

**UNSW CENTRE FOR CONTINUING LEGAL EDUCATION
SEMINAR : LITIGATION MASTER CLASS
22 MARCH 2006**

**TOPIC 1: QUELLING DISPUTES : NARROWING THE ISSUES AND
PROMOTING EARLY RESOLUTION**

Topic 1 of this seminar examines litigation from the perspective of promoting early and effective dispute resolution utilising recent legislative changes to practice, procedure and case management.

This paper is an outline of matters to be examined in the session scheduled from 9.15 am to 10.15 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 content and detail of the paper is constrained by the time available for this session.

Two pre-trial tools to facilitate the just, quick and cheap resolution of the real issues in proceedings per the overriding purpose as stated in the Civil Procedure Act are reviewed. In addition, issues requiring consideration for the compromise of disputes and prior to settlement are examined.

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

litigate –v.t. 1. to make the subject of a lawsuit; to contest at law.
2. to dispute(a point, etc). 3. to carry on a lawsuit¹

1. The High Court has recently stated that: “The ‘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.”²
2. Controversies or disputes which require judicial “quelling”, or in effect third party determination, may be seen as the failure by the opposing parties to be able to align their factual and legal realities. They inhabit “parallel worlds” which have little or no intersection.
3. Absent commercial imperatives, or the hope that “something will turn up” (which is rarely a successful approach to litigation), this situation often occurs due to the absence of communication between parties in the pre-trial phase of litigation to allow a satisfactory identification and subsequent resolution of the real issues in dispute.
4. Disputes are notoriously draining for the parties involved, with a high opportunity and time cost, usually associated with a depletion of resources, both tangible and intangible.

¹ The Macquarie Dictionary 2nd edition reprinted 1995

² *D’Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 per Gleeson CJ, Gummow, Hayne and Heydon JJ at para [43], referring to *Fencott v Muller* (1983) 152 CLR 570 at 608.

5. Beyond the parties' individual interests, the demand on, and the allocation of, the scarce resources of the general community for disputes between parties is substantial. This demand on community resources goes well beyond the provision of a "system of justice", including the courts, and must include matters such as lost productivity and distraction from the pursuit of more altruistic goals.
6. Thus, the community has a significant interest that courts efficiently and effectively quell disputes between parties, according to law.
7. Parliament's passage of the *Civil Procedure Act 2005* ("CPA"), and, in particular, the explicit statement of the *overriding purpose* to facilitate the just, quick and cheap resolution of the real issues in the proceedings³, compels a court to consider interests beyond the individual parties in case management.
8. The approach of the legislature in the *Civil Procedure Act 2005* and related *Uniform Civil Procedure Rules 2005* ("Uniform Rules") follows the pattern found in legislation over the last decade, such as the *Evidence Act 1995* and the *Civil Liability Act 2002*, to attempt to expressly state and in effect to codify common law principles of substantive and adjectival law.
9. For litigators, 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

³ CPA s 56.

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.

10. Such matters require a party to commence the process of educating the opponent of the merits of its case from a much earlier stage in the proceedings.
11. Conversely, the process facilitates a much earlier, more informed, and not necessarily happy, assessment of the strengths and weaknesses of your own case, due to a better understanding of the merits of your opponent's case.
12. The emphasis in the new regime in the CPA of promoting effective communication without the strictures of form for discipline's sake, and the sanctions on a party for failing to appreciate the opponents perspective, requires a considered approach to disputes from a very early stage, with a view to facilitate the quelling of disputes prior to hearing.
13. Clearly the new regime favours the diligent.

B. The overriding purpose and *Civil Procedure Act Pt 6, Div 1 and Div 2*

14. The nature and the extent of the change introduced by the CPA and the Uniform Rules will only be able to be judged in hindsight. The ongoing debate as to whether the new regime has introduced substantive change or merely expressed in a cohesive manner existing practice and procedure is at the heart of that debate.
15. I am most grateful to Michael McHugh, Barrister, of Wardell Chambers, and Thomson Lawbook Co for their permission to allow me to annex to this paper a copy of annotations to the Thomson Law Book Co. New South Wales Uniform Civil Procedure to Part 6 Divisions 1 and 2.
16. The extract from the second reading speech to the reforms, which is contained in those annotations, at page [31], addresses a core issue set out in *Queensland v J L Holdings Pty Ltd*⁴ which was perceived as an impediment to considering the broader interests beyond the individual parties and case management as a tool for increasing the efficiency of the Court system overall.
17. A proposition which I ask you to consider as litigators is that the introduction of the new regime and particularly Part 6 Divisions 1 & 2 provides great assistance benefit and in effect a roadmap to assist lawyers in the conduct of litigation by exposing the mandatory considerations for decision making by a court in regard to case management.

⁴ (1997) 189 CLR 146

18. Necessarily, the contents found in the general principles in Division 1 allow a litigator to have insight and parity of thinking process with the material considerations used by the court in the exercise of its discretion in case management.
19. On one view, it is akin to the process of changing from one of an unseen exam paper to a seen exam paper, and reference to the reasons of the High Court of Australia in *House v King*⁵ illustrate that the court, and the parties, may participate in a more transparent process in regard to discretionary decision making:

"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. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred".

20. Knowing in advance that the trial judge will apply CPA s 56 at hearing, practitioners will make pre-trial decisions mindful of the *overriding purpose* to facilitate the just, quick and cheap resolution of the real issues in dispute.

⁵ *House -v- The King* (1936) 55 CLR 499 at page 505, [1936] HCA 40.

21. CPA s 56 is thus a compass by which any judicial decision maker will determine issues at hearing. Other crucial provisions for pre-trial and trial case management include:
- s 57 – Objects of case management,
 - s 58 – Court to follow dictates of justice
 - s 59 – Elimination of delay
 - s 60 – Proportionality of costs.
22. 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).
23. An example of the use of the CPA and the Uniform Rules as to late evidence is to be found in the reasons for judgment of Campbell J in *Consolidated Credit Network*⁶. On the second day of a hearing 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.
24. His Honour also refused an application by the plaintiff for an adjournment.
25. An example of the application of CPA s 56 leading to a refusal to grant leave to a defendant to amend, and the underpinning

⁶ *Consolidated Credit Network v Illawarra Retirement Trust* [2005] NSWSC 1004.

considerations in regard to the overriding purpose is found in the decision of Hamilton J in *Silver v Dome Resources NL*⁷.

