

UNSW CENTRE FOR CONTINUING LEGAL EDUCATION
LITIGATION MASTER CLASS 17 MARCH 2011
TOPIC 4: Time and money

OVERVIEW

This paper is an outline of the matters to be examined in the seminar session scheduled from 11.15 to 11.55 am. Its contents are presented with the intention to stimulate thought, and to promote discussion. Necessarily, the detail of the paper is constrained by the time available for the session. It is not definitive statement on the subjects which it raises.

Legal practitioners are cautioned to rely on their own research and enquiries to advise clients. This paper does not purport to be the first or last word on the matters examined. Legal practitioners will also be mindful of the evolving nature of the law, together with the importance of the relevant facts to determine outcomes in individual matters.

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... eternity is not an everlasting flux of time, but time is a short parenthesis in a long period; and eternity had been the same as it is, though time had never been.¹

¹ John Donne, Meditation XIV

A. Introduction

What is time?²

1. Time is a construct of the human mind. The development of awareness of a temporal past, present and future liberated *Homo sapiens sapiens* (**sapien**) from life in a continuing present and distinguishes the species from other life forms on Earth.
2. A vital factor in sapien's primitive intuition of time was the sense of rhythm and planning – the passage of the day; the day/night distinction and the seasons – for survival, for organisation and for evolution to urban living. Recurring cycles influenced and fostered routine in past civilisations such as the Mesopotamians, the Egyptians and the Mayas. However the influence of the Hebrew, Zoroastrian and Christian religions appears to have introduced the process of thinking of history to be progressive rather than cyclic.
3. Denominating years by a single year count was adopted by the Greeks in the third century BC by the introduction of the device of dating by the Olympiads from 776 BC. The Christian era, being the *Anno Domini* sequence (**AD**), was adopted in the year 525. The BC sequence extending backwards from the birth of Christ was not introduced until the 17th century.
4. In mediaeval Europe, as in antiquity, time was not conceived as a continuous variable, but was split up into several seasons, and divisions of the Zodiac. Magical time had not yet been succeeded by scientific time.
5. Cyclic and linear concepts of time were in conflict. Scientists and scholars, influenced by astronomy and astrology, tended to emphasise the cyclic concept. The linear concept was fostered by the mercantile class with the rise of trade and a money economy.
6. When power was concentrated in the ownership of land, time was defined by the unchanging cycle of the soil and the seasons. Time was plentiful. However the refinement of the concept of money, and the rise of a commercial economy increased both the tempo of life and mobility for members of a population. From the 15th century public clocks, later private clocks, and subsequently personal timepieces allowed identification of and allocation of each hour of the day. The use of time “productively” and economically by sapien had begun.

² Based on passages from Ch 1 of *What is Time?* G.J. Whitrow, Oxford University Press 1972

7. Time has the paradox of being a concept for measurement and comparison, which also has evolved with use into a commodity. Yet at a fundamental level time remains an artificial construct in civilization notwithstanding the economic, social and personal value placed on this intangible commodity.
8. In human societies regulated by a social code, or subject to the rule of law, time in its many forms has an integral part of the regulation of the conduct of individuals, commercial endeavour and when such matters lead to conflict, of the resolution of disputes. Furthermore, time has become a commodity in itself and the subject of litigation, rather than a mere device of comparison or measurement.

Defining the meaning of time

9. Amongst litigators time is an idea which most intuitively understand, however have difficulty explaining what the term means. By way of example, the *Macquarie Dictionary* provides 64 distinct definitions for this word which may be a noun, adjective or verb depending on its context. Those definitions run over almost an entire column of the 2nd edition.
10. The *Macquarie Dictionary* states etymology of the word “time” as being derived from the Middle and Old English word *tima*, or alternatively the Icelandic *timi*, being words said to be akin to the word TIDE.
11. The first two definitions for noun **time** follow:
 1. the system of those relations which any event has to any other as past, present, or future; indefinite continuous duration regarded as that in which events succeed one another.
 2. duration regarded as belonging to the present life as distinct from the life to come, or from eternity.

Coordinating time: “Do we all have the same time?”

12. Coordinated Universal Time (**UTC**) is the time standard based on International Atomic Time with leap seconds added at irregular intervals to compensate for the earth’s slowing rotation. UTC is derived from International Atomic Time (TAI) which is a coordinate timescale tracking notional proper time on the rotating surface of the earth (the geoid).

13. The former time standard of Greenwich Mean Time (**GMT**) [being mean solar time at the Royal Observatory, Greenwich] or its modern abbreviation UT1 is tracked by UTC. The difference between UTC and UT1 must not exceed 0.9 seconds, thus GMT may be considered equivalent to UTC. However, for technical purposes the use of GMT is avoided and the unambiguous technology of UTC is preferred³.
14. Due to variations in the earth's rotation (remembering UTC and UT1 may differ but never by more than 0.9 s), UTC is only known with the highest precision in retrospect. However, for most legal purposes the difference is inconsequential.
15. UTC is the time standard used for many Internet and World Wide Web standards and, in particular, the network time protocol which is designed to synchronise the clocks of computers over the Internet. The expanding reliance upon electronic transactions in commerce, plus its increasingly global nature and speed (the latter having time as a component) requires a litigator to possess a modest understanding of this reference standard for the measurement and ascertainment of time in commercial transactions, and related dispute resolution.
16. UTC divides the timescale into days, hours, minutes and seconds; under UTC the date of a day is conventionally identified using the Gregorian calendar.

The Gregorian Calendar: "Let's all turn up on the same day."

17. The Western calendar was introduced by Pope Gregory XIII in 1582 and bears his name – it is usually described as the Gregorian Calendar. This reform was to replace the Julian Calendar⁴ which was founded upon an erroneous assumption of the time between annual vernal equinoxes⁵. This error resulted in the equinox occurring steadily earlier in the Church's calendar. The effect

³ UTC replaced GMT as the basis for the main reference timescale for civil time in various regions on 1 January 1972.

⁴ The Julian calendar began in 45 BC as a reform of the Roman calendar by Julius Caesar. It was probably designed to approximate the tropical year. The Julian calendar has a regular year of 365 days divided into 12 months with a leap day added to February every four years. The Julian year is, therefore, on average 365.25 days long. The tropical year (or solar year), which determines the cycle of seasons, is actually about 11 minutes shorter than 365.25 days. These extra 11 minutes per year in the Julian calendar caused it to gain about three days every four centuries, when compared to the observed equinox times and the seasons.

