b) that the Court should transfer the proceedings to another Court pursuant to any such provision,

the party must, on or as soon as practicable after commencement of the proceedings, apply to the Court for a determination of the question whether or not the proceedings should be transferred to another Court.

**44.6 Application of other laws or rules** (cf SCR Part 74, rule 9)

- (1) Where a party wishes to contend that the Supreme Court should, under section 11 (1) (b) or (c) of the relevant cross-vesting Act, apply the written law of another State or Territory or the rules of evidence or procedure other than those applied in New South Wales, the party must, as soon as practicable:
  - (a) file notice of the contention, specifying the law or rules and stating the grounds relied upon in support of the contention, and
  - (b) forthwith after filing the notice, serve it on each other party.
- (2) The Supreme Court may, on the application of a party to the proceedings or of its own motion, give directions in relation to the application of a law or rule under section 11 (1) (b) or (c) of the relevant cross-vesting Act.

**Division 3 Transfers under other legislation**

**44.7 Proceedings after transfer etc to the Court** (cf SCR Part 74, rule 1)

- (1) Subject to any order of the Supreme Court, proceedings that are transferred, removed or remitted to the Supreme Court from any other court are to be assigned to the Division and list to which they would have been assigned had they been commenced in the Supreme Court.
- (2) If proceedings are transferred, removed or remitted by agreement, pursuant to an Act that allows proceedings to be transferred, removed or remitted by agreement, the parties must reduce the agreement to writing and the agreement is to be included in the record of the proceedings.

**44.8 Directions and service of order** (cf SCR Part 74, rule 3)

If the Supreme Court makes an order under any Act (other than an order under Part 9 of the *Civil Procedure Act 2005*) for proceedings in another court to be transferred, removed or remitted to the Supreme Court, the registrar of the Supreme Court must serve a sealed copy of the order on the registrar or other officer having responsibility for the records or process of that other court.

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## **Part 45 Reviews and appeals within the court**

### **Division 1 Matters before master of Supreme Court**

#### **45.1 Reference of proceedings** (cf SCR Part 60, rule 6)

A master of the Supreme Court may, of his or her own motion or on application by a party, refer any proceedings before the master to the Supreme Court.

#### **45.2 Removal of proceedings** (cf SCR Part 60, rule 7)

Before the conclusion of any proceedings before a master, the Supreme Court may, on application by a party, order that the proceedings be removed into the Court.

#### **45.3 Disposal of proceedings referred or removed** (cf SCR Part 60, rule 8)

On the reference or removal of any proceedings to the Supreme Court under this Division, the Court:

- (a) may hear and determine any matter in the proceedings in respect of which the proceedings were before the master, or
- (b) may determine any question arising in the proceedings and remit the proceedings to the master with such directions as the Court thinks fit.

#### **45.4 Right of appeal** (cf SCR Part 60, rule 10)

An appeal lies to the Supreme Court from any decision of a master, except in any case where an appeal lies to the Court of Appeal.

### **Division 2 Matters before a judicial registrar of the District Court**

#### **45.5 Reference of matter to the District Court** (DCR Part 43A, rule 2)

The judicial registrar of the District Court may refer any proceedings before the judicial registrar to the District Court constituted by a Judge.

#### **45.6 Court may order removal of proceedings from judicial registrar** (DCR Part 43A, rule 3)

The District Court constituted by a Judge may, before the conclusion of any proceedings before the judicial registrar (other than proceedings for an interlocutory order), order that the proceedings be removed into the Court as so constituted.



**45.7 Court may dispose of matter referred by or removed from judicial registrar** (DCR Part 43A, rule 4)

If proceedings are referred to the District Court constituted by a Judge under rule 45.5 or removed into the Court under rule 45.6, the Court:

- (a) may hear and determine any matter in the proceedings that was before the judicial registrar, or
- (b) may determine any question arising in the proceedings and remit the proceedings to the judicial registrar with such directions as the Court thinks fit.

**Division 3 Procedures for appeals to court from decisions of master or judicial registrar**

**45.8 Institution of appeal** (cf SCR Part 60, rule 11)

- (1) An appeal from a decision of a master of the Supreme Court under rule 45.4, or an application under section 18FB (2) of the *District Court Act 1973* for the varying or setting aside of a judgment or order of the judicial registrar (also referred to in this Division as an *appeal*), is to be instituted by filing a notice of motion.
- (2) The appeal must be instituted within 28 days after the material date.
- (3) The master or judicial registrar may extend time under subrule (2) within 28 days after the material date, or on a notice of motion filed within 28 days after the material date, and not otherwise.
- (4) The court may extend time under subrule (2) at any time.
- (5) For the purposes of this rule the *material date* is:
  - (a) in the case of an appeal from a judgment, the date on which the judgment was given, or
  - (b) in the case of an appeal from an order, the date of the order, or
  - (c) in any other case, the date of the decision under appeal.