26. An example of the use of CPA s 60 as to costs is provided by the Chief Judge in Equity:

"37 As to the costs of this application, the plaintiff has sought an indulgence. The defendant has resisted it, but resisted it far too strongly. The defendant is entitled to its costs of investigating the matter and taking advice. I order that the plaintiff pay 20% of the defendant's costs.

*38 I take into account in making that order the fact that there is apparently somewhere between \$19,000 and \$44,000 in real dispute between the parties. My assessment is that the defendant perceived the mistake, and indeed pointed it out to the plaintiff, yet resisted the application to the full and s 60 of the **Civil Procedure Act** requires the Court to deal with costs in such a way that it is proportionate to the importance and complexity of the subject matter in dispute."⁸*

27. A further example of the impact of Part 6 Division 1 on costs is found in the Court of Appeal decision in *Commonwealth of Australia v Smith* [2005] NSWCA 478 per Santow JA:

"161 Although not relied upon specifically, there is also the overriding purpose rule enjoining the parties to assist the Court in the just, quick and cheap resolution of the real issues in the proceedings; Pt 1 r3(1), (2) now to be found in s56(3) Civil Procedure Act 2005. By putting unsuccessful submissions as to prejudice based on the unavailability of documentation when this has so frequently been found insufficient to constitute significant prejudice, and was again so found here, that Rule would support the result that the primary judge's cost order should not be interfered with."

28. The powers of the Court to give directions contained in Part 6 Division 2 are of similar assistance to the diligent litigator to those in Division 1. Aside from an explicit statement of specific powers

⁷ [2006] NSWSC 26.

⁸ *A & M Short Pty Ltd v Prestige Residential Marketing Pty Ltd* [2005] NSWSC 872.

they provide a useful case management tool for parties to consider appropriate interlocutory procedures and forensic strategy for any subsequent hearing.

29. These directions assume much greater significance when coupled with available existing procedures which have been restated in the Uniform Rules. There are many examples of means to facilitate the effective and efficient conduct of proceedings by a party. Several examples are underlined on the relevant pages of the annotated service below.

C. Notices to Admit

Uniform Civil Procedure Rules 2005

Part 17 Admissions

17.1 Definitions

In this Part, other than rule 17.5:

the admitting party means a party who is admitting, or being asked to admit, any matter.

the requesting party means a party in whose favour another party is admitting, or being asked to admit, any matter.

17.2 Voluntary admissions of fact

(cf SCR Part 18, rule 1; DCR Part 15, rule 1; LCR Part 14, rule 1)

- (1) The admitting party may, by a notice served on the requesting party, admit, in favour of the requesting party only and for the purposes of the proceedings only, the facts specified in the notice.
- (2) *The admitting party may, with the leave of the court, withdraw any such admission.*

17.3 Notice to admit facts

(cf SCR Part 18, rule 2; DCR Part 15, rule 2; LCR Part 14, rule 2)

- (1) The requesting party may, by a notice served on the admitting party (**the requesting party's notice**), require the admitting party to admit, for the purposes of the proceedings only, the facts specified in the notice.
- (2) *If, as to any fact specified in the requesting party's notice, the admitting party does not, within 14 days after service on the admitting party of the requesting party's notice, serve on the requesting party a notice disputing that fact, that fact is, for the purposes of the proceedings only, taken to have been admitted by the admitting party in favour of the requesting party only.*
- (3) *The admitting party may, with the leave of the court, withdraw any such admission.*

17.4 Notice to admit documents

(cf SCR Part 18, rule 5; DCR Part 15, rule 5; LCR Part 14, rule 3)

- (1) *The requesting party may, by a notice served on the admitting party (**the requesting party's notice**), require the admitting party to admit the authenticity of the documents specified in the notice.*
- (2) *If, as to any document specified in the requesting party's notice, the admitting party does not, within 14 days after service on the admitting party of the requesting party's notice, serve on the requesting party a notice disputing the authenticity of that document, the authenticity of that document is, for the purposes of the proceedings only, taken to have been admitted by the admitting party in favour of the requesting party only.*
- (3) *The admitting party may, with the leave of the court, withdraw any such admission.*

30. Notices to Admit per r 17.2 allow a party to confine issues to the real matters in dispute and in the event of an adverse outcome avoid incurring fees and/or paying the other side's costs for matters which were not in dispute.

31. The Uniform Rules provide the means for a party to serve a Notice Admit Facts [r 17.3], and also for a party to serve a Notice to Admit Documents [r 17.4], on another party. In each rule, the party serving the Notice is referred to as the requesting party. The Notice requires the party receiving the Notice (referred to as the admitting party) to admit the authenticity of the fact or document specified in the Notice.

32. If there is no dispute by the admitting party as to either the facts specified in the Notice or the authenticity of the documents, no further action is required.

33. However, in the event that the admitting party disputes either the relevant fact or the relevant document it is necessary for that

party, within 14 days of the service of the relevant Notice, to serve a notice disputing either the fact or the authenticity of that document.

34. Under each rule, the failure by the admitting party to serve a notice disputing results in the fact or the document, for the purpose of the proceedings only, deems the fact or document to be taken to have been admitted by the admitting party in favour of the requesting party.
35. Notices to Admit per rr 17.3, 17.4 present the opportunity to a litigator to test the evidentiary areas which are likely to be in dispute in a hearing and to have early intelligence of what evidentiary matters to which resources need to be committed. Thus the authenticity of documents may be established per a Notice to Admit, as suggested by Bryson J in *NAB v Rusu*⁹, to avoid the unfortunate consequences which occurred in that matter.
36. If the requesting party perceives that the admitting party is unreasonably disputing facts or documents consideration ought to be given to seeking appropriate directions per Division 2 and CPA s 70:

s 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*

⁹ 47 NSWLR 309 at para. [18].

