



New South Wales

CONSULTATION DRAFT BILL

Civil Procedure Bill 2005

January 2005

Consultation draft

Consultation draft



New South Wales

Civil Procedure Bill 2005

Explanatory note

Overview of Bill

Civil procedure (that is, the rules according to which civil proceedings are commenced and carried on) is currently governed by a number of Acts and instruments, including not only the Acts by which various courts are established (and the rules of practice and procedure made under them) but also other Acts and instruments that deal with particular aspects of civil procedure. Different regimes exist for different courts and different subject-matters, the differences frequently being merely an accident of history. Such differences make it difficult for litigants to take advantage of modern computer technology in relation to the creation, filing and service of court process, and make it difficult for courts to take advantage of such technology in relation to case management.

The object of this Bill is to consolidate as much as possible of the law relating to civil procedure, particularly insofar as it affects proceedings in the Supreme Court, the District Court and the Local Courts (the courts in which the majority of civil proceedings are heard). The Bill contains provisions with respect to preparation for trial (Part 3), mediation and arbitration of proceedings (Parts 4 and 5), the conduct of court proceedings (Part 6), judgments and orders (Part 7), enforcement of judgments and orders (Part 8) and transfers of proceedings between courts (Part 9). It also contains provisions relating to administrative matters (Part 2 and Schedules 1, 2 and

Consultation draft

Civil Procedure Bill 2005

Explanatory note

3), repeals, amendments and savings and transitional provisions (Schedules 4, 5 and 6). Finally, it sets out uniform civil procedure rules to replace the core provisions of the *Supreme Court Rules 1970*, the *District Court Rules 1973* and the *Local Courts (Civil Claims) Rules 1970* (Schedule 7).

Part 4 replicates the provisions with respect to mediation that currently exist in the *Supreme Court Act 1970*, the *District Court Act 1973* and the *Local Courts (Civil Claims) Act 1970*, but does not include the provisions with respect to neutral evaluation that accompany the mediation provisions of the latter two Acts.

Part 5 replicates the provisions of the *Arbitration (Civil Actions) Act 1983*, together with the provisions of the *Supreme Court Act 1970*, the *District Court Act 1973* and the *Local Courts (Civil Claims) Act 1970* that invoke that Act.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines various words and expressions that are used in the proposed Act.

Clause 4 and Schedule 1 provide for the application of the proposed Act to different courts and different classes of civil proceedings. Clause 4 provides that Schedule 1 (which specifies various courts and civil proceedings and the provisions of the proposed Act that are to apply to them) may be amended by regulations under the proposed Act.

Clause 5 provides that the proposed Act, and the uniform rules made under the proposed Act, do not limit the jurisdiction of the Supreme Court, and that the uniform rules do not extend the jurisdiction of any court except to the extent to which the proposed Act expressly provides.

Clause 6 is a formal provision that gives effect to **Schedules 4, 5 and 6**. Those Schedules contain repeals, amendments and savings and transitional provisions, respectively.

Clause 7 is a standard provision requiring the proposed Act to be reviewed in 5 years' time.

Part 2 Administrative matters

Division 1 Rules, practice notes and forms

Clause 8 provides for the establishment of a Uniform Rules Committee comprising 10 members, of whom one is to be the Chief Justice, one is to be the President of the Court of Appeal, two are to be Judges of the Supreme Court, one is to be the Chief

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Judge of the District Court, one is to be a Judge of the District Court, one is to be the Chief Magistrate, one is to be a Magistrate, one is to be a practising barrister and one a practising solicitor. **Schedule 2** contains provisions with respect to the constitution and procedure of the Uniform Rules Committee.

Clause 9 enables the Uniform Rules Committee to make uniform rules for the purposes of the proposed Act including, in particular, rules with respect to the matters set out in **Schedule 3**. The clause further provides that the uniform rules set out in **Schedule 7** are taken to have been made under the proposed section, and may be amended and repealed accordingly.

Clause 10 provides that rules of court (that is, rules of practice and procedure made otherwise than under the proposed Act) are taken to include the uniform rules to the extent to which they are applicable in that court.

Clause 11 provides that the uniform rules prevail over any other rules of court unless the uniform rules expressly provide that those other rules are to prevail.

Clause 12 confers power on a court, and any officer of a court, to exercise any function conferred by the uniform rules on the court or officer.

Clause 13 enables the senior judicial officer of a court to direct that a court's functions under the proposed Act and the uniform rules may be exercised by specified officers of the court.

Clause 14 enables a court to dispense with any requirement of rules of court if satisfied that it is appropriate to do so in the circumstances of the case.

Clause 15 enables the senior judicial officer of a court to issue practice notes in relation to any matter for which rules of court may be made. Part 6 of the *Interpretation Act 1987* will apply to any such practice note. A practice note, like the uniform rules, will therefore be disallowable by either House of Parliament.

Clause 16 provides that a court may give directions with respect to any aspect of practice or procedure for which rules of court or practice notes do not provide.

Clause 17 enables the Uniform Rules Committee to approve forms to be used in connection with civil proceedings.

Division 2 Fees

Clause 18 enables the Governor to make regulations with respect to the various fees payable in connection with court proceedings, mediation, arbitration, enforcement of judgments and administrative services.

Part 3 Preparation for trial

Division 1 Commencing and carrying on proceedings

Clause 19 requires civil proceedings to be commenced and carried on in the manner prescribed by rules of court.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Clause 20 replicates a provision of the *Supreme Court Act 1970* that states that a claim for judgment for possession of land takes the place of a claim in an action for ejectment that could have been brought in the Supreme Court before the commencement of that Act.

Clause 21 gives effect to a recommendation of the Law Reform Commission with respect to the set-off of debts (Report 94: Set-off, published in February 2000) to allow the defendant in any proceedings to set off against the plaintiff's claim any debt owed to the defendant by the plaintiff.

Clause 22 enables the defendant in any proceedings to make a cross-claim against the plaintiff or any other person, and provides that any person against whom a cross-claim is made (if not already a party to the proceedings) becomes a party to the proceedings.

Division 2 Abandoning claims and splitting causes of action

Clause 23 enables a party to proceedings to abandon that part of a claim that exceeds the court's jurisdictional limit, so that if the claim is successful the judgment in the proceedings is in full discharge of the claim.

Clause 24 prevents a party to proceedings from overcoming a court's jurisdictional limit by splitting a cause of action into multiple proceedings. It does so by providing that the party cannot obtain judgment in his or her favour in any of those proceedings after the first judgment is given.

Part 4 Mediation of proceedings

Clause 25 defines certain words and expressions for the purposes of the proposed Part.

Clause 26 enables a court to refer proceedings, or any part of proceedings, for mediation.

Clause 27 requires the parties to proceedings that have been referred for mediation to participate in the mediation.

Clause 28 provides for the payment of the costs of mediation in accordance with an order made by the referring court or, in the absence of such an order, in accordance with an agreement by the parties to the mediation.

Clause 29 empowers a court to make orders to give effect to any agreement or arrangement arising from mediation and, for that purpose, to hear evidence as to the fact that any such agreement or arrangement has been reached and as to the substance of any such agreement or arrangement.

Clause 30 confers privilege on matters arising in relation to a mediation session and, with specified exceptions, renders evidence of any such matter inadmissible in any other legal proceedings.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Clause 31 imposes restrictions on the disclosure by a mediator of information obtained by the mediator in connection with the administration or execution of the proposed Part.

Clause 32 empowers a mediator to give directions as to the conduct of a mediation to the parties to the mediation, and to award costs against a party who fails to comply with any such direction.

Clause 33 gives a mediator, in relation to proceedings referred to mediation by a court, the same protection and immunity as a judicial officer of that court.

Clause 34 preserves the rights of parties to proceedings to make arrangements for mediation otherwise than under the proposed Act, such as under the provisions of the *Community Justice Centres Act 1983*.

Part 5 Arbitration of proceedings

Division 1 Preliminary

Clause 35 defines certain words and expressions for the purposes of the proposed Part.

Clause 36 provides for the appointment of arbitrators for the purposes of the proposed Part.

Clause 37 provides that an arbitrator's jurisdiction under the proposed Part in relation to proceedings that have been referred to arbitration by a court is taken to form part of the jurisdiction of that court.

Division 2 Arbitration

Clause 38 empowers a court to order that certain proceedings be referred to arbitration under the proposed Part.

Clause 39 requires an arbitrator to determine the issues in dispute in any such proceedings on the basis of evidence adduced before the arbitrator.

Clause 40 provides that an arbitrator's award is taken to be a judgment of the court, as of when it is filed in the referring court (where the award is made by consent of all parties) or 28 days after it is sent to the parties (in any other case).

Clause 41 excludes an arbitrator's award from judicial review except on the grounds of lack of jurisdiction or denial of natural justice.

Division 3 Rehearings

Clause 42 provides that any person who is aggrieved by an arbitrator's award may apply for a rehearing by the court that referred the matter to arbitration. The making of such an application suspends the award until an order for rehearing is made.

Clause 43 requires the referring court to order a rehearing, which may be either a full rehearing or a rehearing limited to particular aspects of the award.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Clause 44 requires the referring court to conduct a full or limited rehearing, as the case requires. In the case of a full rehearing, the award ceases to have effect and the court deals with the matter as if it had never been referred to arbitration. In the case of a limited rehearing, the award is suspended pending the determination of the rehearing, and can be reinstated with such modifications as the court thinks appropriate following the rehearing.

Clause 45 allows a rehearing to be discontinued, in which case the award is to be reinstated.

Clause 46 enables a court to make orders for costs in relation to a rehearing and, in addition, orders for costs in relation to the hearing before the arbitrator from which the rehearing arose.

Clause 47 restricts the rights of the parties to a rehearing to subpoena the arbitrator to attend a rehearing for the purpose of giving evidence or producing documents.