⁵ Vernal equinox: the time (in the sense of date) at which the sun crosses the plane of the equator towards the relevant hemisphere, making day and night of equal length. It occurs on about the date 21 March in the northern hemisphere (23 September in the southern hemisphere).

was to disrupt the annual rhythm of religious practice. Each of the Julian and Gregorian was a “solar”⁶ rather than a “lunar”⁷ calendar.

18. Since the vernal equinox defined the date for the celebration of the spring religious festival of Easter⁸, the need for reform was identified and subsequently instituted.
19. The basic premise of the reform by the Gregorian Calendar was to drop ten calendar days to revert to the previous date for the vernal equinox of 11 March. However, other calendar systems continued in use elsewhere in the world. For example, Russia (until late 1917/18) and Greece (until 1923) retained the Julian Calendar until the twentieth century when each country dropped 13 days from their standard and legal calendars to change to the Gregorian Calendar.
20. The Gregorian Calendar is divided into the familiar 12 named months, with the irregular number of days as adopted, together with a 29th date in February to provide for a leap year every fourth year. The Gregorian Calendar omits 3 leap days every 400 years to maintain orientation with the vernal equinox.
21. The system of numbering years which counts years from the traditional incarnation of Jesus (AD or its recent replacement CE: Common Era) was continued under the Gregorian Calendar. This system remains the predominant international standard for identifying events by a linear history. It provides a datum or reference point to measure and to compare events.
22. By contrast a country such as the Islamic Republic of Iran bases its linear measurement of time by reference to the Shiite based Calendar which is defined by the Hejra or movement of Muhammad from Mecca to Medina. The Iranian or Persian calendar (also known as the Jalali calendar) is also a solar calendar and is currently used in Iran and Afghanistan. It is observation-based, rather than rule-based, beginning each year on the vernal equinox as precisely determined by astronomical observations from Tehran.
23. In 1976, Shah Mohammad Reza Pahlavi changed the origin of the calendar, using the birth of Cyrus (approximately 600 BC) as the first day, rather than the Hejra of Muhammad. The change was abandoned from 1979.

⁶ The dates in a solar calendar indicate the position of the earth and its revolution around the sun.

⁷ A lunar calendar is based on cycles of the lunar phase; a lunar year is 354.37 days in duration.

⁸ Easter Sunday is the Sunday following the full moon after the northern hemisphere's vernal equinox.

24. Another measure of linear time arises in the Islamic calendar or Muslim calendar (also called the “Hijri⁹ calendar”) which is the calendar used to date events in many predominantly Sunni Muslim countries, to determine the proper day on which to celebrate Sunni Islam’s holy days. It is a lunar calendar having 12 lunar months in a year of about 354 days. As the lunar year is about 11 days shorter than the solar year, which is the basis of the Jalali and Gregorian calendar, converting dates between calendars is not a simple arithmetic calculation.
25. Today is Thursday 17 March 2011 by the Gregorian calendar in Sydney, Panjshanbeh 26 Esfand 1389 by the Iranian calendar in Tehran, and Yawm al-khamis 11 Rabi’ath-Thani 1432 by the Muslim calendar in Riyadh.

Legal measurement of the unit of time

26. The *National Measurement Act 1960* states in s7A that:
- (1) The regulations may prescribe the Australian legal units of measurement of any physical quantity.
 - (2) The regulations may prescribe units of measurement of any physical quantity to be additional legal units of measurement for use for a particular purpose or for the purpose of a particular contract, dealing or other transaction or class of contracts, dealings or other transactions.
 - (3) ...
27. Section 20 of that Act states that the Governor-General may make regulations prescribing all matters which are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular for the verification of standards of measurement.
28. Regulation 3 provides that **time**, as a standard of measurement, means time that is not derived from the calendar. Pursuant to Reg. 5 and Schedule 1 of the *National Measurement Regulations 1999* the Australian legal unit of measurement for the physical quantity of time, a **second (abbreviation s)**, is stated as the duration of 9 192 631 770 periods of the radiation corresponding

⁹ The Muslim year during which the Hijra occurred was designated the first year of the Islamic calendar by Umar in 638 or 17 AH (anno hegirae = "in the year of the hijra"). The Hijra is the date of migration of the Islamic prophet Muhammad and his followers to the city of Medina in 622 (Common Era).

to the transition between the two hyperfine levels of the ground state of the caesium 133 atom.

29. Derivative measures of time under Schedule 1 are:
- (a) **day** which is 86 400 seconds;
 - (b) **hour** which is 3 600 seconds;
 - (c) **minute which is** 60 seconds.

Legal prescription of “the time”

30. The statutory process of prescribing a legal “standard time” ie what appears on a watch, screen or computer monitor in Australia starts with s8AA of the *National Measurement Act 1960* which provides that “The Chief Metrologist¹⁰ is to maintain, or cause to be maintained, Co-ordinated Universal Time (UTC) as determined by the International Bureau of Weights and Measures”¹¹.
31. In New South Wales the *Standard Time Act 1987* contains provisions for “standard time” and “daylight saving” by reference to UTC (Co-ordinated Universal Time) as determined by the International Bureau of Weights and Measures and maintained under section 8AA of the *National Measurement Act 1960* of the Commonwealth¹².
32. Thus pursuant to the *Standard Time Act* s3 **standard time** in New South Wales is prescribed as 10 hours in advance of UTC. During a **summer time period**, summer time in New South Wales is one hour in advance of New South Wales standard time – see *Standard Time Act* s7.
33. Summer period is defined in New South Wales by s2A of the *Standard Time Act*.

2A Summer time period-definition

- (1) In this Act, **summer time period** means:
- (a) a period starting at 2 am on the first Sunday in October in each year and ending at 2 am on the first Sunday in the following April, or

¹⁰ Macquarie Dictionary: **metrology** the science of measures and weights

¹¹ This is an international standards organisation based in Paris (French: Bureau Internationale Des Poids et Mesures, ie BIPM) established to maintain the international system of units under the *Metre Convention* of 20 May 1875. The *Metre Convention* established this and two other international organisations to oversee the keeping of metric standards. This treaty was revised in 1921. The system of units established was renamed “International System of Units” (SI). The SI base unit for time is the second.

