

Civil Procedure Act 2005 No 28

[2005-28]



New South Wales

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Notes—

- **See also**
[Courts and Other Legislation Amendment Bill 2012](#)

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Civil Procedure Act 2005 No 28



New South Wales

An Act with respect to practice and procedure in civil proceedings.

Part 1 Preliminary

1 Name of Act

This Act is the *Civil Procedure Act 2005*.

2 Commencement

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

3 Definitions

- (1) In this Act:

civil dispute has the same meaning as it has in Part 2A.

civil proceedings means any proceedings other than criminal proceedings.

claim for relief includes:

- (a) a claim for possession of land, and
- (b) a claim for delivery of goods, and

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

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

court includes tribunal.

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

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

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

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

exercise a function includes perform a duty.

function includes power, authority and duty.

hearing includes both trial and interlocutory hearing.

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

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

judgment debt includes:

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

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

judicial officer has the same meaning as it has in the [Judicial Officers Act 1986](#).

jurisdictional limit means:

- (a) in relation to the District Court, the jurisdictional limit of that Court within the meaning of the [District Court Act 1973](#), and
- (b) in relation to the Local Court sitting in its General Division, the jurisdictional limit of the Local Court when sitting in that Division within the meaning of the [Local Court Act 2007](#), and
- (c) in relation to the Local Court sitting in its Small Claims Division, the jurisdictional limit of the Local Court when sitting in that Division within the meaning of the [Local Court Act 2007](#).

local rules means rules of court other than uniform rules.

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

motor accident claim has the same meaning as **claim** has in the [Motor Accidents Compensation Act 1999](#).

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

ordinary basis, in relation to the assessment of legal costs that a court has ordered to be paid, means the basis of assessing costs set out in section 364 (1) and (2) of the [Legal Profession Act 2004](#).

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

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

- (a) a child under the age of 18 years, and
- (b) an involuntary patient, a forensic patient or a correctional patient within the meaning of the [Mental Health Act 2007](#), and
- (c) a person under guardianship within the meaning of the [Guardianship Act 1987](#), and
- (d) a protected person within the meaning of the [NSW Trustee and Guardian Act 2009](#), and
- (e) an incommunicate person, being a person who has such a physical or mental

disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs.

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

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

trial means any hearing that is not an interlocutory hearing.

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

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

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

workplace injury damages claim means a claim for an award of damages to which Division 3 of Part 5 of the [Workers Compensation Act 1987](#) applies.

Note—

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

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

Note—

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

4 Application of Parts 3-10

(1) Subject to this section, Parts 3-9 apply to each court referred to in Schedule 1 in relation to civil proceedings of a kind referred to in that Schedule in respect of that court.

(1A) Part 10 applies in relation to civil proceedings in the Supreme Court.

(2) The uniform rules may exclude any class of civil proceedings from the operation of all or any of the provisions of Parts 3-9.

(3) The Governor may, by regulation, amend or substitute Schedule 1.

(4) A regulation under this section may contain provisions consequent on the amendment or substitution of Schedule 1, including:

(a) provisions excluding any class of civil proceedings from the operation of all or any

of the provisions of Parts 3–9, and

(b) provisions modifying any specified provision of Parts 3–9, or of any other Act or law, in its application to any class of civil proceedings.

(5) Subject to any such regulation, this Act does not limit the operation of any other Act with respect to the conduct of civil proceedings.

5 Jurisdiction of courts

(1) Nothing in this Act or the uniform rules limits the jurisdiction of the Supreme Court.

(2) Nothing in the uniform rules extends the jurisdiction of any court except to the extent to which this Act expressly so provides.

6 Repeals, amendments and savings provisions

(1) Each Act and instrument referred to in Schedule 4 is repealed.

(2) (Repealed)

(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.

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 12 members, of whom:

(a) one is to be the Chief Justice of the Supreme Court or a Judge of the Supreme Court nominated for the time being by the Chief Justice, and

(b) one is to be the President of the Court of Appeal or a Judge of Appeal nominated for the time being by the President, and

(c) two are to be Judges of the Supreme Court appointed by the Chief Justice, and

- (c1) one is to be the Chief Judge of the Land and Environment Court or a Judge nominated for the time being by the Chief Judge, and
 - (c2) one is to be the President of the Industrial Relations Commission or a judicial member of the Commission (within the meaning of the *Industrial Relations Act 1996*) nominated for the time being by the President, and
 - (d) one is to be the Chief Judge of the District Court or a Judge of the District Court nominated for the time being by the Chief Judge, and
 - (e) one is to be a Judge of the District Court appointed by the Chief Judge, and
 - (f) one is to be the Chief Magistrate or a Magistrate nominated for the time being by the Chief Magistrate, and
 - (g) one is to be a Magistrate appointed by the Chief Magistrate, and
 - (h) one is to be a barrister appointed by the Bar Council, and
 - (i) one is to be a solicitor appointed by the Law Society Council.
- (2) Schedule 2 has effect with respect to the constitution and procedure of the Uniform Rules Committee.

9 Uniform rules

- (1) The Uniform Rules Committee may make rules, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed by rules or that is necessary or convenient to be prescribed by rules for carrying out or giving effect to this Act.
- (2) Without limiting subsection (1), rules under this section may make provision, in relation to all civil proceedings in respect of which a court has jurisdiction (however arising), for or with respect to the matters specified in Schedule 3.
- (3) On the commencement of this section, the rules set out in Schedule 7 are taken to have been made under this section, and may be amended and repealed accordingly.
- (4) The rules made under this section may authorise or require the use of an electronic case management system established under clause 2 of Schedule 1 to 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 clause 3 of Schedule 1 to 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 38 of the *Legal Profession Act 2004* or any matter relating to costs that is regulated by Part 3.2 of that Act.

(6) This section does not limit the operation of section 78 of the *Interpretation Act 1987*.

10 Rules of court taken to include uniform rules

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

11 Relationship between uniform rules and local rules

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

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

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

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

- (1) The senior judicial officer of any court may, by instrument in writing:
 - (a) direct that any function of the court under this Act or the uniform rules may be exercised by such registrars or other officers of the court, and in such circumstances and subject to such conditions, as are specified in the instrument, and
 - (b) vary or revoke any such instrument.
- (2) This section does not limit any provision of the Act by which the court is constituted with respect to the exercise of the court's functions.

14 Court may dispense with rules in particular cases

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

15 Practice notes

- (1) Subject to rules of court, the senior judicial officer of the court may issue practice notes for that court in relation to civil proceedings to which this Act applies.
- (2) A practice note must be published in the Gazette.

- (3) Sections 40 and 41 of the *Interpretation Act 1987* apply to a practice note in the same way as they apply to a statutory rule.

16 Court may give directions in circumstances not covered by rules

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

17 Forms

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

Note—

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

Division 2 Fees

18 Fees

- (1) The Governor may make regulations for or with respect to the following matters:
 - (a) the fees payable to a court in relation to the conduct of civil proceedings in the court, including fees for the following:
 - (i) the filing or registration of any document in the court,
 - (ii) the allocation of hearing dates,
 - (iii) the conduct of hearings,

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

Part 2A Steps to be taken before the commencement of proceedings

Division 1 Preliminary

18A Interpretation

- (1) In this Part:

alternative dispute resolution means processes (other than a judicial

determination) in which an impartial person assists persons in dispute to resolve or narrow the issues in dispute, including (but not limited to) the following:

- (a) mediation (whether or not by a referral under this Act),
- (b) expert determination,
- (c) early neutral evaluation,
- (d) conciliation,
- (e) arbitration (whether or not by a referral under this Act).

civil dispute means a dispute that may result in the commencement of civil proceedings.

costs, in relation to compliance with the pre-litigation requirements, means costs payable in or in relation to complying with the requirements, and includes fees, disbursements, expenses and remuneration.

dispute resolution statement means a statement filed under Division 3.

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.

pre-litigation protocol—see section 18C.

pre-litigation requirements means the requirements set out in section 18E.

- (2) In the event of an inconsistency between a provision of regulations made under this Part and a provision of any rules of court made under this Part, the provision in the regulations prevails to the extent of the inconsistency.
- (3) Any provision of this Part that enables or provides for rules of court to be made in relation to a matter operates, in relation to a particular court, to confer power on the rule committee for the court to make local rules in relation to the matter under the Act that constitutes the court.
- (4) Nothing in subsection (3) limits the operation of section 11 (Relationship between uniform rules and local rules).
- (5) If costs of compliance with the pre-litigation requirements are awarded or taken into account in civil proceedings in accordance with a provision of this Part, those costs are to be treated as if they formed part of the costs of the proceedings and the amount of costs payable may be assessed accordingly.

18B Application of Part

- (1) This Part applies in relation to civil disputes and civil proceedings other than excluded disputes or excluded proceedings.
- (2) Each of the following is an **excluded dispute**:
 - (a) any civil dispute where a person is in dispute with another person who is the subject of a vexatious proceedings order under the [Vexatious Proceedings Act 2008](#),
 - (b) any civil dispute (other than a civil dispute referred to in paragraph (a) or (c)) that involves claims that may result in the commencement of excluded proceedings if the issues in dispute are not resolved or narrowed,
 - (c) such other civil disputes (or civil disputes belonging to a class of civil disputes) that are declared under subsection (4) (a) or (5) to be excluded disputes.
- (3) Each of the following are **excluded proceedings**:
 - (a) any civil proceedings that result from a civil dispute referred to in subsection (2) (a) or (c),
 - (b) any civil proceedings in the Dust Diseases Tribunal,
 - (c) any civil proceedings in the Industrial Relations Commission, including the Commission in Court Session (the Industrial Court),
 - (d) any civil proceedings in relation to the payment of workers compensation,
 - (e) any civil proceedings in relation to the enforcement of a farm mortgage to which the [Farm Debt Mediation Act 1994](#) applies,
 - (f) any civil proceedings in relation to a claim to which the [Motor Accidents Act 1988](#) or the [Motor Accidents Compensation Act 1999](#) applies,
 - (g) any civil proceedings in relation to a claim made under the [Motor Accidents \(Lifetime Care and Support\) Act 2006](#),
 - (h) any civil proceedings in which a civil penalty under a civil penalty provision (however described) of or under an Act (including a Commonwealth Act) is sought,
 - (i) any ex parte civil proceedings,
 - (j) any appeal in civil proceedings,
 - (k) such other civil proceedings (or civil proceedings belonging to a class of civil proceedings) that are declared under subsection (4) (a) or (5) to be excluded proceedings.

- (4) The Governor may make regulations declaring that:
- (a) specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) are excluded disputes or excluded proceedings for the purposes of this Part, or
 - (b) specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) that have been excluded by rules of court under subsection (5) are not to be treated as excluded disputes or excluded proceedings for the purposes of this Part.

Note—

See section 18A (2) in relation to the resolution of inconsistencies between regulations made by the Governor and rules of court.

- (5) Rules of court (including the uniform rules) may declare that specified civil disputes or civil proceedings (or classes of civil disputes or civil proceedings) are excluded disputes or excluded proceedings for the purposes of this Part.

18C Pre-litigation protocols

- (1) A **pre-litigation protocol** is a set of provisions setting out steps that will constitute reasonable steps for the purposes of the pre-litigation requirements in their application to a specified class of civil disputes to which this Part applies.
- (2) Without limiting subsection (1), a pre-litigation protocol for a class of civil disputes may provide for any of the following matters:
- (a) appropriate notification and communication steps,
 - (b) appropriate responses to notifications and communication steps,
 - (c) appropriate correspondence, information and documents for exchange between the persons involved in the dispute,
 - (d) appropriate negotiation and alternative dispute resolution options,
 - (e) appropriate procedures to be followed in relation to the gathering of evidence (including expert evidence).
- (3) The Governor may make regulations setting out a pre-litigation protocol for a specified class of civil disputes to which this Part applies.
- (4) Rules of court (including the uniform rules) may also set out a pre-litigation protocol for a specified class of civil disputes to which this Part applies.

Division 2 Pre-litigation requirements

18D Compliance with pre-litigation requirements prior to commencement of civil

proceedings

Each person involved in a civil dispute to which this Part applies is to comply with the pre-litigation requirements before the commencement of any civil proceedings in a court in relation to that dispute.

18E Pre-litigation requirements

- (1) Each person involved in a civil dispute to which this Part applies is to take reasonable steps having regard to the person's situation, the nature of the dispute (including the value of any claim and complexity of the issues) and any applicable pre-litigation protocol:
 - (a) to resolve the dispute by agreement, or
 - (b) to clarify and narrow the issues in dispute in the event that civil proceedings are commenced.
- (2) For the purposes of this section, reasonable steps include (but are not limited to) the following:
 - (a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,
 - (b) responding appropriately to any such notification by communicating about what issues are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,
 - (c) exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute,
 - (d) considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court, including (but not limited to) resolution through genuine and reasonable negotiations and alternative dispute resolution processes,
 - (e) taking part in alternative dispute resolution processes.
- (3) Each person involved in a civil dispute to which this Part applies is not to unreasonably refuse to participate in genuine and reasonable negotiations or alternative dispute resolution processes.
- (4) Nothing in this section requires a person to provide any correspondence, information or document that might tend to incriminate the person.