Division 4 Miscellaneous

Clause 48 provides that a party to referred proceedings has the same rights as to legal representation, and as to examination and cross-examination of witnesses, as he or she would have in proceedings before the referring court.

Clause 49 empowers an arbitrator to determine the procedure to be followed in relation to an arbitration, subject to the proposed Part and to any directions of the referring court.

Clause 50 provides that a referring court has the same powers with respect to compelling attendance of witnesses at referred proceedings as it would have in proceedings before the court.

Clause 51 provides that the rules of evidence applicable to proceedings before the referring court are to apply to evidence adduced before an arbitrator.

Clause 52 provides that the referring court may enforce compliance by a witness in proceedings before an arbitrator of any requirement by the arbitrator to take an oath or to answer any question.

Clause 53 provides that certain misbehaviour before an arbitrator hearing proceedings referred for arbitration is taken to constitute contempt of the referring court.

Clause 54 confers on an arbitrator the same power to make orders for costs in relation to referred proceedings as the referring court would have in relation to proceedings before the court.

Clause 55 gives an arbitrator, in relation to proceedings referred to arbitration by a court, the same protection and immunity as a judge of that court.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Part 6 Conduct of court proceedings

Division 1 Guiding principles

Clause 56 states that the overriding purpose of the proposed 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. Courts are required to give effect to this purpose, and litigants are under a duty to assist the courts in furthering that purpose.

Clause 57 requires court proceedings to be managed having regard to the following objects, namely, the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of available judicial and administrative resources and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

Clause 58 requires courts to act in accordance with the dictates of justice in deciding whether to make orders or directions for the management of proceedings and in what terms any such order or direction should be made. The clause also sets out the matters to which a court must have regard, and the matters to which a court may have regard, for the purpose of determining what are the dictates of justice in a particular case.

Clause 59 requires the practices and procedures of a court to be implemented in such a way as to minimise delay.

Clause 60 requires the practices and procedures of a court to 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

Clause 61 empowers a court to give directions with respect to the conduct of proceedings generally, and to make orders (including orders dismissing proceedings) against parties who fail to comply with any such direction.

Clause 62 empowers a court to give directions with respect to the conduct of any hearing in proceedings, including directions regulating the calling of witnesses, the giving of evidence and the presentation of cases.

Clause 63 empowers a court to give directions to cure procedural irregularities in any proceedings.

Division 3 Other powers of court

Clause 64 empowers a court to adjourn proceedings to a specified day (but not indefinitely), and a registrar to adjourn matters listed for hearing at an appointed time if a judicial officer is unavailable at that time.

Clause 65 empowers a court to stay proceedings before it until a specified day.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Clause 66 empowers a court to order the attendance of persons and the production of documents and things.

Clause 67 empowers a court to dispense with formal proof of matters that are not bona fide in dispute, and to require any person to make admissions with respect to any document or question of fact. Any such admission has effect for the purposes only of the proceedings in which it is made.

Clause 68 empowers a court to allow certain kinds of proceedings to be conducted in the absence of the public, such as proceedings of a non-contentious nature, proceedings that concern a minor and proceedings in which the presence of the public would defeat the ends of justice.

Clause 69 empowers a court to make orders prohibiting the disclosure of information that tends to identify a party or witness in any proceedings or to divulge evidence given in any proceedings. Contravention of such an order will constitute contempt of court.

Clause 70 confers jurisdiction on a court to determine questions in dispute between parties as to whether, and in what terms, proceedings in the court have been compromised or settled between them.

Division 4 Persons under legal incapacity

Clause 71 defines certain words and expressions for the purposes of the proposed Division and excludes certain workers compensation claims and workers compensation payments from the operation of the proposed Division.

Clause 72 empowers a court to approve or disapprove an agreement for the compromise or settlement of any claim by or against a person under legal incapacity where proceedings on the claim have not yet commenced. An agreement that is approved will bind the person, an agreement that is disapproved will not.

Clause 73 applies to persons under legal incapacity, persons who (during the course of proceedings) become persons under legal incapacity and persons whom the court finds (during the course of proceedings) to be incapable of managing their affairs. Once proceedings by or against any such person have commenced, the proceedings cannot be compromised or settled, and money paid into court may not be accepted, except with the approval of the court. The clause also empowers a court to approve or disapprove an agreement for the compromise or settlement of proceedings commenced by or against such a person. An agreement that is approved will bind the person, an agreement that is disapproved will not.

Clause 74 requires all money recovered on behalf of a person under legal incapacity under a compromise or settlement, or under a judgment or order, to be paid into court, unless the court directs otherwise, and regulates how any such money may be paid out of court.

Clause 75 specifies the purposes for which money paid under the proposed Division to the Public Trustee on behalf of a minor may be applied.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Clause 76 provides that money paid under the proposed Division to the manager of a protected person's estate is to form part of that estate.

Clause 77 empowers the Supreme Court to give directions with respect to the conduct of proceedings, whether before the Supreme Court or any other court, by the tutor for a person under legal incapacity.

Division 5 Interim payments

Clause 78 defines certain words and expressions for the purposes of the proposed Division.

Clause 79 empowers a court to order interim payments of compensation in proceedings in which the defendant has admitted liability, in which the plaintiff has obtained judgment or in which the court is satisfied that if the proceedings went to trial the plaintiff would obtain substantial damages.

Clause 80 provides that the making of an interim payment is not of itself an admission of liability, and that the court's making or refusing to make an order for interim payments is not a finding as to liability.

Clause 81 provides for the variation, discontinuance and repayment of interim payments.

Division 6 Miscellaneous

Clause 82 requires a person who is authorised to examine another person for the purposes of court proceedings to examine the other person on oath, and authorises the person to administer an oath to that other person for that purpose.

Clause 83 contains supplementary provisions with respect to a court's power to make orders.

Clause 84 replicates, in relation to orders for production, a provision of the *Evidence Act 1995* that provides protection against self-incrimination to the person against whom such an order is made or sought to be made.

Part 7 Judgments and orders

Division 1 Judgments and orders generally

Clause 85 requires a court to give such judgment, or make such order, as the case requires, enables it to deal with cross-claims and gives it jurisdiction to decide matters relating to compromise and settlement.

Clause 86 provides that the dismissal of proceedings does not prevent the plaintiff in those proceedings from claiming the same relief in fresh proceedings unless the proceedings were dismissed following a determination of the claim on its merits.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Clause 87 provides that a judgment for the possession of land takes the place of, and has the same effect as, a judgment for the claimant in ejectment had immediately prior to the commencement of the *Supreme Court Act 1970*.

Clause 88 provides that judgment in proceedings for the detention of goods may be for the delivery of the goods to the plaintiff or for payment to the plaintiff of their assessed value, or for such those two remedies as the defendant may choose.

Clause 89 empowers a court that gives a judgment, or makes an order, directing a person to execute or endorse any document to order that it be executed or endorsed by some other person if the first person fails to do so.

Clause 90 sets out the consequences on persons having a joint liability if a court gives judgment on the liability in respect of some but not all of those persons.

Clause 91 enables any two judgments of the same or different Local Courts to be set off against each other on the application of the judgment debtor under one of the judgments.

Clause 92 empowers a court to issue an arrest warrant against any person who fails to comply with an order of the court for that person's attendance at court or for production to the court by that person of any document or thing.

Division 2 Costs in proceedings

Clause 93 empowers a court to make orders as to costs, which may be assessed either on a party/party basis (as set out in the *Legal Profession Act 1987*) or on an indemnity basis, and prevents any such costs from being recovered otherwise than pursuant to an order of the court.

Clause 94 empowers a court to disallow a lawyer's costs, to direct a lawyer to repay lawyer's costs to a client or to indemnify any party (other than a client) against costs payable by that party in circumstances in which the lawyer has been responsible for the incurring of unnecessary costs.

Division 3 Payment of interest

Clause 95 empowers a court to order the payment of interest on money recovered under a judgment, at a rate to be determined by the court and for the whole or any part of the period from when the cause of action arose until when the judgment was given.

Clause 96 provides for the payment of interest, at a rate to be prescribed by the uniform rules, on so much of the amount of a judgment debt as is from time to time unpaid and on any amount payable under an order for costs.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Part 8 Enforcement of judgments and orders

Division 1 Preliminary

Clause 97 defines various words and expressions for the purposes of the proposed Part.

Clause 98 provides that the procedure for enforcing a judgment or order of a court is to be as prescribed by rules of court.

Clause 99 provides for the enforcement of a judgment for the possession of land by a writ of possession.

Clause 100 provides for the enforcement of a judgment or order for the delivery of goods by a writ of delivery.

Clause 101 provides for the enforcement of a judgment debt by a writ for the levy of property, by a garnishee order or (in the case of a judgment of the Supreme Court or District Court) by a charging order.

Clause 102 empowers a court to make orders allowing a judgment debtor time to pay and the right to payment by instalments. Such an order stays execution of the judgment or, if the judgment is subject to a garnishee order, stays execution of the judgment otherwise than by means of the garnishee order.

Clause 103 empowers a court to order a judgment debtor to attend court, and to produce documents, for the purpose of ascertaining his or her financial circumstances.

Division 2 Writs for the levy of property

Subdivision 1 Enforcement against goods and securities

Clause 104 regulates the sale of goods the subject of a bill of sale.

Clause 105 regulates the disposal of cheques, bills of exchange, promissory notes, bonds, specialties and other securities for money.

Subdivision 2 Enforcement against land

Clause 106 regulates the sale by the judgment debtor of land the subject of a writ for the levy of property that has been registered in the Register kept under the *Real Property Act 1900* or in the General Register of Deeds kept under the *Conveyancing Act 1919*.

Subdivision 3 General

Clause 107 validates the sale of property by the Sheriff under a writ for the levy of property.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Clause 108 enables any transaction with respect to the sale of land under a writ for the levy of property that is entered into before the expiry of the writ to be completed after the writ expires.

