

UNSW CENTRE FOR CONTINUING LEGAL EDUCATION

LITIGATION - ESSENTIAL SKILLS FOR SUCCESSFUL COURT WORK

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TOPIC 1: Servants of justice: the reforms, strategy and expert evidence

Topic 1 of this seminar examines the forensic advantage to be gained by embracing recent legislative changes to practice, procedure and case management.

This paper is an outline of the matters to be examined in the session scheduled from 8.45 am to 9.45 am. It is drafted mindful that the topics in the session are extensive, and with a view to stimulating thought and promoting discussion. Necessarily, the contents and detail of the paper is constrained by the time available for this session.

The applications the overriding purpose to facilitate the just, quick and cheap resolution of the real issues in dispute is examined with particular reference to the context of expert evidence. The benefit of the CPA and the UCPR to early strategic planning also is considered.

Lawyers are cautioned to rely on their own research and enquiries in advising clients, as this paper does not purport to be definitive on the matters examined. Lawyers will also be mindful of the evolving nature of the law and the importance of the facts to determine outcomes in individual matters.

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A. Introduction

idiosyncratic practice in the past

1. *"... Drake and his fellow officers busied themselves in an atmosphere of expectation ... He then ordered his pilot to navigate the huge, unwieldy Jesus and its fellowship Minion down the Channel. With the help of his rutter, that little book of creased and greasy pages which recorded each landmark along the way, the pilot did so with the expertise for which the English were known and eventually brought the vessels safely into Plymouth."*¹
2. The word "rutter" is likely derived from the French word "routier", and the Dutch "ruiter" meaning "something that finds a way". Italian precursors to modern navigation charts, rutters contained written sailing directions between ports and indicated prominent costal landmarks and navigational hazards. Continually updated and revised, rutters represented the best knowledge at the time about the way to get safely from one place to another and were the navigator's most prized possession².
3. The rutter used by Drake was unique, as was each navigator's rutter in the 1500 - 1600s. A rutter's contents were prized and jealously guarded by its owner. Mass reproduction was antithetical to its purpose, which was to confer an advantage upon its owner. Furthermore, at that time document reproduction relied upon intensive copying efforts such as the scriptoria used to reproduce copies of the Bible. The benefits of increased information exchange from the spread of technology such as the Gutenberg press³ was yet occur.
4. Since the middle of the second millennium AD, navigation aids to combat the perils of the sea have evolved, due to an ethos of sharing information, leading to increased knowledge to aid the planning and implementation of marine adventures.
5. Standardisation and publication of Admiralty Charts and Pilot Books, together with rules of the sea resulted in a paradigm shift⁴ from navigation by an individual's rutter.

¹ *Drake – the Life and Legend of an Elizabethan Hero*, Stephen Coote, Simon and Schuster, 2003, p 3

² <http://williameastman.blogspot.com/> 8 November 2006

³ *Gutenberg Bible* c 1455 was the first mechanically produced book

⁴ Defined by Thomas Kuhn as "A series of peaceful interludes punctuated by intellectually violent revolutions ... in each of which one conceptual world view is replaced by another ..." *Science*, July 8 1997, Thomas Kuhn, pp 143-145

6. The pooling of the knowledge (see, for example, Royal Navy) which those individual rutters contained, fostered this outcome. The resultant navigation norms provide guidance for all mariners, based on the shared experience of others, to achieve safe passage.
7. In digital terminology, the rutter contained both an operating system and a database to navigate a ship's passage efficiently and effectively from dock to dock, and hopefully to avoid the perils of the sea.
8. As lawyers you are similar to mariners in aiming to navigate your client's cause through the protean hazards of litigation to the desired destination using such aids as are available.

the reforms

9. The *Civil Procedure Act 2005* ("**CPA**") and the *Uniform Civil Procedures Rules 2005* ("**Uniform Rules**") expressly state procedural law for the administration of justice in the Supreme, District and Local Courts ("**the reforms**"). By enacting the CPA, Parliament has created a code, from what was previously common law learning, a number of statutes and the rules of individual courts.
10. This is consistent with the approach of legislation enacted over the last decade to attempt to expressly state, and in effect to codify, common law principles of substantive and procedural law, such as the *Evidence Act 1995* and the *Civil Liability Act 2002*.
11. Whilst the reforms do not introduce wholesale change to the law relating to case management, their significance is to look to the greater interests, beyond the individual litigants, and explicitly to state matters as relevant to the administration of justice.
12. Similar to the experience of navigation, necessarily the content of the reforms is built on the learning and experience of the past. On one view, the reforms may be a paradigm shift for litigators, potentially as significant as that for the navigator from rutter to Admiralty Chart and Pilot Book.
13. Canons of statutory construction require Parliament's intention to be found in the content of the reforms, including subtle and not so subtle changes in emphasis as to the importance of case management. In this regard, the elevation of matters which were previously the subject of the rules of courts to the level of statutory

enactment is apparent, see for example: CPA ss 56, 61, 64, 65, 66 and 86 (see section numbers in bold in paragraph 35 below).

second reading speech

14. Further guidance as to the legislators' intentions underpinning the reforms is to be found in Hansard, such as this extract from the Attorney General's Second Reading Speech:

"The Civil Procedure Bill represents an important advance in how civil litigation is conducted in this State. For the first time, one set of rules will govern the general run of civil proceedings in the Supreme Court, District Court, Local Court and Dust Diseases Tribunal. The bill will streamline and simplify procedures and remove unnecessary differences between the courts. It will lead to time and costs savings for the courts, the legal profession and the public. The bill will also create a platform upon which courts will, in the future, be able to avail themselves of new technologies such as electronic lodgement of documents by clients and more efficient court management practices." (emphasis added)

15. The reforms should be seen as the beginning of innovation in practice and procedure, and not the final outcome. The movement to embrace digital technologies and concomitant efficiencies has been foreshadowed and is being implemented, see eg: CourtLink. It remains a driving reason for both the reforms and further change.
16. One certainty for practice and procedure in the next decade is change.

Explanatory Note

17. Guidance as to the intended operation of the reforms is also found in the Explanatory Note⁵.

"Overview of Bill

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

⁵ www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/6A5E9D61A5437C11CA256FDA002023AB?Open&shownotes

technology in relation to case management. The object of this Bill is to consolidate as much as possible of the law relating to civil procedure, particularly insofar as it affects proceedings in the Supreme Court, the District Court and the Local Courts (the courts in which the majority of civil proceedings are heard). The Bill contains provisions with respect to commencing and carrying on proceedings generally (Part 3), mediation and arbitration (Parts 4 and 5), case management and interlocutory matters (Part 6), judgments and orders (Part 7), enforcement of judgments and orders (Part 8) and transfers of proceedings between courts (Part 9). It also contains provisions relating to administrative matters (Part 2 and Schedules 1, 2 and 3), repeals, amendments and savings and transitional provisions (Schedules 4, 5 and 6). Finally, it sets out uniform civil procedure rules to replace the core provisions of the Supreme Court Rules 1970, the District Court Rules 1973 and the Local Courts (Civil Claims) Rules 1988 (Schedule Z). (emphasis added)

speech by the Chief Justice

18. A useful perspective of the courts' approach and participation in the introduction and implementation of the reforms is provided by the Chief Justice in a speech entitled "Case Management in NSW", which His Honour delivered on 22 August 2006⁶.
19. His Honour examines the intent of the reforms and reiterates the cultural change which the reforms are intended to introduce. The Chief Justice has identified that the effectiveness of the reforms will depend on the nature of the judicial system, including the need for commitment to the process of judicial management and cultural change within the legal profession.
20. Furthermore, his Honour states that the essence of the reforms is to ensure that litigation is conducted efficiently and expeditiously, and that success will likely depend on whether the judges and the profession are able to effect a change in the culture of practice which the reforms require.

overview

21. The utility of the express statement of procedural processes in litigation, as set out in the reforms, is evident. As an example, the reforms expose mandatory considerations as to the exercise of discretion in practice and procedure management by the court. They also provide a guide to lawyers for the planning and the conduct of litigation.

⁶ http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman220806

22. The consequence is that both the court and the parties may participate in a more efficient and transparent process as to matters relevant to discretionary decision making, see *House v King*⁷:

“If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.” (emphasis added)

23. Knowing in advance that a judge will apply the content of the CPA to decision making at interlocutory and final hearings, practitioners are now informed of necessary considerations for case management and longer term strategic/tactical planning.
24. Given the above considerations, the express words of the statute, and the central role of CPA Part 6, in particular, the statutory duty imposed on parties and practitioners to facilitate the *overriding purpose*⁸, the impact of the reforms on all forensic decision making is apparent.

⁷ *House v The King* (1936) 55 CLR 499 at page 505, [1936] HCA 40.

⁸ ie the just, quick and cheap resolution of the real issues in dispute

B. Part 6 Civil Procedure Act 2005

where does Part 6 fit in to the administration of justice and litigation?