18F Protection and use of information and documents disclosed under pre-litigation requirements

- (1) A person involved in a civil dispute to which this Part applies who receives any

information or documents provided by another person involved in a civil dispute in accordance with the pre-litigation requirements (and not otherwise available to the recipient) is subject to an obligation not to use the information or documents, or permit the information or documents to be used, for a purpose other than in connection with:

- (a) the resolution of the civil dispute between the persons involved in the civil dispute, or
 - (b) any civil proceedings arising out of the civil dispute.
- (2) Despite subsection (1), a person involved in a civil dispute or a party to civil proceedings to which this Part applies may:
- (a) agree in writing to the use of information or documents otherwise protected under subsection (1), or
 - (b) be released from the obligation imposed under subsection (1) by leave of the court.
- (3) A court may treat a failure to comply with the obligation under subsection (1) as a contempt of court if the court is satisfied that there was no lawful or reasonable excuse for the failure.
- (4) If documents exchanged in accordance with the pre-litigation requirements are permitted by this section to be used in civil proceedings arising from the dispute to which the requirements applied, those documents are to be obtained and admitted into evidence in accordance with the usual rules and procedures applicable in the court in relation to the obtaining and admission of documentary evidence.
- (5) Nothing in this section:
- (a) limits any other undertaking to a court (implied or specific) whether at common law or otherwise, in relation to information or documents disclosed or discovered in civil proceedings, or
 - (b) limits the operation of section 180 in relation to a mediation to which that section applies.

Division 3 Filing of dispute resolution statements by parties to civil proceedings

18G Dispute resolution statement to be filed by plaintiff

- (1) A plaintiff who commences civil proceedings to which this Part applies is to file a dispute resolution statement at the time the originating process for the proceedings is filed.

- (2) A dispute resolution statement filed under subsection (1) is to specify:
- (a) the steps that have been taken to try to resolve or narrow the issues in dispute between the plaintiff and the defendant in the proceedings, or
 - (b) the reasons why no such steps were taken, which may relate to (but are not limited to) the following:
 - (i) the urgency of the proceedings (including that the limitation period for the commencement of the proceedings is about to expire),
 - (ii) whether, and the extent to which, the safety or security of any person or property would have been compromised by taking such steps.

18H Dispute resolution statement to be filed by defendant

- (1) A defendant in civil proceedings to which this Part applies who has been served with a copy of a dispute resolution statement filed by the plaintiff is to file a dispute resolution statement at the time the defendant files a defence in the proceedings.
- (2) A dispute resolution statement filed under subsection (1) is to:
- (a) state that the defendant agrees with the dispute resolution statement filed by the plaintiff, or
 - (b) if the defendant disagrees in whole or part with the dispute resolution statement filed by the plaintiff—specify the respect in which, and reasons why, the defendant disagrees and specify other reasonable steps that the defendant believes could usefully be undertaken to resolve the dispute.

18I Dispute resolution statement to comply with uniform rules

A dispute resolution statement filed under this Division is to comply with such additional requirements as may be specified in rules of court (including the uniform rules).

Note—

See also section 17, which enables the Uniform Rules Committee to approve forms for documents to be used in connection with civil proceedings.

Division 4 Duties of legal practitioners

18J Duty of legal practitioners to provide certain information

- (1) A legal practitioner who is engaged to represent a person involved in a civil dispute to which this Part applies is to:
- (a) inform the person about the applicability of the pre-litigation requirements to the dispute (including of the need to file a dispute resolution statement in relation to those requirements if civil proceedings are commenced), and

(b) advise the person about the alternatives to the commencement of civil proceedings (including alternative dispute resolution processes) that are reasonably available to the person in the circumstances in order to resolve or narrow the issues in dispute.

(2) In determining whether a costs order should be made against a legal practitioner under section 99, a court may take into account a failure by the legal practitioner to comply with subsection (1).

Division 5 Consequences of non-compliance with this Part

18K Failure to comply does not prevent commencement or affect validity of proceedings

(1) Non-compliance with the pre-litigation requirements:

(a) does not (unless the court otherwise orders or the uniform rules otherwise provide) prevent or preclude a person from commencing civil proceedings in a court, or

(b) does not invalidate civil proceedings that have otherwise been duly commenced.

(2) A failure to file a dispute resolution statement in civil proceedings to which this Part applies does not invalidate the originating process commencing the proceedings, a response to such a process or the proceedings if they have otherwise been duly filed or commenced.

18L Persons generally to bear own costs of compliance with pre-litigation requirements

Subject to this Division, each person involved in a civil dispute (or each party to civil proceedings) to which this Part applies is to bear that person's or party's own costs of compliance with the pre-litigation requirements, unless rules of court (including the uniform rules) otherwise provide.

18M Court may make orders as to costs of compliance with pre-litigation requirements

(1) Despite section 18L, a court may:

(a) order that a party to civil proceedings to which this Part applies pay all or a specific part of another party's costs of compliance with the pre-litigation requirements if satisfied that it is reasonable to do so, having regard to the overriding purpose of this Act, and

(b) make a costs order under section 99 against a legal practitioner and, in determining whether such an order should be made, the court may take into account any conduct by the legal practitioner that causes a party to civil proceedings to which this Part applies not to comply with the pre-litigation requirements.

- (2) A court may make an order under subsection (1) (a) of its own motion or on the application of a party to the civil proceedings.

18N Court may take failure to comply with pre-litigation requirements into account

- (1) If a court is satisfied that a party to civil proceedings to which this Part applies has failed to comply with the pre-litigation requirements, the court may take into account that failure:
 - (a) in determining costs in the proceeding generally, and
 - (b) in making any order about the procedural obligations of parties to proceedings, and
 - (c) in making any other order it considers appropriate.
- (2) In determining whether to take into account a failure to comply with the pre-litigation requirements, the court may have regard to any of the following matters:
 - (a) whether or not the persons in dispute were legally represented,
 - (b) whether or not compliance might have resulted in self-incrimination by a person in dispute,
 - (c) any reasons that have been provided for the failure by the persons in dispute,
 - (d) any other matter that the court considers relevant.
- (3) A court may make an order under subsection (1) of its own motion or on the application of a party to the civil proceedings.

Division 6 Miscellaneous

18O Disclosure and publication of information concerning mediation undertaken for the purposes of this Part

- (1) In this section:

mediation means a meeting arranged for the mediation of a civil dispute to which this Part applies, and includes any steps taken in the course of making arrangements for the meeting or in the course of the follow-up of a meeting.

- (2) The following provisions apply in relation to a mediation:
 - (a) evidence of anything said or of any admission made in the mediation is not admissible in any proceedings before any court or other body,
 - (b) a document prepared for the purposes of, or in the course of, or as a result of, the mediation, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body.

- (3) Subsection (2) does not apply with respect to any evidence or document if:
- (a) the persons in attendance at, or identified during, the mediation and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document, or
 - (b) the evidence is called to prove that an agreement or other arrangement has been reached as a result of a mediation and the substance of the agreement or arrangement.
- (4) 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, or
 - (b) a document or other material sent to or produced to a mediator for the purpose of enabling a mediation to be arranged.
- (5) The privilege conferred by subsection (4) extends only to a publication made:
- (a) at a mediation, or
 - (b) in a document or other material sent to or produced to a mediator for the purpose of enabling a mediation to be arranged.

Part 3 Commencing and carrying on proceedings generally

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

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

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

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

Note—

1 July 1972 was the date of commencement of the [Supreme Court Act 1970](#).

21 Defendant's right to set-off

- (1) If there are mutual debts between a plaintiff and a defendant in any proceedings, the defendant may, by way of defence, set off against the plaintiff's claim any debt that is owed by the plaintiff to the defendant and that was due and payable at the time the

defence of set-off was filed, whether or not the mutual debts are different in nature.

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

Note—

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

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

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

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

- (1) If, in any proceedings on a claim, the cause of action giving rise to the claim is for more than the court's jurisdictional limit:
 - (a) the person may abandon the excess by a statement to that effect in the originating process, and
 - (b) in that event, the person's claim is taken to be reduced by the amount of the excess.
- (2) If a person's claim is successful in respect of a cause of action:
 - (a) the amount recoverable by the person (exclusive of costs and interest) is not to exceed the court's jurisdictional limit, and
 - (b) the judgment in the proceedings is in full discharge of all of the person's demands in respect of that cause of action, and
 - (c) entry of the judgment in the records of the court is to be made accordingly.
- (3) This section is subject to section 51 of the *District Court Act 1973* and section 31 of the *Local Court Act 2007*.

Note—

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

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

- (1) If:
 - (a) a person (***the first person***) splits any cause of action against another person (***the other person***) so as to commence proceedings, or make a cross-claim, for part only of the amount for which proceedings may be commenced on that cause, and
 - (b) judgment is given or entered, or a final order is made, on the proceedings or cross-claim,the other person is entitled to judgment in any other proceedings, whether in that or any other court, with respect to the same cause of action.
- (2) Despite subsection (1), if the other person has given a number of securities in respect of a claim made by the first person, the first person:
 - (a) may commence proceedings in any court in respect of each of those securities, or
 - (b) may make a cross-claim in proceedings in any court in respect of each of those securities,

as if each of those securities gave rise to a distinct cause of action, and may do so whether or not the claim made by the first person is for an amount that is more than the court's jurisdictional limit.

Part 4 Mediation of proceedings

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

In this Part:

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

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

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

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

- (1) If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned.
- (2) The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court, who may (but need not be) a listed mediator.
- (2A) Without limiting subsections (1) and (2), the court may refer proceedings or part of proceedings for mediation under the [Community Justice Centres Act 1983](#).
- (3) In this section, **listed mediator** means a mediator appointed in accordance with a practice note with respect to the nomination and appointment of persons to be mediators for the purposes of this Part.

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

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

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

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

- (a) if the court makes an order as to the payment of those costs, by one or more of the

parties in such manner as the order may specify, or

- (b) in any other case, by the parties in such proportions as they may agree among themselves.

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

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

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

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

(b) a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body.

(5) Subsection (4) does not apply with respect to any evidence or document:

(a) if the persons in attendance at, or identified during, the mediation session and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document, or

(b) in proceedings commenced with respect to any act or omission in connection with which a disclosure has been made as referred to in section 31 (c).

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

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

(a) with the consent of the person from whom the information was obtained,

(b) in connection with the administration or execution of this Part, including section 29 (2),

(c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,

(d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,

(e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

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

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

33 Protection from liability for mediator

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

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

This Part does not prevent:

- (a) the parties to proceedings from agreeing to and arranging for mediation of any matter otherwise than as referred to in this Part, or
- (b) a matter arising in proceedings from being dealt with under the provisions of the *Community Justice Centres Act 1983* without having been referred under section 26.

Part 5 Arbitration of proceedings

Division 1 Preliminary

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

In this Part:

arbitrator means an arbitrator appointed under section 36.

award means an arbitrator's award under section 39.

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

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

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

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

(7) An arbitrator's remuneration is to be paid out of money provided by Parliament.

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

- (1) The jurisdiction conferred on an arbitrator by this Part in relation to referred proceedings is part of the jurisdiction of the court by which the proceedings were referred.
- (2) Subject to this Part, but without limiting the specific powers and authorities of an arbitrator under this Part, an arbitrator has and may exercise, in relation to referred proceedings, all of the functions of the court by which the proceedings were referred.
- (3) Subsection (2) does not confer on an arbitrator functions of the court which are the same as, or similar to, the functions conferred by sections 52 and 53 or any other functions in respect of contempt.
- (4) The functions conferred on an arbitrator may be exercised only:
 - (a) for the purpose of determining the issues in dispute in referred proceedings, and
 - (b) for the purpose of making an award in referred proceedings, and
 - (c) for related purposes.
- (5) Subject to this Part, a tribunal (other than the arbitrator to whom proceedings have been referred for determination) has no jurisdiction in respect of any issue in dispute in the proceedings while those proceedings are before the arbitrator.
- (6) In subsection (5), **tribunal** means any court, tribunal, board or other body, or any person, empowered by an Act or by agreement of parties to determine by litigation, arbitration, conciliation or otherwise any issue that is in dispute.

Division 2 Arbitration

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

- (1) The court may order that proceedings before it:
 - (a) in respect of a claim for the recovery of damages or other money, or
 - (b) in respect of a claim for any equitable or other relief ancillary to a claim for the recovery of damages or other money,be referred for determination by an arbitrator.
- (2) Before making such an order in relation to any proceedings, the referring court:
 - (a) is to consider the preparations made by the parties for the hearing of the proceedings, and

- (b) is, as far as possible, to deal with all matters that may be dealt with by the court on application to the court before the hearing of the proceedings, and
 - (c) is to give such directions for the conduct of the proceedings before the arbitrator as appear best adapted for the just, quick and cheap disposal of the proceedings.
- (3) The referring court may not make such an order in relation to any proceedings if:
- (a) no issue in the proceedings is contested or judgment in the proceedings has been given or entered and has not been set aside, or
 - (b) rules of court provide that such an order may not be made in relation to proceedings of that kind, or
 - (c) cause is otherwise shown why the proceedings should not be so referred.
- (4) At any time before the making of an award in relation to referred proceedings, the referring court may revoke an order under this section and give directions for the subsequent conduct of the proceedings and directions as to any costs incurred before the revocation of the order.
- (5) This section does not limit any other power of the court to refer a matter to arbitration.

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

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

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

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

- (a) if it is expressed to be made by consent of all the parties, on the date on which it is received by the referring court, or

(b) in any other case, at the expiry of 28 days after it is sent to all of the parties.

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

(1) No relief lies:

(a) under section 69 or 101 of the *Supreme Court Act 1970*, or

(b) by way of declaratory judgment or order, or

(c) by way of injunction, or

(d) under section 126, 127 or 128 of the *District Court Act 1973*, or

(e) under section 39 or 40 of the *Local Court Act 2007*,

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 Local Court when sitting in its Small Claims Division.

(3) An order for rehearing need not be made if it appears to the court that the applicant failed to attend a hearing before an arbitrator without good reason.

(4) In an order for rehearing, the referring court may direct that the rehearing be a full rehearing or a limited rehearing, as the court thinks appropriate, and may do so regardless of whether the applicant requested a full rehearing or a limited rehearing or made no such request.