**45.9 Contents of notice of motion for appeal** (cf SCR Part 60, rule 12)

A notice of motion filed under this Division must state the following:

- (a) whether the appeal is from the whole or part only, and what part, of the decision,
- (b) briefly, but specifically, the grounds relied on in support of the appeal,
- (c) what judgment, order or determination is sought in place of the decision.

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**45.10 Stay and reinstatement** (cf SCR Part 60, rule 14)

- (1) An appeal under this Division:
  - (a) does not operate as a stay of execution or stay of proceedings under the decision of the master or judicial registrar, and
  - (b) does not invalidate any intermediate act or proceedings, except so far as the court (or, subject to any direction of the court, the master or judicial registrar) may direct.
- (2) If any step has been taken for the enforcement of a judgment or order and the court varies or sets aside the judgment or order on appeal under this Division, the court may make such orders for reinstatement as the court thinks fit.

**45.11 Cross-appeal** (cf SCR Part 60, rule 14A)

- (1) Any party to proceedings the subject of an appeal under this Division may institute a cross-appeal by filing a notice of motion in the proceedings.
- (2) The notice of motion must be filed within 28 days after service of the notice of appeal.
- (3) Subject to this rule, the provisions of this Division with respect to a notice of appeal apply to a notice of cross-appeal.

**45.12 Evidence** (cf SCR Part 60, rule 15)

- (1) Oral evidence may not be adduced on an appeal under this Division except by leave of the court.
- (2) A party who proposes to adduce further evidence on an appeal:
  - (a) if the evidence is to be by affidavit, must serve on each other party a copy of the affidavit, or
  - (b) if the evidence is to be adduced orally, must serve on each other party a statement of the general nature of the evidence, not more than 7 days after the date of institution of the appeal.

**45.13 Notice of contention** (cf SCR Part 60, rule 15A)

A party to an appeal under this Division who wishes to contend that a decision should be affirmed on grounds other than those relied on by the master or judicial registrar, but does not seek a discharge or variation of any part of the decision:

- (a) must file notice of that contention, stating briefly but specifically the grounds relied on in support of the contention, and

- (b) must serve the notice referred to in paragraph (a) on each other party to the appeal,  
within 28 days after being served with the notice of motion instituting the appeal.

#### **Division 4 Review of decisions of registrar (other than judicial registrar)**

##### **45.14 Application of Division**

This Division does not apply to in respect of the judicial registrar of the District Court.

##### **45.15 Mandatory order to registrar** (cf DCR Part 43, rule 11)

- (1) The court, of its own motion or on application by a party, may, by order, direct a registrar or any other officer of the court to do or refrain from doing, in any proceedings, any act relating to the duties of his or her office.
- (2) A party who applies for such an order must give such notice to the officer concerned as is reasonable in the circumstances.

##### **45.16 Reference of proceedings** (cf DCR Part 43, rule 12)

A registrar, of his or her own motion or on application by a party, may refer any proceedings before the registrar to the court.

##### **45.17 Removal of proceedings** (cf DCR Part 43, rule 13)

Before the conclusion of any proceedings before a registrar, the court may, on application by a party, order that the proceedings be removed into the court.

##### **45.18 Disposal of proceedings referred or removed** (cf DCR Part 43, rule 14)

On the reference or removal of any proceedings to the court under this Division, the court:

- (a) may hear and determine any matter in the proceedings in respect of which the proceedings were before the registrar, or
- (b) may determine any question arising in the proceedings and remit the proceedings to the registrar with such directions as the court thinks fit.

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**45.19 Review of registrar's directions, orders and acts** (cf DCR Part 43, rule 15)

If a registrar gives a direction or makes an order or does any other act in any proceedings, the court may, on application by any party, review the direction, order or act and make such order, by way of confirmation, variation, discharge or otherwise, as the court thinks fit.

**Division 5 Procedures for applications for review of decisions of registrar (other than judicial registrar)**

**45.20 Applications generally** (cf SCR Part 60, rule 11)

- (1) An application for review of a decision of a registrar is to be instituted by filing a notice of motion.
- (2) The appeal must be instituted within 28 days after the material date.
- (3) The registrar may extend time under subrule (2) within 28 days after the material date, or on a notice of motion filed within 28 days after the material date, and not otherwise.
- (4) The court may extend time under subrule (2) at any time.
- (5) For the purposes of this rule the *material date* is:
  - (a) in the case of an appeal from a judgment, the date on which the judgment was given, or
  - (b) in the case of an appeal from an order, the date of the order, or
  - (c) in any other case, the date of the decision under appeal.

**45.21 Contents of notice of motion for appeal** (cf SCR Part 60, rule 12)

A notice of motion filed under this Division must state the following:

- (a) whether the application relates to the whole or part only, and what part, of the decision,
- (b) briefly, but specifically, the grounds relied on in support of the application,
- (c) what judgment, order or determination is sought in place of the decision.