Division 3 Garnishee orders

Subdivision 1 Enforcement against debts

Clause 109 states that a garnishee order operates to attach any debt that is owed to a judgment debtor by the garnishee.

Clause 110 requires payment of a debt attached by a garnishee order within 28 days after service of the order or, in relation to a debt falling due after that date, within 28 days after the debt falls due.

Subdivision 2 Enforcement against income

Clause 111 states that a garnishee order operates to attach any wage or salary that is payable to a judgment debtor by the garnishee while the order is in force or, if the amount outstanding under the judgment is the subject of an instalment order, such amounts from that wage or salary as are equivalent to the instalments payable under the instalment order.

Clause 112 requires payment of an amount with respect to a wage or salary within 14 days after the wage or salary falls due.

Clause 113 deals with circumstances in which a single wage or salary is subject to multiple garnishee orders and one of the garnishee orders is affected by an instalment order.

Clause 114 prohibits the amounts deducted under one or more garnishee orders from reducing the net weekly wage or salary paid to the judgment debtor to below 80 per cent of the standard workers compensation weekly benefit.

Subdivision 3 General

Clause 115 regulates the payments made by a garnishee under a garnishee order.

Clause 116 empowers a court to give judgment against a garnishee who fails to comply with the requirements of a garnishee order.

Clause 117 provides for the repayment of amounts paid by a garnishee in excess of the amount required to satisfy the relevant judgment.

Division 4 Charging orders

Clause 118 states that a charging order operates to impose a charge in favour of the judgment creditor on each security interest specified in the order, and to restrain the chargee from dealing with each such interest otherwise than in accordance with the directions of the judgment creditor.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Clause 119 provides that a chargee or other person having notice of a charging order is liable to the judgment creditor for an amount up to the value of the security interest charged by the order if he or she deals with the interest otherwise than in accordance with the directions of the judgment creditor.

Clause 120 invalidates, as against the judgment creditor, any purported transfer or disposal of a security interest charged by the order that is effected otherwise than in accordance with the directions of the judgment creditor.

Division 5 Miscellaneous

Clause 121 prohibits the arrest of a person on mesne process issued by a court (“mesne process” being process issued in proceedings before the proceedings are finally determined).

Clause 122 prohibits the enforcement against a person of any judgment or order by any process for attachment of the person, any process for the committal of the person or any writ of *capias ad satisfaciendum*.

Clause 123 preserves a court’s power to attach or commit a person for contempt.

Clause 124 empowers the Sheriff to appoint a custodian of goods seized by the Sheriff under a writ of delivery or writ for the levy of property.

Clause 125 provides that a judgment or order of a court is not enforceable until it has been entered.

Clause 126 provides that certain enforcement action may not be taken in relation to a judgment or order if the prescribed period (that is, 12 years or such other period as may be prescribed by the uniform rules) has elapsed since the relevant judgment was given or registered or the relevant order was made.

Clause 127 empowers a court to give directions with respect to the enforcement of its judgments and orders.

Clause 128 requires money recovered on account of a judgment debt to be applied towards any interest payable on the judgment debt before it is applied towards the debt itself.

Clause 129 allows a judgment to be enforced in relation to costs separately from its enforcement in relation to anything other than costs, and provides that the costs recoverable in relation to the enforcement of any judgment or order include the costs of any earlier attempt at enforcement.

Clause 130 provides that the proposed Part does not limit any manner of enforcing a judgment or order otherwise than pursuant to the proposed Part.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Part 9 Transfer of proceedings between courts

Division 1 Transfer of proceedings from lower to higher court

Clause 131 defines various words and expressions for the purposes of the proposed Division.

Clause 132 provides for the transfer of proceedings from a Local Court to the District Court or the Supreme Court, and from the District Court to the Supreme Court.

Clause 133 deals with administrative matters in connection with transfer orders.

Clause 134 enables the court to which proceedings are transferred to order a stay of the proceedings.

Clause 135 regulates the continuation of proceedings after they have been transferred.

Clause 136 provides for the transfer of particular kinds of proceedings (such as proceedings in the District Court's limited equitable jurisdiction) from the District Court to the Supreme Court.

Division 2 Transfer of proceedings from higher to lower court

Clause 137 defines various words and expressions for the purposes of the proposed Division.

Clause 138 provides for the transfer of proceedings from the Supreme Court to the District Court or a Local Court, and from the District Court to a Local Court.

Clause 139 deals with administrative matters in connection with transfer orders.

Clause 140 regulates the continuation of proceedings after they have been transferred.

Clause 141 ensures that the court to which proceedings are transferred has jurisdiction to deal with the proceedings.

Division 3 Transfer of proceedings between Local Courts

Clause 142 defines various words and expressions for the purposes of the proposed Division.

Clause 143 provides for the transfer of proceedings between Local Courts.

Clause 144 deals with administrative matters in connection with transfer orders.

Clause 145 enables the court to which proceedings are transferred to order a stay of the proceedings.

Consultation draft

Civil Procedure Bill 2005

Explanatory note

Clause 146 regulates the continuation of proceedings after they have been transferred.

Schedule 1 Application of Act

Schedule 1 lists the courts and civil proceedings to which the Act as a whole (with specified exceptions) is to apply.

Schedule 2 Constitution and procedure of Uniform Rules Committee

Schedule 2 is in two Parts. The first Part deals with the constitution of the proposed Uniform Rules Committee. The second Part deals with the procedures to be followed with respect to its meetings.

Schedule 3 Rule-making powers

Schedule 3 sets out the various matters with respect to which the Uniform Rules Committee may make rules under the proposed Act.

Schedule 4 Repeals

Schedule 4 lists the Acts to be repealed by the proposed Act. These Acts are as follows:

Administration of Justice Act 1924 No 42
Arbitration (Civil Actions) Act 1983 No 43
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
Matrimonial Causes Act 1899 No 14
Notice of Action and Other Privileges Abolition Act 1977 No 19

Schedule 5 Amendments

Schedule 5 amends various Acts and instruments as a consequence of the enactment of the proposed Act. In particular:

Consultation draft

Civil Procedure Bill 2005

Explanatory note

- (a) it repeals provisions of the *Supreme Court Act 1970* and the *District Court Act 1973* that are being transferred to the proposed Act, and
- (b) it transfers to the *Local Courts Act 1982* such of the provisions of the *Local Courts (Civil Claims) Act 1970* (to be repealed by Schedule 4) as confer civil jurisdiction on a Local Court, and
- (c) it transfers to the *Limitation Act 1969* certain provisions of the *Supreme Court Rules 1970* and *District Court Rules 1973* that extend a limitation period to enable a plaintiff's originating process to be amended for certain purposes, and
- (d) it transfers to the *Legal Profession Act 1987* a provision of the *District Court Act 1973* that prevents legal practitioners claiming privilege from suit in any court other than the Supreme Court, and
- (e) it amends the *Oaths Act 1900* so as to make provision for statutory declarations and affidavits made by persons who are blind or illiterate.

Schedule 6 Savings, transitional and other provisions

Schedule 6 contains savings and transitional provisions consequent on the enactment of the proposed Act, and empowers regulations under the proposed Act to make further provision of a savings or transitional nature.

Schedule 7 Uniform Civil Procedure Rules 2005

Schedule 7 sets out the initial set of uniform rules, which under proposed section 9 are taken to have been made by the Uniform Rules Committee and can therefore be amended and repealed by that Committee.

Consultation draft



New South Wales

Civil Procedure Bill 2005

Contents

	Page
Part 1 Preliminary	
1 Name of Act	2
2 Commencement	2
3 Definitions	2
4 Application of Act	4
5 Jurisdiction of courts	5
6 Repeals, amendments and savings provisions	5
7 Review of Act	5
Part 2 Administrative matters	
Division 1 Rules, practice notes and forms	
8 Uniform Rules Committee	6
9 Uniform rules	6
10 Rules of court taken to include uniform rules	7
11 Relationship between uniform rules and local rules	7

Consultation draft

Civil Procedure Bill 2005

Contents

	Page
12 Officers of the court may exercise functions conferred by uniform rules	7
13 Officers of the court may be authorised to exercise court's functions	7
14 Court may dispense with rules in particular cases	8
15 Practice notes	8
16 Court may give directions in circumstances not covered by rules	8
17 Forms	8
Division 2 Fees	
18 Fees	8
Part 3 Preparation for trial	
Division 1 Commencing and carrying on proceedings	
19 Commencing and carrying on proceedings	10
20 Claims for possession of land	10
21 Defendant's right to set-off	10
22 Defendant's right to cross-claim	10
Division 2 Abandoning claims and splitting causes of action	
23 Effect of abandoning excess claim	11
24 Effect of splitting cause of action	12
Part 4 Mediation of proceedings	
25 Definitions	13
26 Referral by court	13
27 Duty of parties to participate	13
28 Costs of mediation	13
29 Agreements and arrangements arising from mediation sessions	13
30 Privilege	14
31 Secrecy	15
32 Directions by mediator	15
33 Protection from liability for listed mediator	15
34 Mediation otherwise than under this Part	16
Part 5 Arbitration of proceedings	
Division 1 Preliminary	
35 Definitions	17
36 Appointment to office as arbitrator	17
37 Jurisdiction of arbitrator	17