¹² *Standard Time Act 1987* s2

- (b) if a summer time period is prescribed by the regulations-that prescribed period.
 - (2) Despite subsection (1), the summer time period commencing in the year 2007 is taken to be the period starting at 2 am on Sunday 28 October 2007 and ending at 2 am on Sunday 6 April 2008.
34. These provisions do not apply to Broken Hill (30 minutes behind standard time and summer time) or Lord Howe Island (30 minutes ahead of standard time).
35. The Act has effect on statutory construction as follow for each of standard time and Summer time by the following provisions:

6 Construction of references to time (standard time)

- (1) A reference (express or implied) in any legal instrument to any time or period of time shall be construed:
 - (a) in relation to an act or omission that occurs, or a state of affairs that exists, at a particular place:
 - (i) as a reference to standard time, as fixed by or under this Part, in that place, or
 - (ii) as a reference to that period as determined by reference to that standard time, and
 - (b) except as provided by paragraph (a):
 - (i) as a reference to New South Wales standard time, or
 - (ii) as a reference to that period as determined by reference to New South Wales standard time.
- (2) Subsection (1) does not apply to a reference to a time or period of time that is expressly required by the legal instrument in which the reference occurs or by any other legal instrument to be construed in some other way.
- (3) This section applies to a legal instrument even though it was made before the appropriate standard time was fixed by or under this Part. (emphasis added)

...

10 Construction of references to time (summer time)

In section 6:

- (a) a reference to standard time shall, in respect of a summer time period, be construed as a reference to the appropriate summer time as fixed by or under this Part, and
- (b) a reference to New South Wales standard time shall, in respect of a summer time period, be construed as a reference to New South Wales summer time. (emphasis added)

B. Reckoning of time

36. The calculation of time periods for legal purposes is prescribed by specific Commonwealth and State legislation in addition to provisions of Interpretation Acts¹³ which are set out below. No universal rule is available for the reckoning of time and identification of the purpose for the calculation and provisions of any applicable statutory regime is critical for this exercise to do so.
37. The Commonwealth *Acts Interpretation Acts 1901 (Cth)* in **Part VIII – Distance and time** provides:

36. Reckoning of time

- (1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.
- (2) Where the last day of any period prescribed or allowed by an Act for the doing of anything falls on a Saturday, on a Sunday or on a day which is a public holiday or a bank holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following which is not a Saturday, a Sunday or a public holiday or bank holiday in that place.

37. Expressions of time

Where in an Act any reference to time occurs, such time shall, unless it is otherwise specifically stated, be deemed in each State or part of the Commonwealth to mean the standard or legal time in that State or part of the Commonwealth. (emphasis added)

38. The New South Wales *Interpretation Act 1987 (NSW)* provides:

36 Reckoning of time

- (1) If in any Act or instrument a period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time shall be reckoned exclusive of that day or of the day of that act or event.
- (2) If the last day of a period of time prescribed or allowed by an Act or instrument for the doing of any thing falls:
 - (a) on a Saturday or Sunday, or
 - (b) on a day that is a public holiday or bank holiday in the place in which the thing is to be or may be done,
 the thing may be done on the first day following that is not a Saturday or Sunday, or a public holiday or bank holiday in that place, as the case may be.

¹³ For convenience where statutory provisions for construction or interpretation such as the *Acts Interpretation Acts 1901 (Cth)* and the *Interpretation Act 1987 (NSW)* are referred to as a class rather than by specific enactment the term "Interpretation Act" is used.

- (3) If in any Act or instrument a period of time is prescribed or allowed for the doing of any thing and a power is conferred on any person or body to extend the period of time:
- (a) that power may be exercised, and
 - (b) if the exercise of that power depends on the making of an application for an extension of the period of time-such an application may be made,
- after the period of time has expired. (emphasis added)

39. The rationale underlying this approach to reckoning time in s36(1) of each Interpretation Act is founded on the difficulties that arise if time runs from the day of the event, ie from a point during the day. Furthermore, if the legal day knows no division, problems of retrospective effect are created, which as the loyal but defeated Royal defenders found in the Battle of Bosworth Field¹⁴, can have unfortunate consequences (the law does not take cognisance of parts of a day¹⁵).
40. As an example, a company could not by notice delivered on the last day of the year of income be controlled on that day by those shareholders as such notice given accordance with its articles operated from the end of the day of the date of delivery¹⁶. As stated by Windeyer J at pp 669-670 “the consequences of the delivery of the notice should commence from the last moment of the day of the date of delivery, which is the same as saying from the first moment of the day following”.
41. By way of further example, a *prima facie* rule of construction is that where a statutory lease or a licence is expressed to commence “from” a specified day, the term commences at midnight on the day specified, and lasts during the whole anniversary of the day from which it began, unless a different intention is revealed in the document.
42. Furthermore, where an instrument prescribes that a period of time must elapse between one event and another, the words “at least”, “not less than” and “not later than”, unless the context or the subject matter reveals a contrary intention, should be regarded as indicating that a clear or full period of time must expire between the two events¹⁷.

¹⁴ Victorious Henry Tudor convinced Parliament to backdate his reign to the day before the battle, whereby those who fought against him under Richard III at Bosworth Field were declared traitors.

¹⁵ *Lester v Garland* (1808) 33 ER 748 at 752: “... Our law rejects fractions of a day more generally than the civil law does.”

¹⁶ *Associated Beauty Aids Pty Limited v Commissioner of Taxation of the Commonwealth of Australia* (1965) 113 CLR 662 at 669

¹⁷ *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421

43. However, caution is required to identify whether a legislative provision indicates an intention by Federal or State Parliaments to displace the relevant Interpretation Act provision. Thus the use of an expression such as “from and including” is likely to do so.
44. So too a legislative provision such as that examined by Beaumont J in *Darwin Broadcasters Pty Limited v Australian Broadcasting Tribunal* (1990) 95 ALR 138, where the Court held that an Interpretation Act presumption did not apply to the ascertainment where the relevant phrase was “period of 60 days commencing on the day” as the word “on” must be distinguished from the word “from” as used in s36 style provisions.
45. Caution is also required when considering dealings between different time zones. Thus, an offer by the New South Wales Government which was said would remain open until 30 June 1902 was found by the Court to be construed by the law [and time] of New South Wales and thus an acceptance by cablegram despatched from London at 3.55 pm on 30 June 1902 by Greenwich Time [being 1.55am on 1 July 1902 by NSW time] was too late¹⁸.

