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the Hon. Justice J P Hamilton**

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Judicial Independence and Impartiality: Old Principles, New Developments

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by the
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In this paper I deal with general aspects of judicial independence; the particular aspect of impartiality is dealt with by my co-presenter, the Honourable Andrew Wilson, a Justice of the Supreme Court of Samoa.

In the narrow confines of this half paper I can deal with this large subject in only a trite way. I shall make a short examination of the modern concept of the independence of the judiciary and deal with some particular aspects, where the independence of the judiciary has been the subject of debate or pressures in recent times. I refer principally to the Australian experience. The particular aspects to which I shall advert are tenure of office, reduction of jurisdiction, judicial immunities, appointment of judges, dismissal of judges and acting or short commission judges. The paper is divided into sections as follows:

- 1 General
- 2 Tenure of Office
- 3 Reduction of Jurisdiction
- 4 Judicial Immunities
- 5 Appointment of Judges
- 6 Dismissal of Judges
- 7 Acting or Short Commission Judges
- 1 General

The general concept of judicial independence was in 1988 stated thus by Sir Nicolas Browne-Wilkinson, then Vice Chancellor, and now Lord Browne-Wilkinson, a Lord of Appeal in Ordinary[1]:

"If you were to ask a thinking man whether he regarded the independence of the judiciary as important, he would almost certainly answer 'Yes.' If asked to explain what he meant by the words, he would probably say that a judge should be free of any pressure from the government or anyone else as to how to decide any particular case; that, for that reason, a judge's salary is not dependent on executive decision but is paid out of the Consolidated Fund and he cannot be removed save by resolution of both Houses of Parliament. If pressed further and asked why judicial independence was important, our thinking man might at first hesitate. But in due course the answer would be along the lines, 'the courts are there to protect the rights of the individual as against the state by ensuring that executive powers are lawfully exercised.'"

Or, thus, more formally, by Sir Richard McGarvie, formerly a Justice of the Supreme Court of Victoria, and subsequently Governor of Victoria[2]:

"It is vital to identify clearly what in this context is meant by judicial independence. It refers only to independence in making decisions in court cases between litigants. It means only that in making such decisions a judge must be individually independent in the sense of being free of pressures which would tend to influence a judge to reach a decision in a case other than that which is indicated by intellect and conscience based on a genuine assessment of the evidence and an honest application of the law."

The modern doctrine of the independence of the judiciary historically has two important sources. The first is the doctrine of the separation of powers. That doctrine has roots going back into classical philosophy[3]. It received its classic modern statement in the 18th century in Montesquieu's *The Spirit of Laws*, where, concerning judicial power it is said[4]:

"Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

The other of those sources flowed from the independence of the common law Judges established through the English constitutional struggles of the 17th century. Sir Edward Coke, the Lord Chief Justice of the Common Pleas, himself recounts thus a famous interview with King James I on the proposition that, the Judges being the King's Judges, the King could withdraw causes from the Judges and decide them himself[5]:

"Then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod Rex non debet esse sub homine, sed sub Deo et lege[6]."

Issues of judicial independence continued important through the Civil War of the mid-17th century and were again at the forefront in the reign of King James II and at the Glorious Revolution of 1688. The Act of Settlement of 1700 or 1701[7] in s III fixed the basic term of appointment of judges in the modern Anglo/American system by providing that "Judges Commissions be made Quandiu se benegesserint[8], and their Salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them." However, there are two views as to whether these provisions were interdependent, one being that the addresses for dismissal are at the will of the Houses, and not dependent on proof of misbehaviour[9], the other that, at least by constitutional convention, they could only be on the ground of misbehaviour[10]. The two sources were drawn together in the constitution making process after the American War of Independence, which had as two of its principal sources of intellectual inspiration the French Enlightenment of the 18th century and the judicial traditions of the common law. In "The Federalist" Papers, the great apologist of the American Republic, Alexander Hamilton, wrote[11]:

"According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices during good behaviour; which is conformable to the most approved of the State constitutions, and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

This theme of the fragility of judicial independence[12] was taken up and elaborated by Sir Ninian Stephen, while a Justice of the High Court of Australia, in his well known "Fragile Bastion" paper[13]. The US Constitution provided that[14]:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

but that[15]:

"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanours."

"Civil Officers" include Judges, and there is no doubt in the US that there can be no removal of Judges without impeachment. The power of the courts under a federal constitution, where the powers of the legislatures at the different levels are limited, to declare void legislation beyond the power of a legislature, was not specifically provided for in the US Constitution, but was assumed by Hamilton to exist, and was taken to itself by the US Supreme Court in the epoch making decision of *Marbury v Madison*[16].

With the growth of international cooperation during the 20th century, there have been various efforts by international organisations to create universal or international standards of judicial independence. Thus cl 1 of the "Basic Principles of the Independence of the Judiciary" endorsed by the General Assembly of the United Nations on 29 November 1985[17] was:

"The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."