- (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.*

37. Any admission made as a consequence of the rules may be withdrawn by an admitting party with leave of the Court, however care ought to be exercised before making admissions. Previously, under the SCR, the court looked to the interests of justice as between the parties, in determining whether or not it would grant leave to withdraw an admission that had been deliberately and clearly made, see *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738.

38. Leave may be refused if the admission relates to a matter that is not seriously in dispute or if the other party has changed its position in reliance upon the admission, see *Australian & Banking Group Ltd v Bechely-Crundall* (NSWSC, Sperling J, 11 June 1996, unreported, BC9602367).

39. The new regime under the *Civil Procedure Act*, including the overriding purpose and provisions such as ss 56-60, may well have the consequence that the test for the withdrawal of admissions by an admitting party has evolved, and taking into account the considerations of not only the interests of the party but third parties and the courts' scarce resources, adverse orders for costs may not be viewed by the court as an adequate or sufficient basis for the withdrawal of admissions.
40. A summary of principles relevant to withdrawal of admissions (in regard to a joint report by experts) is found in *Schmierer v Keong*¹⁰:

" 11 *It seems to me that these are unusual circumstances and ones in which the discretion of the Court should be exercised in favour of permitting the deprived party to replace the lost expert evidence. I am well aware that solemn admissions are not allowed to be retracted as of course: see **Coopers Brewery Limited v Panfida Foods Limited** (1992) 26 NSWLR 738; **Drabsch v Switzerland General Insurance Co Ltd** NSWSC Santow J 16 October 1996 unreported; **Jeans v Commonwealth Bank of Australia** (2003) 204 ALR 327; **Silver v Dome Resources NL** [2005] NSWSC 265, which consider the question of the withdrawal of admissions in pleadings. However, the circumstances here are quite unusual and the injustice in not allowing the defendant to replace the suddenly withdrawn evidence, if other evidence be available, seems to me to be manifest. In this case, the defendant's desire now is to replace it with the earlier evidence, which the defendant's examiner had provided. It does not seem to me to be suggested that the plaintiffs are prejudiced by the resurrection of the defendant's examiner's earlier report (other than by loss of the obvious advantage to them in having a lay down misere as to the state of expert opinion on the handwriting). They have been aware since October last year of the defendant's examiner's report and, indeed, their own expert report was subsequent to, and written in the light of, the defendant's examiner's report. In those circumstances, there is no prejudice which ought preclude my granting the application.*

¹⁰ [2005] NSWSC 1081 per Hamilton J, 21 October 2006.

12 *The result in regard to that part of the application will be that I grant leave to file in Court the amended notice of motion and I shall make an order as sought in prayer 1”.*

41. UCPR Form 16 and Form 17 provide the structure for each notice, see page [39].
42. A party wishing to utilise such notices will tender them at trial. The benefits of Notices to Admit are an example of interlocutory procedures which advance the overriding purpose i.e. to facilitate the just, quick and cheap resolution of the real matters in dispute between the parties.
43. Part 3.4 – Admissions - of the *Evidence Act 1995* bears consideration to maximise the effectiveness of the contents of Notices to Admit. In particular, s 81 provides an exception to the hearsay and opinion rules in regard to admissions and related representations. There follow exclusionary provisions as to second hand hearsay [s 82], admissions as against third parties [s 83] and admissions influenced by violence and certain other conduct such as threats [s 84].
44. To have probative value in proceedings, an admission must be made with authority [see in particular s 87] which is most relevant to proceedings involving corporate entities such as employers.
45. The forensic effect of establishing a significant admission in a matter or alternatively the failure by a party to dispute an admission of fact or an admission in regard to a document can be devastating at trial.
46. The utility of CPA Part 6 Division 1 & Division 2 becomes apparent when the circumstances of a matter change and necessitate

action in regard to admissions e.g. to withdraw an admission. The usefulness of the matters set out in Part 1 and the explicit directions available per Division 2 are self evident in regard to the assistance which they provide to a party to chart its forensic course in such circumstances.

D. Requests

request, n.1. the act of asking for something to be given, or done, esp. as a favour or courtesy; solicitation or petition: a dying request. ¹¹

Evidence Act 1995 Part 4.6 Ancillary Provisions

Division 1 Requests to produce documents or call witnesses

Note. Section 182 of the Commonwealth Act gives Division 1 of Part 4.6 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

166 *Definition of request*

In this Division:

request means a request that a party (“the **requesting party**”) makes to another party to do one or more of the following:

- (a) to produce to the requesting party the whole or a part of a specified document or thing,
- (b) to permit the requesting party, adequately and in an appropriate way, to examine, test or copy the whole or a part of a specified document or thing,
- (c) to call as a witness a specified person believed to be concerned in the production or maintenance of a specified document or thing,
- (d) to call as a witness a specified person in whose possession or under whose control a specified document or thing is believed to be or to have been at any time,
- (e) in relation to a document of the kind referred to in paragraph (b) or (c) of the definition of **document** in the Dictionary—to permit the requesting party, adequately and in an appropriate way, to examine and test the document and the way in which it was produced and has been kept,
- (f) in relation to evidence of a previous representation—to call as a witness the person who made the previous representation,
- (g) in relation to evidence that a person has been convicted of an offence, being evidence to which section 92 (2) applies—to call as a witness a person who gave evidence in the proceeding in which the person was so convicted.