Consultation draft

Civil Procedure Bill 2005

Contents

	Page
Division 2 Arbitration	
38 Referral to arbitration	18
39 Determination by arbitrator	19
40 Award taken to be judgment of court	19
41 Judicial supervision of arbitrator	19
Division 3 Rehearings	
42 Application for rehearing	20
43 Order for rehearing	20
44 Rehearing	21
45 Discontinuance of rehearing	21
46 Costs of rehearing	21
47 Subpoena at rehearing against arbitrator	22
Division 4 Miscellaneous	
48 Appearances	22
49 Procedure	22
50 Issue of subpoenas	22
51 Evidence	22
52 Refusal or failure to take oath etc	23
53 Contempt	23
54 Costs	24
55 Protection from liability for arbitrator	24
 Part 6 Conduct of court proceedings	
Division 1 Guiding principles	
56 Overriding purpose	25
57 Case management	25
58 Court to follow dictates of justice	25
59 Elimination of delay	26
60 Proportionality of costs	27
Division 2 Powers of court to give directions	
61 Directions as to practice and procedure generally	27
62 Directions as to conduct of hearing	27
63 Directions with respect to procedural irregularities	29
Division 3 Other powers of court	
64 Adjournment of proceedings	29
65 Stay of proceedings	29
66 Attendance at court and production of documents and things to court	30
67 Informal proof and admissions	30

Consultation draft

Civil Procedure Bill 2005

Contents

	Page
68 Business in the absence of the public	30
69 Court may prohibit disclosure of information	31
70 Power of court to determine questions about compromises and settlements	31
Division 4 Persons under legal incapacity	
71 Definitions and application	31
72 Settlement of claim made on behalf of, or against, person under legal incapacity	32
73 Settlement of proceedings commenced on behalf of person under legal incapacity	32
74 Payment of money recovered on behalf of person under legal incapacity	33
75 Application of money by Public Trustee	34
76 Application of money by manager of protected person's estate	34
77 Directions to tutor of person under legal incapacity	34
Division 5 Interim payments	
78 Definitions and application	34
79 Court may order interim payments	35
80 Interim payment not admission of liability	35
81 Adjustments on final judgment etc	36
Division 6 Miscellaneous	
82 Examination on oath	36
83 Orders	36
84 Protection against self-incrimination in relation to interlocutory matters	37
Part 7 Judgments and orders	
Division 1 Judgments and orders generally	
85 Judgments generally	39
86 Effect of dismissal of proceedings	39
87 Judgments for possession of land	39
88 Judgments for detention of goods	39
89 Failure to comply with order to execute instrument	40
90 Joint liability	40
91 Set-off of Local Court judgments	41
92 Arrest warrants	42
Division 2 Costs in proceedings	
93 Courts powers as to costs	42
94 Liability of legal practitioner for unnecessary costs	43

Consultation draft

Civil Procedure Bill 2005

Contents

	Page
Division 3 Payment of interest	
95 Interest up to judgment	45
96 Interest after judgment	46
 Part 8 Enforcement of judgments and orders	
Division 1 Preliminary	
97 Definitions	48
98 Enforcement of judgments generally	48
99 Judgments for possession of land	48
100 Judgments for delivery of goods	49
101 Judgments for payment of money	49
102 Deferred payment and payment by instalments	50
103 Order for examination	50
 Division 2 Writs for the levy of property	
Subdivision 1 Enforcement against goods and securities	
104 How goods subject to bill of sale to be dealt with	51
105 How securities to be dealt with	51
 Subdivision 2 Enforcement against land	
106 Sale or mortgage by judgment debtor of land affected by order	52
 Subdivision 3 General	
107 Effect of sale of property	53
108 Effect of expiry of writ	53
 Division 3 Garnishee orders	
Subdivision 1 Enforcement against debts	
109 Operation of garnishee order in relation to debts	54
110 Time within which payment to be made	54
 Subdivision 2 Enforcement against income	
111 Operation of garnishee order in relation to income	54
112 Time within which payment to be made	55
113 Maximum payment under one of several concurrent garnishee orders	55
114 Maximum total payment under all garnishee orders	55
 Subdivision 3 General	
115 Payments by garnishee	56
116 Procedure where garnishee order not complied with	56

Consultation draft

Civil Procedure Bill 2005

Contents

	Page
117 Repayment of excess amounts	57
Division 4 Charging orders	
118 Operation of charging order in relation to specified security interests	57
119 Unauthorised transfer or disposal of security interest under charging order	58
120 Disposal of security interest by judgment debtor invalid	58
Division 5 Miscellaneous	
121 No arrest on mesne process	58
122 Judgments not enforceable by certain means	58
123 Committal for contempt	59
124 Sheriff may appoint custodian for goods	59
125 Judgments and orders unenforceable until entered	59
126 Stale judgments and orders enforceable only by leave	60
127 Directions as to enforcement	60
128 Appropriation of payments towards judgment debt	60
129 Execution of judgments and orders for costs	61
130 Other methods of enforcing judgments	61
 Part 9 Transfer of proceedings between courts	
Division 1 Transfer of proceedings from lower to higher court	
131 Definitions	62
132 Transfer of proceedings to higher court	62
133 Transfer orders	63
134 Stay of proceedings in lower court	63
135 Proceedings after transfer	63
136 Transfer of certain proceedings from District Court to Supreme Court	64
Division 2 Transfer of proceedings from higher to lower court	
137 Definitions	65
138 Transfer of proceedings to lower court	65
139 Transfer orders	66
140 Proceedings after transfer	66
141 Jurisdiction of lower court	67
Division 3 Transfer of proceedings between Local Courts	
142 Definitions	67
143 Transfer of proceedings between Local Courts	67
144 Transfer orders	67
145 Stay of proceedings in transferor court	68
146 Proceedings after transfer	68

Consultation draft

Civil Procedure Bill 2005

Contents

	Page
Schedule 1	Application of Act
Schedule 2	Constitution and procedure of Uniform Rules Committee
Schedule 3	Rule-making powers
Schedule 4	Repeals
Schedule 5	Amendments
Schedule 6	Savings, transitional and other provisions
Schedule 7	Uniform Civil Procedure Rules 2005
	69
	70
	73
	76
	77
	110
	113

Consultation draft

Civil Procedure Bill 2005

Contents

Page

Consultation draft



New South Wales

Civil Procedure Bill 2005

Act No , 2005

A Bill for

An Act with respect to the practice and procedure to be followed in and in relation to civil proceedings before certain courts; and for related purposes.

Consultation draft

Clause 1 Civil Procedure Bill 2005

Part 1 Preliminary

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 subsection (2).
- (2) Schedule 5.3 [1] and [2] commence on the commencement of this Act, or the commencement of the *Legal Profession Act 2004*, whichever is the later.
- (3) 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:

- (a) proceedings of a kind prescribed by the uniform rules, or
- (b) proceedings on an appeal, or an application for leave to appeal, against a decision in proceedings referred to in paragraph (a).

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.

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

Consultation draft

Civil Procedure Bill 2005

Clause 3

Preliminary

Part 1

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 96, 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 generally, the jurisdictional limit of the General Division of a Local Court within the meaning of the *Local Courts Act 1982*, and
- (c) in relation to the Small Claims Division of a Local Court, the jurisdictional limit of that Division within the meaning of the *Local Courts Act 1982*.

local rules means rules of court other than uniform rules.

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.

party/party basis means the basis of assessing costs set out in section 208F (1) and 208G of the *Legal Profession Act 1987*.

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:

Consultation draft

Clause 4 Civil Procedure Bill 2005

Part 1 Preliminary

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

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 claim has the same meaning as **claim** has in the *Workplace Injury Management and Workers Compensation Act 1998*.

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

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

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*.

4 Application of Act

- (1) This Act applies 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) Despite subsection (1), 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 not subject to the operation of any provision of this Act referred to in Column 3 of that Schedule.
- (3) The Governor may make regulations amending Schedule 1 for either or both of the following purposes:

Consultation draft

Civil Procedure Bill 2005

Clause 5

Preliminary

Part 1

- (a) to add references in Columns 1 and 2 to courts and civil proceedings to which this Act does not yet apply,
- (b) to add or omit references in Column 3 to provisions of this Act.
- (4) The Governor may make regulations of a transitional nature consequent on the amendment of Schedule 1, including regulations with respect to the application of any other Act or law to any civil proceedings to which this Act applies as a result of the amendment.

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 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.
- (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.

Consultation draft

Clause 8 Civil Procedure Bill 2005

Part 2 Administrative matters

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 or a Judge of the Supreme Court nominated by the Chief Justice, and
 - (b) one is to be the President of the Court of Appeal or a Judge of Appeal nominated 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 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 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.

Consultation draft

Civil Procedure Bill 2005

Clause 10

Administrative matters

Part 2

- (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 rules of court 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 order, 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 order.
- (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.

Consultation draft

Clause 14 Civil Procedure Bill 2005

Part 2 Administrative matters

14 Court may dispense with rules in particular cases

The court may, by order, dispense with any requirement imposed by 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, by order in writing, issue practice notes for that court with respect to any matter for which rules of court may be made.
- (2) Part 6 of the *Interpretation Act 1987* applies to a practice note in the same way as it applies to a rule of court.

16 Court may give directions in circumstances not covered by rules

- (1) 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 rules of court, the Uniform Rules Committee may approve forms for documents to be used in connection with proceedings in a court.
- (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 the completion of 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 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,

Consultation draft

Civil Procedure Bill 2005

Clause 18

Administrative matters

Part 2

- (iii) the conduct of hearings,
 - (iv) the retention of juries,
 - (v) the sealing 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 under Part 8,
 - (f) the fees payable for administrative services provided by a registrar or other officer of the court,
 - (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 proceedings to which any of the following persons or bodies is a party:
- (a) the Crown, or
 - (b) any Minister of the Crown, or
 - (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 statutory body of any fees that would, had they been paid by the Crown or any such statutory 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.

Consultation draft

Clause 19 Civil Procedure Bill 2005

Part 3 Preparation for trial

Part 3 Preparation for trial

Division 1 Commencing and carrying on proceedings

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)

Consultation draft

Civil Procedure Bill 2005

Clause 23

Preparation for trial

Part 3

- (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 originating process in the proceedings and any other claim for relief in the proceedings.