One of the recent formulations most relevant to the Asia Pacific region of a standard or principles relating to the independence of the judiciary is that made by the Chief Justices of the region at their biennial conferences. These principles were formulated at the meeting in Beijing in 1995. They were refined at the meeting in Manila in 1997, and have now been subscribed by the Chief Justices of 32 nations in the region, nations as diverse as Tonga, Australia, Russia and the People's Republic of China[18]. A copy of the Beijing Statement incorporating these principles is attached to this paper.

2 Tenure of Office

Whilst in 1900 the Constitution of the Commonwealth of Australia did not emulate the US Constitution in its separation of the legislative and executive branches of government, but adopted rather the Westminster system of ministers sitting in and having direct responsibility to Parliament, it did in effect adopt the US model of judicial tenure. The Constitution by s 72 provided for the appointment of federal Judges for life (subsequently reduced to a fixed retiring age by constitutional amendment in 1977), Judges to be removed only by the Governor General in Council upon an address from both Houses of Parliament praying for such removal on the ground of proved misbehaviour or incapacity. The proof of misbehaviour (or incapacity) thus became de jure a precondition of dismissal in the Australian Commonwealth[19].

The Australian States in most instances in their constitutions reflect the less satisfactory pattern of the 18th century settlement in England[20], under which, as has already been pointed out, it is probably the better view that the provisions for tenure during good behaviour, but removal upon an address from both Houses, are disjunctive, so that the addresses for removal by Parliament may be made at will, and not only upon proof of misbehaviour. Furthermore, one of the practical problems that has arisen is what happens upon the abolition of a particular court. There have been a number of instances of this in Australia recently[21]. One example was when New South Wales abolished Courts of Petty Sessions as its Magistrates' Courts in 1982 and replaced them with a Local Court. The Magistrates of the abolished courts were invited to apply for appointment to the new Court, and interviewed by a selection committee. All were recommended for appointment but five. The Magistrates did not then have tenure during good behaviour. The five obtained relief from the Court of Appeal on the basis of a denial of natural justice, to ensure that they were given a full opportunity to be heard by the selection committee on allegations made against them[22]. One of the five obtained further relief from the Court of Appeal relating to subsequent proceedings before a selection committee[23], but this was reversed by the High Court[24]. Perhaps the worst example was when Victoria abolished its Road Accidents Tribunal in 1992, after a short existence (since 1985), and thus, in effect, dismissed its members, who had the status of judges. Some of them were reappointed to the Victorian County Court or Administrative Appeals Tribunal, and thus obtained comparable positions. Other were not. Widespread protests were of no avail[25].

Both these problems have been recently addressed in New South Wales. The provisions of ss 53 - 56 were inserted in the Constitution Act 1902 in 1992 and entrenched in 1995[26]. The provisions now in force in New South Wales are as follows:

"53 Removal from judicial office

- (1) No holder of a judicial office can be removed from the office, except as provided by this Part.
- (2) The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.
- (3) Legislation may lay down additional procedures and requirements to be complied with before a judicial

officer may be removed from office.

(4) This section extends to term appointments to a judicial office, but does not apply to the holder of the office at the expiry of such a term.

(5) This section extends to acting appointments to a judicial office, whether made with or without a specific term.

54 Suspension from judicial office

(1) No holder of a judicial office can be suspended from the office, except in accordance with legislation.

(2) A suspended judicial officer is entitled to be paid remuneration as a judicial officer during the period of suspension, at the current rate applicable to the office from which he or she is suspended.

55 Retirement

(1) This Part does not prevent the fixing or a change of age at which all judicial officers, or all judicial officers of a court, are required to retire by legislation.

(2) However, such a change does not apply to a judicial officer holding office when the change takes effect, unless the judicial officer consents.

56 Abolition of judicial office

(1) This Part does not prevent the abolition by legislation of a judicial office.

(2) The person who held an abolished judicial office is entitled (without loss of remuneration) to be appointed to and to hold another judicial office in the same court or in a court of equivalent or higher status, unless already the holder of such an office.

(3) That right remains operative for the period during which the person was entitled to hold the abolished office, subject to removal or suspension in accordance with law. The right lapses if the person declines appointment to the other office or resigns from it.

(4) This section applies whether the judicial office was abolished directly or whether it was abolished indirectly by the abolition of a court or part of a court."

What is more, whilst the full judicial tenure previously extended in New South Wales only to Judges of the Supreme Court (as remains the case in all or most other States), this entrenched tenure was conferred upon not only Judges of the Supreme Court or courts having the status of the Supreme Court, but of inferior courts such as the District Court and the Compensation Court, and on the Magistrates of the Local Court.

This legislative formulation in New South Wales accords in general terms with the principles laid down in the Beijing statement clauses 18 - 30.