167 *Requests may be made about certain matters*

¹¹ The Macquarie Dictionary 2nd edition reprinted 1995

A party may make a reasonable request to another party for the purpose of determining a question that relates to:

- (a) a previous representation, or*
- (b) evidence of a conviction of a person for an offence, or*
- (c) the authenticity, identity or admissibility of a document or thing.*

168 Time limits for making certain requests

- (1) If a party has given to another party written notice of its intention to adduce evidence of a previous representation, the other party may only make a request to the party relating to the representation if the request is made within 21 days after the notice was given.*
- (2) Despite subsection (1), the court may give the other party leave to make a request relating to the representation after the end of that 21 day period if it is satisfied that there is a good reason to do so.*
- (3) If a party has given to another party written notice of its intention to adduce evidence of a person's conviction of an offence in order to prove a fact in issue, the other party may only make a request relating to evidence of the conviction if the request is made within 21 days after the notice is given.*
- (4) Despite subsection (3), the court may give the other party leave to make a request relating to evidence of the conviction after the end of that 21 day period if it is satisfied that there is good reason to do so.*
- (5) If a party has served on another party a copy of a document that it intends to tender in evidence, the other party may only make a request relating to the document if the request is made within 21 days after service of the copy.*
- (6) If the copy of the document served under subsection (5) is accompanied by, or has endorsed on it, a notice stating that the document is to be tendered to prove the contents of another document, the other party may only make a request relating to the other document if the request is made within 21 days after service of the copy.*
- (7) Despite subsections (5) and (6), the court may give the other party leave to make a request relating to the document, or other document, after the end of the 21 day period if it is satisfied that there is good reason to do so.*

169 Failure or refusal to comply with requests

- (1) If the party has, without reasonable cause, failed or refused to comply with a request, the court may, on application, make one or more of the following orders:*

- (a) *an order directing the party to comply with the request,*
 - (b) *an order that the party produce a specified document or thing, or call as a witness a specified person, as mentioned in section 166,*
 - (c) *an order that the evidence in relation to which the request was made is not to be admitted in evidence,*
 - (d) *such order with respect to adjournment or costs as is just.*
- (2) *If the party had, within a reasonable time after receiving the request, informed the other party that it refuses to comply with the request, any application under subsection (1) by the other party must be made within a reasonable time after being so informed.*
- (3) *The court may, on application, direct that evidence in relation to which a request was made is not to be admitted in evidence if an order made by it under subsection (1) (a) or (b) is not complied with.*
- (4) *Without limiting the circumstances that may constitute reasonable cause for a party to fail to comply with a request, it is reasonable cause to fail to comply with a request if:*
- (a) *the document or thing to be produced is not available to the party, or*
 - (b) *the existence and contents of the document are not in issue in the proceeding in which evidence of the document is proposed to be adduced, or*
 - (c) *the person to be called as a witness is not available.*
- (5) *Without limiting the matters that the court may take into account in relation to the exercise of a power under subsection (1), it is to take into account:*
- (a) *the importance in the proceeding of the evidence in relation to which the request was made, and*
 - (b) *whether there is likely to be a dispute about the matter to which the evidence relates, and*
 - (c) *whether there is a reasonable doubt as to the authenticity or accuracy of the evidence that is, or the document the contents of which are, sought to be proved, and*
 - (d) *whether there is a reasonable doubt as to the authenticity of the document or thing that is sought to be tendered, and*
 - (e) *if the request relates to evidence of a previous representation—whether there is a reasonable doubt as to the accuracy of the representation or of the evidence on which it was based, and*
 - (f) *in the case of a request referred to in paragraph (g) of the definition of **request** in section 166—whether another person is available to give evidence about the conviction or the facts that were in issue in the proceeding in which the conviction was obtained, and*
 - (g) *whether compliance with the request would involve undue expense or delay or would not be reasonably practicable, and*

(h) *the nature of the proceeding.*

Note. *Clause 5 of Part 2 of the Dictionary is about the availability of documents and things, and clause 4 of Part 2 of the Dictionary is about the availability of persons.*

Dictionary

document *means any record of information, and includes:*

- (a) *anything on which there is writing, or*
- (b) *anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or*
- (c) *anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or*
- (d) *a map, plan, drawing or photograph.*

47. Requests provide a litigator with a potent means of redressing potential unfairness arising from streamlining processes which facilitate proof of matters and an opportunity to access the foundations of evidence underpinning an opponent's case.

48. The request provisions in the above division provide a countervailing balance to less stringent admissibility requirements and facilitation of proof introduced by the *Evidence Act 1995* ("EA") including the abolition or modification of:

- the best evidence rule, e.g. EA s 50 Proof of voluminous or complex documents, or EA s 51 Original document rule abolished;
- the hearsay evidence rule, e.g. EA s 64 Exception: civil proceedings if maker available, or EA s 69 – Exception : business records; and
- rules excluding evidence of judgments and convictions, e.g. EA s 92.

49. In *Deputy Commissioner of Taxation v Trimcoll Pty Limited* [2005] NSWSC 1324 Hall J, described the operation of this Division:

" 49 *The provisions of Division 1 are directed fundamentally to ensuring that documentary evidence, things or representations which one party wishes to tender or adduce and rely upon against the other can in particular circumstances be subjected to testing.*

50 *In so providing, Division 1 affords a measure of protection against documents or other records being accorded the evidential significance that they may otherwise carry on their face where the circumstances of the supply of information contained within them or attending the making of them or both (or the representations they evidence) indicate a reason to question or dispute what the records would otherwise establish or tend to establish".*

50. Early authority on the operation of the division established the limits of the request mechanism. Thus any request must be between parties to litigation to do something which requires conduct of the requested party, see s 166. Thus where the request requires action by an entity that is not a party to litigation, e.g. a request that a pathology practice make a tissue sample available, the provisions will not be applicable¹².

51. In *Commissioner of Taxation v Karageorge & Ors*¹³ a request that a defendant call or proffer himself as a witness consequent to the tender pursuant to s 1274(4C) (Registers) of the *Corporations Law* of a certified copy of the Notification of Allotment lodged with the Australian Securities Commission was held to be not a valid request. Referring to EA s 8, his Honour stated that the division "*is not intended to affect the many other mechanisms that, as is well known, are provided in state and federal legislation for the admission of evidence by the provision of*

¹² *Pecar v National Australia Trustees Ltd & Anor*, unreported NSWSC, Bryson J, 27 November 1996

¹³ (1996) 22 ACSR 199 per Hamilton AJ, 26 September 1996

certificates or in various other mechanical manners to enable matter to be put into evidence".