25. The effect of the reforms is, and is intended to be, broad reaching. Yet they do not introduce novel concepts. It is the change in emphasis and priorities which aim to bring about a change in litigation culture and practice.
26. To understand the role of CPA Part 6, (which addresses case management and interlocutory matters), it is useful to locate those specific matters within the general field of the administration of justice.
27. This may be achieved by viewing the topic from decreasing levels of abstraction.
28. The concept of justice and the challenge to state its definitive components is evident. It is as elusive as an idea as what is “fair” or “art” or “truth”, yet centrally important to both the rights of individuals, and the maintenance of harmony and order, in their society.
29. Justice has been an aspiration for civilised existence for millennia. Egyptian civilization in the Old Kingdom period relied on a high official known as a Vizier (whose duties included those akin to Chief Justice) to administer justice on behalf of the Pharaoh⁹.
30. The root of the underpinning of the central principle of justice in the common law is often said to be Magna Carta, see para (40) ***To no one will we sell, to no one deny or delay right or justice***¹⁰.

⁹ *Ancient Egypt, its culture and history*, J E Manchip White, 1970, Dover Publications, pp 48 – 49

¹⁰ In January 1215 a group of Barons demanded a Charter of Liberties as a safeguard against the King's arbitrary behaviour. The Barons took up arms against John and captured London in May 1215. By 10 June both parties met and held negotiations at Runnymede, a meadow by the River Thames. The concessions made by King John were outlined in a document known as the 'Articles of the Barons', to which the King's Great Seal was attached, and on 19 June the Barons renewed their oaths of allegiance to the King. Meanwhile the Royal Chancery produced a formal Royal Grant, based on the agreements reached at Runnymede, which became known as Magna Carta (Latin for 'the Great Charter').

31. In New South Wales, the Supreme Court has such statutory and inherent jurisdiction which may be necessary for the administration of justice in the state¹¹. It is useful to note that this will include both judicial administration and the incidental courts administration and infrastructure.

32. In *Mansfield*, the High Court of Australia stated:

*"The unique and essential function of the judicial branch of government is the quelling of controversies by the ascertainment of the facts and the application of the law. Fencott v Muller (1983) 152 CLR 570 at 608; D'Orta-Ekenaike v Victoria Legal Aid (2005) 79 ALJR 755 at 763 [43]; 214 ALR 92 at 102-103. This is done by an adversarial system of litigation"*¹² (emphasis added)

33. Having identified what courts do, it is necessary to distinguish how courts achieve that end:

*"Substantive law is concerned with the ends which the administration of justice seeks; procedural law is deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated."*¹³ (emphasis added)

34. However, in practice the distinction between procedural and substantive law is not marked by a "bright line". Both are components of a dynamic system of justice and are inter-dependant to be determined on a case by case basis. There can be no substitute for practitioners referring to the words of the CPA (and also the UCPR) for matters of case management following the reforms.

content of CPA Part 6

35. The scope and content of this part can be appreciated by the overview gained by examining the six divisions and individual section headings. Namely:

"Part 6 Case management and interlocutory matters

Division 1 Guiding principles

56 *Overriding purpose*

57 *Objects of case management*

58 *Court to follow dictates of justice*

¹¹ *Imperial Act 4 George IV c 96 and the Third Charter of Justice for NSW 1823; Supreme Court Act 1970 s 23*

¹² *Mansfield v Director of Public Prosecutions for Western Australia* [2006] HCA 38 at [49] (20 July 2006)

¹³ *Salmond on Jurisprudence*, 10th ed (1947): p 476; approved and applied by the HCA in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176

59 *Elimination of delay*

60 *Proportionality of costs*

Division 2 Powers of court to give directions

61 *Directions as to practice and procedure generally*

62 *Directions as to conduct of hearing*

63 *Directions with respect to procedural irregularities*

Division 3 Other powers of court

64 *Amendment of documents generally*

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

66 *Adjournment of proceedings*

67 *Stay of proceedings*

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

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

70 *Informal proof and admissions*

71 *Business in the absence of the public*

72 *Court may prohibit disclosure of information*

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

Division 4 Persons under legal incapacity

74 *Definitions and application*

75 *Settlement of claim made on behalf of, or against, person under legal incapacity*

76 *Settlement of proceedings commenced by or on behalf of person under legal incapacity*

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

78 *Application of money by Public Trustee*

79 *Application of money by manager of protected person's estate*

80 *Directions to tutor of person under legal incapacity*

Division 5 Interim payments

81 *Definitions and application*

82 *Court may order interim payments*

83 *Interim payment not admission of liability*

84 *Adjustments on final judgment etc*

Division 6 Miscellaneous

85 *Examination on oath*

86 *Orders*

87 *Protection against self-incrimination in relation to interlocutory matters*

88 *Fresh trial*

89 *Procedure on fresh trial*"

36. Four of the six divisions in Part 6 deal explicitly with case management and matters of practice and procedure. The remaining divisions are case specific for what were:
- (a) matters subject to the now repealed (and replaced by Part 6 Division 4) *Damages (Infants and Persons of Unsound Mind) Act 1929*, and
 - (b) statutory provision for pre-judgment interim payment in Part 6 Division 5.
37. The impact of the contents of Divisions 1, 2, 3 and 6 on case analysis, forensic decision making, case management and interlocutory (and final) hearings is apparent by considering the areas which are addressed (that is, directions, amendments, adjournments and orders including the grant of leave to excuse procedural default).

cultural change

38. The cultural change introduced by the reforms is detected in Division 1, with s 56 being the compass by which any judicial decision maker will determine case management issues at hearing. The new emphasis on judicial management and the role of judges to manage proceedings is found in ss 57 and 58, particularly the imperatives in

"s 57 (1) "... *proceedings in any court are to be managed ...*"

and

"s 58(1) *In deciding to make any order or direction for the management of proceedings, ...*" (emphasis added).

39. One of the significant aims driving the reforms was to clarify that the dictates of justice will not be limited to the dictates of justice only as between the parties.

Queensland v J L Holdings

40. The latter was perceived to be the effect of the majority judgment in one of the leading cases High Court of Australia on case management in *Queensland v J L*

*Holdings Pty Ltd*¹⁴, where the reasons of the majority included the following passage:

“...Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion.” (emphasis added)

Lemoto v Able Technical

41. Further guidance is provided in the reasons of McColl JA, (Hodgson JA, Ipp JA agreeing) in the decision of the Court of Appeal in *Lemoto*¹⁵ where her Honour stated:

“95 In Ketteman v Hansel Properties Ltd [1987] AC 189 at 220 Lord Griffiths spoke of the “pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently.” The days when the suit of Jarndyce v Jarndyce wound its apocryphal way through the pages of Dickens’ Bleak House are long gone – if they ever were.

96 The prompt and efficient disposal of litigation is a core aspect of the administration of justice. In the Supreme Court that objective has been enshrined in the statement that the overriding purpose of the court’s rules, “... in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings” (emphasis added)

42. Efficient and effective case management is the objective of the reforms CPA Part 6 sets out expressly both this objective and the ways and means by which it is to be achieved by the courts, parties and lawyers.
43. Lawyers will be particularly mindful of their common law obligations to appropriately assist the Court to quell disputes which are now stated in CPA s 56(4),(5) and s 60, as are sanctions, including costs orders against practitioners, for default.

¹⁴ *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155

¹⁵ *Lemoto v Able Technical Pty Ltd & 2 Ors* (2005) 63 NSWLR 300 at 322; [2005] NSWCA 153

C. How the reforms assist a party to focus on the real issues in dispute

44. Regardless of their perspective, either as a party or as the court, those involved in seeking to quell a controversy start with the question “**what are the real issues in dispute?**”. There is nothing novel to such a forensic approach. It existed long before the reforms.
45. It is also trite that lawyers seeking to persuade a judge as to the justness of their client’s cause are assisted by recognising that a judge should be equipped with cogent answers to the following questions:
 - (a) what precisely is the problem leading to the controversy?
 - (b) what am I being asked to do to solve the problem?
 - (c) why is that solution to the problem preferable to others?
46. The reforms assist a lawyer greatly in regard to both strategic and tactical forensic considerations, by identifying key issues which a court will take into account in making decisions in regard to practice and procedure. A further benefit arises by specifying matters which may require evidentiary support to advance that party’s cause. In a sense, the reforms provide a “statutory advice on procedure and on evidence”.
47. It goes without saying that the conduct of litigation requires an holistic approach to the forensic journey, which takes into account both the starting point and the desired destination.
48. Having defined a party’s desired destination or goal, preparation is then best undertaken by preparing backwards to allow presentation and presenting forwards to move to the desired destination. Necessarily, it is essential that a party, and those lawyers assisting the party, are on message in the sense of being able to identify at the outset the desired outcome or in effect the relief that the court is being asked to grant to the party.
49. The overall destination or goal to litigation involves strategic considerations. Interlocutory disputes and the exercise of the court’s discretion as to matters such as amendments, adjournments or waiving the application of the rules where a party is in default are best understood as tactical matters informed by the overall strategy.