**45.22 Stay and reinstatement** (cf SCR Part 60, rule 14)

- (1) An application under this Division:
  - (a) does not operate as a stay of execution or stay of proceedings under the decision of the registrar, and
  - (b) does not invalidate any intermediate act or proceedings,

except so far as the court (or, subject to any direction of the court, the registrar) may direct.

- (2) If any step has been taken for the enforcement of a judgment or order and the court varies or sets aside the judgment or order on appeal under this Division, the court may make such orders for reinstatement as the court thinks fit.

**45.23 Evidence** (cf SCR Part 60, rule 15)

- (1) Oral evidence may not be adduced on an application under this Division except by leave of the court.
- (2) A party who proposes to adduce further evidence on an application:
  - (a) if the evidence is to be by affidavit, must serve on each other party a copy of the affidavit, or
  - (b) if the evidence is to be adduced orally, must serve on each other party a statement of the general nature of the evidence, not more than 7 days after the date of institution of the application.

**45.24 Notice of contention** (cf SCR Part 60, rule 15A)

A party to an application under this Division who wishes to contend that a decision should be affirmed on grounds other than those relied on by the registrar, but does not seek a discharge or variation of any part of the decision:

- (a) must file notice of that contention, stating briefly but specifically the grounds relied on in support of the contention, and
- (b) must serve the notice referred to in paragraph (a) on each other party to the application,

within 28 days after being served with the notice of motion instituting the application.

## **Part 46 Appeals to the court**

### **Division 1 Preliminary**

**46.1 Application** (cf SCR Part 51A, rule 1)

Subject to any Act, this Part applies to any appeal, other than:

- (a) an appeal to the Supreme Court that, under the *Supreme Court Act 1970*, is assigned to the Court of Appeal, or
- (b) an appeal to the Supreme Court under Part 5 of the *Crimes (Local Courts Appeal and Review) Act 2001*, or

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- (c) an appeal to the Supreme Court to which the provisions of Part 80A rule 32 (1) of the *Supreme Court Rules 1970* or rule 14.1 of the *Supreme Court (Corporations) Rules 1999* apply.

**46.2 Definitions** (cf SCR Part 51A, rule 2)

In this Part:

***court below***, in relation to an appeal, means the court in which, or the person or body by whom, the decision to which the appeal relates was made.

***decision*** includes a judgment, order, opinion, direction or determination.

***higher court***, in relation to an appeal, means the court to which the appeal is made.

***material date***, in relation to an appeal, means:

- (a) if the appeal is from the decision of a court, the date on which the decision is pronounced or given, and
- (b) if the appeal is from any other person or body, the date on which notice of the decision was given, by or on behalf of the person or body who made the decision, to the person who wishes to appeal.

**Note.** See the definition of ***court*** in section 3 (1) of the *Civil Procedure Act 2005*.

**Division 2 Appeals**

**46.3 Time for appeal** (cf SCR Part 51A, rule 3)

- (1) Subject to any Act, a summons commencing an appeal must be filed:
  - (a) within 28 days after the material date, or
  - (b) if the appeal relates to the decision of a judicial officer, within such further time as the judicial officer may allow so long as the application for such further time is filed within 28 days after the material date, or
  - (c) within such further time as the higher court may allow.
- (2) An application for an extension of time under subrule (1) (c) must form part of the summons commencing the appeal.

**46.4 Statement of ground** (cf SCR Part 51A, rule 5)

A summons commencing an appeal must state:

- (a) whether the appeal relates to the whole or part only, and what part, of the decision of the court below, and
- (b) briefly, but specifically, the grounds relied on in support of the appeal including, in particular, any grounds on which it is

contended that there is an error of law in the decision of the court below, and

- (c) what decision the plaintiff seeks in place of the decision of the court below.

**46.5 Parties** (cf SCR Part 51A, rule 6)

- (1) Each person who is directly affected by the relief sought in the appeal or is interested in maintaining the decision under appeal must be joined as a defendant.
- (2) If the court below is a person or body that is not a court, the person or body must be joined as a defendant.
- (3) The court may order the addition or removal of any person as a party to an appeal.
- (4) A person must not be made a plaintiff in the appeal without his or her consent.

**46.6 Filing with court below** (cf SCR Part 51A, rule 7)

If the court below is a court, the plaintiff must, on the date of instituting the appeal, file a copy of the summons commencing the appeal in the registry or office of that court.

**46.7 Stay** (cf SCR Part 51A, rule 8)

An appeal to the court:

- (a) does not operate as a stay of proceedings under the decision of the court below, and
- (b) does not invalidate any intermediate act or proceedings, except so far as the court (or, subject to any direction of the court, the court below) may direct.