- (5) In the absence of a direction under subsection (4), the rehearing is to be a full rehearing.
- (6) An order for a limited rehearing must specify the aspects that are to be the subject of the rehearing, whether by reference to specific issues in dispute, specific parties to the dispute or otherwise.
- (7) The referring court may amend an order for rehearing at any time before or during a rehearing.

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

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

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

- (1) A rehearing may be discontinued, but only with the consent of all parties or by leave of the court.
- (2) If a rehearing is discontinued, the court is to reinstate the award from which the rehearing has arisen.
- (3) An award that is reinstated under this section:
 - (a) is final and conclusive, and
 - (b) is taken to be a judgment of the referring court, and
 - (c) unless the court otherwise orders, is taken to have had effect as such a judgment

as from the date on which it would have taken effect under section 40 (b) had no application for a rehearing been made under this Division.

Note—

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

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

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

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

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

Division 4 Miscellaneous

48 Appearances (cf Act No 43 1983, section 8)

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

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

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

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

- (1) Subject to this Act and any directions given by the referring court, the procedure at an arbitration is to be determined by the arbitrator.

- (2) Subject to the rules of evidence, an arbitrator must act according to equity, good conscience and the substantial merits of the case without regard for technicalities or legal forms.

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

A referring court has the same powers with respect to:

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

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

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

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

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

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

- (5) Failure to comply with an order under this section constitutes a contempt of the referring court, committed in the face of the court.

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

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

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

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

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

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

Part 6 Case management and interlocutory matters

Division 1 Guiding principles

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

- (1) The overriding purpose of this Act and of rules of court, in their application to a civil dispute or civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the dispute or 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.
- (3A) A party to a civil dispute or civil proceedings is under a duty to take reasonable steps to resolve or narrow the issues in dispute in accordance with the provisions of Part 2A (if any) that are applicable to the dispute or proceedings in a way that is consistent with the overriding purpose.
- (4) Each of the following persons must not, by their conduct, cause a party to a civil dispute or civil proceedings to be put in breach of a duty identified in subsection (3) or (3A):
 - (a) any solicitor or barrister representing the party in the dispute or proceedings,
 - (b) any person with a relevant interest in the proceedings commenced by the party.
- (5) The court may take into account any failure to comply with subsection (3), (3A) or (4) in exercising a discretion with respect to costs.
- (6) For the purposes of this section, a person has a **relevant interest** in civil proceedings if the person:
 - (a) provides financial assistance or other assistance to any party to the proceedings, and
 - (b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.

Note—

Examples of persons who may have a relevant interest are insurers and persons who fund litigation.

- (7) In this section:

party to a civil dispute means a person who is involved in the dispute.

57 Objects of case management

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

58 Court to follow dictates of justice

- (1) In deciding:
 - (a) whether to make any order or direction for the management of proceedings, including:
 - (i) any order for the amendment of a document, and
 - (ii) any order granting an adjournment or stay of proceedings, and
 - (iii) any other order of a procedural nature, and
 - (iv) any direction under Division 2, and
 - (b) the terms in which any such order or direction is to be made,the court must seek to act in accordance with the dictates of justice.
- (2) For the purpose of determining what are the dictates of justice in a particular case, the court:
 - (a) must have regard to the provisions of sections 56 and 57, and
 - (b) may have regard to the following matters to the extent to which it considers them relevant:
 - (i) the degree of difficulty or complexity to which the issues in the proceedings give rise,
 - (ii) the degree of expedition with which the respective parties have approached

the proceedings, including the degree to which they have been timely in their interlocutory activities,

- (iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,
- (iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),
- (v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,
- (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
- (vii) such other matters as the court considers relevant in the circumstances of the case.

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

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

60 Proportionality of costs

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

Division 2 Powers of court to give directions

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

- (1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings.
- (2) In particular, the court may, by order, do any one or more of the following:
 - (a) it may direct any party to proceedings to take specified steps in relation to the proceedings,
 - (b) it may direct the parties to proceedings as to the time within which specified steps

in the proceedings must be completed,

(c) it may give such other directions with respect to the conduct of proceedings as it considers appropriate.

(3) If a party to whom such a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:

(a) it may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,

(b) it may strike out or limit any claim made by a plaintiff,

(c) it may strike out any defence filed by a defendant, and give judgment accordingly,

(d) it may strike out or amend any document filed by the party, either in whole or in part,

(e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,

(f) it may direct the party to pay the whole or part of the costs of another party,

(g) it may make such other order or give such other direction as it considers appropriate.

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

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

(1) The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.

(2) The court may, by order, give directions as to the order in which questions of fact are to be tried.

(3) Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:

(a) a direction limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,

(b) a direction limiting the number of witnesses (including expert witnesses) that a party may call,

- (c) a direction limiting the number of documents that a party may tender in evidence,
 - (d) a direction limiting the time that may be taken in making any oral submissions,
 - (e) a direction that all or any part of any submissions be in writing,
 - (f) a direction limiting the time that may be taken by a party in presenting his or her case,
 - (g) a direction limiting the time that may be taken by the hearing.
- (4) A direction under this section must not detract from the principle that each party is entitled to a fair hearing, and must be given a reasonable opportunity:
- (a) to lead evidence, and
 - (b) to make submissions, and
 - (c) to present a case, and
 - (d) at trial, other than a trial before the Local Court sitting in its Small Claims Division, to cross-examine witnesses.
- (5) In deciding whether to make a direction under this section, the court may have regard to the following matters in addition to any other matters that the court considers relevant:
- (a) the subject-matter, and the complexity or simplicity, of the case,
 - (b) the number of witnesses to be called,
 - (c) the volume and character of the evidence to be led,
 - (d) the need to place a reasonable limit on the time allowed for any hearing,
 - (e) the efficient administration of the court lists,
 - (f) the interests of parties to other proceedings before the court,
 - (g) the costs that are likely to be incurred by the parties compared with the quantum of the subject-matter in dispute,
 - (h) the court's estimate of the length of the hearing.
- (6) At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party a memorandum stating:
- (a) the estimated length of the trial, and the estimated costs and disbursements of the solicitor or barrister, and
 - (b) the estimated costs that, if the party were unsuccessful at trial, would be payable

by the party to any other party.

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

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

Division 3 Other powers of court

64 Amendment of documents generally (cf SCR Part 20, rules 1 and 4; DCR Part 17, rules 1 and 4)

- (1) At any stage of proceedings, the court may order:
 - (a) that any document in the proceedings be amended, or
 - (b) that leave be granted to a party to amend any document in the proceedings.
- (2) Subject to section 58, all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings.
- (3) An order under this section may be made even if the amendment would have the effect of adding or substituting a cause of action that has arisen after the

commencement of the proceedings but, in that case, the date of commencement of the proceedings, in relation to that cause of action, is, subject to section 65, taken to be the date on which the amendment is made.

- (4) If there has been a mistake in the name of a party, this section applies to the person intended to be made a party as if he or she were a party.
- (5) This section does not apply to the amendment of a judgment, order or certificate.

65 Amending process after expiry of limitation period (cf SCR Part 20, rule 4; DCR Part 17, rule 4)

- (1) This section applies to any proceedings commenced before the expiration of any relevant limitation period for the commencement of the proceedings.
- (2) At any time after the expiration of the relevant limitation period, the plaintiff in any such proceedings may, with the leave of the court under section 64 (1) (b), amend the originating process so as:
 - (a) to enable the plaintiff to maintain the proceedings in a capacity in which he or she has, since the proceedings were commenced, become entitled to bring and maintain the proceedings, or
 - (b) to correct a mistake in the name of a party to the proceedings, whether or not the effect of the amendment is to substitute a new party, being a mistake that, in the court's opinion, is neither misleading nor such as to cause reasonable doubt as to the identity of the person intended to be made a party, or
 - (c) to add or substitute a new cause of action, together with a claim for relief on the new cause of action, being a new cause of action that, in the court's opinion, arises from the same (or substantially the same) facts as those giving rise to an existing cause of action and claim for relief set out in the originating process.
- (3) Unless the court otherwise orders, an amendment made under this section is taken to have had effect as from the date on which the proceedings were commenced.
- (4) This section does not limit the powers of the court under section 64.
- (5) This section has effect despite anything to the contrary in the *Limitation Act 1969*.
- (6) In this section, **originating process**, in relation to any proceedings, includes any pleading subsequently filed in the proceedings.

66 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.

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

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

68 Attendance at court and production of documents and things to court (cf Act No 9 1973, section 64; Act No 11 1970, section 72; SCR Part 36, rule 12)

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

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

Note—

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

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

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

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

- (1) At any stage of the proceedings, the court:
- (a) may, by order, dispense with the rules of evidence for proving any matter that is not bona fide in dispute, also with such rules of evidence as may give rise to expense or delay, and
 - (b) without limiting the generality of paragraph (a), may, by order, dispense with the proof of handwriting, documents, the identity of parties or parcels of land, or of authority, and
 - (c) may, by order, require any party (not being a person under legal incapacity) to make admissions with respect to any document or to any question of fact, and
 - (d) in the case of a party's refusal or neglect to make any admission required under paragraph (c), may, unless of the opinion that the refusal or neglect is reasonable, order that the costs of proof occasioned by the refusal or neglect are to be paid by

the party.

- (2) An admission made under subsection (1) (c):
 - (a) is to be for the purpose of the proceedings in which it is made and for no other purpose, and
 - (b) is to be subject to all just exceptions, and
 - (c) may, with the leave of the court, be amended or withdrawn.

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

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

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

72 (Repealed)

73 Power of court to determine questions about compromises and settlements

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

Division 4 Persons under legal incapacity

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

(1) In this Division:

manager, in relation to a protected person's estate, means the person having the management of the estate under the *NSW Trustee and Guardian Act 2009*.

protected person has the same meaning as it has in the *NSW Trustee and Guardian Act 2009*.

(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*.

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

(1) This section applies to any claim, enforceable by proceedings in the court, that is made by or on behalf of, or against, a person under legal incapacity.

(2) If, before proceedings are commenced with respect to any such claim, an agreement for the compromise or settlement of the claim is made by or on behalf of the person under legal incapacity, the court may approve or disapprove the agreement.

(3) An agreement disapproved by the court does not bind the person under legal incapacity.

(4) An agreement approved by the court binds the person under legal incapacity as if he or she were of full capacity and (if it was made by some other person on his or her behalf) as if that other person had made the agreement as his or her agent.

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

(1) This section applies to proceedings commenced by or on behalf of, or against, any of the following persons:

- (a) a person under legal incapacity,

- (b) a person who, during the course of the proceedings, becomes a person under legal incapacity,
 - (c) a person whom the court finds, during the course of the proceedings, to be incapable of managing his or her own affairs.
- (2) The court may make a finding referred to in subsection (1) (c) only on the basis of evidence given in the proceedings in which it is made, and such a finding has effect for the purpose only of those proceedings.
- (3) Except with the approval of the court, there may not be:
- (a) any compromise or settlement of any proceedings to which this section applies, or
 - (b) any acceptance of money paid into court in any such proceedings,
- as regards a claim made by or on behalf of, or against, a person referred to in subsection (1).
- (4) If an agreement for the compromise or settlement of any matter in dispute in any such proceedings is made by or on behalf of a person referred to in subsection (1), the court may approve or disapprove the agreement.
- (5) An agreement disapproved by the court does not bind the person by whom or on whose behalf it was made.
- (6) An agreement approved by the court binds the person by whom or on whose behalf it was made as if he or she were of full capacity and (if it was made by some other person on his or her behalf) as if that other person had made the agreement as his or her agent.

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

- (1) This section applies to money recovered in any proceedings on behalf of any of the following persons:
- (a) a person under legal incapacity,
 - (b) a person who, during the course of the proceedings, becomes a person under legal incapacity,
 - (c) a person whom the court has found, under section 76 (1) (c), to be incapable of managing his or her own affairs,
- pursuant to a compromise, settlement, judgment or order in any proceedings.
- (2) All money recovered on behalf of a person referred to in subsection (1) is to be paid into court.

- (3) Despite subsection (2), the court may order that the whole or any part of such money not be paid into court but be paid instead to such person as the court may direct, including:
- (a) if the person is a minor, to the NSW Trustee and Guardian, or
 - (b) if the person is a protected person, to the manager of the protected person's estate.
- (4) Money paid into court under subsection (2) is to be paid to such person as the court may direct, including:
- (a) if the person is a minor, to the NSW Trustee and Guardian, or
 - (b) if the person is a protected person, to the manager of the protected person's estate.

78 Application of money by NSW Trustee and Guardian (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 NSW Trustee and Guardian on behalf of a minor is to be held and applied by the NSW Trustee and Guardian for the maintenance and education of, or otherwise for the benefit of, the minor.
- (2) On the application of the NSW Trustee and Guardian, the Supreme Court may give directions to the NSW Trustee and Guardian as to the administration of any such money.
- (3) If given effect to by the NSW Trustee and Guardian, any such direction exonerates the NSW Trustee and Guardian from any claim or demand by any other person.

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

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

80 Directions to tutor of person under legal incapacity

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

Division 5 Interim payments

81 Definitions and application (cf Act No 52 1970, sections 76D and 76H; Act No 9 1973, sections

57 and 61)

(1) In this Division:

interim payment, in relation to proceedings for the recovery of damages, means a payment of any of those damages by a defendant before the completion of the proceedings, either voluntarily or in accordance with an order of the court under this Division.

public authority means a public or local authority constituted by or under an Act, a Government Department or a statutory body representing the Crown, and includes a person exercising functions on behalf of any such authority, Department or body.

(2) This Division does not apply to an award of damages to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies except as specifically provided by section 82 (7).

Note—

Clause 11 of Schedule 6 to this Act provides that the reference in subsection (2) 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.