Meaning of certain words in an Interpretation Act

46. An Interpretation Act will commonly provide a defined meaning for words such as month or calendar month or named month; year or calendar year.
47. Thus the *Acts Interpretation Act 1901* provides in s22 **Meaning of certain words:**
- (1) In any Act, unless the contrary intention appears:
 - (b) **Month** shall mean calendar month;
 - (g) **Calendar month** means a period commencing at the beginning of a day of one of the 12 months of the year and ending immediately before the beginning of the corresponding day of the next month or, if there is no such corresponding day, ending at the expiration of the next month;
 - (h) **Calendar year** means a period of 12 months commencing on 1 January; and

¹⁸ *White Cliffs Opal Mines, Ltd v Miller* (1904) 4 SR(NSW) 150

48. The *Interpretation Act 1987* provides similar definitions in s21 **Meanings of commonly used words and expressions** and additionally:

midnight, in relation to a particular day, means the point of time at which that day ends.

UCPR time rules

49. The *Uniform Civil Procedure Rules 2005* (UCPR) make provision for these matters in the following rule which is applicable to the forensic process of the courts, but cannot oust Commonwealth provisions where a relevant inconsistency arises to engage s109 of the Constitution. Nor can the provisions of the UCPR be used to modify or to interpret the rights and obligations created by Parliament in cognate legislation, absent a clear intention in the relevant statute.
50. It is most important to emphasise that whilst s36 of the *Interpretation Act 1987* (NSW) does not apply to these Rules (see below), however UCPR r1.11, is, and must be, silent as to s36 of the *Acts Interpretation Act 1901* (Cth), for disputes involving a Federal matter.

1.11 Reckoning of time

- (1) Any period of time fixed by these rules, or by any judgment or order of the court or by any document in any proceedings, is to be reckoned in accordance with this rule.
- (2) If a time of one day or longer is to be reckoned by reference to a given day or event, the given day or the day of the given event is not to be counted.
- (3) If, apart from this subrule, the period in question, being a period of 5 days or less, would include a day or part of a day on which the registry is closed, that day is to be excluded.
- (4) If the last day for doing a thing is, or a thing is to be done on, a day on which the registry is closed, the thing may be done on the next day on which the registry is open.
- (5) Section 36 of the *Interpretation Act 1987* (which relates to the reckoning of time) does not apply to these rules.

Example #1: Corporations Act s459G application and 21 days

51. A convenient example for reckoning time is the calculation of the 21 day period provided in s459G of the *Corporations Act*. For convenience, the section is set out following:

- (1) A company may apply to the Court for an order setting aside a statutory demand served on the company.
 - (2) An application may only be made within 21 days after the demand is so served.
 - (3) An application is made in accordance with this section only if, within those 21 days:
 - (a) an affidavit supporting the application is filed with the Court; and
 - (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company. (emphasis added)
52. The High Court has stated that the 21 day time requirements in s459G must be strictly fulfilled, ie a condition of the “gift” is that provisions for extension of time such as *Corporations Act* s1322 cannot be utilised to extend the time limit imposed by the provision¹⁹.
53. This is also an example of circumstances where the content of an Act has provision for the calculation of time:

105. Calculation of time

Without limiting subsection 36(1) of the *Acts Interpretation Act 1901*, in calculating how many days a particular day, act or event is before or after another day, act or event, the first-mentioned day, or the day of the first-mentioned act or event, is to be counted but not the other day, or the day of the other act or event.

54. In this context s105 of the *Corporations Act* is consistent with s36(1) of the *Acts Interpretation Act 1901*. Thus the day of service of a statutory demand is to be excluded from the calculation of the 21 days.
55. Furthermore, the time allowed by s459G(3) cannot be cut down by procedural provisions such as the UCPR. The basis for this proposition is that Parliament could not have intended that a State court’s rules of procedure might detract from a statutory right to apply to set aside a statutory demand.
56. Thus a creditor could not rely on the provisions of r 103 of the *Uniform Civil Procedure Rules 1999 (Qld)* which states “If a document is served on a person after 4.00 p.m., the document is taken to have been served on the next day.”, to contend that that a s459G application served at 4.30pm on the 21st day was by operation of r103 served on the 22nd day, Keane JA (agreed in by Williams JA and Muir J)²⁰ rejected such an approach and stated:

¹⁹ *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265

²⁰ *C & E Pty Ltd v Corrigan* [2006] 2 Qd R 399

[28] It was established by the High Court's decision in *David Grant & Co Pty Ltd v Westpac Banking Corporation* that the time allowed by s459G(3) of the Act for the service of an application to set aside a statutory demand cannot be extended by reliance upon procedural provisions similar to those contained in the UCPR. In my view, by a parity of reasoning, the time allowed by s459G(3) cannot be cut down by such procedural provisions. To construe r103 of the UCPR to operate in that way would be to abridge by eight hours the time allowed for an application by s459G(3). Construed in this way, r103 of the UCPR would detract from the right to apply to set aside a statutory demand conferred by the Act. It is unlikely that the Commonwealth Parliament contemplated that the rights conferred by s459G could be cut down in this way. The construction of r103 for which the respondent contends would thus give rise to difficulties by reason of the terms of s109 of the *Commonwealth Constitution*.

[29] In my view, r103 of the UCPR should not be understood as purporting to affect the time for service provided by s459G(3) of the Act.

57. In addition, s36(2) means that where a statutory demand is served on a weekend eg a Saturday, the 21 day period does not conclude until the end of the Monday three weeks later. So to where an application for the deadline to set aside a statutory demand falls on a public holiday. For those who practice interstate, easy access to an almanac or calendar of public holiday for each State is prudent, the detail of which is beyond the scope of this paper.
58. By way of example of the calculation of the 21 day period in s459G²¹:
- (a) a statutory demand is served on the plaintiff on 16 March 2010²²;
 - (b) for s459G(2) to be satisfied the application embodied in the plaintiff's summons must be seen to be made "within 21 days after" the service that occurred on 16 March 2010;
 - (c) all steps mentioned in s459G(3) must be seen to have been taken "within those 21 days";
 - (d) the process of identifying the end of the period of "21 days after" 16 March 2010 is assisted by s105 of the *Corporations Act* and s36(1) of the *Acts Interpretation Act*;
 - (e) in calculating whether an application was made within the 21 days "after" 16 March 2010, 16 March 2010 is left out of account – it is in s105 terms "the other day" or "the day of the other act or event";

²¹ *Autumn Solar Installations Pty Limited v Solar Magic Australia Pty Limited* [2010] NSWSC 463 at [4] – [6]

²² 16 March 2010 was a Tuesday

- (f) the 21 day period started when 16 March 2010 came to an end; the first day “after 16 March 2010 was 17 March 2010 which concluded at midnight when the second day commenced with the beginning of 18 March 2010”;
 - (g) a continuation of this process means that 21 days “after 16 March 2010” elapsed with the conclusion of 6 April 2010 ie at midnight before the commencement of 7 April 2010²³.
59. Evidence in admissible form of compliance with the time requirements of s459G of filing (usually by way of court’s stamp applied in the registry), and the precise date of service, of the documents comprising the s459G application is essential to satisfy the applicant’s onus, if challenged on the point.