**46.8 Security for costs** (cf SCR Part 51A, rule 9)

- (1) In special circumstances, the court may order that such security as the court thinks fit be given of the costs of an appeal to the court.
- (2) Subject to subrule (1), no security for the costs of an appeal to the court is to be required.
- (3) Subrules (1) and (2) do not affect the powers of the court under rule 42.21 (which relates to security for costs).

**46.9 Date of hearing of appeal** (cf SCR Part 51A, rule 10)

Unless the court orders otherwise, an appeal must not be heard before 21 days after service of the summons commencing the appeal.

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### **Division 3 Cross-appeals**

#### **46.10 Cross-appeal** (cf SCR Part 51A, rule 12)

- (1) If a defendant to an appeal wishes to appeal from the whole or part of a decision, that defendant must file a cross-summons.
- (2) The defendant must file the cross-summons:
  - (a) within 28 days after service of the summons commencing the appeal on the defendant, or
  - (b) if the appeal relates to the decision of a judicial officer, within such further time as the judicial officer may allow so long as the application for such further time is filed within 28 days after service of the summons commencing the appeal on the defendant, or
  - (c) within such further time as the higher court may allow.
- (3) An application for an extension of time under subrule (2) (c) must form part of the cross-summons.
- (4) Subject to subrules (1), (2) and (3), Division 2 applies to the cross-appeal and cross-summons.

#### **46.11 Notice of contention** (cf SCR Part 51A, rule 13)

- (1) This rule applies if the defendant wishes to contend that the decision of the court below should be affirmed on grounds other than those relied on by the court below, but does not seek a discharge or variation of any part of that decision.
- (2) In the circumstances referred to in subrule (1), the defendant need not file a cross-summons but must instead file notice of that contention, stating, briefly but specifically, the grounds relied on in support of the contention.
- (3) The notice referred to in subrule (2) must be filed and served:
  - (a) within 14 days after service of the summons commencing the appeal on the defendant, or
  - (b) within such further time as the higher court may allow.

### **Division 4 Applications for leave to appeal and cross-appeal**

#### **46.12 Leave to appeal** (cf SCR Part 51A, rule 2A)

- (1) A summons seeking leave to appeal must be filed:
  - (a) within 28 days after the material date, or



- (b) if the appeal relates to the decision of a judicial officer, within such further time as the judicial officer may allow so long as the application for such further time is filed within 28 days after the material date, or
  - (c) within such further time as the higher court may allow.
- (2) An application for an extension of time under subrule (1) (c) must form part of the summons seeking leave to appeal.
- (3) The plaintiff must file and serve with, or subscribe to, the summons a statement of:
  - (a) the nature of the case, and
  - (b) the reasons why leave should be given, and
  - (c) if applicable, the reasons why time to apply for leave should be extended, and
  - (d) in respect of the proposed appeal:
    - (i) whether the appeal relates to the whole or part only, and what part, of the decision of the court below, and
    - (ii) briefly, but specifically, the grounds relied on in support of the appeal including, in particular, any grounds on which it is contended that there is an error of law in the decision of the court below, and
    - (iii) what decision the plaintiff seeks in place of the decision of the court below.

**46.13 Leave to cross-appeal** (cf SCR Part 51A, rule 2A)

- (1) A cross-summons seeking leave to cross-appeal must be filed:
  - (a) within 14 days after service of the summons commencing the appeal or the summons seeking leave to appeal, or
  - (b) within such further time as the higher court may allow.
- (2) An application for an extension of time under subrule (1) (b) must form part of the summons commencing the appeal.
- (3) The defendant must file and serve with, or subscribe to, the cross-summons a statement of:
  - (a) the nature of the case, and
  - (b) the reasons why leave should be given, and
  - (c) if applicable, the reasons why time to apply for leave should be extended, and
  - (d) in respect of the proposed cross-appeal:

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- (i) whether the cross-appeal relates to the whole or part only, and what part, of the decision of the court below, and
  - (ii) briefly, but specifically, the grounds relied on in support of the cross-appeal including, in particular, any grounds on which it is contended that there is an error of law in the decision of the court below, and
  - (iii) what decision the defendant seeks in place of the decision of the court below.

## **Division 5      General**

### **46.14    Reasons for decision, transcript and other parts of the record of the court below**

- (1) Unless the court otherwise orders, the plaintiff must prepare, file and serve on each defendant, not later than 3 days before the date fixed for the hearing of the summons, an affidavit to be relied on at the appeal or application for leave to appeal that annexes or exhibits:
  - (a) a copy of the reasons for the decision of the court below, unless the court below has not given, and does not intend to give, written reasons, and
  - (b) a copy of the transcript of the proceedings in the court below, unless a transcript cannot be obtained in respect of proceedings of that type, and
  - (c) a copy of any exhibit, affidavit or other document from the proceedings in the court below that the plaintiff wishes to be considered at the hearing of the appeal or proposed appeal.
- (2) The defendant may prepare an affidavit to be relied on at the appeal, cross-appeal or application for leave to appeal or cross-appeal any exhibit, affidavit or other document from the proceedings in the court below that the defendant wishes to be considered at the hearing of the appeal, cross-appeal or application for leave to appeal or cross-appeal in addition to any exhibit, affidavit or other document referred to in subrule (1) (c).
- (3) The higher court may make further directions for the filing and service of an affidavit under subrule (1) or (2) and for the lodging and service of any exhibits to such an affidavit.