50. Taking the example of an application to amend a document (ie as envisaged by CPA s. 64), *"the Court must seek to act in accordance with the dictates of justice"* per CPA s. 58(1)(a)(i).
51. In addition, the relevant considerations are contained in CPA s. 58(2) which clearly articulate considerations relevant to the court. Under those provisions the court must have regard to the provisions of CPA ss. 56 and 57 ie, the overriding purpose and the objects of case management.
52. The legislature is quite clear that proceedings are to be managed having regard to the following objects, see in particular CPA s. 57(1):
 - “(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.”
53. Further guidance as to the purpose of the reforms is found in CPA s. 57(2) as to matters of construction and application of the CPA and any rules of court, together with practice and procedure of the courts.

trial by ambush

54. Trial by ambush and surprise has for some time been unacceptable forensic behaviour in New South Wales.
55. The contents of the CPA and the Uniform Rules proscribe such conduct explicitly. Furthermore, the contents of the CPA and the Uniform Rules require parties to “show their hand” much earlier than was often the case previously and certainly well before hearing. This has the effect of promoting an informed approach to decision making by the parties, rather than to have a decision imposed upon them by the court. An example of the new regime is in regard to disclosure of expert evidence and innovations such as expert conclaves.
56. The effect of disclosure by parties prior to hearing of the strength of their case (or alternatively the absence of a strong case) is a potent means of narrowing the real issues in proceedings and in some cases leading to early resolution.

application of the reforms

57. Given that most cases do not run the course of a hearing, most decisions on CPA Part 6 will not appear as either reported or unreported decisions. Two examples of the application of the CPA and Uniform Rules inform as to their operation.
58. *Consolidated Credit Network*¹⁶ – late evidence: on the second day of a hearing, before Campbell J, in an action for specific performance the plaintiff sought to read an affidavit which had been filed in Court that morning and to which course the defendant objected on the basis that the evidence was too general and could not be tested without the opportunity for subpoenas. His Honour referred to the provisions of Part 6 Division 1 and the facts of the matter in declining to permit the affidavit to be read.
59. His Honour also refused an application by the plaintiff for an adjournment.
60. *Silver v Dome Resources NL*¹⁷ – amendment of pleadings: an example of the application of CPA s 56 leading to a refusal to grant leave to a defendant to amend its defence, and the underpinning considerations in regard to the overriding purpose is found in the decision of Hamilton J.

does tension exist between the ratio of *Queensland v J L Holdings*, the passage from *Lemoto* and the reforms?

61. Traditionally the courts have been reluctant to disturb the discretionary decisions relating to practice and procedure made by trial judges, see *Adam P. Brown Male Fashions Pty. Ltd. v. Philip Morris Inc.*¹⁸:

"For ourselves, we believe it to be unnecessary and indeed unwise to lay down rigid and exhaustive criteria. The circumstances of different cases are infinitely various. We would merely repeat, with approval, the oft-cited statement of Sir Frederick Jordan in In re the Will of F B Gilbert (dec) (1946) 46 SR (NSW) 318, at p 323:

"... I am of opinion that, ... there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition

¹⁶ *Consolidated Credit Network v Illawarra Retirement Trust* [2005] NSWSC 1004

¹⁷ *Silver v Dome Resources NL* [2006] NSWSC 26.

¹⁸ (1981) 148 CLR 170 at 177

could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal."

See also, Brambles Holdings Ltd v Trade Practices Commission (1979) 40 FLR 364, at p 365; 28 ALR 191, at p 193; Dougherty v Chandler (1946) 46 SR (NSW) 370, at p 374. It is safe to say that the question of injustice flowing from the order appealed from will generally be a relevant and necessary consideration."

62. It is possible that the express statement of "relevant considerations" in Part 6 may facilitate the possibility of appellate review of matters of practice and procedure, notwithstanding *Adam P Brown*, given the clear statement of long standing principle set out in *House v King*¹⁹.

¹⁹ *House v The King* (1936) 55 CLR 499 at page 505, [1936] HCA 40

D. Part 31 Uniform Civil Procedure 2005²⁰

63. Part 31 prescribes the procedure for adducing lay and expert evidence in both interlocutory and final hearings. It contains three distinct Divisions.

overview of Part 31 Division 1

64. Division 1 sets out the steps necessary prior to adducing evidence, and also the ways that evidence is to be given at hearing. Importantly, this Division affects the operation, the necessary procedure and the manner for the facilitation of proof found in evidence legislation (for example, the *Evidence Act*) such as the use of technology to give evidence and hearsay and tendency notices.
65. Division 1 comprises the following rules and second headings:

“Part 31 Division 1 - Evidence at hearing

- 31.1 Manner of giving evidence at trial*
- 31.2 Evidence of witnesses at interlocutory hearings*
- 31.3 Evidence by telephone, video link or other communication*
- 31.4 Court may direct party to furnish witness statement*
- 31.5 Notice under s 67 or s 99 of the Evidence Act 1995*
- 31.6 Evidence on Commission*
- 31.7 Foreign material*
- 31.8 Earlier evidence in the same proceedings*
- 31.9 Earlier evidence in other proceedings*
- 31.10 Plans, photographs and models*
- 31.11 Production of court documents*
- 31.12 Proof of court documents*
- 31.13 Unstamped documents: arrangements under s 304 Duties Act 1997*
- 31.14 Unstamped documents: undertaking per s 29 Stamp Duties Act 1920*
- 31.15 Evidence of consent to act as tutor, trustee, receiver or other office*

²⁰ My ideas set out in Part D are in part derived from my annotations to Part 31 of the Thomson Lawbook Co Loose leaf Service, NSW Civil Practice & Procedure, Uniform Civil Procedure

31.16 Evidence of published research concerning maintenance of children"

66. Part 31 Division 1 sets out matters of practice and procedure for evidence both for pre-hearing matters and for hearing. The rules in Division 1 affect the operation and use at hearing of Commonwealth and State evidence legislation including the following:

Duties Act 1997: see r 31.13

Evidence Act 1995: see r 31.1 and r 31.5

Evidence and Procedure (New Zealand) Act 1994 (Cth): see r 31.3

Evidence on Commission Act 1995: see: r 31.6

Foreign Evidence Act 1994 (Cth) : see r 31.7

Stamp Duties Act 1920 : see r 31.14

overview of Part 31 Division 2

67. Division 2 codifies the procedures for the use of expert opinion evidence in proceedings. It includes provisions for a conference of experts and the provision of joint experts' reports. The role of the expert code of conduct continues (see: UCPR Schedule 7 [Annexure C at page 72 of this document which replaces SCR Schedule K).
68. Division 2 comprises the following rules and second headings:

"Part 31 Division 2 – Experts called by parties

31.17 Definitions

31.18 Disclosure of expert's reports and hospital reports

31.18A Admissibility of expert's report

31.19 Admissibility of expert's report in District Court and Local Courts

31.20 Fees for medical expert for compliance with subpoena

31.21 Service of subpoena on medical expert

31.22 Subpoena requiring production of medical records

31.23 Expert witnesses to agree to be bound by code

31.24 Supplementary reports by expert witness

31.25 *Conference between expert witnesses*

31.26 *Opinion evidence by expert witnesses*

31.27 *Service of experts' reports in professional negligence claims"*

overview of Part 31 Division 3

69. Division 3 introduces a new procedure for the court to appoint a single expert to inquire into and report on relevant facts and questions. The expert is subject to the expert code of conduct in UCPR Schedule 7 [Annexure C at page 72 of this document].
70. Division 3 comprises the following rules and second headings:

"Part 31 Division 3 – Experts appointed by the court

31.28 Definitions

31.29 Selection and appointment

31.30 Code of conduct

31.31 Expert's report to be sent to registrar

31.32 Cross-examination of expert

31.33 Prohibition of other expert evidence

31.34 Remuneration of expert

31.35 Assistance to court by other persons"

E. How the reforms provide an effective and structured approach to expert evidence²¹

overview of expert evidence and the Code

71. The utility of the procedures in Pt 31 for the court and the parties is enhanced by CPA ss 61 and 62 which provide powers to a court to give directions for practice and procedure or for the conduct of a hearing. The overriding purpose of the CPA in s 56 has crucial operation in Pt 31 with that parts early and timely pre-trial evidentiary requirements, particularly in regard to expert evidence.
72. The common law concept is that an expert may provide specialised knowledge to assist the court by providing opinion evidence in a field of expertise which is beyond the general knowledge and common sense of the court underpins Division 2 and Division 3.
73. Additionally, there is recurring demand in the rules that expert evidence should be transparent in its reasoning process and also unbiased. For example, the requirements and underlying principles of the *code of conduct* (“Code”) and the presumption of the exclusion of expert evidence which fails to acknowledge and to agree to be bound by the contents of the Code.
74. For many, the importance of the application of the principles underpinning the Code first appeared on the radar with the decision of the Court of Appeal in *Makita*²². The reasons of Heydon JA in *Makita* explain the approach required by an expert which is to expose the expert’s reasoning process and to furnish the opponent and the court with the means of evaluating the validity of the expert’s conclusion.
75. Paragraphs [59] and [64] of His Honour’s reasons are often identified as explaining the essential principles as to “a most useful dissertation on expert evidence”²³. One clear aspect explained by Heydon JA in para [64] of *Makita* is the distinction between issues of fact and of opinion in a matter.