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

- (1) In any proceedings for the recovery of damages, the court may order a defendant in the proceedings to make one or more payments to the plaintiff of part of the damages sought to be recovered in the proceedings.
- (2) The court may make such an order against a defendant on the application of the plaintiff at any stage of the proceedings.
- (3) The court may not make such an order unless:
 - (a) the defendant has admitted liability, or
 - (b) the plaintiff has obtained judgment against the defendant for damages to be assessed, or
 - (c) the court is satisfied that, if the proceedings went to trial, the plaintiff would obtain judgment for substantial damages against the defendant.
- (4) The court may not make such an order if the defendant satisfies the court that:
 - (a) the defendant is not insured in respect of the risk giving rise to the plaintiff's claim for the recovery of damages, and
 - (b) the defendant is not a public authority, and
 - (c) the defendant would, having regard to the defendant's means and resources,

suffer undue hardship if such a payment were to be made.

- (5) The court may order a defendant to make one or more payments of such amounts as it thinks just, but not exceeding a reasonable proportion of the damages that, in the court's opinion, are likely to be recovered by the plaintiff.
- (6) In estimating those damages, the court is to take into account any relevant contributory negligence, and any cross-claims, on which the defendant may be entitled to rely.
- (7) The court may make an order under this section in proceedings for the recovery of damages to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies, but only an order for one or more payments to be made to the plaintiff of part of the damages for economic loss sought to be recovered in the proceedings and only if the court is satisfied that the plaintiff would suffer financial hardship if such a payment were not made.

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

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

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

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

(c) on the application of any party, at any other stage of the proceedings.

Division 6 Miscellaneous

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

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

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

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

- (1) The power of the court to make orders in relation to proceedings, whether under this or any other Act or otherwise, includes the power:
 - (a) to make orders by way of leave or direction, and
 - (b) to make all or any orders on terms.
- (2) The power of the court to make orders on terms is taken to be a power to make orders on such terms and conditions as the court thinks fit.
- (3) Subject to this Act and to rules of court, the court may make any order that it has power to make either of its own motion or on the application of a party or any other person entitled to make such an application.
- (4) Nothing in this Act limits the operation of section 43 of the *Interpretation Act 1987*.

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

(1) In this section:

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

conduct includes both act and omission.

culpable conduct means conduct that, under:

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

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

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

provide evidence means:

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

(2) This section applies in circumstances in which:

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

(2A) This section does not apply in circumstances in which section 128A of the [Evidence Act 1995](#) applies.

(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.

(4) If the person informs the court that he or she will provide the evidence, the court is to cause the person to be given a certificate under this section in respect of the evidence.

(5) The court is also to cause a person to be given a certificate under this section if the court overrules an objection to the making of an order for production, or refuses an application for the revocation of such an order, but, after the evidence is provided, the court finds that there were reasonable grounds for the objection or application.

(6) Despite anything in this section, the court may make an order for production if it is

satisfied of the following:

(a) that the evidence required by the order may tend to prove that the person has engaged in culpable conduct,

(b) that the culpable conduct does not comprise conduct that, under:

(i) the laws of any State or Territory (other than New South Wales), or

(ii) the laws of the Commonwealth, or

(iii) the laws of a foreign country,

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

(c) that the interests of justice require that the person provide the evidence.

(7) If the court makes an order for production under subsection (6), it is to cause the person to be given a certificate under this section in respect of the evidence required by the order.

(8) In any proceedings:

(a) evidence provided by a person in respect of which a certificate under this section has been given, and

(b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having provided such evidence,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

(9) If a question arises under this section relating to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

88 Fresh trial

(1) If a trial of proceedings has commenced before a judicial officer and he or she is unable to continue the trial or give judgment in the proceedings, by reason of death, resignation or incapacity, the senior judicial officer of the relevant court may nominate some other judicial officer of that court as the judicial officer before whom the proceedings are to be listed for trial.

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

89 Procedure on fresh trial

(1) If:

- (a) any proceedings have been listed for trial pursuant to section 88, or
- (b) an appellate court has made an order for a fresh trial generally (being an order given on an appeal after a trial of any proceedings), or
- (c) a judicial officer before whom a trial of any proceedings has commenced has discharged himself or herself from the trial without having given judgment in the proceedings,

the court may give such directions as it thinks fit as to the evidence to be used in the fresh trial.

- (2) In particular, the court may give either or both of the following directions:
 - (a) a direction that all or any part of the evidence given at the previous trial is to be taken to be evidence in the fresh trial without the need for the witnesses to be recalled,
 - (b) a direction that all or any of the witnesses are to be recalled for examination or cross-examination, or both, either generally or as to a particular question or questions in the proceedings.
- (3) In subsection (1), a reference to a trial of proceedings includes a reference to a trial of one or more questions in the proceedings.

Part 7 Judgments and orders

Division 1 Judgments and orders generally

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

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

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

- (1) Dismissal of:
 - (a) any proceedings, either generally or in relation to any cause of action, or

(b) the whole or any part of a claim for relief in any proceedings,

does not, subject to the terms on which any order for dismissal was made, prevent the plaintiff from bringing fresh proceedings or claiming the same relief in fresh proceedings.

- (2) Despite subsection (1), if, following a determination on the merits in any proceedings, the court dismisses the proceedings, or any claim for relief in the proceedings, the plaintiff is not entitled to claim any relief in respect of the same cause of action in any subsequent proceedings commenced in that or any other court.

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

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

Note—

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

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

- (1) In proceedings for the detention of goods, the court may (whether or not their value has yet been assessed) give judgment:

- (a) for their delivery to the plaintiff, or
- (b) for payment to the plaintiff of an amount equivalent to their assessed value, or
- (c) for their delivery to the plaintiff or for payment to the plaintiff of their assessed value, at the defendant's option,

and, in addition to any judgment referred to in paragraph (a), (b) or (c), may also give judgment for payment to the plaintiff of damages for their detention.

- (2) The court may, in an order for delivery of goods or in a subsequent order, specify the date by which delivery of the goods must be effected.
- (3) If judgment has been given as referred to in subsection (1) (a), but the goods are subsequently damaged, destroyed or otherwise rendered unavailable for delivery, the court may, on application by the plaintiff, make an order for the payment to the plaintiff of an amount equivalent to their assessed value, as referred to in subsection (1) (b).
- (4) If judgment has been given as referred to in subsection (1) (c) and the plaintiff subsequently applies for an order under this subsection, the court may make an order for the delivery of the goods to the plaintiff without the option for any payment of the kind referred to in subsection (1) (b).

- (5) In this section, the **assessed value** of goods is their value as assessed by, or in accordance with the directions of, the court.

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

- (1) If any person does not comply with a judgment or order directing the person:

- (a) to execute any conveyance, contract or other document, or
- (b) to endorse any negotiable instrument,

the court may order that the conveyance, contract or other document be executed, or the negotiable instrument endorsed, by such person as the court may nominate for that purpose.

- (2) A conveyance, contract, document or instrument that is executed or endorsed pursuant to an order under subsection (1) operates, and is for all purposes available, as if it had been executed or endorsed by the person originally directed to execute or endorse it.

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

- (1) If two or more persons have a joint liability and, in any proceedings, judgment on the liability is given against one or more but not all of them:

- (a) the liability of the other or others of them is not discharged by the judgment or by any step taken for the enforcement of the judgment, and
- (b) after the judgment takes effect, those of them against whom the judgment is given and the other or others of them become liable, as between those of them against whom the judgment is given on the one hand and the other or the others of them on the other hand, severally but not jointly, and
- (c) if there are two or more such persons against whom the judgment is not given, they remain, after the judgment takes effect, jointly liable amongst themselves, and
- (d) if the judgment is satisfied wholly or in part by payment or by recovery under execution, the liability of the persons against whom the judgment is not given is taken also to have been satisfied in the amount of the payment or recovery.

- (2) This section does not affect a person's right to contribution or indemnity in respect of the person's satisfaction, wholly or in part, of a liability that the person has (whether jointly or severally or jointly and severally) with any other person.

- (3) This section does not apply to a judgment to which section 5 (1) (a) of the [Law Reform \(Miscellaneous Provisions\) Act 1946](#) applies.

- (4) In this section, **liability** includes liability in contract, liability in tort and liability under

a statute.

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

- (1) This section applies if, in relation to any two or more judgments of the same court, the judgment creditor and judgment debtor under one or more of the judgments are the judgment debtor and judgment creditor, respectively, under the other judgments.
- (2) The judgment debtor under any such judgment (***the first judgment***) may apply to the court for an order that the judgment be set off against any other such judgment (***the second judgment***) in respect of which he or she is the judgment creditor.
- (3) An order under this section has the following effect:
 - (a) if the amount of the first judgment is less than the amount of the second judgment, the first judgment is taken to have been satisfied and the amount of the second judgment is taken to have been reduced by the amount of the first judgment,
 - (b) if the amount of the first judgment is equal to the amount of the second judgment, both judgments are taken to have been satisfied,
 - (c) if the amount of the first judgment is greater than the amount of the second judgment, the second judgment is taken to have been satisfied and the amount of the first judgment is taken to have been reduced by the amount of the second judgment.
- (4) (Repealed)
- (5) This section does not apply to judgments of the Supreme Court.

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

- (1) Subject to rules of court:
 - (a) if, by subpoena or otherwise, the court makes an order, whether under this Act or any other law:
 - (i) for a person to attend court for any purpose, or
 - (ii) for a person to produce any document or thing to the court, and
 - (b) the person fails to comply with the order,the court may issue, or make an order for the issue of, a warrant for the person's arrest.
- (2) Subject to rules of court, an arrest warrant may be issued without notice to the person.

- (3) The court from which an arrest warrant has been issued may revoke the warrant.
- (4) An arrest warrant is sufficient authority for any person to whom it is addressed, with the assistance of such police officers as may be necessary, to arrest the person named in the warrant, to convey the person to the place specified in the warrant and to deliver the person into the custody of the court sitting at that place.

Division 2 Costs in proceedings

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

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

- (c) in the case of proceedings transferred or removed into the court, the costs of the proceedings before they were transferred or removed.

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

- (1) This section applies if it appears to the court that costs have been incurred:
 - (a) by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or
 - (b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.
- (2) After giving the legal practitioner a reasonable opportunity to be heard, the court may do any one or more of the following:
 - (a) it may, by order, disallow the whole or any part of the costs in the proceedings:
 - (i) in the case of a barrister, as between the barrister and the instructing solicitor, or as between the barrister and the client, as the case requires, or
 - (ii) in the case of a solicitor, as between the solicitor and the client,
 - (b) it may, by order, direct the legal practitioner:
 - (i) in the case of a barrister, to pay to the instructing solicitor or client, or both, the whole or any part of any costs that the instructing solicitor or client, or both, have been ordered to pay to any other person, whether or not the solicitor or client has paid those costs, or
 - (ii) in the case of a solicitor, to pay to the client the whole or any part of any costs that the client has been ordered to pay to any other person, whether or not the client has paid those costs,
 - (c) it may, by order, direct the legal practitioner to indemnify any party (other than the client) against costs payable by that party.
- (3) Before making such an order, the court may refer the matter to a costs assessor (within the meaning of Part 3.2 of the [Legal Profession Act 2004](#)) for inquiry and report.
- (4) The court may direct that notice of any proceedings or order under this section with respect to a legal practitioner be given:
 - (a) in the case of a barrister, to the instructing solicitor or client, or both, as the court may direct, or
 - (b) in the case of a solicitor, to the client.

- (5) The court may give ancillary directions to give full effect to an order under this section, including directions to a legal practitioner to provide a bill of costs in assessable form:
- (a) to the court, or
 - (b) to a party to the proceedings, or
 - (c) in the case of a barrister, to the instructing solicitor or client, or both, or
 - (d) in the case of a solicitor, to the client.
- (6) A party's legal practitioner is not entitled to demand, recover or accept:
- (a) in the case of a barrister, from the instructing solicitor or client, or
 - (b) in the case of a solicitor, from the client,
- any part of the amount for which the legal practitioner is directed by the court to indemnify any party pursuant to an order referred to in subsection (2) (c).
- (7) In this section, **client** includes former client.

Division 3 Payment of interest

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

- (1) In proceedings for the recovery of money (including any debt or damages or the value of any goods), the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate as the court thinks fit:
- (a) on the whole or any part of the money, and
 - (b) for the whole or any part of the period from the time the cause of action arose until the time the judgment takes effect.
- (2) In proceedings for the recovery of a debt or damages in which payment of the whole or a part of the debt or damages has been made after the proceedings commenced but before, or without, judgment being given, the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate as the court thinks fit:
- (a) on the whole or any part of the money paid, and
 - (b) for the whole or any part of the period from the time the cause of action arose until the time the money was paid.
- (3) This section:

- (a) does not authorise the giving of interest on any interest awarded under this section, and
 - (b) does not authorise the giving of interest on a debt in respect of any period for which interest is payable as of right, whether by virtue of an agreement or otherwise, and
 - (c) does not authorise the giving of interest in any proceedings for the recovery of money in which the amount claimed is less than such amount as may be prescribed by the uniform rules, and
 - (d) does not affect the damages recoverable for the dishonour of a bill of exchange.
- (4) In any proceedings for damages, the court may not order the payment of interest under this section in respect of the period from when an appropriate settlement sum was offered (or first offered) by the defendant unless the special circumstances of the case warrant the making of such an order.
- (5) For the purposes of subsection (4), **appropriate settlement sum** means a sum offered in settlement of proceedings in which the amount for which judgment is given (including interest accrued up to and including the date of the offer) does not exceed the sum offered by more than 10 per cent.

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

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

(6) This section does not authorise the giving of interest on any interest payable under this section.

(7) In this section, a reference to the **prescribed rate** of interest is a reference to the rate of interest prescribed by the uniform rules for the purposes of this section.