52. Had the tender been made pursuant to EA s 69, the outcome may have differed.
53. In *NAB v Rusu*¹⁴, the request machinery was found not to be applicable as the plaintiff did not give notice of its intention to tender the relevant documents in time to allow a request under s 167(1) to be made within 21 days per s 169(1). The court noted that the machinery provided in this division does not facilitate the admission of evidence nor provide the means of proof of authenticity.
54. In *Deputy Commissioner of Taxation v Trimcoll Pty Ltd*¹⁵, the plaintiff made a request under s 167 including in regard to express and implied representations contained in third party documents annexed to affidavit evidence served by the defendant to sustain its defence to the claim. After a detailed analysis of issues in contest, the Court made in part the orders sought by the plaintiff under s 169 (see below). Those orders included that the defendant call the makers of those previous representations (to allow the author of those documents to be tested as to underlying facts where otherwise such matters would be untestable) but not in the alternative self-executing orders that the documents not be admitted into evidence at trial.
55. His Honour's reasons for judgment provide, with respect, an extremely useful analysis of the division, including its history from

¹⁴ (1999) 47 NSWLR 309; [1999] NSWSC 539 per Bryson J

¹⁵ [2005] NSWSC 1324 per Hall J, 16 December 2005

the confined proposal of the Australian Law Reform Commission and more compendious final provisions¹⁶; and considerations in regard to the exercise of the power under s 169¹⁷ .

56. The order made by the Court was:

" 116 I make an order pursuant to s.169(1) of the Evidence Act 1995 (NSW), that the defendant call as witnesses the persons specified in the letter dated 23 May 2005 written by the ATO General Counsel to Mr. Charles Roth as persons believed to be concerned in the production or maintenance of the documents referred to in the schedule to this order for the purpose of determining questions that relate to either the previous representations made by those persons, or to the identity or admissibility of the documents:-

Schedule to order

The documents referred to in the requests made in the said letter in paragraphs 1, 2, 3, 4(iii), 5, 6, 7, 8, 9, 10, 11 and 12".

57. The court did not specifically refer to the CPA or the overriding purpose. Yet the ideas underpinning the express approach set out in CPA Part 6 Div 1&2, i.e. the just, quick and cheap resolution of the real issues in dispute, are evident in the court's approach which in summary was:

- whether the plaintiff's requests under s 167 were reasonable;
- whether the defendant's refusal to comply with the request was made without reasonable cause; and
- how the discretion to make orders under s 169 ought to be exercised.

58. Further insight into the application of the request mechanism may be found in the decisions of *Telstra Corporation v Australis*

¹⁶ *Trimcoll* paras [40]-[58]

¹⁷ *Trimcoll* paras [89]-[102]

*Media Holdings & Ors*¹⁸ in regard to a request relating to a claim for client legal privilege; and in *Official Trustee in Bankruptcy v D'Jamirze & Ors*¹⁹ where an order was made per s 169(1), (5) requiring the signatories to a document in the Russian language to be produced for cross-examination as the basis for the tender of the document.

59. In summary, the ideas underpinning Part 6 Divisions 1, proportionality and particularly the overriding purpose, will likely determine the exercise of the Court's discretion, and the outcome of an application.
60. The ever increasing sophistication of processes for the generation and storage of documents by digital means is notorious. An electronic/digital revolution has occurred due to the innovations in communication and data technology, at the expense of historical forms of recording information such as paper and ink.
61. The traditional forensic approach to authenticity of documents per the common law and statutory enactment must accommodate these changes. There appears to be no basis to go back to "traditional approaches" nor any ability to do so. Technology has been embraced by the judicial process, see Practice Note SC Gen 7.
62. Nonetheless the scepticism of a portion of the legal profession as to the integrity and reliability of electronically generated evidence has been recognised and remains a live issue. Yet with the wide and cheap availability of digital imaging technologies,

¹⁸ Unreported NSWSC, per McLelland CJ in Eq., 18 March 1997.

¹⁹ [1999] NSWSC 986, per Hodgson CJ in Eq., 23 September 1999.

similar concerns must also arise regarding forgery of paper documents.²⁰

63. This represents one area where the mechanism to make a request per the Evidence Act likely to become increasingly useful.
64. Similarly, the need for an effective forensic tool to address concerns as to authenticity of evidence, mindful of the potential unfairness arising from streamlining provisions which facilitate proof, e.g. reception of hearsay evidence²¹, is addressed by the request mechanism.
65. Clearly, prompt interceptive action is essential for the effective use of the request provisions. When they are used in conjunction with the case management provisions in CPA Part 6, they allow a party to have early insight and intelligence as to the quality of the evidence in support, and thus the overall merits, of an opponent's case, well before trial.

²⁰ *Evidential Status of Electronic Data*, Emmanuel T Laryea (1999) 3 NLR 1

²¹ See, EA s 69 regarding business records.

E. Maximising the effectiveness of compromise offers

compromise, N.1. A settlement of differences by mutual concessions; an adjustment of conflicting claims, principles etc., by yielding a part of each; arbitration.

[ME, from L *compromissum* a mutual promise to abide by a decision, ...]

66. It is trite that unless you know your destination it is impossible to get there. In considering compromise offers, a party needs to weigh up strategic considerations and ultimately what that party “can live with” to resolve its dispute.
67. Compromise offers have traditionally been approached by means of “Calderbank letters” or the structure provided under the UCPR known as Offers of Compromise, see *Uniform Rules* rr 20.25 – rr 20.32. Both forms of negotiation between parties are unusually covered by privilege, see EA s131, subject to exceptions.
68. Assessment of the effectiveness of either form of offer is achieved by looking at the benefit and detriment for the party making the offer including such issues as certainty, e.g. buying out risk and minimising further expenditure on costs related to disputes such as legal fees.
69. To achieve the desired result, a compromise offer must have attraction to the recipient. In this regard, creativity as to what is being offered is helpful.