²¹ My ideas set out in Part E are in part derived from my annotations to Part 31 of the Thomson Lawbook Co Loose leaf Service, NSW Civil Practice & Procedure, Uniform Civil Procedure

²² *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705

²³ *Australian Law Journal*, Recent Cases, Mr Justice P W Young, (2002) 76 ALJ pp 93, 94.

76. In effect, Clause 3 of the Code is an abbreviated restatement of the principles and the requirements which are expressed by Heydon JA in *Makita*. Practitioners may greatly assist their experts by clearly indicating the factual matters which are to form assumptions upon which the expert evidence is to be founded.
77. Problems often arise when the expert is given free rein to establish the factual matters upon which his opinion is founded and his or her reasoning process/conclusions.

facts and the foundation for expert evidence

78. Expert opinion is only relevant following proof at trial of facts “sufficiently like” those upon which the expert’s opinion is based. This is not a new concept; as His Honour stated referring to earlier decisions such as *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844. Thus an expert report will be rejected if it is unable to be shown there is sufficient congruence between the facts assumed by the expert and the facts established.
79. It is a prudent course to seek a direction pre-trial per CPA s 61 or at trial per CPA s 62 or per r 31.26(a) that expert evidence not be given until after factual evidence is received.
80. This will allow the necessary distinction to be made between the function of each in the forensic process and avoid the blurring effect that inspections, experiments, recreations and medical histories tend to produce.
81. Another vice which may arise from experts’ reports is the operation of *Evidence Act 1995* s 60 particularly in regard to attributed histories²⁴. Whilst r 31.19(6) which facilitated this process has been repealed, it is prudent if in doubt to seek an order per *Evidence Act 1995* s 136 to restrict the use of the history.

useful directions set out in the CPA and UCPR

82. As set out above, the CPA states guiding principles for the exercise of broad case management powers in proceedings including: s 56 (overriding purpose); s 57 (objects of case management); s 58 (court to follow dictates of justice); s 59 (elimination of delay); and ss 61, 62 (power of court to give directions) to maximise the effectiveness of expert assistance to a court.

²⁴ LRC Report 109 (FN 5 supra) paras 6.64-6.66.

83. UCPR rr 31.25 & 31.26 set out specific directions available to a court as to practice and procedure regarding expert evidence. Examples of such directions include conferences amongst experts, joint reports, and the taking of evidence in a “hot-tub” format to facilitate expert assistance to the court for the just, quick and cheap resolution of any dispute amongst experts.
84. Part 31 Divisions 2 and 3 address matters of practice and procedure for the use of expert evidence by parties in proceedings or proposed proceedings. Lawyers need to note the distinction in this Division between the use of the terms “adducing evidence” and “admissibility”.
85. The former is used to impose a prerequisite on a party before a court considers the latter. Failure to comply with the requirements of the rules for adducing evidence, absent the grant of leave by the court to excuse such default, will result in the question of admissibility not arising, usually to the detriment to the non-complying party’s prospects of success.

early disclosure

86. The obligation on a party to make timely disclosure of any expert evidence upon which it relies is stated in r 31.18, which helps to achieve the *overriding purpose* in CPA s 56. The consequent mechanism to facilitate proof of expert evidence, see rr 31.18A(1) and 31.19(1), given timely disclosure, and the sanction for non-compliance by a party in r 31.18(3), has similar effect.
87. Any potential prejudice to a party being taken by surprise due to late service or non-disclosure of expert evidence is addressed, by requiring the party not complying with disclosure requirements to satisfy the court that there are “exceptional circumstances that warrant the granting of leave” to excuse its default.

applications to seeking the exercise of the court’s discretion

88. The reforms provide power for the court to excuse non-compliance with an individual rule by making “an order otherwise”. However, the party seeking such an order bears the onus of establishing why such an order ought to be made. Matters such as prejudice to the opponent, or the absence of any satisfactory explanation by an applicant for its default, may result in the discretion not being exercised by the court: see *Adams v Kennick Trading (International) Ltd* (1986) 4 NSWLR 503 at 506.

89. The court has the power to dispense with rules in particular civil proceedings per CPA s 14, and to make directions per CPA s 63 with respect to procedural irregularities, including a failure to comply with the rules. As to extension and abridgment of time fixed by the rules or any judgment or order of the court, see UCPR r 1.12.
90. However, in deciding to make any order or direction for the management of proceedings, the court is required to follow the dictates of justice by CPA s 58 (which sets out relevant matters for the court to consider in doing so).

non-compliance with UCPR r 31.23 (the Code) and excusing default

91. Non-compliance with rule 31.23 *Expert witness to agree to be bound by code*, places a significant burden upon a party in attempting to seek an order otherwise, with related effects as to service under rule 31.18.
92. When the court considers excusing default by exercising its discretion to make an *order otherwise*, a relevant consideration is the nature of the case. Thus in a commercial cause a higher degree of alertness to strict compliance with procedure requirements may be indicated than a personal injury case, see *Portal Software v Bodsworth* [2005] NSWSC 1228. In that case, Brereton J stated that a court may dispense with strict compliance where it is otherwise satisfied of the likely impartiality of the opinions noted in the report, see *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 870.
93. Decisions under the former rules and the predecessor to the code provide broad guidance as to the applicable principles. However, caution is required as to their utility given the changes introduced by the CPA, particularly ss 56-60 and the “*overriding purpose*”.
94. In *Commonwealth Development Bank v Cassegrain* [2002] NSWSC 980, Einstein J suggested strict compliance with the Rules on expert evidence was necessary, and declined to make an order otherwise to excuse non-compliance. Accordingly, the tender of an expert’s report was rejected. The cogent logic to be found in paragraph [9] of His Honour’s reasons has resonance with the *overriding purpose* and the desirability of improving the quality of expert evidence.

95. On the other hand, the Court has excused non-compliance in circumstances where the failure to comply was said to be technical in the sense that the report was in fact prepared in compliance with the Code: see *Barack Pty Ltd v WTH Pty Ltd* [2002] NSWSC 649; or that the expert witness sufficiently confirms compliance with the Code after being apprised of its contents: see *Langbourne v State Rail Authority* [2003] NSWSC 537; *Jermen v Shell Co of Australia Ltd* [2003] NSWSC 1106; or where the Court is satisfied as to the integrity of the expert evidence; see *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 870. These decisions relate to Schedule K and SCR Part 36 rr 13, 13C.

likely operation of the reforms

96. The Honourable Justice Peter McClellan, Chief Judge of the Common Law Division of the Supreme Court of New South Wales (the former Chief Judge of the Land and Environment Court), brings to the court experience of the practical operation of the principles and techniques underlying the reforms in regard to expert evidence.
97. His Honour provides insight into the operation of the hot tubbing process (and also other issues pertinent to expert evidence) in his lecture “Expert Witnesses – The Experience of the Land and Environment Court of NSW”²⁵ delivered in March 2005.
98. In summary, his Honour describes the procedure as involving:
- (a) experts being sworn and their written reports tendered together with a document which reflects their pre-trial discussions, ie matters upon which they agree or disagree;
 - (b) the Judge then identifies with the help of the advocates and in the presence of expert witnesses the topics which require discussion in order to resolve the outstanding issues;
 - (c) each expert witness is then invited to briefly speak to their position on the first issue followed by a general discussion of the issue during which they can ask each other questions;

²⁵ *Expert Witnesses The experience of the Land and Environment Court of New South Wales*, Hon Justice Peter McClellan, 20-24 March 2005, XIX BIENNIAL LAWASIA CONFERENCE 2005. http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_21Mar05_CJ.doc

- (d) advocates are invited to join in the discussion by asking questions of their own, or any other expert witnesses; and
 - (e) having completed discussion on one issue the Court then moves onto the next issue.
99. His Honour's suggested approach to concurrent evidence is comfortably accommodated by r 31.25 Conference between expert witnesses and r 31.26 Opinion evidence by expert witnesses.
100. This approach allows earlier identification, and narrowing, of the real issues in dispute to promote a just, quick and cheap resolution of disputes. For example the service of a hearsay notice per s 67 *Evidence Act 1995* is required by r 31.5 before the date for determining the date of the final hearing.
101. The Chief Judge in Common Law has provided further articulation of his experience and thoughts in regard to the utility and challenges of expert assistance to the Court in a paper delivered to the Industrial Relations Commission of New South Wales at its Annual Conference on 20 October 2006 entitled:

"Expert Evidence – Aces Up Your Sleeve?"²⁶

102. The opening paragraph of his Honour's speech provides insight to his thinking:
- "In his address on the occasion of the Administrative Appeals Tribunal's 30th Anniversary Chief Justice Gleeson emphasised that "effective and fair" use of expert evidence is currently an issue facing the court system. Over the last thirty years various mechanisms have been adopted to address problems with the cost and efficiency of the court process. Some courts have also reviewed their approach to expert evidence. Whilst sharing the Chief Justice's view I would go further. To my mind the "effective and fair" use of the learning of others in the resolution of disputes is one of the most significant issues which the courts face. Unless effective responses to identifiable problems are found community acceptance of the role which courts have traditionally performed in the resolution of disputes will be eroded."*
103. His Honour recounts his experience in the Land and Environment Court, recent debates on the changing culture and dismisses resistance to the reforms.