### **46.15    Directions for service** (cf SCR Part 51A, rule 6A)

- (1) If the court makes an order granting an extension of time for applying for leave to appeal or cross-appeal, the court:
  - (a) may hear the application for leave on the documents already filed without requiring a summons for the application, or

- (b) may give directions for the filing of such additional documents, and for the service of such documents (including documents already filed), as it thinks fit.
- (2) If the court makes an order granting leave to appeal or cross-appeal, the court:
  - (a) may hear the appeal or cross-appeal on the documents already filed without requiring a summons or cross-summons for the appeal or cross-appeal, or
  - (b) may give directions for the filing of such additional documents, and for the service of such documents (including documents already filed), as it thinks fit.

**46.16 Conduct of appeal**

- (1) If the decision under appeal has been given after a hearing, the appeal is to be by way of rehearing.
- (2) The higher court has the powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning:
  - (a) amendment, and
  - (b) the drawing of inferences and the making of findings of fact, and
  - (c) the assessment of damages and other money sums.
- (3) The higher court may receive further evidence.
- (4) Despite subrule (3), where the appeal is from a judgment after a trial or hearing on the merits, the higher court may not receive further evidence except on special grounds.
- (5) Subrule (4) does not apply to evidence concerning matters occurring after the trial or hearing.
- (6) The higher court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made.

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## Schedule 1 Application of rules

(Rules 1.5 and 1.6)

Column 1	Column 2	Column 3	Column 4
Court	Kinds of civil proceedings	Excluded provisions of Civil Procedure Act 2005	Excluded provisions of rules
Supreme Court	All civil proceedings		
District Court	All civil proceedings		
Dust Diseases Tribunal	All civil proceedings	Part 6, Division 5 Part 9	Part 15, Division 3
Local Court	Civil proceedings under Part 7 of the <i>Local Courts Act 1970</i> that are held before a Local Court sitting in its General Division		
	Proceedings under Part 7 of the <i>Local Courts Act 1970</i> that are held before a Local Court sitting in its Small Claims Division	Parts 4 and 5 Sections 60, 70, 87, 92, 98 and 130 Division 5 of Part 6	Part 5 Rule 6.13 (b) Part 7, Divisions 2, 3, 4 and 6 Part 11 Part 13 Rules 14.4 and 14.5 Rules 15.7 and 15.8 Part 15, Division 2 Rule 16.4 Part 18, except in relation to an application under rule 23.8, 36.15, 36.16 or 43.6 Part 20, Divisions 1, 2, 3 and 4 Parts 21 and 22 Part 23, Divisions 1 and 2 Parts 24, 25, 26 and 27 Rules 29.7 and 29.9

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>	<b>Column 4</b>
<b>Court</b>	<b>Kinds of civil proceedings</b>	<b>Excluded provisions of Civil Procedure Act 2005</b>	<b>Excluded provisions of rules</b>
			Parts 31, 32 and 33 Rules 36.8, 36.15 and 36.16 Part 39, Division 2 Parts 40 and 41 Parts 44, 45 and 46

## **Schedule 2 Local rules that prevail over these rules**

(Rule 1.7)

### **Supreme Court Rules 1970**

<b>Part</b>	<b>Provision</b>
Part 83 (Admiralty List)	All rules in that Part

### **Supreme Court (Corporations) Rules 1999**

<b>Division</b>	<b>Provision</b>
All Divisions	All rules in those Divisions

### **District Court Rules 1973**

<b>Part</b>	<b>Provision</b>
Part 24D (Coal Miners' Workers Compensation List)	Rules 15, 17, 18, 20 and 30
Part 24F (Special Statutory Compensation List)	Rule 4
Part 39B (Costs in Coal Miners' Workers Compensation List and Special Statutory Compensation List matters)	All rules in that Part

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### Schedule 3 Fees and other prescribed amounts

(Rule 1.14)

Item	Matter for which fee payable	Fee payable
1	Rule 1.15 (Fees chargeable under section 28 of the <i>Oaths Act 1900</i> by a person authorised under section 27 (2) of that Act)	
	(a) for taking an oath at the office of the authorised person	\$4.00
	(b) for taking an oath anywhere less than 5 kilometres from the office of the authorised person	\$4.90
	(c) for taking an oath anywhere 5 kilometres or more from the office of the authorised person	\$18.90
	(d) for marking an annexure or exhibit	\$1.60
	(e) for attesting a document	\$4.00
2	Rule 31.20 (Fee for witness subpoenaed but not called to testify)	\$214.00
3	Rule 31.22 (Fee for production of medical records)	\$36.00
4	Rule 39.42 (Amounts garnishee may retain)	
	(a) to cover expenses of a garnishee order in relation to debts	\$13.00
	(b) to cover expenses of a garnishee order (other than a limited garnishee order) in relation to income	\$13.00
	(c) to cover expenses of a limited garnishee order in relation to income	Nil
	In this item, <i>limited garnishee order</i> means a garnishee order in respect of a judgment that is the subject of an instalment order.	