70. Costs sanctions which arise under the Uniform Rules from Offers of Compromise, often focus the recipient's attention on the wisdom of resolving the dispute.
71. There is little utility in making an offer which in truth is not a compromise or which may be perceived by the recipient as presenting no worse a scenario than taking the chance of the uncertain outcome of judicial determination.
72. Thus, in commercial disputes such as shareholder deadlocks, a generous but commercial offer to purchase the opposing shareholder's interests represents a starting point.
73. An alternative approach is to consider agreeing to a Savoy Clause²² type determination.

Savoy Clause

" 37 The parties constructed an arrangement by which the "joint venture" could be brought to an end at a value which either could determine. It was an ingenious arrangement, expressed in cl 7, known as a "Savoy clause". The clause is in the following terms:

7.1 Either News or ACP (hereinafter called 'the offeror party') may at any time after the date six months from the date of this Deed offer in writing to sell or procure the sale to the other party (hereinafter called 'the offeree party') the offeror party's interest under this Deed for the sum of money specified by the offeror party in the said offer. If the offeree party shall not have accepted the offer by giving notice in writing within fourteen (14) days after the making of the offer the offeror party shall thereupon be deemed to have notified the offeree party that the offeror party will purchase from the offeree party all of the offeree party's interest under this Deed for the sum specified in the offeror party's original offer and the offeree party shall in that case be bound to sell to the offeror party. Completion of any

²² *ACP Magazines Pty Ltd v Southdown Publications Pty Ltd & Ors* [2002] NSWSC 901

sale or purchase pursuant to this Clause 7 shall take place within twenty-one (21) days after acceptance of the offer by the offeree party or the deemed notice by the offeror party as the case may be, and this Deed shall subject to Clause 7.3 cease to operate."

74. Finally, and as a lead in to the next topic, the contents of CPA s 73 should be noted:

s 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.

75. This allows a party to agitate such issues in the existing proceedings rather than commencing separate proceedings for specific performance, see *St Hilliers Constructions (NSW) v Peter Kelly Flooring Pty Ltd*²³.

²³ [2002] NSWSC 270.

F. Settlement risks

76. Risks arising from settlement can be procedural or substantive.
77. A starting point is whether or not a settlement has been achieved. Oral settlements frequently produce discord and further disputation as to what each party understood the terms of settlement to be. Difficulties akin to *Masters v Cameron*²⁴ frequently arise. A useful explanation of the typical contest is found in *No 96 Factory Bargains v Kershel*²⁵.
78. It is often prudent to commence settlement negotiations with clear parameters such as the statement that there will be no settlement until “written terms of settlement are signed by the parties”. This benediction added in the process of exchanging offers will evoke an understanding between parties as to when a settlement can occur.
79. Required reading for all litigators as to settlement risks and entry of consent orders is the High Court decision of *James Hardie & Coy Pty Limited v Seltsam Pty Limited*²⁶.
80. The factual matters giving rise to the decision of the High Court were consent judgments involved the resolution of proceedings between a plaintiff who sued three defendants as concurrent tortfeasors in the Dust Diseases Tribunal of New South Wales. Consent judgments were entered after the commencement of the trial in favour of the plaintiff against two defendants and judgment was entered for the third defendant against the

²⁴ (1954) 91 CLR 353.

²⁵ [2003] NSWSC 421 per Campbell J.

²⁶ (1998) 196 CLR 53.

plaintiff with no order as to costs. The issue which arose consequent to the consensual resolution of the proceedings between the plaintiff and the defendants was the effect upon a claim for contribution by either the first and second defendants against the third defendant, pursuant to s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946*.

81. Notwithstanding the statement by counsel for one of the first two defendants, that his client did not consent to judgment in favour of the third defendant against the plaintiff and that he could not be heard in relation to it, a differently constituted Tribunal at first instance made orders striking out the cross-claim for contribution on the basis that the entry of judgment in the third defendant's favour meant that it was not liable to the other defendants.

82. It is to be recalled that a component of a cross-claim under s 5 of the *Law Reform (Miscellaneous Provisions) Act* is:

"... against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage."

83. The majority of Gauldron, Gummow and Callinan JJ in *James Hardie & Coy Pty Limited v Seltsam Pty Limited* held that the third defendant was not a joint tortfeasor who was liable with the other defendant in respect of the damage suffered by the plaintiff within the meaning of the section because the entry of judgment in favour of the third defendant established that it was not liable to the plaintiff and therefore absolved it from liability to the other defendant.

84. As the third defendant had been sued by the plaintiff and the plaintiff's action had been brought to an end by final order the

third defendant was not a person yet to be sued for the purposes of s 5 and accordingly there was no entitlement in the other defendants to contribution.

85. Thus, even though the judgment was by consent in favour of the third defendant, it was no less effective to absolve it from liability in the contribution proceedings than if the judgment had been given after a trial. As long as the judgment remained on the record, s 5 of the *Law Reform (Miscellaneous Provisions) Act* could not be satisfied.
86. The majority suggests that the defendant might have taken steps to oppose the entry of judgment and thus put itself in the position to appeal against an adverse order on that application.
87. A further area of risk in regard to settlement is the potential for estoppels to arise including those founded upon *res judicata* or issue estoppel which have the effect of preventing a party from relitigating decided issues or alternatively from conducting proceedings which are likely to bring the courts into disrepute.
88. The unreported decision in *Pecar v National Australia Trustees Ltd & Anor*²⁷ contains the following passage per Bryson J which highlights the potential problems:

"... counsel for the second defendant made a number of observations to the effect that it was inappropriate that the litigation should continue because of inconsistency with the holdings in the earlier litigation, although he did not make any clear application. The earlier judgment may operate as an estoppel or otherwise to establish conclusively against all persons the plaintiff's personal status as the son of the late Chris

²⁷ See above FN 12.

*Pecar; that is it may be a judgment in rem. It also requires consideration whether the litigation is to proceed or ought to be stayed as an abuse of process or on the grounds that the allegations on which it is based are scandalous in view of the plaintiff's having made, successfully, an entirely inconsistent allegation in other litigation. The view could reasonably be taken that it would a scandal if he were to succeed in claims on paternity in the estates of two different deceased men. The power of the court to stay proceedings is shown by authorities stemming from *Reichel v Magrath* (1889) 14 App Cas 665 ...*

.....
.....The plaintiff made and based his case in the earlier litigation on an allegation entirely contrary to the allegation on which this case is based, and succeeded unopposed ..."