Note—

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

Part 8 Enforcement of judgments and orders

Division 1 Preliminary

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

In this Part:

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

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

financial institution means an authorised deposit-taking institution within the meaning of the [Banking Act 1959](#) of the Commonwealth.

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

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

goods means chattels, other than chattels real.

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

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

wage or salary includes:

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

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

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

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

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

Note—

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

103 Enforcement of judgments generally

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

104 Judgments for possession of land

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

105 Judgments for delivery of goods

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

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

- (1) A judgment debt may be enforced by means of any one or more of the following:
 - (a) a writ for the levy of property,
 - (b) a garnishee order,
 - (c) in the case of a judgment of the Supreme Court or the District Court, a charging order.
- (2) Subject to the uniform rules, a writ for the levy of property is sufficient authority for the Sheriff:
 - (a) to seize and to sell goods of or to which the judgment debtor is or may be possessed or entitled or which the judgment debtor may, at law or in equity, assign or dispose of, and
 - (b) to seize money belonging to the judgment debtor, and
 - (c) to seize and to realise cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the judgment debtor, and
 - (d) to enter into possession of, and to sell, land of or to which the judgment debtor is seized or entitled, or which the judgment debtor may, at law or in equity, assign or dispose of, and
 - (e) to take and to sell choses in action or equitable interests in goods or land held by the judgment debtor.

- (3) The power conferred on the Sheriff by subsection (2) (a) may not be exercised in relation to:
 - (a) any clothing, or
 - (b) any bedroom or kitchen furniture, or
 - (c) any tools of trade (including vehicles, plant, equipment and reference books) not exceeding, in aggregate value, the sum prescribed by the uniform rules,if the clothing, furniture or tools are used by the judgment debtor or by any member of his or her family.
- (4) For the purposes of subsection (2) (d), the Sheriff is taken to have entered into possession of land when notice of the proposed sale of the land is published in accordance with the uniform rules.
- (5) The power conferred on the Sheriff by subsection (2) (d) may not be exercised in relation to land if the amount outstanding under the judgment is less than the jurisdictional limit of the Local Court when sitting in its Small Claims Division.
- (6) A garnishee order or charging order addressed to the Crown binds the Crown as garnishee or chargee, as the case requires.

Note—

Divisions 2, 3 and 4, respectively, apply to the enforcement of writs for the levy of property, garnishee orders and charging orders.

107 Deferred payment and payment by instalments

- (1) A court in which judgment has been entered may, subject to and in accordance with the uniform rules, make an order allowing for:
 - (a) payment of the judgment debt within such time as is specified in the order, or
 - (b) payment of the judgment debt by instalments, payable in such amounts and at such times as are specified in the order.

Note—

Such an order may be varied or rescinded pursuant to section 43 (2) of the [Interpretation Act 1987](#). The circumstances in which such an order may be varied or rescinded, and the procedure for varying or rescinding such an order, may be dealt with by the uniform rules.

- (2) Subject to section 119, execution of a judgment for the payment of money is stayed while the judgment is the subject of an order in force under this section.
- (3) (Repealed)

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

rule 1)

- (1) The court may, subject to and in accordance with the uniform rules, make an order requiring a person bound by a judgment or order:
 - (a) to attend the court to be orally examined as to any material question, or
 - (b) to produce any document or thing that is in his or her possession and that relates to a material question.
- (2) An order under this section with respect to a person that is a corporation:
 - (a) may be addressed to any officer or former officer of the corporation, and
 - (b) binds any such officer or former officer as if he or she were the person bound by the judgment or order.
- (3) Without limiting subsection (1), the uniform rules may require the judgment creditor under a judgment debt to have attempted to obtain information as to the judgment debtor's financial circumstances (whether by means of a notice requiring the judgment debtor to supply such information or otherwise) before the judgment creditor may apply for an order under this section.
- (4) (Repealed)
- (5) For the purposes of this section, the **material questions** in relation to a judgment or order are:
 - (a) to the extent to which it requires the person bound by it to pay money:
 - (i) questions as to whether any and, if so, what debts are owing to that person, and
 - (ii) questions as to whether that person has any and, if so, what other property or other means of satisfying the judgment or order, and
 - (b) to the extent to which it does not require the person bound by it to pay money, such questions concerning or in aid of the enforcement or satisfaction of the judgment or order as may be specified in the order under this section.

Division 2 Writs for the levy of property

Subdivision 1 Enforcement against goods and securities

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

- (1) A writ of execution against goods binds the property in the goods as from the time the writ is delivered to the Sheriff.
- (2) Despite subsection (1), a writ of execution does not affect the title to goods acquired

by a person in good faith and for valuable consideration unless, when the person acquires title, he or she has notice that such a writ has been delivered to the Sheriff and remains unexecuted.

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

- (1) If goods the subject of a writ for the levy of property (being goods in the possession of the judgment debtor) are the subject of a conditional bill of sale, the Sheriff may sell the judgment debtor's interest in the goods without taking possession of them.
- (2) On receiving written notice of the purchase of the judgment debtor's interest, the person having the benefit of the bill of sale (***the holder of the bill***) may take possession of the goods and, if he or she does so, is taken to hold them for the use of the purchaser, subject to the purchaser's due payment of any amounts payable under the bill of sale.
- (3) If the goods are subsequently sold under the bill of sale, and there is any surplus remaining from the proceeds of sale after the debt to the holder of the bill is satisfied, the holder must pay the surplus to the purchaser, and, accordingly, the amount of that surplus is recoverable by the purchaser from the holder as a debt.
- (4) Nothing in this section affects the right of any judgment creditor to test the validity of any bill of sale by interpleader.

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

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

Subdivision 2 Enforcement against land

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

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

remains unexecuted.

(3) A judgment in any action at law does not of itself bind or affect any land.

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

(1) This section applies to land the subject of a writ for the levy of property:

- (a) that is registered, in the Register kept under the *Real Property Act 1900*, pursuant to section 105 of that Act, or
- (b) that is registered, in the General Register of Deeds kept under the *Conveyancing Act 1919*, pursuant to section 186 of that Act.

(2) During the period:

- (a) that begins when the writ is registered in the relevant register, and
- (b) that ends at the expiration of 6 months after the writ is registered in the relevant register, or on the expiration of the writ, whichever first occurs,

land the subject of the writ may not be sold or mortgaged by the judgment debtor otherwise than in accordance with this section.

(3) Before the land may be sold or mortgaged by the judgment debtor:

- (a) the judgment creditor:
 - (i) must consent, by notice in writing, to the sale or mortgage of the land by the judgment debtor, and
 - (ii) must stipulate, in the notice of consent, the minimum amount to be paid to the Sheriff from the proceeds of the sale of the land or from the money advanced under the mortgage of the land, and
- (b) the judgment debtor must lodge the notice of consent with the Sheriff, and
- (c) the Sheriff, after due inquiry, must endorse the notice of consent with a certificate to the effect that the land has not been sold under the writ.

(4) During the period of 8 weeks commencing on the date on which the Sheriff endorses the notice of consent, as referred to in subsection (3) (c):

- (a) the judgment debtor may enter into an agreement for the sale or mortgage of the land, and
- (b) the Sheriff is prohibited from causing the land to be sold.

(5) Any deposit paid under an agreement for the sale of the land is to be paid to the

Sheriff, to be held by the Sheriff as stakeholder.

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

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

- (1) The court may, in relation to land to be sold by public auction under a writ of execution, make orders:
 - (a) authorising entry onto the land by the Sheriff (including entry by force if necessary) for the purpose of showing the land to prospective purchasers, and
 - (b) authorising entry onto the land by prospective purchasers in the presence of the Sheriff.
- (2) For those purposes, such an order may also authorise the Sheriff to do either or both of the following:
 - (a) to secure entry onto the land (including by breaking or replacing locks, bars and other devices restricting entry, if necessary),

(b) to take such steps as are necessary to prevent persons from entering the land.

(3) This section does not affect any other power of the court to make orders in relation to such matters.

(4) A reference in this section to land includes any premises on land.

Subdivision 3 General

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

(1) A sale of property by the Sheriff under this Part is as valid and effectual as if the property had been sold to the purchaser by the judgment debtor personally.

(2) Subsection (1) does not apply to the sale of an equity of redemption or other equitable interest relating to land unless a deed of bargain and sale to the purchaser is duly executed by the Sheriff.

(3) In a deed of conveyance executed by the Sheriff in relation to any land, a statement to the effect that:

(a) the land has been sold under a writ for the levy of property, and

(b) the writ for the levy of property has been issued pursuant to a judgment of a court in relation to proceedings specified in the writ,

is admissible in any proceedings as evidence of those facts.

116 Effect of expiry of writ

Subject to section 135:

(a) the expiry of a writ for the levy of property does not affect any agreement for sale or other transaction entered into under the authority of the writ before that expiry, and

(b) any action necessary to complete that sale or give effect to that transaction may be taken as if the writ were still in force.

Division 3 Garnishee orders

Subdivision 1 Enforcement against debts

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

(1) Subject to the uniform rules, a garnishee order operates to attach, to the extent of the amount outstanding under the judgment, all debts that are due or accruing from the garnishee to the judgment debtor at the time of service of the order.

(2) For the purposes of this Division, any amount standing to the credit of the judgment debtor in a financial institution is taken to be a debt owed to the judgment debtor by

that institution.

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

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

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

Subdivision 2 Enforcement against income

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

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

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

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

121 Maximum payment under one of several concurrent garnishee orders (cf Act No 9 1973, section 101; Act No 11 1970, section 51)

- (1) This section applies in circumstances in which a wage or salary is attached by one or more garnishee orders of which one or more (but not all) are limited garnishee orders.
- (2) Unless the court orders otherwise, the amount payable by a garnishee under a garnishee order that is not a limited garnishee order must not, in respect of any wage

or salary attached by the garnishee order, exceed the greatest amount payable by the garnishee under any limited garnishee order that attaches the same wage or salary.

- (3) In this section, **limited garnishee order** means a garnishee order in respect of a judgment debt that is the subject of an instalment order.

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

- (1) The amounts attached under one or more garnishee orders must not, in total, reduce the net weekly amount of any wage or salary received by the judgment debtor from the garnishee to less than the standard workers compensation weekly benefit.

- (2) In this section:

net weekly amount, in relation to any wage or salary payable to a judgment debtor, means the amount payable each week to the judgment debtor after deducting any taxes or other sums that, pursuant to any Act (including any Commonwealth Act), are required to be deducted from any such money.

standard workers compensation weekly benefit means an amount equivalent to the weekly payment of compensation referred to in section 37 (1) (a) (i) of the [Workers Compensation Act 1987](#), as adjusted under Division 6 of Part 3 of that Act.

Subdivision 3 General

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

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

- (4) As between the garnishee and the judgment debtor, the amount attached under the garnishee order is taken, subject to any order of the court, to have been paid by the garnishee to the judgment debtor.

Note—

Such an order may be made, for example, if the garnishee has failed to comply with the requirements of subsection (3).

- (5) As between the judgment creditor and the judgment debtor, the amount of the payment to the judgment creditor is taken to have been paid by the judgment debtor to the judgment creditor in satisfaction, to the extent of that amount, of the judgment.

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

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

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

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

(b) on demand made by the judgment debtor, must repay the excess to the judgment debtor.

(2) The amount of the excess is recoverable from the judgment creditor, by the judgment debtor or by the garnishee, as a debt in any court of competent jurisdiction.

Division 4 Charging orders

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

(1) This section applies to the following kinds of property in relation to a judgment debtor (referred to in this Division as **security interests**):

(a) stock and shares in a public company,

(b) money on deposit in a financial institution, being:

(i) money held in the judgment debtor's name in the judgment debtor's own right,
or

(ii) money held in the name of some other person in trust for the judgment debtor,

(c) any equitable interest in property.

(2) Subject to the uniform rules, a charging order operates, in relation to each security interest specified in the order:

(a) to charge the security interest in favour of the judgment creditor to the extent necessary to satisfy the judgment, and

(b) to restrain the chargee from dealing with the security interest otherwise than in accordance with the directions of the judgment creditor.

(3) A charging order takes effect when it is made.

(4) Despite subsection (3), the judgment creditor may not commence proceedings to take the benefit of a charge arising under a charging order until after the expiration of 3 months from the date of the order.

(5) A charging order entitles the judgment creditor, in relation to the security interests charged by the order, to any relief to which the judgment creditor would have been entitled had the charge been made in the judgment creditor's favour by the judgment debtor.

127 Unauthorised transfer or disposal of security interest under charging order (cf Act No 8

1901, section 29)

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

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

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

Division 5 Miscellaneous

129 No arrest on mesne process (cf Act No 52 1970, section 10)

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

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

A judgment or order is not enforceable against a person:

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

131 Committal for contempt

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

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

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

(b) any other person who has the custody of the goods,

may appoint the judgment debtor or other person as custodian of the goods pending their delivery or sale under the writ.

(2) A custodian so appointed, and any other person aware that a custodian is so appointed, must not:

(a) sell, give or otherwise deal with the goods, or

(b) damage or destroy the goods, or

(c) hide or remove the goods, or

(d) cause, permit or allow the goods to be sold, given or otherwise dealt with, damaged or destroyed or hidden or removed,

otherwise than with the leave of the court or the written consent of the Sheriff.

Maximum penalty: 50 penalty units.

(3) Prosecution of a person for an offence under subsection (2) does not prevent any other proceedings from being taken against the person in respect of an alleged failure to comply with a duty arising from the person's appointment as a custodian of goods.

133 Judgments and orders unenforceable until entered

(1) A judgment or order of the court may not be enforced until it has been entered in accordance with the uniform rules.

(2) This section extends to:

(a) any judgment, order, determination or decree of a court, and

(b) any adjudication or award of a person having authority to make an adjudication or award,

that may be filed or registered in the court, or of which a certificate may be filed or registered in the court, under any other Act or law.