Example #2: UCPR r18.4 Time for service of notice of motion

r18.4 Unless the court orders otherwise, a notice of motion must be served at least 3 days before the date fixed for the motion.

60. This rule requires a notice of motion to be served 3 days before the date fixed for the motion (**return date**). If the return date is Friday, that day and the day that the notice is served are not counted in working out the 3 days. See UCPR r1.11 set out above. For service to be valid under the rules, that notice of motion must be served on or before the Monday before the return date, unless an “order otherwise” is sought, eg for abridgement of time for service of the notice of motion.
61. If the return date is a Tuesday, as the period is less than 5 days, and given that the registry is closed on Saturday and Sunday, they will not count in measuring the 3 days, see UCPR r1.11(3). Service must be achieved before or on the previous Wednesday.

C. Changing time – extension and abridgment

62. Federal and State legislation confer benefits upon parties but also impose limits to such benefits “as a price of the gift”. Such legislation may also provide ameliorating provisions designed to soften the harsh impact upon a party imposed by time limits in legislation.

²³ 6 April 2010 was a Tuesday

63. The converse situation arises from limitation legislation which imposes fixed time limits for prosecuting civil claims driven by the general perception that where there is delay the whole quality of justice deteriorates. Limitation legislation is expressed in terms of a cause of action being “not maintainable”. It is important to distinguish between legislation which extinguishes the cause of action, as opposed to legislation which bars a remedy. Such legislation may contain ameliorating provisions for an extension of time by an applicant who satisfies various conditions whereby the court may exercise its discretion in favour of the applicant to extend time.
64. The purpose of such a provision is to eliminate the injustice a prospective plaintiff might suffer by reason of the importance of a rigid time limit within which an action is to be commenced. The object of such a discretion has been described as leaving scope for a judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the instant case²⁴.
65. The provisions of the *Civil Procedure Act 2005 (CPA)* confer powers upon the court to achieve the **overriding purpose** as defined in s56 and by means of other provisions in CPA Part 6. In deciding whether to dispense with the rules providing for timely performance by a party including by way of extension or abridgement of time under the CPA a court is required to follow the dictates of justice defined by CPA s58, which sets out relevant matters for the court to consider.
66. In addition to the power conferred upon the court to give directions as it thinks fit (whether or not inconsistent with the rules of court) for the speedy determination of the real issues between the parties to the proceedings, see CPA s61 and for further for directions as to conduct of the hearing, see CPA s62; the UCPR makes specific provision and confers a power upon a court in regard to time as provided in UCPR r1.12:

1.12 Extension and abridgment of time

- (1) Subject to these rules, the court may, by order, extend or abridge any time fixed by these rules or by any judgment or order of the court.
- (2) The court may extend time under this rule, either before or after the time expires, and may do so after the time expires even if an application for extension is made after the time expires.

²⁴ *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541

67. It is to be observed that UCPR r1.12(2) is consonant with the wording of the *Interpretation Act 1987 (NSW)* s36(3) each of which provide that an application for the extension of time may be made after the relevant period of time has expired. Such provision is analogous to an order *nunc pro tunc* (now as if then) which may validate an act done pursuant to a statutory provision notwithstanding a failure to comply with an antecedent condition²⁵
68. It is fundamental to any application for relief from the operation of the provisions of the UCPR that a litigator identify the power for a court to excuse compliance. Thus the Supreme Court may exercise its inherent jurisdiction for the administration of justice beyond the provisions of the CPA and UCPR, whereas a court of prescribed jurisdiction such as the District Court or Local Court has no such power beyond the jurisdiction conferred by Parliament by the relevant statutes.
69. In the exercise of its power arising under the CPA and the UCPR, including to relieve a party from compliance with provision of the rules or a practice note or to make “orders otherwise” under the rules, a court is required to take into account the overriding purpose stated in CPA s56(1) and the objects identified in s57(1); together with the object of minimising delay per s59, the principle of proportionality stated in s60 and the matters specified in s58(2), to the extent the court considers those matters relevant.
70. A decision in particular case is likely to require a “weighing of considerations that will not always be easy to reconcile”: see *Halpin v Lumley General Insurance Ltd* (2009) 261 ALR 741; [2009] NSWCA 372 at [90] – [96], [107].
71. The proper approach by a court to the grant to a party of the indulgence of relief from compliance with timely performance has evolved from earlier decisions prior to the Woolf Reforms in the United Kingdom, which led to the introduction of the *Civil Procedure Act* in New South Wales in 2005 and Part VB of the *Federal Court of Australia Act 1996 (Cth)* in 2010.
72. The proper approach to such legislation has been explained by the High Court of Australia in *Aon Risk Services Australia Limited v Australian National University*²⁶, including the need to consider that the purpose of case management by the courts is for the resolution of disputes to serve the public as a whole and not merely the parties to the proceedings in question.

²⁵ See generally: *Emanuele v Australian Securities Commission* (1997) 188 CLR 114

²⁶ [2009] HCA 27

Furthermore, that delay has deleterious effects not only to those parties, but to other litigants.

73. Procedural provisions such as time limits are not an end in themselves, but rather the servants of justice. There is no qualified right in a party to an extension or abridgement but rather a discretion in the court to consider the relief on sufficient reason being shown.
74. A cogent explanation by a party, in admissible form, will greatly improve the prospects of success of its application for the court to excuse compliance with normal time requirements, such as an application for extension and abridgment of time. Substantive and irremediable prejudice to another party or third party is likely to defeat such an application.
75. The price of the indulgence to a party may sound in an adverse costs order.

D. Money – decimal currency and foreign equivalents

76. The term money has many definitions including:
 - (a) gold, silver or other metal in convenient form stamped by public authority and issued as a medium of exchange and measure of value²⁷;
 - (b) the medium of exchange authorised or adopted by government as part of its currency²⁸.
77. The etymology of the word “money” and “coin” provided by the *Macquarie Dictionary* gives insight to the underpinning ideas and history of the words:

money: Middle English moneye, from Old French moneie, from Latin monēta mint, money, from Jūno Monēto Juno the Adviser, in whose temple at Rome money was coined (emphasis added)

coin: Middle English, from French: wedge, corner, die, from Latin cuneus wedge.
78. Early commerce relied upon barter or exchange of goods or services. The convenience of a fungible and permanent means for the storage and use of purchasing power in a form which might be exchanged as an alternative to goods or services led to the rise of money. Coinage has existed from earliest times, more frequently than not in a form of valuable metal in money’s worth.