Division 2 Abandoning claims and splitting causes of action

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 in the proceedings, 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*.

Consultation draft

Clause 24 Civil Procedure Bill 2005

Part 3 Preparation for trial

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.

Consultation draft

Civil Procedure Bill 2005

Clause 25

Mediation of proceedings

Part 4

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:

listed mediator means a person nominated and appointed as a mediator in accordance with the uniform rules.

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.

- 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.

- 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)

Consultation draft

Clause 30 Civil Procedure Bill 2005

Part 4 Mediation of proceedings

- (1) The court may make orders to give effect to any agreement or arrangement arising out of a mediation session.
- (2) In any proceedings 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), 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.
- (5) 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.
- (6) Subsections (4) and (5) do not apply with respect to any evidence or document:

Consultation draft

Civil Procedure Bill 2005

Clause 31

Mediation of proceedings

Part 4

- (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 Secrecy (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,
- (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)

- (1) Subject to the uniform rules and any relevant practice notes, a mediator may, by order, give directions with respect to the conduct of the mediation.
- (2) Without limiting subsection (1), an order under this section:
 - (a) may direct the parties to the mediation as to the time within which specified steps in the mediation must be completed, and
 - (b) may award costs against a party for failure to complete specified steps within the time allowed.

33 Protection from liability for listed mediator

A listed mediator to whom the court refers proceedings has, in the exercise of his or her functions as a mediator in relation to those

Consultation draft

Clause 34 Civil Procedure Bill 2005

Part 4 Mediation of proceedings

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*.

Consultation draft

Civil Procedure Bill 2005

Clause 35

Arbitration of proceedings

Part 5

Part 5 Arbitration of proceedings

Division 1 Preliminary

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

In this Part:

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 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.

Consultation draft

Clause 38 Civil Procedure Bill 2005

Part 5 Arbitration of proceedings

- (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:

Consultation draft

Civil Procedure Bill 2005

Clause 39

Arbitration of proceedings

Part 5

- (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 file the award in 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 filed in 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:

Consultation draft

Clause 42 Civil Procedure Bill 2005

Part 5 Arbitration of proceedings

- (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 74 or 75 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 the Small Claims Division of a Local Court.
- (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.

Consultation draft

Civil Procedure Bill 2005

Clause 44

Arbitration of proceedings

Part 5

- (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, either with the consent of all parties or by leave of the court.
- (2) If a rehearing is discontinued:
 - (a) the court is to reinstate the award, and
 - (b) the award, as reinstated, is final and conclusive, and is taken to be a judgment of the referring court.

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:

Consultation draft

Clause 47 Civil Procedure Bill 2005

Part 5 Arbitration of proceedings

- (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)

Consultation draft

Civil Procedure Bill 2005

Clause 52

Arbitration of proceedings

Part 5

- (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

Consultation draft

Clause 54 Civil Procedure Bill 2005

Part 5 Arbitration of proceedings

- (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 93 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.

Consultation draft

Civil Procedure Bill 2005

Clause 56

Conduct of court proceedings

Part 6

Part 6 Conduct of court proceedings

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 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

Consultation draft

Clause 59 Civil Procedure Bill 2005
Part 6 Conduct of court proceedings

- (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

In any proceedings, the practices and procedures 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.

Consultation draft

Civil Procedure Bill 2005

Clause 60

Conduct of court proceedings

Part 6

60 Proportionality of costs

In any proceedings, the practices and procedures 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

- (1) 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.
- (2) 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.
- (3) Subsection (2) 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)

Consultation draft

Clause 62 Civil Procedure Bill 2005

Part 6 Conduct of court proceedings

- (1) The court may, by order, give directions as to the conduct of any hearing in proceedings, 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 to lead evidence, to make submissions, to present a case and, at trial, 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 may be 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:

Consultation draft

Civil Procedure Bill 2005

Clause 63

Conduct of court proceedings

Part 6

- (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.

Division 3 Other powers of court

64 Adjournment 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.

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

Consultation draft

Clause 66 Civil Procedure Bill 2005

Part 6 Conduct of court proceedings

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

66 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:

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

67 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 court 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 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.

68 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) if, in proceedings in the Equity Division of the Supreme Court, the court thinks fit,
- (b) if the business concerns the guardianship, custody or maintenance of a minor,

Consultation draft

Civil Procedure Bill 2005

Clause 69

Conduct of court proceedings

Part 6

- (c) if the proceedings are not before a jury and are formal or non-contentious,
- (d) if the business does not involve the appearance before the court of any person,
- (e) on the hearing of an interlocutory application, except while a witness is giving oral evidence,
- (f) if the uniform rules so provide,
- (g) if the presence of the public would defeat the ends of justice.

69 Court may prohibit disclosure of information

- (1) The court may, by order, prohibit the publication or disclosure of:
 - (a) any information tending to reveal the identity of:
 - (i) any party to proceedings, or
 - (ii) any witness in proceedings, or
 - (b) any information tending to divulge evidence given in proceedings,if it is of the opinion that disclosure of any such information would defeat the ends of justice.
- (2) Contravention of an order under subsection (2) by any person who is aware of the existence of the order constitutes contempt of court, regardless of whether or not the person is aware of the terms of the order.

70 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 in 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

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

- (1) In this Division:

Consultation draft

Clause 72	Civil Procedure Bill 2005
Part 6	Conduct of court proceedings

manager, in relation to a protected person's estate, means the person having the management of the estate under the *Protected Estates Act 1983*.

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

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*,
 - (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*.

72 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.

73 Settlement of proceedings commenced 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,

Consultation draft

Civil Procedure Bill 2005

Clause 74

Conduct of court proceedings

Part 6

- (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.

74 Payment of money recovered on behalf of person under legal incapacity
(cf Act No 25 1929, section 4)

- (1) All money recovered on behalf of a person under legal incapacity pursuant to a compromise, settlement, judgment or order in any proceedings is to be paid into court.
- (2) Despite subsection (1), the court may direct 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 order.
- (3) Money paid into court under subsection (1) for the benefit of a person under legal incapacity may be paid:
 - (a) if the person is a minor, to the Public Trustee, or

Consultation draft

Clause 75	Civil Procedure Bill 2005
Part 6	Conduct of court proceedings

- (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 order.

75 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.

76 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.

77 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

78 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.

Consultation draft

Civil Procedure Bill 2005

Clause 79

Conduct of court proceedings

Part 6

- (2) This Division does not apply to an award of damages to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies.

79 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.

80 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.

Consultation draft

Clause 81 Civil Procedure Bill 2005

Part 6 Conduct of court proceedings

81 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 in the proceedings.

Division 6 Miscellaneous

82 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 for the purposes of any proceedings:

- (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.

83 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 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.

Consultation draft

Civil Procedure Bill 2005

Clause 84

Conduct of court proceedings

Part 6

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

84 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):

- (a) to provide evidence to the court or to a party to a proceeding before the court, or
- (b) to permit possession to be taken of a document or thing.

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.

- (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.

Consultation draft

Clause 84 Civil Procedure Bill 2005

Part 6 Conduct of court proceedings

- (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 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.

Consultation draft

Civil Procedure Bill 2005

Clause 85

Judgments and orders

Part 7

Part 7 Judgments and orders

Division 1 Judgments and orders generally

85 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.

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

- (1) Subject to subsection (2), dismissal of proceedings, whether under this Act or otherwise, does not prevent the plaintiff from bringing fresh proceedings on the same cause of action, whether for the same or for different relief.
- (2) 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.

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

- (1) Judgment for possession of land takes the place of judgment for the claimant in ejectment given under the practice of the Supreme Court as it was immediately before 1 July 1972.
- (2) Subject to the uniform rules, judgment for possession of land has the same effect as judgment for the claimant in ejectment had immediately before 1 July 1972.

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

88 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 give judgment:
 - (a) for their delivery to the plaintiff, or

Consultation draft

Clause 89 Civil Procedure Bill 2005

Part 7 Judgments and orders

- (b) for payment to the plaintiff of an amount equivalent to their value (as assessed by, or in accordance with the directions of, the court), 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 consequential damages.
- (2) A judgment for the delivery of goods referred to in subsection (1) (a) may (but need not) specify a date or event 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 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).

89 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.

90 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:

Consultation draft

Civil Procedure Bill 2005

Clause 91

Judgments and orders

Part 7

- (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.

91 Set-off of Local Court judgments (cf Act No 11 1970, section 64)

- (1) This section applies if, in relation to any two judgments of the same or different Local Courts, the judgment creditor and judgment debtor under one judgment are the judgment debtor and judgment creditor, respectively, under the other judgment.
- (2) The judgment debtor under any such judgment may apply to the Local Court in which the judgment was given or entered (the **first court**) for an order that the judgment be set off against the judgment of the other Local Court (the **second court**) 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 judgment in the first court is less than the amount of the judgment in the second court, the judgment in the first court is taken to have been satisfied and the amount of the judgment in the second court is taken to have been reduced by the amount of the judgment in the first court,

Consultation draft

Clause 92 Civil Procedure Bill 2005

Part 7 Judgments and orders

- (b) if the amount of the judgment in the first court is equal to the amount of the judgment in the second court, the judgments in both courts are taken to have been satisfied,
- (c) if the amount of the judgment in the first court is greater than the amount of the judgment in the second court, the judgment in the second court is taken to have been satisfied and the amount of the judgment in the first court is taken to have been reduced by the amount of the judgment in the second court.

92 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, or make an order for the revocation of, an arrest 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.

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

Division 2 Costs in proceedings

93 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 a party/party basis or on an indemnity basis.