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### Schedule 4 Documents to be filed by means of ECM system

(Rule 3.4)

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## Schedule 5 Interest rates

(Rules 6.12, 26.6 and 36.7)

Column 1 Period	Column 2 Interest rate (per cent per year)
the beginning of 1 July 1972 to the end of 31 December 1973	5
the beginning of 1 January 1974 to the end of 31 December 1980	10
the beginning of 1 January 1981 to the end of 30 June 1981	13.5
the beginning of 1 July 1981 to the end of 30 June 1982	14.5
the beginning of 1 July 1982 to the end of 31 December 1983	15.5
the beginning of 1 January 1984 to the end of 31 December 1985	14.5
the beginning of 1 January 1986 to the end of 30 June 1986	18.25
the beginning of 1 July 1986 to the end of 31 October 1987	19.5
the beginning of 1 November 1987 to the end of 29 February 1988	18
the beginning of 1 March 1988 to the end of 28 February 1989	15
the beginning of 1 March 1989 to the end of 31 August 1989	17
the beginning of 1 September 1989 to the end of 31 August 1990	21
the beginning of 1 September 1990 to the end of 28 February 1991	19
the beginning of 1 March 1991 to the end of 31 August 1991	17
the beginning of 1 September 1991 to the end of 28 February 1992	15
the beginning of 29 February 1992 to the end of 31 August 1992	13
the beginning of 1 September 1992 to the end of 31 August 1993	11.25
the beginning of 1 September 1993 to the end of 28 February 1995	10.5
the beginning of 1 March 1995 to the end of 28 February 1997	12
the beginning of 1 March 1997 to the end of 31 August 1997	10.5
the beginning of 1 September 1997 to the end of 31 August 1998	10
the beginning of 1 September 1998 to the end of 29 February 2000	9.5
the beginning of 1 March 2000 to the end of 31 August 2000	10

<b>Column 1</b>	<b>Column 2</b>
<b>Period</b>	<b>Interest rate (per cent per year)</b>
the beginning of 1 September 2000 to the end of 31 August 2001	11
the beginning of 1 September 2001 to the end of 28 February 2002	10
after 28 February 2002	9

## **Schedule 6      Proceedings in respect of which originating process may be served outside Australia** (cf SCR Part 10, rule 1A)

(Rule 11.2)

Originating process may be served outside Australia in relation to the following proceedings:

- (a) if the proceedings are founded on a cause of action arising in New South Wales,
- (b) if the proceedings are founded on a breach in New South Wales of a contract (wherever made), whether or not the breach is preceded or accompanied by a breach (wherever occurring) that renders impossible the performance of any part of the contract which ought to be performed in New South Wales,
- (c) if the subject-matter of the proceedings is a contract and the contract:
  - (i) is made in New South Wales, or
  - (ii) is made on behalf of the person to be served by or through an agent carrying on business or residing in New South Wales, or
  - (iii) is governed by the law of New South Wales, or
  - (iv) is one a breach of which was committed in New South Wales,
- (d) if the proceedings are founded on a tort committed in New South Wales,
- (e) if the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in New South Wales caused by a tortious act or omission wherever occurring,
- (f) if the proceedings are for contribution or indemnity in respect of a liability enforceable by proceedings in the court,
- (g) if the person to be served is domiciled or ordinarily resident in New South Wales,