(3) In subsection (2), **law** includes:

(a) a law of the Commonwealth, and

(b) a law of another State or Territory, and

(c) in relation to the Supreme Court, a law of a foreign country.

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

(1) An application by a judgment creditor for:

- (a) a writ of execution, or
- (b) a garnishee order, or
- (c) a charging order, or
- (d) an order for examination,

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

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

135 Directions as to enforcement

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

136 Appropriation of payments towards judgment debt

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

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

137 Execution of judgments and orders for costs

- (1) A judgment may be enforced in relation to costs separately from its enforcement in relation to matters other than costs.

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

138 Other methods of enforcing judgments

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

Part 9 Transfer of proceedings between courts

Division 1 Transfer of proceedings from lower to higher court

139 Definitions

In this Division:

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

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

transfer order means an order referred to in section 140.

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

- (1) The Supreme Court may, of its own motion or on application by a party to proceedings before the District Court or the 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 the Local Court, order that the proceedings, including any cross-claim in the proceedings, be transferred to the District Court.

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

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

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

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

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

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

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

144 Transfer of certain proceedings from District Court to Supreme Court (cf Act No 9 1973, section 147)

- (1) This section applies to proceedings under Subdivision 2 of Division 8 of Part 3 of the *District Court Act 1973*.
- (2) If, during proceedings to which this section applies, the District Court decides that it lacks, or may lack, jurisdiction to hear and dispose of the proceedings, the District Court must order that the proceedings be transferred to the Supreme Court.
- (3) Proceedings that are transferred to the Supreme Court under subsection (2):
 - (a) are to be continued in the Supreme Court:
 - (i) as if the proceedings had been duly commenced in the Supreme Court on the date on which they were commenced in the District Court, and
 - (ii) as if any cross-claim in the proceedings had been duly made in the Supreme Court on the date on which it was made in the District Court, or
 - (b) if the Supreme Court so orders, are to be remitted to the District Court and

continued in the District Court as if they had not been transferred.

- (4) The District Court has, and may exercise, jurisdiction to hear and dispose of proceedings the subject of an order by the Supreme Court under subsection (3) (b), including such jurisdiction as is necessary to determine any question arising in any such proceedings.
- (5) If, during proceedings to which this section applies, the District Court decides that it is appropriate to do so for any reason other than the reason referred to in subsection (2), the District Court may order that the proceedings be transferred to the Supreme Court.
- (6) Proceedings that are transferred to the Supreme Court under subsection (5), are to be continued in the Supreme Court:
 - (a) as if the proceedings had been duly commenced in the Supreme Court on the date on which they were commenced in the District Court, and
 - (b) as if any cross-claim in the proceedings had been duly made in the Supreme Court on the date on which it was made in the District Court.
- (7) Subject to the rules of court applicable in the Supreme Court, the power of the Supreme Court to make orders as to costs includes a power to make orders with respect to the costs of:
 - (a) the application for, and the making of, an order under subsection (2) or (5), and
 - (b) any step taken in the proceedings before an order under subsection (2) or (5) was made.
- (8) The making of an order under subsection (2) or (5) does not invalidate any order previously made by the District Court in the proceedings.

Division 2 Transfer of proceedings from higher to lower court

145 Definitions

In this Division:

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

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

transfer order means an order referred to in section 146.

146 Transfer of proceedings to lower court (cf Act No 9 1973, section 143; Act No 11 1970,

section 21F)

(1) If the Supreme Court is satisfied, in relation to proceedings before it:

- (a) that the proceedings could properly have been commenced in the District Court or the 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 the Local Court,

the Supreme Court may order that the proceedings, including any such cross-claim, be transferred to the District Court or to the 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 the Local Court, and
- (b) that any cross-claim in the proceedings could properly have been brought as a cross-claim in the Local Court,

the District Court may order that the proceedings, including any such cross-claim, be transferred to the Local Court.

(3) In determining:

- (a) whether any proceedings could properly have been commenced in the lower court, or
- (b) whether any cross-claim could properly have been brought in the lower court,

the higher court must have regard to the current limits of the lower court's jurisdiction as if they had been the limits of that jurisdiction when the proceedings were commenced, or the cross-claim brought, in the higher court.

(4) Proceedings in the Supreme Court on a claim for damages arising from personal injury or death are to be transferred under this section unless the Supreme Court is satisfied:

- (a) in the case of a motor accident claim or workplace injury damages claim:
 - (i) that the amount to be awarded to the plaintiff, if successful, is likely to be more than \$1,000,000, and
 - (ii) that the case involves complex legal issues or issues of general public importance, or
- (b) in any other case:
 - (i) that the amount to be awarded to the plaintiff, if successful, is likely to exceed the jurisdictional limit of the District Court, or

(ii) that there is other sufficient reason for hearing the proceedings in the Supreme Court.

(5) This section extends to proceedings that have been transferred to the Supreme Court or the District Court pursuant to a previous transfer order under Division 1.

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

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

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

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

149 Jurisdiction of lower court

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 2A Transfer of proceedings between Supreme Court and Land and Environment Court

149A Definitions

(1) In this Division:

transfer order means an order referred to in section 149B (1) or (2).

transferee court means the court to which proceedings are to be transferred pursuant to a transfer order.

transferor court means the court from which proceedings are transferred pursuant to a transfer order.

- (2) For the purposes of this Division, proceedings are **related** if the matters with which they deal are so closely associated as to form part of the same controversy.

149B Transfer of proceedings between Supreme Court and Land and Environment Court

- (1) If either the Supreme Court or the Land and Environment Court is satisfied, in relation to proceedings before it, that it is more appropriate for the proceedings to be heard in the other court, it may, on application by a party to the proceedings or of its own motion, order that the proceedings be transferred to the other court.
- (2) If either the Supreme Court or the Land and Environment Court is satisfied, in relation to proceedings before it, that:

- (a) there are related proceedings pending in the other court, and
- (b) it is more appropriate for the proceedings to be heard, together with the related proceedings, in the other court,

it may, on application by a party to the proceedings or of its own motion, order that the proceedings be transferred to the other court and heard together with the related proceedings.

- (3) No appeal lies against a decision of the transferor court to make, or not to make, an order under this section.

149C 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 the proceedings before the order was made.
- (3) Any order made by the transferor court (other than the transfer order) may be varied or revoked by an order of the transferee court.

149D Proceedings after transfer

- (1) Subject to the rules of court applicable in the transferee court:
- (a) any proceedings with respect to which a transfer order takes effect continue in the transferee court:
- (i) 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

- (ii) 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, and
 - (b) any proceedings with respect to which a transfer order under section 149B (2) takes effect are to be heard together with, and are taken to form part of, the related proceedings in the transferee court.
- (2) For the purposes of any proceedings continued in the transferee court:
- (a) any admission duly made in the transferor court is to be treated as if it had been made in the transferee court, and
 - (b) in the case of proceedings affected by a transfer order under section 149B (2), any process or other documentation before the transferee court may be amended so as to reflect the merger of the proceedings concerned.
- (3) Subject to the rules of court applicable in the transferee court, the power of the transferee court to make orders as to costs includes a power to make orders with respect to the costs of:
- (a) the application for, and the making of, the transfer order, and
 - (b) any step taken in the proceedings before the transfer order was made.

149E Jurisdiction of transferee court

The transferee court has, and may exercise, all of the jurisdiction of the transferor 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 Supreme Court and Industrial Court

150 Definitions

- (1) In this Division:

transfer order means an order referred to in section 151 (1) or (2).

transferee court means the court to which proceedings are to be transferred pursuant to a transfer order.

transferor court means the court from which proceedings are transferred pursuant to a transfer order.

- (2) For the purposes of this Division, proceedings are **related** if the matters with which they deal are so closely associated as to form part of the same controversy.

151 Transfer of proceedings between Supreme Court and Industrial Court

- (1) If either the Supreme Court or the Industrial Court is satisfied, in relation to proceedings before it, that it is more appropriate for the proceedings to be heard in the other court, it may, on application by a party to the proceedings or of its own motion, order that the proceedings be transferred to the other court.
- (2) If either the Supreme Court or the Industrial Court is satisfied, in relation to proceedings before it, that:
 - (a) there are related proceedings pending in the other court, and
 - (b) it is more appropriate for the proceedings to be heard, together with the related proceedings, in the other court,it may, on application by a party to the proceedings or of its own motion, order that the proceedings be transferred to the other court and heard together with the related proceedings.
- (3) No appeal lies against a decision of the transferor court to make, or not to make, an order under this section.

152 Transfer orders

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

153 Proceedings after transfer

- (1) Subject to the rules of court applicable in the transferee court:
 - (a) any proceedings with respect to which a transfer order takes effect continue in the transferee court:
 - (i) 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
 - (ii) 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, and
 - (b) any proceedings with respect to which a transfer order under section 151 (2) takes effect are to be heard together with, and are taken to form part of, the related proceedings in the transferee court.
- (2) For the purposes of any proceedings continued in the transferee court:

- (a) any admission duly made in the transferor court is to be treated as if it had been made in the transferee court, and
 - (b) in the case of proceedings affected by a transfer order under section 151 (2), any process or other documentation before the transferee court may be amended so as to reflect the merger of the proceedings concerned.
- (3) Subject to the rules of court applicable in the transferee court, the power of the transferee court to make orders as to costs includes a power to make orders with respect to the costs of:
- (a) the application for, and the making of, the transfer order, and
 - (b) any step taken in the proceedings before the transfer order was made.

154 Jurisdiction of transferee court

The transferee court has, and may exercise, all of the jurisdiction of the transferor court in relation to any proceedings to which a transfer order relates, including jurisdiction to determine any question arising in any such proceedings.

Part 10 Representative proceedings in Supreme Court

Division 1 Preliminary

155 Definitions (cf s33A FCA)

In this Part:

Court means the Supreme Court.

defendant means a person against whom relief is sought in representative proceedings.

group member means a member of a group of persons on whose behalf representative proceedings have been commenced.

proceedings means proceedings in the Court other than criminal proceedings.

representative party means a person who commences representative proceedings.

representative proceedings—see section 157.

sub-group member means a person included in a sub-group established under section 168.

sub-group representative party means a person appointed to be a sub-group representative party under section 168.

Note—

For the purposes of comparison, a number of provisions of this Part contain bracketed notes in headings drawing attention ("cf") to equivalent or comparable (though not necessarily identical) provisions of Part IVA of the *Federal Court of Australia Act 1976* ("FCA") of the Commonwealth as in force immediately before the commencement of this Part.

156 Application

This Part applies to proceedings commenced after the commencement of this section, whether the cause of action arose before or arises after that commencement.

Division 2 Commencement of representative proceedings

157 Commencement of representative proceedings (cf s33C FCA)

(1) Subject to this Part, where:

- (a) 7 or more persons have claims against the same person, and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and
- (c) the claims of all those persons give rise to a substantial common question of law or fact,

proceedings may be commenced by one or more of those persons as representing some or all of them.

(2) Representative proceedings may be commenced:

- (a) whether or not the relief sought:
 - (i) is, or includes, equitable relief, or
 - (ii) consists of, or includes, damages, or
 - (iii) includes claims for damages that would require individual assessment, or
 - (iv) is the same for each person represented, and
- (b) whether or not the proceedings:
 - (i) are concerned with separate contracts or transactions between the defendant in the proceedings and individual group members, or
 - (ii) involve separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

158 Standing (cf s33D FCA)

(1) For the purposes of section 157 (1) (a), a person has a sufficient interest to commence representative proceedings against another person on behalf of other persons if the

person has standing to commence proceedings on the person's own behalf against that other person.

- (2) The person may commence representative proceedings on behalf of other persons against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings.
- (3) If a person has commenced representative proceedings, that person retains standing:
 - (a) to continue the proceedings, and
 - (b) to bring an appeal from a judgment in the proceedings,even though the person ceases to have a claim against any defendant.

159 Is consent required to be a group member? (cf s33E FCA)

- (1) Subject to subsection (2), the consent of a person to be a group member is not required.
- (2) None of the following is a group member in representative proceedings unless the person gives consent in writing to being so:
 - (a) the Commonwealth, a State or a Territory,
 - (b) a Minister of the Commonwealth, a State or a Territory,
 - (c) a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or association,
 - (d) an officer of the Commonwealth, a State or a Territory, in his or her capacity as an officer.

160 Persons under legal incapacity (cf s33F FCA)

- (1) It is not necessary for a person under legal incapacity to have a tutor merely in order to be a group member.
- (2) A group member who is a person under legal incapacity may only take a step in representative proceedings, or conduct part of the proceedings, by the member's tutor.

161 Originating process (cf s33H FCA)

- (1) The originating process in representative proceedings, or a document filed in support of the originating process, must, in addition to any other matters required to be included:
 - (a) describe or otherwise identify the group members to whom the proceedings relate, and

(b) specify the nature of the claims made on behalf of the group members and the relief claimed, and

(c) specify the question of law or facts common to the claims of the group members.

(2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.

162 Right of group member to opt out (cf s33J FCA)

(1) The Court must fix a date before which a group member may opt out of representative proceedings in the Court.

(2) A group member may opt out of the representative proceedings by written notice given under the local rules before the date so fixed.

(3) The Court may, on application by a group member, the representative party or the defendant in the proceedings, fix another date so as to extend the period during which a group member may opt out of the representative proceedings.

(4) Except with the leave of the Court, the hearing of representative proceedings must not commence earlier than the date before which a group member may opt out of the proceedings.

163 Causes of action accruing after commencement of representative proceedings (cf s33K FCA)

(1) The Court may at any stage of representative proceedings, on application by the representative party, give leave to amend the originating process commencing the representative proceedings so as to alter the description of the group.