²⁷ *Macquarie Dictionary* www.macquariedictionary.com.au 12 March 2011

²⁸ *Blacks Law Dictionary*, Ninth Edition, 2004, West Publishers

79. The process and funding needs of the governance of a population, be it by pharaohs, emperors or treasurers, seems inevitably to have led to the political outcome of control of money by the polity, such as prescribing the coin of the realm.
80. Essential criteria for money to perform its functions optimally are that it is available, affordable, durable, fungible, portable and reliable. Historically, as precious metals such as gold and silver met these criteria for the millennia they have been used in monetary units or coinage.
81. In the 17th-century the innovation of lending and borrowing non-physical, ie flat or paper or fiat, money led to the creation of banks including the Amsterdam Exchange Bank in 1609 and the Bank of England in 1694. These institutions were modelled on the Italian systems developed by amongst others the Medicis of Florence and other wealthy city states.
82. In simple terms the modern fractional reserve banking process which allows the creation of credit is derived from those early financial institutions. The credit thereby created is in an amount multiples greater than any reserve of actual coinage or hard money in gold or precious metal form held on deposit ie the gold standard. This innovation has allowed the creation of money based on a proportional rather than co-ordinate deposit base and the earning of fees or interest for the use of money so created, albeit the fiat money is not in physical form or covered by a reserve²⁹.
83. The consequential effect of fractional reserve banking was an expansion in the amount of nominal money in commercial use which bore no relation nor was able to be exchanged for its supposedly worth in a precious commodity such as gold. Control of a nation's money became a matter of national interest and security of necessity a function of government.
84. Section 51 of *Commonwealth of Australia Constitution Act (Cth)* states:

51. Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xii) currency, coinage, and legal tender;

²⁹ The Ascent Of Money, A Financial History Of The World, Niall Ferguson, Penguin Press 2008.

- (xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;

...

115. States not to coin money

A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

Coinage and legal tender

85. The *Currency Act 1965 (Cth)* came into operation in February 1966. That Act introduced a new monetary unit known as the dollar to Australia and its Territories; and prescribed that the denomination of money in the currency of Australia are the dollar and the cent³⁰. The dollar and the cent replaced the previous Australian currency prescribed by the *Coinage Acts (Cth)* of 1909, 1936 and 1947. That Australian monetary unit of currency and denominations of money prior to 14 February 1966 was the sovereign or pound, the shilling and the penny.
86. The *Currency Act 1965 (Cth)* makes the following provision for commercial transactions in Australia:

9. Transactions to be in Australian currency

- (1) Subject to this section, every sale, every bill of exchange or promissory note, every security for money, and every other contract, agreement, deed, instrument, transaction, dealing, matter or thing relating to money, or involving the payment of, or a liability to pay, money, that is made, executed, entered into or done, shall, unless it is made, executed, entered into or done according to the currency of some country other than Australia, be made, executed, entered into or done according to the currency of Australia provided for by this Act.
- (2) Nothing in this section operates so as to invalidate a will or other testamentary instrument.

Important transitional provisions for construction of pre-1966 documents

87. The *Currency Act* s10 makes provision for statutory references to an amount in the currency provided for in the repealed *Coinage Acts (Cth)* to be construed as a reference to the corresponding amount in decimal currency with a calculation equivalent as provided by the new legislation.

³⁰ *Currency Act 1965* s8

88. Furthermore, s11 provided that payments are to be made in currency under the *Currency Act (Cth)* ie in dollars or cents unless it is made according to the currency of some other country other than Australia or if the payment was payable prior to 14 February 1966 but not made until on or after that date the amount was prescribed to be calculated on the basis of equivalents set out in the Act.
89. The Act provides for the issue of coinage by the Treasurer³¹ and the schedule provides for standard compositions of coins including for denominations \$25, \$50, \$100 and \$200 which pursuant to ss13 and 14 are to have a standard composition of “11/12^{ths} gold and 1/12th other metal”.
90. Section 16 of the Act provides for “Legal tender” being the payment of money if that payment is made in coins, and which coins may be issued under the Act and of their prescribed weights. Section 20 of the Act makes further provision for “Concurrent legal tender” in the form of coinage.
91. The *Reserve Bank Act 1959* states in s36 (1) that “Australian notes³² are a legal tender throughout Australia”; and in s43 that “The Bank shall not issue bills or notes (other than Australian notes) intended for circulation as money.”

Non-monetary mediums of exchange

92. An alternative to legal tender or money, which for commercial purposes had similar properties to money in terms of being fungible and exchangeable for payment, which in effect had money’s qualities, was developed amongst merchants in Europe. This was the system of instruments with the hallmarks of negotiability to overcome commercial problems of international or multi-party commercial transactions.
93. These took the form of paper representing and recording the rights to enforce the relevant debt which could be exchanged as payment to settle other debts and eventually presented to the debt or to get settlement in the official currency. These instruments became known as the “bill of exchange”.
94. Later developments of such instruments included negotiable instruments such as the “cheque”.

³¹ *Currency Act 1966* s14

³² *Reserve Bank Act 1959* s32 – Interpretation states: In this Part, unless the contrary intention appears: “Australian note” means a note issued under the *Australian Notes Act 1910*, under Part VII of the *Commonwealth Bank Act 1911*, under Part VI of the *Commonwealth Bank Act 1945* or under this Part as in force at any time.

Foreign exchange

95. Increasing global commerce has given rise to the concept of foreign exchange for a nation's currency. In essence this is the process of exchange of one country's currency for the currency of another country, usually at an agreed and thus fixed rate, or alternatively at a floating market rate including by speculative traders with settlement to occur at the market rate an agreed time or date, with a view to profit.
96. A foreign exchange market in part had its genesis the 17th-century development of banking and has, with the infusion of modern technology, evolved into a massive global financial and banking industry. Derivatives and synthetic instruments including options futures or swaps whose return are tied to or derived from the price of some other asset such as the Australian dollar are a component of this industry. Such instruments and consequent risk/reward are invariably time and date specific.