²⁶ http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_mcclellan201006

104. The following paragraph provides further emphasis that cultural change is happening:

“Experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although I do not encourage it, very often the experts, who will be sitting next to each other, end up referring to each other on first name terms. Within a short time of the discussion commencing, you can feel the release of the tension which normally infects the evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

This change in procedure has met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively respond to the views of the other expert or experts. They believe that there is less risk that their evidence will be distorted by the advocate's skill. It is also significantly more efficient. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary.

As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you actually have the expert's views expressed in his or her own words.”

Practice Notes regarding expert evidence

105. Practice Notes remain court specific, ie not uniform. In the Supreme Court²⁷, there are two Practice Notes which provide parties with insight to the practical application of the reforms and a useful procedural guide for lawyers:

(a) **Practice Note SC Gen 11 Joint Conferences of Expert Witnesses**

“4. The objective of this Practice Note is to facilitate compliance with any directions of the Court given pursuant to Division 2 of Part 31 of the UCPR. Joint report.

...

25. Pursuant to UCPR Rule 31.25 and paragraph 4 of the Code, the report should specify matters agreed and matters not agreed and the reasons for non agreement.”

²⁷ http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf

(b) **Practice Note SC Gen 10 Single Expert Witness**

“2. This Practice Note applies to all proceedings commenced after its commencement in which a claim is made for damages for personal injury or disability.

...

5. The purpose of this Practice Note is to prescribe the procedures surrounding the use of single expert witnesses in the Court.”

further reform of expert evidence rules

106. The recommendations of the Law Reform Commission contained in LRC 109 include two significant changes to the existing regime in regard to expert evidence:

- (a) a “permission rule”, i.e. that no expert evidence should be called without the leave of the court, see LRC 109 pp 82-83; and
- (b) the inclusion of provisions for joint expert witnesses in addition to the existing provisions for court-appointed experts, see LRC 109 pp.106-124.

F. Conclusion

Portia:

Thyself shalt see the act:

For, as thou urgest justice, be assured

*Thou shalt have justice, more than thou desirest.*²⁸

107. In *D’Orta*²⁹ the majority Gleeson CJ, Gummow, Hayne and Heydon JJ explained, at para [43], that “[t]he unique and essential function of the judicial branch is the quelling of controversies by the ascertainment of the facts and the application of the law.”³⁰
108. Such a function and aspiration is both a necessary and appropriate role for the courts as the core of the system of the administration of justice in New South Wales. Few could disagree that effective social technology for the “quelling of controversies” is an essential component of the infrastructure that enables a State to provide an harmonious and peaceful existence for individual citizens, and a commercially effective environment for its, and their endeavours. That might be described as “what” the judicial system does.
109. The means of achieving that function or the “how”, remains the subject of discussion and change. In *Mansfield*³¹, the High Court of Australia re-iterated that the adversarial system court is the means by which that function is achieved.
110. The reforms in New South Wales include court procedures which incline towards the inquisitorial and a code based system. Whether a tension will arise is unknown. Ultimately, that might only be revealed by a challenge to the High Court’s decision in *Queensland v JL Holdings*.
111. Whether judicial management is compatible with community expectations of justice is as much a political issue as a matter of jurisprudence. In the current climate of accountability, the question “what price justice?” will become more often a topic of discourse.
112. Yet justice remains an enduring aspiration for both the individual citizen and the community at large and has been an essential part of the fabric of human society for at least five millennia.

²⁸ *The Merchant of Venice*, William Shakespeare, ACT IV SCENE I. Venice. A court of justice.

²⁹ *D’Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12.

³⁰ *D’Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12.

³¹ *Mansfield v Director of Public Prosecutions for Western Australia* [2006] HCA 38 at [49] (20 July 2006)

113. The reforms are perhaps best recognised as an improved means of achieving justice for the State of New South Wales by the adoption of the innovations which progress offers, particularly in the field of information technology.
114. The *overriding purpose*³², infuses every aspect of litigation under the reforms. Notwithstanding concerns as to potential threats to traditional judicial roles by the introduction of judicial management, there can be little argument against the stated objects of case management set out in CPA s. 57.
115. Beyond the parties' interests, the community has an interest in the quelling of controversies according to law thus the new regime including procedure for expert evidence aims to compel early communication between parties to facilitate the quelling of disputes prior to hearing.
116. In summary, the development of a structured approach by utilising the contents of the CPA and UCPR must advance a lawyer's forensic efficiency and effectiveness, with likely cost savings for the client.
117. Litigation conducted on a systems based approach, which the reforms appear to envisage, inevitably will achieve a paradigm shift, with the inherent inefficiencies of the "rutter" like approach being left behind.
118. Similarly, presenting expert evidence using the protocol provided by UCPR Part 31 confers significant advantages on parties, both prior to, and at the hearing. They include advantages gained by the early marshalling of both factual and expert evidence, which include the means of making an informed consideration of the prospects of success; the flexibility to meet pre-trial developments, such as, the receipt of expert reports from other parties; and, the ability to conduct the party's case at hearing with confidence and without the need for applications to the court to redress non-compliance.
119. The task of persuading both the decision maker and the opponent of the justness of the party's cause will be advanced.

³² CPA s 56 "the just, quick and cheap resolution of the real issues in the proceedings".

120. A disciplined and effective application of the provisions of the CPA and Uniform Rules to case management and procedural matters, as exemplified by the rules relating to the use of expert evidence, is necessary for all practitioners and parties.
121. This must enhance forensic effectiveness and efficiency, and can only increase a party's prospects of success, of achieving a just outcome to the cause, which lies at the heart of the judicial process, and for which statutory prescriptions as the Court of Appeal reminds us in *Harding v Bourke*³³:
- "... Such a dispensing power is commonly encountered in rules of the Court and it serves to remind that **the rules are the servants of justice, not their masters**..."* (emphasis added).
122. Finally, my thanks to the University of New South Wales Centre for Continuing Legal Education, its Director, Christopher Lemercier and Dr Deborah Lum, for the opportunity to participate in this seminar, and to fellow participants thanks for your time and patience.

Mark Walsh
Seven Wentworth
16 November 2006

³³ (2000) 48 NSWLR 598 at [26] Mason P, Meagher and Heydon JJA agreeing

ANNEXURE A

Civil Procedure Act 2005 No 28

Part 6 Case management and interlocutory matters

Division 1 Guiding principles

56 Overriding purpose

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

57 Objects of case management

- (1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:
 - (a) the just determination of the proceedings,
 - (b) the efficient disposal of the business of the court,
 - (c) the efficient use of available judicial and administrative resources,
 - (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

- (2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

58 Court to follow dictates of justice

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

proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,

- (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
- (vii) such other matters as the court considers relevant in the circumstances of the case.

59 Elimination of delay

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

- (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

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

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

63 Directions with respect to procedural irregularities

- (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

- (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 Amendment of originating process after expiry of limitation period

- (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

- (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

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

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

- (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

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

- (a) on the hearing of an interlocutory application, except while a witness is giving oral evidence,
- (b) if the presence of the public would defeat the ends of justice,

- (c) if the business concerns the guardianship, custody or maintenance of a minor,
- (d) if the proceedings are not before a jury and are formal or non-contentious,
- (e) if the business does not involve the appearance before the court of any person,
- (f) if, in proceedings in the Equity Division of the Supreme Court, the court thinks fit,
- (g) if the uniform rules so provide.

72 Court may prohibit disclosure of information

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

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

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

73 Power of court to determine questions about compromises and settlements

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

Division 4 Persons under legal incapacity

74 Definitions and application

(1) In this Division:

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

protected person has the same meaning as it has in the Protected Estates Act 1983.

(2) This Division does not apply to claims made or compensation awarded under any of the following Acts:

(a) the Workers Compensation Act 1987,

(b) the Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987,

(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

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

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

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

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

76 Settlement of proceedings commenced by or on behalf of person under legal incapacity

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

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

- (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 Public Trustee, 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 Public Trustee, or
 - (b) if the person is a protected person, to the manager of the protected person's estate.

78 Application of money by Public Trustee

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

79 Application of money by manager of protected person's estate

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

- (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.

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

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

- (a) the defendant is not insured in respect of the risk giving rise to the plaintiff's claim for the recovery of damages, and
 - (b) the defendant is not a public authority, and
 - (c) the defendant would, having regard to the defendant's means and resources, suffer undue hardship if such a payment were to be made.
- (5) The court may order a defendant to make one or more payments of such amounts as it thinks just, but not exceeding a reasonable proportion of the damages that, in the court's opinion, are likely to be recovered by the plaintiff.
- (6) In estimating those damages, the court is to take into account any relevant contributory negligence, and any cross-claims, on which the defendant may be entitled to rely.

83 Interim payment not admission of liability

- (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

- (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

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

- (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

- (1) In this section:

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

conduct includes both act and omission.

culpable conduct means conduct that, under:

- (a) the laws of New South Wales, or
 - (b) the laws of any other State or Territory, or
 - (c) the laws of the Commonwealth, or
 - (d) the laws of a foreign country,
- constitutes an offence or renders a person liable to a civil penalty.