(2) The description of the group may be altered so as to include a person:

(a) whose cause of action accrued after the commencement of the representative proceedings but before such date as the Court fixes when giving leave, and

(b) who would have been included in the group, or, with the consent of the person would have been included in the group, if the cause of action had accrued before the commencement of the proceedings.

(3) The date fixed under subsection (2) (a) may be the date on which leave is given or another date before or after that date.

(4) If the Court gives leave under subsection (1), it may also make any other orders it thinks just, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceedings.

164 Situation where fewer than 7 group members (cf s33L FCA)

If, at any stage of representative proceedings, it appears likely to the Court that there are fewer than 7 group members, the Court may, on such conditions (if any) as it thinks fit:

- (a) order that the proceedings continue under this Part, or
- (b) order that the proceedings no longer continue under this Part.

165 Distribution costs excessive (cf s33M FCA)

If:

- (a) the relief claimed in representative proceedings is or includes payment of money to group members (otherwise than in respect of costs), and
- (b) on application by the defendant, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the defendant of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts,

the Court may, by order:

- (c) direct that the proceedings no longer continue under this Part, or
- (d) stay the proceedings so far as it relates to relief of the kind mentioned in paragraph (a).

166 Court may order discontinuance of proceedings in certain circumstances (cf s33N FCA)

- (1) The Court may, on application by the defendant or of its own motion, order that proceedings no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because:
 - (a) the costs that would be incurred if the proceedings were to continue as representative proceedings are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding, or
 - (b) all the relief sought can be obtained by means of proceedings other than representative proceedings under this Part, or
 - (c) the representative proceedings will not provide an efficient and effective means of dealing with the claims of group members, or
 - (d) a representative party is not able to adequately represent the interests of the group members, or
 - (e) it is otherwise inappropriate that the claims be pursued by means of representative proceedings.

- (2) It is not, for the purposes of subsection (1) (e), inappropriate for claims to be pursued by means of representative proceedings merely because the persons identified as group members in relation to the proceedings:
 - (a) do not include all persons on whose behalf those proceedings might have been brought, or
 - (b) are aggregated together for a particular purpose such as a litigation funding arrangement.
- (3) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the defendant except with the leave of the Court.
- (4) Leave for the purposes of subsection (3) may be granted subject to such conditions as to costs as the Court considers just.

167 Effect of discontinuance order under this Part (cf s33P FCA)

- (1) If the Court makes an order under section 164, 165 or 166 that proceedings no longer continue under this Part:
 - (a) the proceedings may be continued as proceedings by the representative party on the party's own behalf against the defendant, and
 - (b) on the application of a person who was a group member for the purposes of the proceedings, the Court may order that the person be joined as an applicant in the proceedings.

- (2) In this section:

applicant, in relation to proceedings, includes a claimant or plaintiff (as the case may be) in the proceedings.

168 Determination of questions where not all common (cf s33Q FCA)

- (1) If it appears to the Court that determination of the question or questions common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining questions.
- (2) In the case of questions common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.

169 Individual questions (cf s33R FCA)

- (1) In giving directions under section 168, the Court may permit an individual group member to appear in the proceedings for the purpose of determining a question that

relates only to the claims of that member.

- (2) In such a case, the individual group member, and not the representative party, is liable for costs associated with the determination of the question.

170 Directions relating to commencement of further proceedings (cf s33S FCA)

If a question cannot properly or conveniently be dealt with by the Court under section 168 or 169, the Court may give directions for the commencement and conduct of other proceedings, whether or not group proceedings.

171 Adequacy of representation (cf s33T FCA)

- (1) If, on application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and make such other orders as it thinks fit.
- (2) If, on application by a sub-group member, it appears to the Court that a sub-group representative party is not able adequately to represent the interests of the sub-group members, the Court may substitute another person as sub-group representative party and may make such other orders as it thinks fit.

172 Stay of execution in certain circumstances (cf s33U FCA)

If a defendant in representative proceedings commences proceedings in the Court against a group member, the Court may order a stay of execution in respect of any relief awarded to the group member in the representative proceedings until the other proceedings are determined.

173 Approval of Court required for settlement and discontinuance (cf s33V FCA)

- (1) Representative proceedings may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court.

174 Settlement of individual claim of representative party (cf s33W FCA)

- (1) A representative party may, with the leave of the Court, settle the party's individual claim in whole or in part at any stage of the representative proceedings.
- (2) A representative party who is seeking leave to settle, or who has settled, the party's individual claim may, with the leave of the Court, withdraw as representative party.
- (3) If a person has sought leave to withdraw as representative party under subsection (2), the Court may, on application by a group member, make an order for the substitution

of another group member as representative party and may make such other orders as it thinks fit.

- (4) Before granting a person leave to withdraw as a representative party:
 - (a) the Court must be satisfied that notice of the application has been given to group members in accordance with section 175 (1) and in sufficient time for them to apply to have another person substituted as the representative party, and
 - (b) any application for the substitution of another group member as a representative party must have been determined.

Division 3 Notices

175 Notice to be given of certain matters (cf s33X FCA)

- (1) Notice must be given to group members of the following matters in relation to representative proceedings:
 - (a) the commencement of the proceedings and the right of the group members to opt out of the proceedings before a specified date, being the date fixed under section 162 (1),
 - (b) an application by the defendant in the proceedings for the dismissal of the proceedings on the ground of want of prosecution,
 - (c) an application by a representative party seeking leave to withdraw under section 174 as representative party.
- (2) The Court may dispense with compliance with any or all of the requirements of subsection (1) if the relief sought in the proceedings does not include any claim for damages.
- (3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceedings is founded.
- (4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 173 must not be determined unless notice has been given to group members.
- (5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.
- (6) Notice under this section must be given as soon as practicable after the happening of the event to which it relates.

176 Notices under section 175 (cf s33Y FCA)

- (1) The form and content of a notice under section 175 must be approved by the Court.
- (2) The Court must, by order, specify:
 - (a) who is to give the notice, and
 - (b) the way in which the notice is to be given.
- (3) An order under subsection (2) may also include provision:
 - (a) directing a party to provide information relevant to the giving of the notice, and
 - (b) relating to the costs of giving notice.
- (4) An order under subsection (2) may require that notice be given by means of press advertisement, radio or television broadcast, or by any other means.
- (5) The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.
- (6) A notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.
- (7) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.
- (8) The failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in any proceedings.

Division 4 Powers of the Court

177 Judgment—powers of the Court (cf s33Z FCA)

- (1) The Court may, in determining a matter in representative proceedings, do any one or more of the following:
 - (a) determine a question of law,
 - (b) determine a question of fact,
 - (c) make a declaration of liability,
 - (d) grant any equitable relief,
 - (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts

worked out in such manner as the Court specifies,

(f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members.

(2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.

(3) Subject to section 173, the Court is not to make an award of damages under subsection (1) (f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.

(4) If the Court has made an award of damages, the Court may give such directions (if any) as it thinks just in relation to:

(a) the manner in which a group member is to establish the member's entitlement to share in the damages, and

(b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

178 Constitution etc of fund (cf s33ZA FCA)

(1) Without limiting the operation of section 177 (2), in making provision for the distribution of money to group members, the Court may provide for:

(a) the constitution and administration of a fund consisting of the money to be distributed, and

(b) either:

(i) the payment by the defendant of a fixed sum of money into the fund, or

(ii) the payment by the defendant into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members, and

(c) entitlements to interest earned on the money in the fund.

(2) The costs of administering a fund are to be borne by the fund, or by the defendant in the representative proceedings, or by both, as the Court directs.

(3) If the Court orders the constitution of a fund under subsection (1), the order must:

(a) require notice to be given to group members in such manner as is specified in the order, and

(b) specify the manner in which a group member is to make a claim for payment out of the fund and establish the group member's entitlement to payment, and

(c) specify a day (which is 6 months or more after the day on which the order is

made) on or before which the group members are to make a claim for payment out of the fund, and

(d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.

(4) The Court may allow a group member to make a claim after the day fixed under subsection (3) (c) if:

(a) the fund has not already been fully distributed or applied in accordance with an order under subsection (5), and

(b) it is just to do so.

(5) On application by the defendant after the day fixed under subsection (3) (d), the Court may make such orders as it thinks fit for the payment from the fund to the defendant of the money remaining in the fund.

179 Effect of judgment (cf s 33ZB FCA)

A judgment given in representative proceedings:

(a) must describe or otherwise identify the group members who will be affected by it, and

(b) binds all such persons other than any person who has opted out of the proceedings under section 162.

Division 5 Appeals

180 Appeals (cf s 33ZC FCA)

(1) The following appeals from a judgment of the Supreme Court in representative proceedings may (subject to the rules of court) themselves be brought in the Court of Appeal under section 101 of the *Supreme Court Act 1970* as representative proceedings:

(a) an appeal by the representative party on behalf of group members and in respect of the judgment to the extent that it relates to questions common to the claims of group members,

(b) an appeal by a sub-group representative party on behalf of sub-group members in respect of judgment to the extent that it relates to questions common to the claims of sub-group members.

(2) The parties to an appeal in respect of the determination of a question that relates only to the claim of an individual group member are that group member and the defendant.

(3) If the representative party or the sub-group representative party does not bring an

appeal within the time provided for instituting appeals, another member of the group or sub-group may, within a further 21 days, bring an appeal as representing the group members or sub-group members, as the case may be.

- (4) If an appeal is brought from the judgment of the Court in representative proceedings, the Court of Appeal may direct that notice of the appeal be given to such person or persons, and in such manner, as it considers appropriate.
- (5) This Part (other than section 162) applies to any such appeal proceedings despite the provisions of any other Act or law.
- (6) The notice instituting an appeal in relation to questions that are common to the claims of group members or sub-group members must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members.

Division 6 Miscellaneous

181 Costs (cf s43 (1A) FCA)

Despite section 98, in any representative proceedings, the Court may not award costs against a person on whose behalf the proceedings have been commenced (other than a representative party) except as authorised by sections 168 and 169.

182 Suspension of limitation periods (cf s33ZE FCA)

- (1) On the commencement of any representative proceedings, the running of the limitation period that applies to the claim of a group member to which the proceedings relate is suspended.
- (2) The limitation period does not begin to run again unless either the member opts out of the proceedings under section 162 or the proceedings, and any appeals arising from the proceedings, are determined without finally disposing of the group member's claim.
- (3) However, nothing in this section affects the running of a limitation period in respect of a group member who, immediately before the commencement of the representative proceedings, was barred by the expiration of that period from commencing proceedings in the member's own right in respect of a claim in the representative proceedings.
- (4) This section applies despite anything in the [Limitation Act 1969](#) or any other law.

183 General power of Court to make orders (cf s33ZF FCA)

In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

184 Reimbursement of representative party’s costs (cf s33ZJ FCA)

- (1) If the Court has made an award of damages in representative proceedings, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.
- (2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceedings by the person making the application are likely to exceed the costs recoverable by the person from the defendant, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.
- (3) On an application under this section, the Court may also make any other order that it thinks just.

Schedule 1 Application of Act

(Section 4)

| Column 1 | Column 2 |
|---|---|
| Court | Kinds of civil proceedings |
| Supreme Court | All civil proceedings |
| Land and Environment Court | All civil proceedings in Class 1, 2, 3, 4 or 8 of the Court’s jurisdiction |
| Industrial Relations Commission (including the Commission in Court Session (the Industrial Court)) | All civil proceedings |
| District Court | All civil proceedings |
| Dust Diseases Tribunal | All civil proceedings |
| Local Court | All civil proceedings under Part 3 of the Local Court Act 2007 All civil proceedings under the Property (Relationships) Act 1984 |

Schedule 2 Constitution and procedure of Uniform Rules Committee

(Section 8)

Part 1 Constitution

1 Definitions

In this Schedule:

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

member means a member of the Uniform Rules Committee.

2 Term of office

Subject to this Schedule:

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

3 Vacancy in office

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

Note—

See also section 47 of the [Interpretation Act 1987](#) with respect to appointments generally.

3A Deputies for members

- (1) An ex-officio member of the Uniform Rules Committee may nominate his or her own deputy.
- (1A) Each person referred to in section 8 (1) who is authorised to nominate or appoint some other person as a member of the Uniform Rules Committee may nominate or appoint a deputy for that member.
- (2) In the absence of an ex-officio member or a member appointed or nominated under section 8 (1), the member's deputy:
 - (a) may, if available, act in the place of the member, and
 - (b) subject to clause 6 (6)—while so acting, has the functions of the member and is taken to be the member.
- (3) In this clause, **ex-officio member** means the Chief Justice of the Supreme Court, the

President of the Court of Appeal, the Chief Judge of the Land and Environment Court, the Chief Judge of the District Court or the Chief Magistrate, but does not include any of their nominees under section 8 (1).

Part 2 Procedure

4 General procedure

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

5 Quorum

The quorum for a meeting of the Uniform Rules Committee is 7 members, of whom at least 3 must be judicial officers.

6 Presiding member

(1) At any meeting of the Uniform Rules Committee:

- (a) the Chief Justice of the Supreme Court, or
 - (b) the Chief Justice's nominee referred to in section 8 (1) (a),
- is to preside.

(2) In the absence of the Chief Justice or the Chief Justice's nominee:

- (a) the President of the Court of Appeal, or
 - (b) the President's nominee referred to in section 8 (1) (b),
- is to preside.

(3) In the absence of:

- (a) the Chief Justice or the Chief Justice's nominee, and
 - (b) the President of the Court of Appeal or the President's nominee,
- the next most senior of the Judges of the Supreme Court who are present is to preside.

(4) In the absence of any Judge of the Supreme Court, the next most senior judicial officer who is present is to preside.

(5) The presiding member has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

(6) A person nominated as a deputy is not entitled to exercise any of the functions of a presiding member under this clause.