89. Another species of such risk is that explained by the High Court of Australia in *Port of Melbourne Authority v Anshun Proprietary Limited*²⁸.
90. Under the Uniform Rules an agreement between parties per r 20.33(1) may be filed before judgment and the Registrar must enter judgment in accordance with the agreement per r 20.33. There is provision that a judgment entered under these circumstances may be set aside by the Court on sufficient cause being shown on the application of any party to the proceedings who is not a party to the agreement, see r 20.33(7).
91. Other relevant rules include r 36.15 and r 36.16 as to setting aside or varying judgments or orders.
92. In conclusion, the most fundamental risk arising from settlement is that for the majority of claims settlement is "for once and for all" and a binding resolution of the dispute between the parties, see *Davis by her tutor the Protective Commissioner v Willis & Anor*²⁹.

²⁸ (1980-1981) 147 CLR 589.

²⁹ [2006] NSWSC 87.

G. Conclusion

93. A 19th century American lawyer is recorded as saying the following:

*"persuade your neighbors to compromise whenever you can ... As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough. A worse man can scarcely be found than one who [creates litigation]."*³⁰

94. The words of Abraham Lincoln have resonance with the overriding purpose, Part 6 Division 1 & 2 generally and the dictates of justice found in CPA s 58 in particular. Moreover the duty upon parties as now expressed in CPA s 56 subr (3) and upon lawyers per subr (4) in this regard remains fundamental to the practice of litigation.

16 March 2006

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³⁰ *A History of the American People*: Paul Johnson, Phoenix Press Paperback 1997 Part 4 Civil War America 1850-1870, page 445 passage attributed to Abraham Lincoln.



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Commentary by Mr Michael McHugh, Barrister

PART 6 — CASE MANAGEMENT AND INTERLOCUTORY MATTERS

[s 6.0.20] General comments on CPA Part 6

Rules of court not uncommonly now provide a general statement of an overriding purpose and a general statement of case management powers: Cairns B, *Australian Civil Procedure* (6th ed, Lawbook Co., 2005) Ch 2. Part 6 of the CPA builds upon and gives statutory supremacy to these rules and reinforces recent judicial pronouncements concerning case management and the duties of practitioners to give effect to the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings: *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487 at 493-494; *Ashmore v Corporation of Lloyds* [1992] 1 WLR 446; *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 at 744. The *Civil Procedure Rules 1998* (UK) introduced reforms to case management not dissimilar to those set out in Pt 6 and their history is set out in *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 49 NSWLR 51.

The NSW Attorney General in the Second Reading speech, inter alia, outlined Pt 6 of the CPA:

Part 6 of the Bill introduces a number of new provisions relating to the conduct of court proceedings. The provisions recognise the importance of case management as a tool for increasing the efficiency of the court system and for reducing the cost of litigation. They seek to strike a balance between protecting the interests of justice in an individual case and protecting the interests of justice for other litigants and the courts ... It is important to note that the dictates of justice will not be limited to the dictates of justice only as between the parties, which has been argued to be the effect of the majority judgment in one of the leading cases on case management – *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

From the perspective of judges, the main attraction of CPA Pt 6 Div 1 could be the opportunity it presents them to escape from what they might perceive to be the constraints of *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146. The headnote of that case states: "While case management principles were a relevant consideration, they could not be used to prevent a party from litigating an issue which was fairly arguable. A party should be permitted to raise an arguable defence provided any prejudice to other parties could be compensated by costs". In any event, each case must be considered on its own facts and in the context of the current statutory regime.

The prominence given in Pt 6 to the court's overriding objective could affect the dynamics of case management decisions, both in particular cases and generally. Parties need to bear that truth in mind in formulating submissions about the "dictates of justice" in particular cases.

Part 6 of the CPA has the effect of reinforcing two points: (a) the courts and not the parties, are in charge of the proceedings; and (b) practitioners are bound to help the court to get to the real point of a case as quickly as possible. Parties can no longer seek "to advance a multitude of ingenious arguments in the hope that out of 10 bad points the judge will be capable of fashioning a winner": *Ashmore v Corporation of Lloyds* [1992] 1 WLR 446.

Division 1 — Guiding principles

56 Overriding purpose

(cf SCR Part 1, rule 3)

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

(4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).

(5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

[s 56.20] Section 56

Courts are required to give effect to the overriding purpose, and litigants are under a duty to assist the courts in furthering that purpose. Any failure to do so can be taken into account on costs questions. The phrase "just, quick and cheap" was, with its infamous comma, introduced to the SCR in 2000 in Pt 1 r 3. The legislation is entirely consistent with, and reflective of, its historical models – in particular, Pt 1 r 3, Pt 26 r 1 of the *Supreme Court Rules 1970* (NSW) and s 76A of the *Supreme Court Act 1970* (NSW), enacted in the mid-1980s to strengthen the powers of the Supreme Court to give directions for the conduct of civil proceedings. When making orders or directions for the management of proceedings the court must give effect to s 56: s 58.

[s 56.1000] References

The liability of legal practitioners for unnecessary costs is dealt with under s 99 of the CPA.

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).

[s 57.20] Section 57

Section 57 requires court proceedings to be managed having regard to the listed criteria: the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of available judicial and administrative resources and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties. Section 57 ostensibly gives primacy to "the just determination" of proceedings, but it is subject to the "over-riding purpose" of the legislation (identified in s 56) requiring

the facilitation of "the just, quick and cheap resolution of the real issues" in proceedings.

When making orders or directions for the management of proceedings the court must give effect to s 57: s 58.

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.

[s 58.20] Section 58

Section 58 requires the court to act in accordance with the dictates of justice set out in subs (2) in deciding whether to make orders or directions for the management of proceedings and in what terms any such order or direction should be made. The section also sets out the matters in which a court must have regard to ss 56 and 57, and the matters to which a court may have regard, for the purpose of determining what are the dictates of justice in a particular case. Parties might not be well-placed to know with precision administrative constraints within which courts might be required to make particular decisions. Accordingly, care needs to be taken to neither make assumptions about such constraints, nor to ignore the possibility that they exist. Advocates should endeavour to address statutory criterion bearing in mind that they need to be applied with flexibility, not pedantry.