Consultation draft

Civil Procedure Bill 2005

Clause 94

Judgments and orders

Part 7

- (2) Subject to the uniform rules, 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) Despite subsection (1), if in any proceedings a party's costs, or any part of those costs, are required to be paid by any other person:
 - (a) the party and that other person may agree on the amount of those costs, and
 - (b) unless the court otherwise orders, the amount of those costs is the amount so agreed and the court may give judgment accordingly.
- (6) 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*.
- (7) 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.

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

- (1) If unnecessary costs are incurred, and it appears to the court that a legal practitioner is responsible (whether personally or through a servant or agent) for the incurring of those costs, the court may, after giving the legal practitioner a reasonable opportunity to be heard, do any one or more of the following:

Consultation draft

Clause 94 Civil Procedure Bill 2005

Part 7 Judgments and orders

- (a) it may, by order, disallow the costs in the proceedings, or the costs for any step in the proceedings:
 - (i) where the legal practitioner is a barrister, as between the barrister and the barrister's instructing solicitor, or as between the barrister and the client, as the case requires, or
 - (ii) where the legal practitioner is a solicitor, as between the solicitor and the client,
 - (b) it may, by order, direct the legal practitioner to repay to the client costs that the client has been ordered to pay to any other person,
 - (c) it may, by order, direct the legal practitioner to indemnify any party (other than the client) against costs payable by that party.
- (2) Without limiting subsection (1), a legal practitioner is responsible for the incurring of unnecessary costs if proceedings cannot conveniently proceed, or can proceed only with the incurring of extra costs or with the inconvenience of the court or another party to the proceedings, because of the failure of the legal practitioner:
- (a) to attend in person or by a proper representative, or
 - (b) to file any document that ought to have been filed, or
 - (c) to deliver any document that ought to have been delivered for the use of the court, or
 - (d) to be prepared with any proper evidence or account, or
 - (e) to comply with any rules of court or any judgment, order or direction of the court, or
 - (f) otherwise to proceed.
- (3) Without limiting subsection (1) (c), an order referred to in that paragraph may be made in relation to a legal practitioner who has previously represented a party to the proceedings, whether in those or other proceedings or otherwise, and whether or not the party is still his or her client.
- (4) Before making an order under this section, the court may refer the matter to a registrar for inquiry and report.
- (5) The court may direct that notice of any proceedings or order under this section with respect to a party's legal practitioner be given:
- (a) if the legal practitioner is a barrister, to the barrister's instructing solicitor or to the party, or to both, as the court may direct, or
 - (b) if the legal practitioner is a solicitor, to the party.
- (6) The court may give ancillary directions to give full effect to an order under this section, including directions to a legal practitioner to provide

Consultation draft

Civil Procedure Bill 2005

Clause 95

Judgments and orders

Part 7

to the court, or to a party to the proceedings, a bill of costs in assessable form.

- (7) A party's legal practitioner is not entitled to demand, recover or accept from the party any part of the amount for which the legal practitioner is directed by the court to indemnify another party pursuant to an order referred to in subsection (1) (c).
- (8) The court's powers under this section extend to costs incurred in proceedings before an arbitrator under Part 5, being proceedings in respect of which the court is the referring court within the meaning of that Part.
- (9) For the purposes of this section, **unnecessary costs** means costs that are incurred improperly or without reasonable cause, or are wasted by undue delay or by any other conduct or default.

Division 3 Payment of interest

95 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's judgment may include an order for the payment of interest, at such rate as the court may determine:
 - (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's judgment may include an order for the payment of interest, at such rate as the court may determine:
 - (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 charged 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

Consultation draft

Clause 96 Civil Procedure Bill 2005

Part 7 Judgments and orders

- (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.

96 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 to the contrary, interest is payable on so much of the amount of a judgment debt as is from time to time unpaid.
- (2) Interest under subsection (1) is to be calculated, at the prescribed rate, as from:
 - (a) the date when the judgment debt came into being, or
 - (b) such later date as the court may order in relation to the judgment debt.
- (3) The court may order that interest is to be paid on any amount payable under an order for the payment of costs.
- (4) Unless the court otherwise orders, interest under subsection (3) is to be calculated, at the prescribed rate, as from the date or dates when the costs concerned were duly paid.
- (5) Interest charged under this section in relation to a judgment debt forms part of the judgment debt.
Note. See section 128 in relation to the appropriation of payments made on account of a judgment debt.
- (6) This section does not authorise the giving of interest on any interest charged under this section.
- (7) Despite subsections (1) and (3), if:
 - (a) a judgment debt (excluding costs yet to be assessed) is paid in full within 28 days after the judgment debt becomes payable, or

Consultation draft

Civil Procedure Bill 2005

Clause 96

Judgments and orders

Part 7

- (b) costs that have been assessed are paid in full within 28 days after they are assessed,
interest is not payable on the judgment debt or costs unless the court orders to the contrary.
- (8) 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.

Consultation draft

Clause 97 Civil Procedure Bill 2005

Part 8 Enforcement of judgments and orders

Part 8 Enforcement of judgments and orders

Division 1 Preliminary

97 Definitions

In this Part:

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

charging order means an order referred to in section 101 (1) (c).

equitable interest includes an equity of redemption.

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

garnishee order means an order referred to in section 101 (1) (b).

goods includes chattels, other than chattels real.

instalment order means an order referred to in section 102 (1).

order for examination means an order referred to in section 103 (1).

proceeds of enforcement of a writ for the levy of property means the proceeds derived from the enforcement of the writ under Division 2.

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 101 (1) (a).

writ of delivery means a writ referred to in section 100.

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 99.

98 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.

99 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 in relation to land does not require any goods on the land to be removed.

Consultation draft

Civil Procedure Bill 2005

Clause 100

Enforcement of judgments and orders

Part 8

100 Judgments for delivery of goods

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

101 Judgments for payment of money

- (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, or
 - (b) a garnishee order, or
 - (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 any goods in which the judgment debtor has a beneficial interest, and
 - (b) to seize any money belonging to the judgment debtor, and
 - (c) to seize and to realise any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the judgment debtor, and
 - (d) to take and to sell any chose in action or equitable interest held by the judgment debtor, and
 - (e) to enter into possession of, and to sell, such of the land identified in the writ as is land in which the judgment debtor has a beneficial interest.
- (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 regulations,if the clothing, furniture or tools are used by the judgment debtor or by any member of his or her family.
- (4) The Governor may make regulations for the purposes of subsection (3) (c).
- (5) The power conferred on the Sheriff by subsection (2) (e) may not be exercised in relation to land if the amount outstanding under the judgment is less than the jurisdictional limit of the Small Claims Division of a Local Court.

Consultation draft

Clause 102 Civil Procedure Bill 2005

Part 8 Enforcement of judgments and orders

- (6) For the purposes of subsection (2) (e), 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.
- (7) 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.

102 Deferred payment and payment by instalments

- (1) A court in which judgment has been entered may, subject to and in accordance with rules of court, 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.
- (2) While a judgment for the payment of money is the subject of an order in force under this section:
 - (a) subject to paragraph (b), execution of the judgment is stayed, or
 - (b) if a garnishee order is in force in relation to the amount outstanding under the judgment, execution of the judgment otherwise than by means of the garnishee order is stayed.
- (3) Subsection (2) does not limit or affect any power of the court to stay a judgment.
- (4) 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.

103 Order for examination (cf Act No 9 1973, section 91; Act No 11 1970, section 41)

- (1) If a judgment is not satisfied, the court may, subject to and in accordance with the uniform rules, make an order requiring the judgment debtor:
 - (a) to attend the court to be examined as to the judgment debtor's financial circumstances, or
 - (b) to produce documents as to the judgment debtor's financial circumstances.
- (2) An order under this section with respect to a judgment debtor that is a corporation:
 - (a) may be addressed to any officer or former officer of the corporation, and

Consultation draft

Civil Procedure Bill 2005

Clause 104

Enforcement of judgments and orders

Part 8

- (b) binds any such officer or former officer as if he or she were the judgment debtor.
- (3) Without limiting subsection (1), the uniform rules may require the judgment creditor 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 debt may be exercised by any Local Court, whether or not the Local Court in which the judgment was given.

Division 2 Writs for the levy of property

Subdivision 1 Enforcement against goods and securities

104 How goods subject to 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 bill of sale, the Sheriff may sell the judgment debtor's interest in the goods without taking possession of them.
- (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.

105 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 may sue in the name of the Sheriff for the recovery of the sum secured thereby.

Consultation draft

Clause 106 Civil Procedure Bill 2005

Part 8 Enforcement of judgments and orders

- (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.
- (3) The Sheriff may refuse to commence proceedings against any person liable under a security for money unless the judgment creditor undertakes to indemnify the Sheriff against the Sheriff's costs in the proceedings.

Subdivision 2 Enforcement against land

106 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.

Consultation draft

Civil Procedure Bill 2005

Clause 107

Enforcement of judgments and orders

Part 8

- (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):
 - (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).

Subdivision 3 General

107 Effect of sale of property (cf Act No 9 1973, section 110)

A sale of property by the Sheriff under a writ for the levy of property is as valid and effectual as if the property had been sold to the purchaser by the judgment debtor personally.

108 Effect of expiry of writ

Subject to section 127:

Consultation draft

Clause 109 Civil Procedure Bill 2005

Part 8 Enforcement of judgments and orders

- (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

109 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 an authorised deposit-taking institution (within the meaning of the *Banking Act 1959* of the Commonwealth) is taken to be a debt owed to the judgment debtor by that institution.

110 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 28 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 28 days after the date on which the debt falls due.

Subdivision 2 Enforcement against income

111 Operation of garnishee order in relation to income (cf Act No 9 1973, section 97)

- (1) Subject to sections 113 and 114 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.