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

provide evidence means:

- (a) to provide an answer to a question or to produce a document or thing, or
 - (b) to swear an affidavit, or
 - (c) to file and serve an affidavit or a witness statement, or
 - (d) to permit possession to be taken of a document or thing.
- (2) This section applies in circumstances in which:
- (a) an application is made for, or the court makes, an order for production against a person, and
 - (b) the person objects to the making of such an order, or applies for the revocation of such an order, on the ground that the evidence required by the order may tend to prove that the person has engaged in culpable conduct.
- (3) If the court finds that there are reasonable grounds for the objection or application referred to in subsection (2) (b), the court is to inform the person, or the person's legal representative:
- (a) that the person need not provide the evidence, and
 - (b) that, if the person provides the evidence, the court will give a certificate under this section, and
 - (c) of the effect of such a certificate.
- (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.

ANNEXURE B

Uniform Civil Procedure Rules 2005

Part 31 Evidence

Division 1 Evidence at hearing

31.1 Manner of giving evidence at trial

- (1) This rule applies to a trial of proceedings commenced by statement of claim, or in which a statement of claim has been filed.
- (2) Subject to subrules (3), (4) and (5) and to the provisions of the *Evidence Act 1995*, a witness's evidence at a trial must be given orally before the court.
- (3) The court may order that all or any of a witness's evidence at a trial must be given by affidavit or, subject to rule 31.4, by witness statement.
- (4) Unless the court orders otherwise, evidence of facts must be given by affidavit if the only matters in question are:
 - (a) interest up to judgment in respect of a debt or liquidated claim, or
 - (b) the assessment of damages or the value of goods under Part 30, or
 - (c) costs.
- (5) Unless the court otherwise orders, at any trial on an assessment of the amount to be recovered by a plaintiff after default judgment has been given, the following evidence may be given by affidavit:
 - (a) evidence of the identity of any motor vehicle,
 - (b) evidence of the damage sustained by a motor vehicle in a particular collision,
 - (c) evidence of the reasonable cost of repairing that damage.

31.2 Evidence of witnesses at other hearings

Subject to rule 31.1, evidence in chief of any witness at any hearing must be given by affidavit unless the court orders otherwise.

31.3 Evidence by telephone, video link or other communication

- (1) If the court so orders, evidence and submissions may be received by telephone, video link or other form of communication.
- (2) This rule does not apply to circumstances in which directions could be sought under section 25 of the *Evidence and Procedure (New Zealand) Act 1994* of the Commonwealth.

31.4 Court may direct party to furnish witness statement

- (1) The court may direct any party to serve on each other active party a written statement of the oral evidence that the party intends to adduce in chief on any questions of fact to be decided at any hearing (a **witness statement**).
- (2) A direction under subrule (1):
 - (a) may make different provision with regard to different questions of fact or different witnesses, and
 - (b) may require that notice be given of any objection to any of the evidence in a witness statement and of the grounds of any such objection.
- (3) Each witness statement must be signed by the intended witness unless the signature of the witness cannot be procured or the court orders otherwise.
- (4) If an intended witness to whose evidence a witness statement relates does not give evidence, no party may put the statement in evidence at the hearing except by leave of the court.
- (5) If the party serving the statement calls as a witness at the hearing any person whose witness statement has been served pursuant to a direction under subrule (1):
 - (a) that person's witness statement is to stand as the whole of his or her evidence in chief, so long as that person testifies to the truth of the statement, and
 - (b) except by leave of the court, the party may not adduce from that person any further evidence in chief.
- (6) A party who fails to comply with a direction given under this rule may not adduce evidence to which the direction relates, except by leave of the court.

- (7) This rule does not deprive any party of the right to treat any communication as privileged and does not make admissible any evidence that is otherwise inadmissible.
- (8) An application by a party for an order that the party not be required to comply with a direction under this rule in respect of any proposed witness or witnesses (whether or not such a direction has been given) may be made without serving notice of motion.

31.5 Notice under s 67 or s 99 of the Evidence Act 1995

Unless the court orders otherwise, notice for the purposes of section 67 or 99 of the Evidence Act 1995 must be given:

- (a) in any case where the court by notice to the parties fixes a date for determining the date for hearing, not later than 21 days before the date fixed by that notice, and
- (b) in any other case where the place of hearing is a place other than Sydney, not later than 21 days before the first call-over held in respect of the sittings at that place, and
- (c) in any other case, not later than 21 days before the date on which the court determines the date for hearing.

31.6 Evidence on commission

- (1) The court may permit a party to any proceedings the subject of an order under rule 24.3 (relating to the taking of evidence otherwise than at trial) to tender in the proceedings the evidence of a person examined under the order.
- (2) The evidence is not admissible in the proceedings if:
 - (a) it appears to the satisfaction of the court that the person examined is in New South Wales and is able to attend the hearing, or
 - (b) the evidence would not have been admissible had it been given orally at the hearing of the proceedings.
- (3) If it is in the interests of justice to do so, the court may exclude from the proceedings any evidence of the person examined even though the evidence is otherwise admissible.

- (4) Unless the court orders otherwise, evidence in any proceedings that a case falls within:
- (a) subrule (2) (a), or
 - (b) section 8 (2) (a) or 22 (2) (a) of the *Evidence on Commission Act 1995*, or
 - (c) section 9 (2) (a) of the *Foreign Evidence Act 1994* of the Commonwealth, may be given by affidavit on information and belief, but the person making the affidavit must give the source of and ground for the information and belief.
- (5) The judicial officer presiding at the trial may make any necessary observations and findings as to demeanour and credibility of the person examined, and act on them for the determination of the issues at the trial, if:
- (a) the examination has been conducted by the same judicial officer, or
 - (b) an audio-visual recording under rule 24.13 is tendered in evidence at the trial,
except where the trial is before a jury.
- (6) In this rule, **evidence** includes:
- (a) any document or thing produced at the examination, and
 - (b) any answers made (whether in writing, or orally and reduced to writing) to any written interrogatories presented at the examination, and
 - (c) any audio-visual recording made in accordance with rule 24.13.

31.7 Foreign material

- (1) Unless the court orders otherwise, a party who adduces foreign material under section 24 or 32 of the *Foreign Evidence Act 1994* of the Commonwealth as evidence:
- (a) must give at least 14 days' written notice to each other active party of:
 - (i) the intention to adduce evidence under that section, and
 - (ii) the nature of the foreign material, and
 - (b) must adduce all relevant evidence available to that party:

- (i) as to whether the person who gave the testimony that is the subject of the foreign material is in Australia and is able to attend the hearing, and
 - (ii) if the foreign material is adduced under section 24 of the Foreign Evidence Act 1994 of the Commonwealth, of the matters to which section 25 (2) (a) or (c) of that Act refer, and
 - (iii) if the foreign material is adduced under section 32 of the Foreign Evidence Act 1994 of the Commonwealth, of the matters to which section 33 (2) (a) or (c) of that Act refer.
- (2) In this rule **foreign material** has the same meaning as it has in the Foreign Evidence Act 1994 of the Commonwealth.

31.8 Earlier evidence in the same proceedings

- (1) Evidence taken at a trial with respect to a question that is ordered to be tried separately may be used in any subsequent trial in the same proceedings, saving all just exceptions and unless the court orders otherwise.
- (2) Evidence taken at a trial may be used for any subsequent trial for the assessment of damages or of the value of goods in the same proceedings, saving all just exceptions and unless the court orders otherwise.
- (3) Subject to subrules (1) and (2), evidence taken at a hearing may not be used as evidence in any subsequent hearing in the same proceedings except by leave of the court.

31.9 Earlier evidence in other proceedings

- (1) In any proceedings, evidence taken, or an affidavit filed, in other proceedings may not be used as evidence, saving all just exceptions and unless the court orders otherwise.
- (2) Leave may not be granted under subrule (1) except to allow the evidence taken, or affidavit filed, in the other proceedings to be used in relation to the proof of particular facts.

31.10 Plans, photographs and models

- (1) At least 7 days before the commencement of a hearing, a party who intends to tender any plan, photograph or model at the hearing must give the other parties an opportunity to inspect it and to agree to its admission without proof.

- (2) A party who fails to comply with subrule (1) may not tender the plan, photograph or model in evidence except by leave of the court.
- (3) This rule does not apply to any proceedings entered, or intended to be entered, in:
 - (a) the Commercial List or the Technology and Construction List in the Supreme Court, or
 - (b) the Commercial List or the Construction List in the District Court.

31.11 Production of court documents

Unless the court orders otherwise, the registrar must produce to the court any document in the registrar's custody that, by notice in writing, any party to proceedings requests the registrar to produce to the court for the purposes of the proceedings.

31.12 Proof of court documents

A document purporting to be marked with the seal of any court or tribunal is admissible in evidence without further proof.

31.13 Unstamped documents: arrangements under section 304 of the Duties Act 1997

- (1) The "usual undertaking by person liable" if given to the court by a party in relation to an instrument referred to in section 304 (2) of the Duties Act 1997 is an undertaking that the party will, within a time specified by the court, transmit the instrument to the Chief Commissioner of State Revenue.
- (2) The "usual undertaking by person not liable" if given to the court by a party in relation to an instrument referred to in section 304 (2) of the Duties Act 1997 is an undertaking that the party will, within a time specified by the court, forward to the Chief Commissioner of State Revenue the name and address of the person liable to pay duty on the instrument under that Act together with the instrument.