Foreign currency debts

97. The recovery in Australian courts of a debt which is denominated in a currency which is not legal tender within the jurisdiction, ie it is denominated in the currency of another country may present forensic challenges to a creditor.
98. As an example a threshold question for the service of a statutory demand is that a debt is due and payable the amount of which is the least the statutory minimum amount of \$2,000 to found a s459E statutory demand. There is conflicting authority as to whether an obligation to pay an amount of foreign currency is capable of supporting a statutory demand.
99. A crucial forensic issue for a litigator is to establish by admissible evidence the existence of the foreign debt in a sum certain as due and payable in the foreign currency, and by transparent process the proper conversion of that foreign currency amount to an Australian legal tender, ie a dollar amount. This presents to the legal practitioner advising the creditor interesting considerations as to the date of conversion of the foreign currency, the appropriate rate of conversion and the drafting of the statutory demand.
100. Other interesting jurisdictional issues arise for foreign currency debts where:
 - (a) the debtor is beyond the jurisdiction;

- (b) the source of obligation giving rise to the debt has no connection to Australia;
- (c) proper service of process is not possible;
- (d) effective enforcement of a judgment cannot be achieved.

101. The prudent commercial practitioner will be aware of and advise clients of means to either avoid or minimise such forensic challenges including by denominating money terms in Australian legal tender; by making provision for an agreed exchange rate or calculation for foreign exchange rates; by parties agreeing to submit to the jurisdiction; and by provision of security within the jurisdiction to facilitate enforcement.

E. Time, money and restitutionary principles

...*time is money*...³³

102. Time and money are both constructs of human organisation and tools for measurement or comparison. In a society subject to the rule of law, each has value, and may be viewed in a broad sense as a species of property. On occasion each is the subject of disputes in the courts.
103. The history of the law of restitution and unjust enrichment is an example of the organic nature of our jurisprudence and particularly the common law's facility to fashion a remedy to address a wrong. A brief historical overview of the subject is provided in Mason and Carter's *Restitution Law in Australia*, 2nd Ed Lexis Nexis 2008, in Chapter 1. As with other areas of legal study, in this area of law terminology and taxonomy are crucial.
104. Orders granting relief by way of restitution to a plaintiff arise consequent to a court finding the existence of unjust enrichment in a defendant. A convenient and fundamental overview of the components of the doctrine is provided by the learned authors in *Restitution Law* at [110] and [141] as follow:
- (a) a benefit or enrichment is conferred upon a defendant;
 - (b) that benefit or enrichment was obtained at the plaintiff's expense;
 - (c) that the benefit or enrichment and its retention is unjust;

³³ Benjamin Franklin from *Advice to a Young Tradesman* (1748)

- (d) that no recognised defence is made out to defeat the plaintiff's claim;
 - (e) whether a personal or proprietary remedy is appropriate.
105. It is settled law that principles of restitution arising from an unjust enrichment do not provide for a cause of action for unjust enrichment but rather identify a unifying legal concept³⁴. The doctrine attempts to inform the underpinning the jurisprudential principles for a number of categories of case which fall under its description.
106. As the High Court of Australia has recently emphasised unjust enrichment is not determined by reference to a subjective evaluation of what is unfair or unconscionable but recovery under restitutionary principles depends on the existence of a qualifying or vitiating factor falling into some particular category³⁵.
107. In many cases of unjust enrichment no breach of duty exists and no question of compensatory damages will arise. The High Court has warned against confusing principles giving rise to rights of compensation as opposed to rights to restitution³⁶.
108. An example of a category of case which is recognised as having its underpinnings in restitutionary principles is the count for money paid. Another category of case is the count for money had and received. Each seek to recover a sum certain ie a debt claim.
109. Such common money counts offer a streamlined approach to recovery of a debt, as opposed to a claim for damages due to breach of duty. However such counts fail properly to address a plaintiff's loss founded on the period of time for which the defendant has had the use of the plaintiff's money. Furthermore, neither address the practical reality of the expansion of money over time, its loss of value and concepts such as "inflation".
110. Commercial demands have led to the application of restitutionary principles (and also in compensation principles – a separate topic) to give rise to the legal concept of interest which attempts to respond to the unjust use of time and money.

³⁴ *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353

³⁵ *Farah Constructions Pty Ltd & Ors v Say-Dee Pty Ltd* (2007) 230 CLR 89

³⁶ *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516

F. Interest – turning time into money

111. The meaning of the noun interest has many differing meanings and like time is a word which is highly dependent on context. Once again its etymology from the Macquarie Dictionary gives insight for present purposes:

interest: late Middle English, adoption of Anglo-French interest in place of Middle English interest, from Medieval Latin interesse compensation for loss (noun use of Latin infinitive) (emphasis added)

112. The principle underlying an award of the award of interest is that a plaintiff should be compensated for the loss of the use of its money for a period of time. This principle applicable to each of the categories of statutory, common law and equitable awards of interest.
113. At common law interest on money owing is neither payable nor recoverable by suit absent a contractual entitlement, including by express or implied terms such as commercial practice or custom, or by principles of unjust enrichment giving rise to an entitlement to restitution. In equity interest may be awarded against a defaulting fiduciary or other person subject to equitable obligations and the exercise of a court's exclusive or auxiliary jurisdiction. Each class of claim tended to be idiosyncratic to the instant case and to bring an additional and unneeded complexity to litigation.
114. Legislative provisions for the award of statutory interest created a statutory right in addition to the common law to confer power on a court to award interest in money claims – however the award of interest remains discretionary and not an entitlement in a successful creditor.
115. In *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 666 the High Court of explained the legal foundation for an interest claim:

“A plaintiff is awarded interest because he or she has been deprived of the use of his or her money, not because he or she has foregone investment opportunities. It would be wrong, for example, to refuse to award a plaintiff interest simply because the real rate of interest during the relevant period was zero or a negative figure.”

116. In *Grincelis v House* (2000) 201 CLR 321 at 16, the High Court approved that passage from *Gogic* set out above, and stated:

“The function of an award of interest is to compensate a plaintiff for the loss or detriment which he or she has suffered by being kept out of his or her money during the relevant period.”

The majority went on to state that there was no doubt that this was a very important purpose to the statutory provisions providing for an award of interest

in respect of the period between the cause of action accruing and the date of judgment. The Court also stated that such interest was also more readily understood in relation to claims for debts, or a sum certain, than in personal injury cases.