Consultation draft

Civil Procedure Bill 2005

Clause 112

Enforcement of judgments and orders

Part 8

- (2) A garnishee order ceases to have effect, in relation to the wage or salary payable to a judgment debtor:
 - (a) at the expiry of 4 weeks after the date on which the order took effect, or when the judgment has been satisfied, whichever is the sooner, or
 - (b) if the garnishee order becomes the subject of an instalment order, when the judgment has been satisfied.
- (3) An order under this section addressed to the Crown as garnishee binds the Crown.

112 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.

113 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 more than one garnishee order of which one or more (but not all) are the subject of instalment orders.
- (2) The amount payable by a garnishee under a garnishee order that is not the subject of an instalment order must not, in respect of any wage or salary attached by the order, exceed the greatest amount payable by the garnishee under any other garnishee order that is the subject of an instalment order and that attaches the same wage or salary.

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

- (1) The amounts deducted 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

Consultation draft

Clause 115 Civil Procedure Bill 2005

Part 8 Enforcement of judgments and orders

37 (1) (a) (i) of the *Workers Compensation Act 1987*, as adjusted under Division 6 of Part 3 of that Act.

Subdivision 3 General

115 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 deducted under the garnishee order, the garnishee:
 - (a) subject to payment of the balance being made within the time required by section 110 or 112, 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 deducted under the garnishee order, and
 - (b) how much of that amount has been retained by the garnishee, and
 - (c) how much of that amount has been paid to the judgment creditor.
- (4) As between the garnishee and the judgment debtor, the amount deducted 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 notice 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.

116 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

Consultation draft

Civil Procedure Bill 2005

Clause 117

Enforcement of judgments and orders

Part 8

(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.

117 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

118 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 (referred to in this Division as *security interests*):
 - (a) stock and shares issued by a public company,
 - (b) money on deposit in a financial institution,
 - (c) equitable interests 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

Consultation draft

Clause 119 Civil Procedure Bill 2005

Part 8 Enforcement of judgments and orders

- (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.

119 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.

120 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

121 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.

122 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

Consultation draft

Civil Procedure Bill 2005

Clause 123

Enforcement of judgments and orders

Part 8

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

123 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.

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

- (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.

125 Judgments and orders unenforceable until entered

- (1) A judgment or order of the court may not be enforced until it has been entered in the court.
- (2) For the purposes of this section, a judgment, order or decree of a court exercising jurisdiction under:
 - (a) the laws of the Commonwealth, or
 - (b) the laws of another State or Territory, or
 - (c) the laws of a foreign country,

Consultation draft

Clause 126 Civil Procedure Bill 2005

Part 8 Enforcement of judgments and orders

is taken to be entered as a judgment in a court exercising jurisdiction under the laws of New South Wales if it is registered in that court pursuant to a law of the Commonwealth.

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

- (1) An application by the 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 125 (2)) was registered as referred to in section 125 (2).
- (2) In this section, *prescribed period* means 12 years or, if the uniform rules prescribe a different period, the period so prescribed.

127 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 prohibiting the Sheriff from taking any further action on a writ,
 - (b) an order prohibiting any other person from taking any further action, either permanently or temporarily, to enforce a judgment or order of the court,
 - (c) 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.

128 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 96, and
- (b) secondly, towards the balance of the judgment debt.

Consultation draft

Civil Procedure Bill 2005

Clause 129

Enforcement of judgments and orders

Part 8

129 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 on 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.

130 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.

Consultation draft

Clause 131 Civil Procedure Bill 2005

Part 9 Transfer of proceedings between courts

Part 9 Transfer of proceedings between courts

Division 1 Transfer of proceedings from lower to higher court

131 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 132.

132 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 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.

Consultation draft

Civil Procedure Bill 2005

Clause 133

Transfer of proceedings between courts

Part 9

- (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.

133 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.

134 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.

135 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 uniform rules 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

Consultation draft

Clause 136 Civil Procedure Bill 2005

Part 9 Transfer of proceedings between courts

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

136 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.

Consultation draft

Civil Procedure Bill 2005

Clause 137

Transfer of proceedings between courts

Part 9

-
- (7) 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

137 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 138.

138 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.

Consultation draft

Clause 139 Civil Procedure Bill 2005

Part 9 Transfer of proceedings between courts

- (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 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.

139 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.

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

- (1) Subject to the uniform rules 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 uniform rules 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

Consultation draft

Civil Procedure Bill 2005

Clause 141

Transfer of proceedings between courts

Part 9

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

141 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

142 Definitions

In this Division:

transfer order means an order referred to in section 143.

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.

143 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.

144 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.

Consultation draft

Clause 145 Civil Procedure Bill 2005

Part 9 Transfer of proceedings between courts

145 Stay of proceedings in transferor court

- (1) The transferee 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 transferor court to adjourn or stay the proceedings.

146 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 the uniform rules, 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.

Consultation draft

Civil Procedure Bill 2005

Application of Act

Schedule 1

Schedule 1 Application of Act

(Section 4)

Column 1	Column 2	Column 3
Court	Kind of civil proceedings	Excluded provisions
Supreme Court	All civil proceedings	
District Court	All civil proceedings	
Local Court	Civil proceedings in the General Division	
	Civil proceedings in the Small Claims Division	Parts 4 and 5 Sections 60, 67, 84, 87, 93, 94 and 122 Part 9

Consultation draft

Civil Procedure Bill 2005

Schedule 2 Constitution and procedure of Uniform Rules Committee

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, the President of the Court of Appeal, the Chief Judge of the District Court or the Chief Magistrate.

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 (not exceeding 12 months) 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, 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.

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.

Consultation draft

Civil Procedure Bill 2005

Constitution and procedure of Uniform Rules Committee

Schedule 2

5 Quorum

The quorum for a meeting of the Uniform Rules Committee is 6 members, of whom:

- (a) one must be a Judge of the Supreme Court, and
- (b) one must be a Judge of the District Court, and
- (c) one must be a Magistrate.

6 Presiding member

- (1) At any meeting of the Uniform Rules Committee:
 - (a) the Chief Justice, 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) 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.

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.

Consultation draft

Civil Procedure Bill 2005

Schedule 2 Constitution and procedure of Uniform Rules 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 in such manner as the Chief Justice thinks fit.

Consultation draft

Civil Procedure Bill 2005

Rule-making powers

Schedule 3

Schedule 3 Rule-making powers

(Section 9)

- 1 The procedure (including the method of pleading) and the practice to be followed in the court in all 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 admissibility 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 proceedings to or from the court and the practice and procedure to be followed with respect to proceedings that are so transferred.
- 11 The assignment of 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.

Consultation draft

Civil Procedure Bill 2005

Schedule 3 Rule-making powers

- 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.
- 14 The circumstances in which proceedings, or claims in 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 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 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 proceedings, or on any application in connection with, or at any stage of, any 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 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.

Consultation draft

Civil Procedure Bill 2005

Rule-making powers

Schedule 3

-
- 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 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.

Consultation draft

Civil Procedure Bill 2005

Schedule 4 Repeals

Schedule 4 Repeals

(Section 6)

Administration of Justice Act 1924 No 42
Arbitration (Civil Actions) Act 1983 No 43
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
Matrimonial Causes Act 1899 No 14
Notice of Action and Other Privileges Abolition Act 1977 No 19

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

Schedule 5 Amendments

(Section 6)

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 96 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 the General Division of a Local Court within the meaning of the *Local Courts Act 1982*”.

[2] Section 46 (5)

Omit the subsection. 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*.
- (5A) 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 “section 208F (1) and 208G of the *Legal Profession Act 1987*” from section 3 (1).

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

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

[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] Schedule 7 Uniform Civil Procedure Rules

Omit the Schedule.

Note. The continued effect of the *Uniform Civil Procedure Rules* 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” wherever occurring in section 4 (2) (a) and (b).

[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 90 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 90 of the *Civil Procedure Act 2005*”.

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

[2] Section 26 (3)

Omit “97”. Insert instead “*90”.

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 96 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 65 of the *Local Courts Act 1982*”.

5.9 Conveyancing Act 1919 No 6

Section 53 Obligation to show title etc

Insert at the end of the section:

- (4) 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 under the *Civil Procedure Act 2005*, 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.

5.10 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*”.

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

5.11 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 79 (1) of the *Local Courts Act 1982*”.

[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 96 of the *Civil Procedure Act 2005*”.

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] Part 3, Division 1, Subdivision 2, heading

Omit “and bailiffs”.

[5] Sections 26, 27, 28, 29 and 30

Omit the sections.

[6] Section 34 Permanent substitution of proclaimed place

Omit “section 40” from section 34 (3). Insert instead “rules of court”.

[7] Section 39 Proper place not affected

Omit “section 40”. Insert instead “rules of court”.

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

[8] Part 3, Division 1, Subdivisions 4, 5 and 6

Omit the Subdivisions.

[9] Sections 44 and 48

Omit “\$750,000” wherever occurring.

Insert instead “the Court’s jurisdictional limit”.

[10] Section 44 (1) (e)

Omit “section 143 (1)”.

Insert instead “section 132 (1) of the *Civil Procedure Act 2005*”.

[11] Section 44 (2)

Omit “section 83A (1)”.

Insert instead “section 95 (1) of the *Civil Procedure Act 2005*”.

[12] Part 3, Division 2, Subdivision 2

Omit the Subdivision.

[13] Part 3, Division 3, Subdivisions 2, 3, 4, 6 and 7

Omit the Subdivisions.

[14] Section 77 Questions of fact and law

Omit section 77 (4).

[15] Sections 83 and 83A

Omit the sections.

[16] Part 3, Divisions 4 and 5

Omit the Divisions.

[17] Section 127A

Insert after section 127:

127A Lodgment of appeals and applications for leave to appeal

- (1) An appeal against the Court’s judgment or order is to be made by lodging a notice of appeal with the registrar of the Court for the proclaimed place at which the Court was sitting when the judgment or order was made.
- (2) An application for leave to appeal against the Court’s judgment or order is to be made by lodging an application for leave to

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

appeal, together with a notice of appeal, with the registrar of the Court for the proclaimed place at which the Court was sitting when the judgment or order was made.