31.14 Unstamped documents: undertaking in respect of section 29 of the Stamp Duties Act 1920

- (1) The "solicitor's usual undertaking as to stamp duty", if given to the court by a solicitor in relation to an instrument referred to in section 29 of the Stamp Duties Act 1920, or an unexecuted copy referred to in that section, is an undertaking that the solicitor will cause the instrument or copy to be presented to the Chief

Commissioner of State Revenue for assessment in accordance with that Act and cause any duty and fine to which the instrument or copy is liable to be paid.

- (2) The “party’s usual undertaking as to stamp duty”, if given to the court by a party in relation to an instrument referred to in section 29 (4) of the Stamp Duties Act 1920, is an undertaking that the party will, within 28 days, inform the Chief Commissioner of State Revenue of the name of the person primarily liable to duty in respect of the instrument and lodge the instrument or a copy of the instrument with the Chief Commissioner.

31.15 Evidence of consent to act as tutor, trustee, receiver or other office

- (1) A document:
 - (a) purporting to contain a person’s written consent to act as tutor of a person under legal incapacity, to act as trustee, to act as receiver or to act in any other office on appointment by the court, and
 - (b) purporting to have been duly executed and authenticated,is evidence of the consent.
- (2) A document is duly executed and authenticated for the purposes of subrule (1):
 - (a) in the case of a consenting person who is a natural person, if the document is signed by the consenting person and the signature is verified by some other person, or
 - (b) in the case of a consenting person that is a corporation, if the seal of the corporation is affixed to the document in accordance with the law regulating the use of the seal.

31.16 Evidence of published research concerning maintenance of children

If the proper needs of a minor are relevant, the court may have regard, to the extent to which it considers appropriate, to any relevant findings of published research in relation to the maintenance of minors.

Division 2 Experts called by parties

31.17 Definitions

In this Division:

code of conduct means the expert witness code of conduct in Schedule 7.

expert, in relation to any question, means a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his or her opinion on that question would be admissible in evidence.

expert witness means an expert engaged for the purpose of:

- (a) providing a report as to his or her opinion for use as evidence in proceedings or proposed proceedings, or
- (b) giving opinion evidence in proceedings or proposed proceedings.

expert's report means a written statement by an expert (whether or not an expert witness in the proceedings concerned) that sets out the expert's opinion, and the facts on which the opinion is formed, and contains the substance of the expert's evidence that the party serving the statement intends to adduce in chief at the trial.

hospital report means a written statement concerning a patient, made by or on behalf of a hospital, that the party serving the statement intends to adduce in evidence in chief at the trial.

31.18 Disclosure of experts' reports and hospital reports

- (1) Each party must serve experts' reports and hospital reports on each other active party:
 - (a) in accordance with any order of the court, or
 - (b) if no such order is in force, in accordance with any relevant practice note, or
 - (c) if no such order or practice note is in force, not later than 28 days before the date of the hearing at which the report is to be used.
- (2) An application to the court for an order under subrule (1) (other than an order solely for abridgment or extension of time) may be made without serving notice of motion.

- (3) Except by leave of the court, or by consent of the parties:
 - (a) an expert's report or hospital report is not admissible unless it has been served in accordance with this rule, and
 - (b) without limiting paragraph (a), an expert's report or hospital report, when tendered under section 63, 64 or 69 of the Evidence Act 1995, is not admissible unless it has been served in accordance with this rule, and
 - (c) the oral expert evidence in chief of any expert is not admissible unless an expert's report or hospital report served in accordance with this rule contains the substance of the matters sought to be adduced in evidence.
- (4) Leave is not to be given as referred to in subrule (3) unless the court is satisfied:
 - (a) that there are exceptional circumstances that warrant the granting of leave, or
 - (b) that the report concerned merely updates an earlier version of a report that has been served in accordance with subrule (1).

31.18A Admissibility of expert's report

- (1) If an expert's report is served in accordance with rule 31.18 or an order made under that rule, the report is admissible:
 - (a) as evidence of the expert's opinion, and
 - (b) if the expert's direct oral evidence of a fact on which the opinion was formed would be admissible, as evidence of that fact, without further evidence, oral or otherwise.
- (2) Unless the court otherwise orders, a party may require the attendance for cross-examination of the expert by whom the report was prepared by notice served on the party by whom the report was served.
- (3) Unless the court otherwise orders, such a requirement may not be made later than:
 - (a) in the case of proceedings for which the court has fixed a date for trial, 35 days before the date so fixed, or
 - (b) in any other case, 7 days before the date on which the court fixes a date for trial.

- (4) The parties may not by consent abridge the time fixed by or under subrule (3).
- (5) If the expert's attendance for cross-examination is required under subrule (2), the report may not be tendered under section 63, 64 or 69 of the *Evidence Act 1995* or otherwise used unless the expert attends or is dead or the court grants leave to use it.
- (6) The party using the report may re-examine the expert if the expert attends for cross-examination pursuant to a requirement under subrule (2).
- (7) This rule does not apply to proceedings in the District Court or a Local Court or to proceedings on a trial with a jury.

31.19 Admissibility of expert's report in District Court and Local Courts

- (1A) This rule applies to proceedings in the District Court or a Local Court.
- (1) If an expert's report is served in accordance with rule 31.18 or an order made under that rule, the report is admissible:
 - (a) as evidence of the expert's opinion, and
 - (b) if the expert's direct oral evidence of a fact on which the opinion was formed would be admissible, as evidence of that fact, without further evidence, oral or otherwise.
- (2) Unless the court orders otherwise:
 - (a) it is the responsibility of the party requiring the attendance for cross-examination of the expert by whom an expert's report has been prepared to procure that attendance, and
 - (b) the party requiring the expert's attendance must notify the expert at least 28 days before the date on which attendance is required.
- (3) Except for the purpose of determining any liability for conduct money or witness expenses, an expert does not become the witness for the party requiring his or her attendance merely because his or her attendance at court has been procured by that party.
- (4) A party who requires the attendance of a person as referred to in subrule (2):
 - (a) must inform all other parties to the proceedings that the party has done so at least 28 days before the date fixed for hearing, and

- (b) must pay to the person whose attendance is required (whether before or after the attendance) an amount sufficient to meet the person's reasonable expenses (including any standby fees) in complying with the requirement.
- (5) If the attendance of an expert is required under subrule (2), the report may not be tendered under section 63, 64 or 69 of the Evidence Act 1995 or otherwise used unless the expert attends or is dead or the court grants leave to use it.
- (6) (Repealed)
- (7) The party using an expert's report may re-examine an expert who attends for cross-examination under a requirement under subrule (2).
- (8) This rule does not apply to proceedings on a trial with a jury.

31.20 Fees for medical expert for compliance with subpoena

- (1) If a subpoena is served on a medical expert who is to give evidence of medical matters but is not called as a witness, the expert is, unless the court orders otherwise, entitled to be paid, in addition to any other amount payable to the expert, the amount specified in item 2 of Schedule 3.
- (2) The amount payable under subrule (1) must be paid to the expert by the issuing party within 28 days after the date for the expert's attendance.
- (3) A party that requires an expert's attendance under rule 31.19 (2), but subsequently revokes it, must pay to the issuing party any amount paid by the issuing party under subrule (2), but otherwise such an amount is not recoverable by the issuing party from any other party unless the court so orders.
- (4) In this rule, *issuing party* means the party at whose request a subpoena is issued.

31.21 Service of subpoena on medical expert

- (1) Service of a subpoena on a medical expert may be effected, at any place at which the expert's practice is carried on, by handing it over to a person who is apparently engaged in the practice (whether as an employee or otherwise) and is apparently of or above the age of 16 years.
- (2) If a person refuses to accept a subpoena when it is handed over, the subpoena may be served by putting it down in the person's presence after he or she has been told of its nature.

- (3) If a subpoena requires a medical expert to attend court on a specified date for the purpose of giving evidence on medical matters, it must be served on the expert not later than 21 days before the date so specified unless the court orders otherwise.
- (4) The parties may not by consent abridge the time fixed by or under subrule (3).

31.22 Subpoena requiring production of medical records

- (1) A subpoena for production may require a medical expert to produce medical records or copies of them.
- (2) A person is not required to comply with a subpoena for production referred to in subrule (1) unless the amount specified in item 3 of Schedule 3 is paid or tendered to the person at the time of service of the subpoena or a reasonable time before the date on which production is required.
- (3) Rule 33.6 (Compliance with subpoena) does not apply to a subpoena to which subrule (1) applies.
- (4) Rule 33.7 (Production otherwise than on attendance) applies to the photocopies in the same way as it applies to the records.
- (5) If, after service of a subpoena for production referred to in subrule (1), the party who requested the issue of the subpoena requires production of the original medical records without the option of producing copies of them, the party must request the issue of, and serve, another subpoena requiring production of the original medical records.