- (h) if the proceedings are proceedings in respect of which the person to be served has submitted or agreed to submit to the jurisdiction of the court,
- (i) if the proceedings are properly commenced against a person served or to be served in New South Wales and the person to be served outside New South Wales is properly joined as a party to the proceedings,
- (j) if the subject-matter of the proceedings, so far as concerns the person to be served, is property in New South Wales,
- (k) if the proceedings are for the perpetuation of testimony relating to property in New South Wales,
- (l) if the proceedings concern the construction, effect or enforcement of an Imperial Act or Commonwealth Act, or a regulation or other instrument having or purporting to have effect under such an Act, affecting property in New South Wales,
- (m) if the proceedings are for the construction, rectification, setting aside or enforcement of a deed, will or other instrument or of a contract, obligation or liability, affecting property in New South Wales,
- (n) if the proceedings are for an injunction as to anything to be done in New South Wales or against the doing of any act in New South Wales, whether damages are also sought or not,
- (o) if the proceedings are for the administration of the estate of a person who dies domiciled in New South Wales, or are for relief which might be granted in proceedings for administration of such an estate,
- (p) if the proceedings are for the execution of trusts which are governed by the law of New South Wales, or are for relief which might be granted in proceedings for the execution of such trusts,
- (q) if the proceedings affect the person to be served in respect of his or her membership of a corporation incorporated in New South Wales, or of an association formed or carrying on any part of its affairs in New South Wales,
- (r) if the proceedings concern the construction, effect or enforcement of an Act or a regulation or other instrument having or purporting to have effect under an Act,
- (s) if the proceedings concern the effect or enforcement of an executive, ministerial or administrative act done or purporting to be done under an Act or regulation or other instrument having or purporting to have effect under an Act,
- (t) if the proceedings:
  - (i) relate to an arbitration held in, or governed by the law of, New South Wales, or

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- (ii) are commenced to enforce in New South Wales an arbitral award wherever made, or
  - (iii) are for orders necessary or convenient for carrying into effect in New South Wales the whole or any part of an arbitral award wherever made,
  - (u) if the proceedings are commenced to enforce in New South Wales a judgment wherever given,
  - (v) if the proceedings are for relief relating to the custody, guardianship, protection or welfare of a minor, whether or not the minor is in New South Wales, which relief the court has, apart from service, jurisdiction to grant,
  - (w) if the proceedings, so far as concerns the person to be served, fall partly within one or more of the foregoing paragraphs and, as to the residue, within one or more of the others of the foregoing paragraphs.

## **Schedule 7      Expert witness code of conduct** (cf SCR Schedule K)

(Rules 31.17 and 31.28)

### **1 Application of code**

This code of conduct applies to any expert engaged:

- (a) to provide a report as to his or her opinion for use as evidence in proceedings or proposed proceedings, or
- (b) to give opinion evidence in proceedings or proposed proceedings.

### **2 General duty to the court**

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

### **3 The form of expert reports**

- (1) A report by an expert witness must (in the body of the report or in an annexure) specify the following:
  - (a) the person's qualifications as an expert,
  - (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed),
  - (c) reasons for each opinion expressed,

- (d) if applicable, that a particular question or issue falls outside his or her field of expertise,
  - (e) any literature or other materials utilised in support of the opinions,
  - (f) any examinations, tests or other investigations on which he or she has relied, including details of the qualifications of the person who carried them out.
- (2) If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
  - (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
  - (4) An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) (b), (c), (d), (e) and (f) as is appropriate.
  - (5) If an expert witness is appointed by the court, the preceding paragraph applies as if the court were the engaging party.

#### **4 Experts' conference**

- (1) An expert witness must abide by any direction of the court:
  - (a) to confer with any other expert witness, and
  - (b) to endeavour to reach agreement on material matters for expert opinion, and
  - (c) to provide the court with a joint report, specifying matters agreed and matters not agreed and the reasons for any failure to reach agreement.
- (2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

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## Dictionary

(Rule 1.2)

**active party**, in relation to any proceedings, means a party who has an address for service in the proceedings, other than:

- (a) a party against whom judgment has been entered in the proceedings, or
- (b) a party in respect of whom the proceedings have been dismissed, withdrawn or discontinued,

being, in either case, a party against whom no further claim in the proceedings subsists.

**approved form**, in relation to a document, means the form approved under section 17 of the *Civil Procedure Act 2005* for the purposes of that document.

**authorised DX system** means the document exchange operated by Toll Transport Pty Ltd (ACN 006 604 191) trading as DX Mail.

**business name** means a name, style, title or designation under which a business is conducted (not being the name or names of the persons by whom the business is conducted), and includes such a name, style, title or designation whether or not it is registered under the *Business Names Act 2002* or under Part 3 of the *Partnership Act 1892*.

**cost assessor's certificate** means a certificate under section 208J (3), section 208JA (4), section 208KF (2) (b) or section 208KH (6) of the *Legal Profession Act 1987*.

**document** includes any part of a document and any copy of a document or part of a document.

**DX address**, in relation to a person having a DX box in an authorised DX system, means the address of the DX box.

**DX box** means an exchange box in an authorised DX system.

**hearing** includes trial.

**interest up to judgment** means interest under:

- (a) section 100 of the *Civil Procedure Act 2005*, or
- (b) section 73 of the *Motor Accidents Act 1988*, or
- (c) section 137 of the *Motor Accidents Compensation Act 1999*, or
- (d) section 151M of the *Workers Compensation Act 1987*.