- (3) On the granting of leave to appeal, an appeal is taken to have been made in accordance with the notice of appeal referred to in subsection (2).
- (4) As soon as practicable after receiving a notice of appeal or application for leave to appeal, a registrar must send the relevant papers (including a copy of the relevant judgment or order of the Court) to the Prothonotary of the Supreme Court.

[18] Sections 134 and 134A

Omit “\$750,000” wherever occurring.

Insert instead “the Court’s jurisdictional limit”.

[19] Part 3, Divisions 9 and 9A

Omit the Divisions (except for section 148E).

[20] Section 148E Liability of legal practitioners for clients’ costs in certain cases

Renumber as section 160 and transfer to the end of Division 10 of Part 3.

[21] Section 153 Proceedings for offences

Omit section 153 (2).

[22] Section 159

Omit the section.

[23] Section 160, as renumbered by item [*20]

Omit “section 148B or” from section 160 (5).

[24] 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

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

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.

[25] Part 3A

Omit the Part.

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 42 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 96 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 90 of the *Civil Procedure Act 2005*”.

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

[3] 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 to 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.

5.17 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 the General Division of a Local Court within the meaning of the *Local Courts Act 1982*.

5.18 Fines Act 1996 No 99

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

Omit section 72 (5).

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 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 102”.

[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*”.

5.19 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

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

- (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.

5.20 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*” wherever occurring.
Insert instead “section 96 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 96 of the *Civil Procedure Act 2005*”.

5.21 Industrial Relations Act 1996 No 17

[1] Section 372 Order for interest

Omit “section 95 (1) of the *Supreme Court Act 1970*” from section 372 (4).
Insert instead “section 96 of the *Civil Procedure Act 2005*”.

[2] Section 383 Procedure

Omit “the *Local Courts (Civil Claims) Act 1970*” from section 383 (1).
Insert instead “the *Civil Procedure Act 2005*”.

[3] 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 8 of the *Local Courts Act 1982*”.

5.22 Infants’ Custody and Settlements Act 1899 No 39

Section 5 Custody of minor

Omit section 5 (9).

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

5.23 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).

[2] Section 74 Rules

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

5.24 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”.

5.25 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 96 of the *Civil Procedure Act 2005*”.

5.26 Legal Profession Act 1987 No 109

[1] Section 20

Insert after section 19:

20 Legal practitioner not to be allowed certain privilege (cf Act No 9 1973, section 196)

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*”.

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

Insert instead “section 96 (3) of the *Civil Procedure Act 2005*”.

5.27 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 of Schedule 3.

5.28 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 76A**

Insert after section 76:

76A Amendment of process after expiry of limitation period

- (1) This section applies to any action (including any action in the nature of a cross-claim) brought before expiration of the limitation period fixed by or under this Act for the bringing of the action.
- (2) At any time after the expiration of the relevant limitation period, the plaintiff in an action to which this section applies may, with the leave of the court before which the action has been brought, amend the process by which the action has been brought so as:
 - (a) to enable the plaintiff to maintain the action in a capacity in which he or she has, since the action was brought, become entitled to bring and maintain such an action, or

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

- (b) to correct a mistake in the name of a party to the action, 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 founding an existing cause of action and claim for relief set out in the process.
- (3) For the purposes of the action, such an amendment has the same effect as if it had been made before the expiration of the relevant limitation period.
 - (4) This section extends to any action brought before the commencement of this section.

[3] 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*".

5.29 Local Courts Act 1982 No 164

[1] Section 4 Definitions

Insert in alphabetical order in section 4 (1):

jurisdictional limit of a Court means:

- (a) \$60,000, in relation to its General Division, and
- (b) \$10,000, in relation to 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.

Consultation draft

Civil Procedure Bill 2005

Schedule 5

Amendments

[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 36 Proceedings to which Part does not apply

Omit “the *Local Courts (Civil Claims) Act 1970*” from section 36 (1) (c).

Insert instead “Part 7 of this Act”.

[6] 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 General 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 General 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 Small Claims 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

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

damages claimed for their detention, is less than or equal to the jurisdictional limit of the Small Claims 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 95 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.
- (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.
- (2) Despite section 65 (1) (a), 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 General Division if a memorandum of consent is filed in relation to the proceedings.
- (3) A memorandum of consent referred to in subsection (2):

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

- (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.

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.

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.

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

- (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 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.

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

- (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.

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 the Small Claims Division of a Court 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.

72 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 the Small Claims Division of a Court 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 the Small Claims Division of a Court.
- (4) 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.
- (5) Proceedings in the Small Claims Division of a Court (other than any judgment given or order made in respect of the proceedings) are not required to be recorded.

Division 3 Appeals from Local Courts

73 Judgments and orders final

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

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

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

- (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 on a ground that involves a question of law alone.
- (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.

75 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 fact and law, 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.

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

- (1) 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.
- (2) Subject to any order of the Supreme Court to the contrary, the judgment or order against which the appeal is made is stayed pending the determination of the appeal.

Division 4 Miscellaneous

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

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

- (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 courts and in proceedings before registrars,
 - (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,

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

- (i) 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.
- (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.

[7] Schedule 2

Insert after Schedule 1:

Schedule 2 Provisions relating to Assessors

(Section 70)

1 Terms 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

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

- (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

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

- (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.

5.30 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 96 of the *Civil Procedure Act 2005*”.

5.31 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 96 of the *Civil Procedure Act 2005*”.

5.32 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 96 of the *Civil Procedure Act 2005*”.

5.33 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 the General Division of a Local Court 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*”.

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

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

5.34 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 96 of the *Civil Procedure Act 2005*”.

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

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

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

5.36 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 the General Division of a Local Court within the meaning of the *Local Courts Act 1982*”.

5.37 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”.

5.38 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 the General Division of a Local Court 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 the General Division of a Local Court 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 96 and Part 8 of the *Civil Procedure Act 2005*, and of Division 3 of Part 7 of the *Local Courts Act 1982*”.

5.39 Real Property Act 1900 No 25

[1] Section 3 Definitions

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

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

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 107 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 106 (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)”.

[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”.

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

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 106 (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 106 (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).

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

[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 section 105D:

- (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.

5.40 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 96 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

5.41 Sheriff Act 1900 No 16

Section 9

Omit the section.

5.42 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*)”.

5.43 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*”.

5.44 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] Section 76B

Omit the section.

[4] Section 76D

Insert after section 76C:

76D Application of sections 76, 76A and 76C

Sections 76, 76A and 76C do not apply to proceedings to which the *Civil Procedure Act 2005* applies.

[5] Part 5, Division 2

Omit the Division.

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

[6] Sections 78 and 79

Omit the sections.

[7] Section 84A

Insert after section 84:

84A Application of sections 80, 81 and 82

Sections 80, 81 and 82 do not apply to proceedings to which the *Civil Procedure Act 2005* applies.

[8] Section 87

Omit the section.

[9] Section 91 Judgment

Omit section 91 (2).

[10] Sections 92, 93, 94, 95 and 97

Omit the sections.

[11] Section 96 Effect of judgment or order

Omit section 96 (2) and (3).

[12] Part 6, Division 4

Omit the Division.

[13] Part 7B

Omit the Part.

[14] Section 124 Rule-making power

Omit section 124 (1) (i) and (p).

[15] Section 124 (10A) and (10B)

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 to any proceedings in a court in respect of which the use of such

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

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.

5.45 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 74, 75 and 76 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 74 (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*.

5.46 Water (Interest on Overdue Rates and Charges) Regulation 1999

Clause 4 Prescribed rate of interest

Omit clause 4 (2). Insert instead:

- (2) For the purposes of sections 55B (2) (e) and 159 (2) (b) (iv) of the *Water Act 1912*, the prescribed rate of interest is the rate prescribed under section 96 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

Consultation draft

Civil Procedure Bill 2005

Schedule 5 Amendments

5.47 Water (Part 2—General) Regulation 1997

Clause 15

Omit the clause. Insert instead:

23 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 96 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

5.48 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 96 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

5.49 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 96 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

5.50 Wine Grapes Marketing Board (Reconstitution) Regulation 2003

Clause 5 Board may make order as to terms and conditions of payment

Omit clause 5 (4). Insert instead:

- (4) The rate at which interest is to accrue must not exceed the prescribed rate of interest under section 96 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

Consultation draft

Civil Procedure Bill 2005

Amendments

Schedule 5

5.51 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 96 of the *Civil Procedure Act 2005*”.

5.52 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 96 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgment debt.

5.53 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 96 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 96 of the *Civil Procedure Act 2005*”.

Consultation draft

Civil Procedure Bill 2005

Schedule 6 Savings, transitional and other provisions

Schedule 6 Savings, transitional and other provisions

(Section 6)

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 Definitions

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*, 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 this Act, and may be amended and repealed accordingly:

Consultation draft

Civil Procedure Bill 2005

Savings, transitional and other provisions

Schedule 6

- (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, and such consequential orders (including orders as to costs), as are appropriate in the circumstances.
- (3) Such an order may be made by the court of its own motion or on application by any of the parties to the proceedings.

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 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.

8 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, 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 extends to the corresponding act, matter or thing referred to in the corresponding provision of this Act.

Consultation draft

Civil Procedure Bill 2005

Schedule 6 Savings, transitional and other provisions

9 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 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 (including anything arising under paragraph (a)) is taken to have been done under the corresponding provision of this Act.

10 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 78 (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.

Consultation draft

Civil Procedure Bill 2005

Uniform Civil Procedure Rules 2005

Schedule 7

Schedule 7 Uniform Civil Procedure Rules 2005

(Section 9)

Note. This Schedule will contain the *Uniform Civil Procedure Rules 2005*, currently contained in a separate document.