31.23 Expert witnesses to agree to be bound by code

- (1) As soon as practicable after engaging an expert as a witness, whether to give oral evidence or to provide an expert's report, the party engaging the expert must provide the expert with a copy of the code of conduct.
- (2) Oral evidence may not be received from an expert witness unless:
 - (a) he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it, and
 - (b) a copy of the acknowledgment has been served on all parties affected by the evidence.

- (3) If an expert's report does not contain an acknowledgment by the expert witness who prepared it that he or she has read the code of conduct and agrees to be bound by it:
 - (a) service of the report by the party who engaged the expert witness is not valid service, and
 - (b) the report is not admissible in evidence.
- (4) This rule applies unless the court orders otherwise.

31.24 Supplementary reports by expert witness

- (1) If an expert witness provides a supplementary report to the party by whom he or she has been engaged, neither the engaging party nor any other party having the same interest as the engaging party may use the earlier report on the question to which the earlier report relates unless the engaging party has served the supplementary report on all parties on whom the engaging party served the earlier report.
- (2) For the purposes of this rule, *supplementary report*, in relation to an earlier report provided by an expert witness, includes any report by the expert witness that indicates that he or she has changed his or her opinion on a material matter expressed in the earlier report.

31.25 Conference between expert witnesses

- (1) The court may direct expert witnesses:
 - (a) to confer, either generally or in relation to specified matters, and
 - (b) to endeavour to reach agreement on outstanding matters, and
 - (c) to provide the court with a joint report, specifying matters agreed and matters not agreed and reasons for any failure to reach agreement.
- (2) An expert so directed may apply to the court for further directions.
- (3) The court may direct that a conference be held:
 - (a) with or without the attendance of the parties affected or their legal representatives, or
 - (b) with or without the attendance of the parties or their legal representatives, at the option of the parties.

- (4) The content of the conference between the expert witnesses must not be referred to at the hearing unless the parties affected agree.
- (5) If the parties have agreed to be bound on any specified matter dealt with by the joint report, the report may be tendered at the trial as evidence of the matters agreed.
- (6) If the parties have not agreed to be bound on any matter dealt with by the joint report, the report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court.
- (7) If expert witnesses have conferred and provided a joint report agreeing on any matter, a party affected may not, except by leave of the court, adduce expert evidence inconsistent with the matter agreed.

31.26 Opinion evidence by expert witnesses

In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same question or similar questions, or indicate to the court an intention to call expert witnesses for that purpose, the court may give any one or more of the following directions:

- (a) a direction that:
 - (i) the expert witnesses give evidence at trial after all factual evidence relevant to the question or questions concerned, or such evidence as may be specified by the court, has been adduced, or
 - (ii) each party intending to call one or more expert witnesses close that party's case in relation to the question or questions concerned, subject only to adducing evidence of the expert witnesses later in the trial,
- (b) a direction that, after all factual evidence relevant to the question, or such evidence as may be specified by the court, has been adduced, each expert witness file an affidavit or statement indicating:
 - (i) whether the expert witness adheres to any opinion earlier given, or
 - (ii) whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given,
- (c) a direction that the expert witnesses:

- (i) be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined, in accordance with paragraphs (d), (e), (f), (g) and (h)), and
 - (ii) when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence,
- (d) a direction that each expert witness give an oral exposition of his or her opinion, or opinions, on the question or questions concerned,
 - (e) a direction that each expert witness give his or her opinion about the opinion or opinions given by another expert witness,
 - (f) a direction that each expert witness be cross-examined in a particular manner or sequence,
 - (g) a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:
 - (i) by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another, or
 - (ii) by putting to each expert witness, in turn, each question relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete,
 - (h) a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witness together with whom he or she is giving evidence as so referred to,
 - (i) such other directions as to the giving of evidence in the circumstances referred to in paragraph (c) as the court thinks fit.

31.27 Service of experts' reports in professional negligence claims

- (1) Unless the court orders otherwise, a person commencing a professional negligence claim (other than a claim against a legal practitioner) must file and serve, with the statement of claim commencing the professional negligence claim, an expert's report that includes an opinion supporting:

- (a) the breach of duty of care, or contractual obligation, alleged against each person sued for professional negligence, and
 - (b) the general nature and extent of damage alleged (including death, injury or other loss or harm and prognosis, as the case may require), and
 - (c) the causal relationship alleged between such breach of duty or obligation and the damage alleged.
- (2) In the case of a professional negligence claim against a legal practitioner, the court may order the plaintiff to file and serve an expert's report or experts' reports supporting the claim.
- (3) If a party fails to comply with subrule (1) or (2), the court may by order made on the application of a party or of its own motion dismiss the whole or any part of the proceedings, as may be appropriate.
- (4) In this rule:

professional negligence means the breach of a duty of care or of a contractual obligation in the performance of professional work or in the provision of professional services by a medical practitioner, an allied health professional (such as dentist, chemist, physiotherapist), a hospital, a solicitor or a barrister.

professional negligence claim means a claim in the court for damages, indemnity or contribution based on an assertion of professional negligence.

Division 3 Experts appointed by the court

31.28 Definitions

In this Division:

code of conduct means the expert witness code of conduct in Schedule 7.

expert, in relation to any question, means a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his or her opinion on that question would be admissible in evidence.

party affected means a party who may be affected by the court's decision with respect to a question that the court has referred to an expert for inquiry and report.

31.29 Selection and appointment

- (1) If a question for an expert arises in any proceedings the court may, at any stage of the proceedings:
 - (a) appoint an expert to inquire into and report on the question, and
 - (b) authorise the expert to inquire into and report on any facts relevant to the inquiry and report on the question, and
 - (c) direct the expert to make a further or supplemental report or inquiry and report, and
 - (d) give such instructions (including instructions concerning any examination, inspection, experiment or test) as the court thinks fit relating to any inquiry or report of the expert.
- (2) The court may appoint as an expert a person selected by the parties affected, a person selected by the court or a person selected in a manner directed by the court.

31.30 Code of conduct

- (1) A copy of the code of conduct must be provided to the expert by the registrar or as the court may direct.
- (2) A report by an expert may not be admitted into evidence unless the report contains an acknowledgment by the expert that he or she has read the code of conduct and agrees to be bound by it.

- (3) Oral evidence may not be received from an expert unless the court is satisfied that he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it.

31.31 Expert's report to be sent to registrar

- (1) The expert must send his or her report to the registrar.
- (2) The registrar must send a copy of the report to each party affected.
- (3) Subject to rule 31.30 and unless the court orders otherwise, the report is taken to have been admitted in evidence in the proceedings when it is received by the court.

31.32 Cross-examination of expert

Any party affected may cross-examine an expert, and the expert must attend court for examination or cross-examination if so requested on reasonable notice by the registrar or by a party affected.

31.33 Prohibition of other expert evidence

Except by leave of the court, a party to proceedings may not adduce evidence of any expert on any question arising in proceedings if an expert has been appointed under this Division in relation to that question.

31.34 Remuneration of expert

- (1) The remuneration of an expert is to be fixed by the court.
- (2) Subject to subrule (3), the parties specified by the court are jointly and severally liable to an expert to pay the amount fixed by the court for his or her remuneration.
- (3) The court may direct when and by whom an expert is to be paid.
- (4) Subrules (2) and (3) do not affect the powers of the court as to costs.

31.35 Assistance to court by other persons

- (1) In any proceedings, the court may obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings and may act on the adviser's opinion.

- (2) Rule 31.34 applies to and in respect of a person referred to in subrule (1) in the same way as it applies to and in respect of an expert appointed under this Division.
- (3) This rule does not apply to proceedings in the Admiralty List of the Supreme Court or to proceedings that are tried before a jury.

ANNEXURE C

Uniform Civil Procedure Rules 2005

Schedule 7 Expert witness code of conduct

(Rules 31.17 and 31.28)

1 Application of code

This code of conduct applies to any expert engaged:

- (a) to provide a report as to his or her opinion for use as evidence in proceedings or proposed proceedings, or
- (b) to give opinion evidence in proceedings or proposed proceedings.

2 General duty to the court

- (1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise.
- (2) An expert witness's paramount duty is to the court and not to the person retaining the expert.
- (3) An expert witness is not an advocate for a party.

3 The form of expert reports

- (1) A report by an expert witness must (in the body of the report or in an annexure) specify the following:
 - (a) the person's qualifications as an expert,
 - (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed),
 - (c) reasons for each opinion expressed,
 - (d) if applicable, that a particular question or issue falls outside his or her field of expertise,
 - (e) any literature or other materials utilised in support of the opinions,
 - (f) any examinations, tests or other investigations on which he or she has relied, including details of the qualifications of the person who carried them out.

- (2) If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
- (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- (4) An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) (b), (c), (d), (e) and (f) as is appropriate.
- (5) If an expert witness is appointed by the court, subclause (4) applies as if the court were the engaging party.

4 Experts' conference

- (1) An expert witness must abide by any direction of the court:
 - (a) to confer with any other expert witness, and
 - (b) to endeavour to reach agreement on material matters for expert opinion, and
 - (c) to provide the court with a joint report, specifying matters agreed and matters not agreed and the reasons for any failure to reach agreement.
- (2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.