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

9 First meeting

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

Schedule 3 Rule-making powers

(Section 9 (2))

- 1 The procedure (including the method of pleading) and the practice to be followed in the court in all civil proceedings in, or with respect to which, the court has jurisdiction (including the procedure and practice to be followed in the offices of the court), and any matters incidental to, or relating to, any such procedure or practice (including the manner and time of making any applications that under this or any other Act, or under any Commonwealth Act, are to be made to the court).
- 2 The rights and obligations of parties, prospective parties and other persons as to examination,

interrogatories, discovery and inspection and other means of obtaining access to information, documents or things in relation to civil proceedings and prospective civil proceedings.

- 3 The service of documents (including the service of documents outside New South Wales, whether interstate or overseas).
- 4 The form and contents of any case stated to the court by or from any other court or person, and the time within which and the manner in which proceedings on a stated case are to be commenced and maintained and the court's decision notified.
- 5 The practice and procedure to be followed in connection with interpleaders.
- 6 The practice and procedure to be followed in connection with the splitting and consolidation of civil proceedings.
- 7 The admission and exclusion of evidence and the manner in which evidence is to be tendered.
- 8 The practice and procedure to be followed in connection with the review by the court of decisions made on its behalf by registrars and other officers of the court.
- 9 The practice and procedure to be followed in connection with any appeal to the court, including the time within which, and the manner in which, such an appeal is to be made, and the practice and procedure to be followed in the court with respect to such an appeal.
- 10 The practice and procedure to be followed in connection with the transfer of any civil proceedings to or from the court and the practice and procedure to be followed with respect to civil proceedings that are so transferred.
- 11 The assignment of civil proceedings to any division of the court or to any list established within the court.
- 12 The nomination and appointment of suitable persons to be mediators for the purposes of Part 4.
- 13 The practice and procedure to be followed in relation to the mediation of any matter under Part 4 or the arbitration of any matter under Part 5.
- 14 The circumstances in which civil proceedings, or claims in civil proceedings, may be dismissed.
- 15 The circumstances in which the court may order parties to civil proceedings not to disclose matters that arise in hearings that are held in the absence of the public.
- 16 The circumstances in which the court may stay civil proceedings, either permanently or temporarily.
- 17 The practice and procedure to be followed with respect to the giving of judgment, including judgment that is reserved and judgment where the giving of reasons is deferred.
- 18 Matters relating to the costs of civil proceedings in the court and, in particular, prescribing, limiting or otherwise affecting the costs recoverable in any action or proceedings that the court considers might properly have been dealt with in a lower court.
- 19 The means for, and the practice and procedure to be followed in, securing the future conduct of

parties to civil proceedings.

- 20 The means for, and the practice and procedure to be followed in, the enforcement and execution of judgments and orders.
- 21 The circumstances in which the court may authorise entry on land for the purpose of enabling its orders to be enforced.
- 22 The exercise by the Supreme Court of its jurisdiction to make orders for the enforcement of its judgments and orders.
- 23 The circumstances in which the court may vary or set aside its judgments and orders.
- 24 The means for proving particular facts, and the mode in which evidence may be given (including the administration of oaths to and the taking of the evidence of witnesses in or out of New South Wales), in any civil proceedings, or on any application in connection with, or at any stage of, any civil proceedings.
- 25 Matters relating to expert evidence, including:
 - (a) the disclosure (by the furnishing of copies of reports or otherwise) of the nature of expert evidence to be given, and including the exclusion of expert evidence in case of non-compliance with the rules relating to expert evidence or with any order for disclosure of the nature of expert evidence, and
 - (b) the use of expert witnesses including, in particular, the use of expert witnesses engaged jointly by parties to civil proceedings and the use of court-appointed expert witnesses.
- 25A The means for answering questions as to the principles of the law of a country other than Australia, and their application.
- 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.
- 27 For regulating or making other provision concerning interim payments referred to in Division 5 of Part 6.
- 28 The payment or transfer into or out of court and, subject to the consent of the Treasurer, the custody, management and investment of moneys, securities and effects.
- 29 The duties of registrars and other officers of the court in relation to or for the purpose of any civil proceedings.
- 30 Any matter with respect to civil proceedings for which rules of court may be made under the Act by which the court is constituted.
- 31 Any matter with respect to which the court has jurisdiction under any other Act or law (including any Commonwealth Act).
- 32 Any matter for which the rules set out in Schedule 7 made provision when that Schedule commenced.

- 33 Any matter for which any other Act provides that rules may be made under this Act.
- 34 Any matter of a savings or transitional nature consequent on the making of any uniform rule.
- 35 The pre-litigation requirements under Part 2A (including the practice and procedure relating to the pre-litigation requirements).
- 36 Pre-litigation requirements other than those under Part 2A (including specific protocols for civil proceedings or classes of civil proceedings).

Schedule 4 Repeals

(Section 6 (1))

Administration of Justice Act 1924 No 42

Arbitration (Civil Actions) Act 1983 No 43

Arbitration (Civil Actions) Regulation 1999

Attachment of Wages Limitation Act 1957 No 28

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

Foreign Judgments Act 1973 No 39

Judgment Creditors' Remedies Act 1901 No 8

Local Courts (Civil Claims) Act 1970 No 11

Maintenance Orders (Facilities for Enforcement) Act 1923 No 4

Schedule 5 (Repealed)

Schedule 6 Savings, transitional and other provisions

(Section 6 (3))

Part 1 General

1 Regulations

- (1) The Governor may make regulations of a savings or transitional nature consequent on the enactment of the following Acts:

 this Act

Courts Legislation Amendment Act 2006, to the extent that it amends this Act

Courts Legislation Further Amendment Act 2006 (but only to the extent that it amends this Act)

Courts Legislation Amendment Act 2007 (but only to the extent to which it amends

this Act)

Courts and Crimes Legislation Amendment Act 2009 (but only to the extent to which it amends this Act)

Courts Legislation Amendment Act 2010 (but only to the extent that it amends this Act)

Courts and Crimes Legislation Further Amendment Act 2010

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of this Act

2 Definition

In this Part:

the old legislation means the *Supreme Court Act 1970*, the *District Court Act 1973* and the *Local Courts (Civil Claims) Act 1970*, and the rules of court made under those Acts, as in force immediately before the commencement of this clause.

3 Rules under the *Local Courts (Civil Claims) Act 1970*

The *Local Courts (Civil Claims) Rules 1988* are taken to have been made under the *Local Courts Act 1982*, and may be amended and repealed accordingly.

4 Regulations

The following regulations are taken to have been made under section 18, and may be amended and repealed accordingly:

- (a) the *Supreme Court Regulation 2000*,
- (b) the *District Court Regulation 2000*,
- (c) the *Local Courts (Civil Claims) Regulation 2000*.

5 Pending proceedings

- (1) Subject to subclause (2), this Act and the uniform rules apply to proceedings commenced before the commencement of this Act in the same way as they apply to proceedings commenced on or after that commencement.
- (2) A court before which proceedings have been commenced before the commencement of this Act may make such orders dispensing with the requirements of the uniform rules in relation to the proceedings, and such consequential orders (including orders as to costs), as are appropriate in the circumstances.

6 Right to claim set-off

- (1) Subject to subclause (2), section 21 extends to:
 - (a) any debt arising under an agreement entered into before the commencement of that section, and
 - (b) any other debt arising before the commencement of that section.
- (2) The court may order that section 21 does not apply to a debt referred to in subclause (1) (a) if it is satisfied that it would be in the interests of justice to make such an order.

7 Amendment of originating process after expiry of limitation period

Section 65 extends to any proceedings commenced before the commencement of that section.

8 Delegations

Any delegation that was in force immediately before the commencement of this Act under a provision of the old legislation for which there is a corresponding provision in this Act is taken to be a delegation in force under the corresponding provision of this Act.

9 Construction of references

Subject to this Schedule and the regulations, in any Act or instrument:

- (a) a reference to a provision of the old legislation for which there is a corresponding provision in this Act extends to the corresponding provision of this Act or the uniform rules, and
- (b) a reference to any act, matter or thing referred to in a provision of the old legislation for which there is a corresponding provision in this Act or the uniform rules extends to the corresponding act, matter or thing referred to in the corresponding provision of this Act or the uniform rules, as the case requires.

10 General saving

Subject to this Schedule and the regulations:

- (a) anything begun before the commencement of this Act under a provision of the old legislation for which there is a corresponding provision in this Act or the uniform rules may be continued and completed under the old legislation as if this Act had not been enacted, and
- (b) subject to paragraph (a), anything done under a provision of the old legislation for which there is a corresponding provision in this Act or the uniform rules (including anything arising under paragraph (a)) is taken to have been done under the corresponding provision of this Act or the uniform rules, as the case requires.

11 Motor accident claims

- (1) In the definition of **motor accident claim** in section 3 (1), the reference to a claim within the meaning of the *Motor Accidents Compensation Act 1999* includes a reference to a claim within the meaning of Part 5 of the *Motor Accidents Act 1988*.
- (2) In section 81 (2), the reference to an award of damages to which Chapter 5 of the *Motor Accidents Compensation Act 1999* applies includes a reference to an award of damages to which Part 6 of the *Motor Accidents Act 1988* applies.

Part 3 Provisions relating to dismissal of proceedings

12 Dismissal of proceedings

- (1) Any proceedings taken to have been dismissed under clause 18 of the *Civil Procedure Regulation 2005* before the repeal of that clause by the *Civil Procedure Amendment (Savings and Transitional) Regulation 2005* are taken to have never been dismissed under that clause and may be continued accordingly.
- (2) Subclause (1) does not apply to any such proceedings to the extent to which they relate to a cause of action for which relief has been claimed in fresh proceedings, as referred to in section 91.
- (3) The District Court or Local Court, as the case may be, may make such orders as are necessary to enable the proceedings to be continued.

Part 4 Provisions consequent on enactment of the *Courts Legislation Amendment Act 2007*

13 Definitions

In this Part:

relevant commencement date means the date of the commencement of Schedule 2 [9] to the *Courts Legislation Amendment Act 2007*.

relevant proceedings means proceedings in Class 1, 2, 3 or 4 of the jurisdiction of the Land and Environment Court.

unamended L & E legislation means the *Land and Environment Court Act 1979* or the rules of court made under that Act, as in force immediately before the relevant commencement date.

14 Regulation

The *Land and Environment Court Regulation 2005* is taken to have been made under section 18 and may be amended and repealed accordingly.

15 Pending proceedings

- (1) Subject to subclause (2), this Act and the uniform rules apply to relevant proceedings commenced in the Land and Environment Court before the relevant commencement date in the same way as they apply to relevant proceedings commenced on or after that commencement.
- (2) If relevant proceedings are commenced in the Land and Environment Court before the relevant commencement date, the Land and Environment Court may make such orders dispensing with the requirements of the uniform rules in relation to the proceedings, and such consequential orders (including orders as to costs), as are appropriate in the circumstances.

16 Construction of references

Subject to the regulations, in any other Act or instrument:

- (a) a reference to a provision of the unamended L & E legislation for which there is a corresponding provision in this Act extends to the corresponding provision of this Act or the uniform rules, and
- (b) a reference to any act, matter or thing referred to in a provision of the unamended L & E legislation for which there is a corresponding provision in this Act or the uniform rules extends to the corresponding act, matter or thing referred to in the corresponding provision of this Act or the uniform rules, as the case requires.

17 General saving

Subject to this Schedule and the regulations:

- (a) anything begun before the relevant commencement date under a provision of the unamended L & E legislation for which there is a corresponding provision in this Act or the uniform rules may be continued and completed under the unamended L & E legislation as if this Act had not been enacted, and
- (b) subject to paragraph (a), anything done under a provision of the unamended L & E legislation for which there is a corresponding provision in this Act or the uniform rules (including anything arising under paragraph (a)) is taken to have been done under the corresponding provision of this Act or the uniform rules, as the case requires.

Part 5 Provisions consequent on enactment of Schedule 6.1 to Courts and Crimes Legislation Further Amendment Act 2010

18 Effect of enactment of Part 10 on existing proceedings

- (1) Except as provided by this clause or the regulations, nothing in the new Part affects the commencement or continuance of any action or proceedings of a representative character commenced otherwise than under the new Part before the commencement of that Part.
- (2) Subject to subclause (3), the new Part extends to proceedings commenced (but not finally determined) in the relevant court under Division 2 of Part 7 of the uniform rules before the commencement of that Part.
- (3) The relevant court may make such orders dispensing with or modifying the requirements of the new Part in relation to proceedings referred to in subclause (2) as the relevant court thinks appropriate or necessary to ensure that justice is done in the proceedings.
- (4) In this clause:

relevant court, in relation to actions or proceedings referred to in subclause (1), means the court or tribunal in which the action or proceedings commenced.

the new Part means Part 10 (as inserted by the *Courts and Crimes Legislation Further Amendment Act 2010*).

Part 6 Provisions consequent on enactment of Schedule 6.2 to Courts and Crimes Legislation Further Amendment Act 2010

19 Application of Part 2A

- (1) Part 2A (as inserted by the *Courts and Crimes Legislation Further Amendment Act 2010*) applies only to civil proceedings commenced on or after the application day (regardless of whether the civil dispute to which any such proceedings relate arose before, on or after that day).
- (2) The **application day** for the purposes of this clause is:
 - (a) the day that is 18 months after the day on which Schedule 1 to the *Courts and Other Legislation Further Amendment Act 2011* commences, or
 - (b) such earlier day as the Governor may appoint by proclamation published on the NSW legislation website.
- (3) Subject to the regulations, Part 2A (as inserted by the *Courts and Crimes Legislation Further Amendment Act 2010*) is taken not to have applied to any civil proceedings commenced before the application day. However, any purported compliance with the

provisions of that Part before that day does not affect the validity or prevent the continuation of any civil proceedings that have otherwise been duly commenced.

Schedule 7 (Repealed)