**liquidated claim** includes a claim for interest up to judgment.

**liquidator** includes a provisional liquidator.

**officer of the court** does not include a barrister, solicitor or liquidator.

**Note.** See rule 1.3 for the definitions of **barrister** and **solicitor**.

**opposite party** means defendant (in relation to a plaintiff) and plaintiff (in relation to a defendant).

**order for examination** means an order for examination under section 108 of the *Civil Procedure Act 2005*.

**pleading** includes a statement of claim, defence, reply and any subsequent pleading for which leave is given under Part 14, but does not include a summons or notice of motion.

**principal officer**, in relation to a corporation, means:

- (a) the chairman or president (however described) of the governing body of the corporation, or
- (b) the general manager, chief executive officer or other person (however described) having general management of the affairs of the corporation, or
- (c) the secretary, treasurer or other person (however described) having the general function of accepting correspondence on behalf of the corporation.

**privileged document** means a document that contains privileged information.

**privileged information** means any of the following information:

- (a) information of which evidence could not, by virtue of the operation of Division 1 of Part 3.10 of the *Evidence Act 1995*, be adduced in the proceedings over the objection of any person,
- (b) information that discloses a protected confidence, the contents of a document recording a protected confidence or protected identity information (within the meaning of section 126B of the *Evidence Act 1995*) where:
  - (i) consent by the protected confider (within the meaning of section 126C of that Act) has not been given to disclosure of the confidence, contents or information, and
  - (ii) section 126D of that Act would not operate to stop Division 1A of Part 3.10 of that Act from preventing the adducing of evidence in respect of the confidence, contents or information,
- (c) information of which evidence could not be adduced in the proceedings by virtue of the operation of section 126H of the *Evidence Act 1995*,
- (d) information that tends to prove that a party by whom a document is required to be made available, or by whom an interrogatory is to be answered, under section 128 of the *Evidence Act 1995* or section 87 of the *Civil Procedure Act 2005*:
  - (i) has committed an offence against or arising under an Australian law or a law of a foreign country, or
  - (ii) is liable to pay a civil penalty,
- (e) information the admission or use of which in a proceeding would be contrary to section 129 of the *Evidence Act 1995*,

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- (f) information that relates to matters of state within the meaning of section 130 of the *Evidence Act 1995*,
- (g) information to which section 131 of the *Evidence Act 1995* applies,
- (h) information:
- (i) the disclosure of the contents of which, or
  - (ii) the production of which, or
  - (iii) the admission or use of which,
- in the proceedings would be contrary to any Act (other than the *Evidence Act 1995*) or any Commonwealth Act (other than the *Evidence Act 1995* of the Commonwealth),

but does not include information that the court declares not to be privileged information for the purposes of those proceedings.

***proceeds of enforcement*** of a writ for the levy of property means the proceeds derived from the enforcement of the writ under Division 2 of Part 8 of the *Civil Procedure Act 2005*.

***professional negligence*** means the breach of a duty of care or of a contractual obligation in the performance of professional work or in the provision of professional services by a medical practitioner, an allied health professional (for example, dentist, chemist, physiotherapist), a hospital, a solicitor or a barrister.

***registered business name*** means a business name that is registered under the *Business Names Act 2002* or under Part 3 of the *Partnership Act 1892*.

***registry*** means the registry of the relevant court.

***relief*** includes remedy.

***senior officer***, in relation to a corporation, includes the principal officer of the corporation and any other person who (whether alone or with others) has powers of management, direction or control of the corporation.

***tutor***, in relation to a person under legal incapacity, means a tutor appointed to represent the person (whether by the court or otherwise) in accordance with Division 4 of Part 7.

***unregistered business name*** means a business name that is not registered under the *Business Names Act 2002* or Part 3 of the *Partnership Act 1892*.

***witness statement*** means a statement referred to in rule 31.4.

Civil Procedure Act 2005 No 28

Schedule 7 Uniform Civil Procedure Rules 2005

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**Note.** The following words and expressions are defined in the *Civil Procedure Act 2005*, either for the purposes of that Act generally or for the purposes of particular portions of that Act, and consequently have the same meanings in these rules:

chargee (Part 8)	instalment order (Part 8)	person under legal incapacity
charging order (Part 8)	judgment	plaintiff
civil proceedings	judgment creditor	possession
claim for relief	judgment debt	trial
costs	judgment debtor	tutor
court	judicial officer	uniform rules
criminal proceedings	jurisdictional limit	Uniform Rules Committee
cross-claim	local rules	wage or salary (Part 8)
defendant	minor	workplace injury damages claim
exercise	motor accident claim	writ for the levy of property (Part 8)
financial institution (Part 8)	officer	writ of delivery (Part 8)
function	order for examination (Part 8)	writ of execution (Part 8)
garnishee (Part 8)	ordinary basis	writ of possession (Part 8)
garnishee order (Part 8)	originating process	
goods (Part 8)		
hearing		

[Second reading speech made in—  
Legislative Assembly on 6 April 2005  
Legislative Council on 24 May 2005]

BY AUTHORITY