117. It is settled law that “a plaintiff who has been kept out of his or her money between the date of loss and the date of judgment is entitled to be awarded interest on those moneys for that period. On the other hand, if the plaintiff has not been kept out of his or her money for that period, it is not appropriate to make such an award”³⁷.
118. Until 1 July 2010 rates of statutory interest ie pre- and post-judgment interest were in practice taken by courts to be equivalent by reference to the post-judgment rates prescribed in UCPR Schedule 5. From 1 July 2010 the Rules Committee prescribed a 2% differential, ie 4% v 6%, above the cash rate published by the Reserve Bank in June and December each year.
119. Practice Note – SC Gen 16 **Supreme Court – Pre-judgment interest rates**

Clause 5.

Practitioners and litigants should expect that where, pursuant to s100(1) and (2) of the *Civil Procedure Act 2005*, interest in respect of a pre-judgment period is to be included in a judgment, the Court will have regard to the following rates, being rates agreed upon by the Discount and Interest Rate Harmonisation Committee established following a referral by the Council of Chief Justices:

- (a) in respect of the period from 1 January to 30 June in any year – the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced, and
- (b) in respect of the period from 1 July to 31 December in any year – the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced.

Interest up to judgment

120. In initiating proceedings for a claim for debt, liquidated or unliquidated damages interest up to judgment pursuant to CPA s100 must be claimed, see UCPR r6.12 **Relief claimed:**

...

- (6) An order for interest up to judgment must be specifically claimed.

³⁷ *Screenco Pty Limited v R L Dew Pty Limited and Anor* [2003] NSWCA 319 per Tobias JA at [115]

- (7) In the case of a liquidated claim, a claim for an order for interest up to judgment:
- (a) must specify the period or periods for which interest is claimed, and
 - (b) may specify the rate or rates at which interest is claimed.
- (8) If no rate of interest is specified under subrule (7) (b), the rate at which interest is claimed is taken to be:
- (a) in respect of the period from 1 January to 30 June in any year – the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced, and
 - (b) in respect of the period from 1 July to 31 December in any year – the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced.

121. Pre-judgment statutory interest pursuant to CPA s100 accrues from the date which the cause of action arises for the principal sum:

s100 Interest up to judgment

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

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

Interest after judgment

122. Whilst the heading of CPA s101 refers to interest after judgment its provision create a statutory right to both interest on a judgment amount and interest on costs which have been paid. Thus if costs have been paid prior to judgment an entitlement to interest on costs arises from that date i.e. both up to and after judgment.

s101 Interest after judgment

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

Rate of interest for interest after judgment

123. From 1 July 2010 the former tables of court rates of interest for post-judgment interest contained in UCPR Schedule 5 were replaced by operation of the following provision of the Rules:

UCPR r36.7 Payment of interest

- (1) The prescribed rate at which interest is payable under section 101 of the *Civil Procedure Act 2005* is:
- (a) in respect of the period from 1 January to 30 June in any year – the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced, and
 - (b) in respect of the period from 1 July to 31 December in any year – the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced.
- (2) The Local Court may not order the payment of interest up to judgment in any proceedings in which the amount claimed is less than \$1,000.

Discretion to award interest

124. CP Act ss100 and 101 do not confer an automatic entitlement to interest, however the discretion provided to a court to award pre-judgment interest must be exercised judicially. Relevant considerations to the exercise of that discretion conferred by the legislative regime include the following matters:
- (a) whether or not to grant interest;
 - (b) at what rate interest should be awarded;
 - (c) the part or parts of any award which are to bear interest;
 - (d) the length of time between the accrual of the cause of action and the payment of the indemnity amount for which interest is to run.
125. It is a general rule that the circumstances in which a claim for interest can be refused are rare. This rule was recognised by the Court of Appeal in *Faulkner v Bourke* (1990) 19 NSWLR 574 at 576 applying the 1983 decision of the Court of Appeal in *Home Owners Insurances Pty Ltd v Job* (1983) 2 ANZ Insurance Cases 60-535 at 78,105 – 78,106.
126. In the Court of Appeal the practice is to award restitutionary interest at the rates payable on judgments unless special circumstances exist, see *Heydon v NRMA Ltd (No 2)* (2001) 53 NSWLR 600 per Mason P (agreed in by

Beazley JA and Ipp AJA at [33] approving the Court's earlier statement that: "... considerations of 'justice and consistency' were seen to require the court to apply the special statutory rates applicable to the payment of interest on compensation when awarding interest on overpaid compensation ordered to be refunded"³⁸.

Practice points

127. A claim for interest up to judgment and also for interest after judgment must be specifically claimed including the period for which pre-judgment interest is claimed and the rates for both.
128. If the terms of a contract provide for the award of interest at special rates or on a commercial basis, such as for compound interest, on debts or an award of damages, that agreed term will regulate the award of interest by a court to the exclusion of the statutory regimen.
129. However in such a case relief for a contractual claim for interest must be made in the initiating document and form part of the court's final orders lest that entitlement merge on judgment. If so, the statutory rate is then available, provided it is claimed. Prudent practice suggests that for such a matter a claim for interest on each basis is pleaded in the alternative ie common law interest pursuant to the contract and in the alternative statutory interest.
130. The rules provide that evidence of facts relevant to a claim for interest up to judgment in respect of a debt or liquidated claim must be given by affidavit, see UCPR r31.1(4)(a).
131. Any claim for interest on costs ought to be supported by evidence in admissible form, eg by affidavit, including proof of the amount, the detail and nature of to whom and the dates of payment of components of those costs, plus a schedule setting out the calculation of interest claimed at the appropriate rate.
132. Convenient orders in regard to interest on costs include: an order that interest is payable on that proportion of costs as assessed; *and*, an order for the payment of interest until further order – to allow the matter to be brought back before the court if the process of costs assessment becomes subject to a

³⁸ *Haig v Minister Administering the National Parks and Wildlife Act 1974 (No 3)* (1996) 90 LGERA 408 at 412

deadlock, or to make a final order in a specified amount after the costs assessment has concluded.

G. Conclusion

133. Time and money are areas in litigation practice which require an ordered approach to planning and executing a comprehensive litigation strategy to achieve successful outcomes for a client.
134. Litigation which picks up the legal issues of time or money on a substantive or adjectival basis has the potential to turn on argument of a technical or an abstruse nature. A careful consideration of the relevant statutory framework for each of these objects to the facts of the dispute will allow for early assessment of prospects of success and for arguments to be deployed with confidence.
135. My thanks to the University of New South Wales for the opportunity to participate in this Litigation Master Class and particularly to Mr Chris Lemercier.

M J Walsh

17 March 2011