[s 58.40] Dictates of justice

A novel feature of the legislation – which might provide an illusion of administrative law formality – is the check list of factors set out in subs (2) as a charter for a requirement that courts “must seek to act in accordance with the dictates of justice”. The degree of injustice that might be suffered by the respective parties as a consequence of any order or direction is only one of the matters that may be taken into account in subs (2)(b). None of those matters are to be given precedence over any other, each case turning on its own facts. Hence, parties should, consistent with and to the extent necessary to discharge their duty to assist the court (s 56) and eliminate delay (s 59), address each matter relevant to the advancement of their case.

59 Elimination of delay

(cf Western Australia SCR Order 1, rule 4A)

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

[s 59.20] Section 59

Section 59 requires the practices and procedures of a court to be implemented in such a way as to minimise delay. However, that is subject to what is reasonably necessary by way of interlocutory activities for the fair and just determination of the issues in dispute and the preparation of the case for trial.

60 Proportionality of costs

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

[s 60.20] Section 60

Section 60 requires court procedures to be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute. The section taken literally imposes an impossible task upon the court to determine what "costs", in its view, might be allowed to be expended by the parties in bringing the matter to a conclusion. What is "important" must be objectively assessed by the court having regard to the subjective importance attached to the proceedings by one or more of the parties. The section is likely to be used in conjunction with ss 61 and 62.

Division 2 — Powers of court to give directions

61 Directions as to practice and procedure generally

(cf SCR Part 23, rule 4; Act No 9 1973, section 68A)

(1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings.

(2) In particular, the court may, by order, do any one or more of the following:

(a) it may direct any party to proceedings to take specified steps in relation to the proceedings,

(b) it may direct the parties to proceedings as to the time within which specified steps in the proceedings must be completed,

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

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

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

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

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

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

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

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

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

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

62 Directions as to conduct of hearing

(cf Act No 52 1970, section 87; Act No 9 1973, section 77(4); SCR Part 34, rules 6 and 6AA)

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

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

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

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

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

(c) a direction limiting the number of documents that a party may tender in evidence,

(d) a direction limiting the time that may be taken in making any oral submissions,

(e) a direction that all or any part of any submissions be in writing,

(f) a direction limiting the time that may be taken by a party in presenting his or her case,

(g) a direction limiting the time that may be taken by the hearing.

(4) A direction under this section must not detract from the principle that each party is entitled to a fair hearing, and must be given a reasonable opportunity:

(a) to lead evidence, and

(b) to make submissions, and

(c) to present a case, and

(d) at trial, other than a trial before a Local Court sitting in its Small Claims Division, to cross-examine witnesses.

(5) In deciding whether to make a direction under this section, the court may have regard to the following matters in addition to any other matters that the court considers relevant:

(a) the subject-matter, and the complexity or simplicity, of the case,

(b) the number of witnesses to be called,

(c) the volume and character of the evidence to be led,

(d) the need to place a reasonable limit on the time allowed for any hearing,

(e) the efficient administration of the court lists,

(f) the interests of parties to other proceedings before the court,

(g) the costs that are likely to be incurred by the parties compared with the quantum of the subject-matter in dispute,

(h) the court's estimate of the length of the hearing.

(6) At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party a memorandum stating:

(a) the estimated length of the trial, and the estimated costs and disbursements of the solicitor or barrister, and

(b) the estimated costs that, if the party were unsuccessful at trial, would be payable by the party to any other party.

63 Directions with respect to procedural irregularities

(cf Act No 52 1970, section 81; Act No 9 1973, section 159; Act No 11 1970, section 75A)

(1) This section applies to proceedings in connection with which there is, by reason of anything done or omitted to be done, a failure to comply with any requirement of this Act or of rules of court, whether in respect of time, place, manner, form or content or in any other respect.

(2) Such a failure:

(a) is to be treated as an irregularity, and

(b) subject to subsection (3), does not invalidate the proceedings, any step taken in the proceedings or any document, judgment or order in the proceedings.

(3) The court may do either or both of the following in respect of proceedings the subject of a failure referred to in subsection (1):

(a) it may, by order, set aside the proceedings, any step taken in the proceedings or any document, judgment or order in the proceedings, either wholly or in part,

(b) it may exercise its powers to allow amendments and to make orders dealing with the proceedings generally.

(4) The court may not take action of the kind referred to in subsection (3)(a) on the application of any party unless the application is made within a reasonable time and, in any case, before the party takes any fresh step in the proceedings after becoming aware of the failure.

Form 16 (version 1)
Rules 17.3 and 17.4

NOTICE TO ADMIT FACTS AND

AUTHENTICITY OF DOCUMENTS

COURT DETAILS

Court

**Division

**List

Registry

Case number

TITLE OF PROCEEDINGS

First plaintiff

**Number of
plaintiffs

First defendant

**Number of
defendants

FILING DETAILS

Filed for
Address

NOTICE TO [ROLE OF PARTY]

The [role of party requiring admission] requires you to admit the following facts

The [role of party requiring admission] requires you to admit the authenticity of the following documents

SIGNATURE

Signature of solicitor,
authorised person for [role of
party] or [role of party]

Name

**Solicitor for [role of party]

**Authorised person for [role
of party]

**[Role of party]

Date

HOW TO RESPOND

If you do not, within 14 days after service of this notice on you, serve a notice on the plaintiff disputing any fact (and the authenticity of any document) in this notice, that fact (and the authenticity of that document) will, for the purpose of these proceedings, be admitted by you in favour of the plaintiff.

[On separate page]

PARTY DETAILS

Parties to the proceedings

PLAINTIFFS

[Name]
[First] plaintiff

[Name]
[Second] plaintiff

DEFENDANTS

[Name]
[First] defendant

[Name]
[Second] defendant