3 Reduction of Jurisdiction

Another way in which Judges may be removed from adjudicating upon particular issues is the withdrawal of jurisdiction from their Court. There have been two recent developments in this area in Australia. The first is by way of legislative action for entrenched protection of jurisdiction in Victoria. Whilst the provisions for protection of the tenure of Judges have not been entrenched, as in New South Wales, an amendment in 1991 to s 85 of the Constitution Act 1975 (Vic) provides that the jurisdiction of the Supreme Court of Victoria may not be diminished by implication, but only expressly, by subsequent enactment, and that such enactment requires, not a referendum, but special procedures within the Parliament for its enactment.

The second development arises from the provisions of the Commonwealth Constitution as to judicial power and their interpretation by the High Court in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The relevance of this in the area of judicial independence was adverted to as follows in the New South Wales Court of Appeal by Spigelman CJ in *Bruce v Cole*[27]:

"Although the New South Wales Constitution does not embody a formal separation of powers, there is significant restraint upon the ability of the Parliament of New South Wales to impinge on the independence of the judiciary. This restraint derives from The Commonwealth Constitution.

In *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, the High Court enunciated an incompatibility doctrine, directed to the matter in issue in that case, namely: Was the exercise of a specific non-judicial power compatible with the exercise by the State Court of the judicial power of the Commonwealth? The reasoning of the Court involved principles of broader application.

As McHugh J said:

'... it is a necessary implication of the Constitution's plan of an Australian judicial system with State Courts invested with federal jurisdiction, that no government can act in a way that might undermine public confidence in the impartial administration of the judicial function of State Courts.' (118)

His Honour emphasised the centrality of independence of the judiciary and concluded:

'In the case of State Courts, this means they must be independent and appear to be independent of their own State's legislature and executive government as well as the federal legislature and government' (106)

Justice Gaudron's reasoning was to similar effect:

'... there is nothing anywhere in the Constitution to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State Courts or Federal Courts created by the Parliament.' (103)

The reasoning in *Kable*, in my opinion, indicates that the legislative power of the State may not be used to fundamentally alter the independence of a Supreme Court Judge, or the integrity of the State judicial system. No submission has been made that any part of the Judicial Officers Act 1986 or the Constitution Act 1902, in their present form, has any such effect."

4 Judicial Immunities

Whilst they are a less frequent subject of commentary than protected tenure, judicial immunities are an equally important aspect of judicial independence. "Just as members of parliament are immune from action in respect of what they say in the course of parliamentary debates, so judicial officers are immune from suit in respect of judicial acts"[28]. So far as litigation is concerned, the immunity also extends to advocates, jurors and witnesses. Judges are also immune from being obliged to submit to investigation of their reasons for their decisions. A recent Canadian case[29] considered this immunity in the context of a Royal Commission into the circumstances of a murder trial and conviction. The matter had been referred to the Appeal Division of the Supreme Court of Nova Scotia for a redetermination. The Royal Commission summoned the Justices who sat on the reference to be examined before it. The Supreme Court of Canada held that the Public Inquiries Act of Nova Scotia was not effective to abrogate the privilege which entitles judges to refuse to testify about the grounds of their decision. They must give reasons for their judgments, but they cannot be examined about them. That privilege was established in the 17th century, when the House of Lords made an unsuccessful attempt to have Lord Chief Justice Holt explain why he had quashed an indictment for murder[30].

McLachlin J said[31]:

"The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence."

See also *Valente v The Queen*[32] and *Beauregard v Canada*[33].

5 Appointment of Judges

This is not the place in which to go at any length into the difficult question of the appointment of judges. Whilst the principle of the separation of powers might suggest that a mode of selection independent of the executive government is desirable, and this has been adopted in some jurisdictions, in general appointment remains the prerogative of the executive government of the day. This is generally exercised according to conventions within the particular jurisdiction concerned[34]. One pressure that is heard from time to time in Australia is a call for a "more representative" judiciary, which, insofar as it has any objective meaning, seems to be based upon a notion that the judiciary should somehow be proportionally representative in numbers of various groups in the community, such as women or minority racial groups. Whilst the process of adjudication must in an overall way reflect community views, in order for the judiciary to retain the confidence of the community, it is vital to the survival of the "fragile bastion" that individual decisions, to do justice, may run contrary to public opinion on specific issues[35]. The inherent fault of the notion of a representative judiciary is that it is antithetical to the notion of an independent judiciary that "representative" judges should give judgments in favour of or be sympathetic to the groups in the community from which they spring, and which they are conceived to represent. The principal requirement for a strong, healthy and independent judiciary is that the people who join it should be people of excellence and that, overall, they have experience in the practical matters of evidence, procedure and court craft, the administration and control of which are their daily task[36].

6 Dismissal of Judges

Whilst removal through the mechanism of parliamentary address and upon the ground of proved incapacity or misbehaviour is the ideal, it is one where practical problems have been found to exist in the rare instances of the necessity for its application in practice. In Australia, only a small number of Judges were removed in the colonial days of the 19th century, before the modern constitutional provisions were fully in force. One was Mr Justice Willis, the Port Phillip District Judge of the Supreme Court of New South Wales, in 1843, who was removed by the Governor without legislative address[37]. A second was Mr Justice Montague who was removed from the Supreme Court of Van Dieman's Land for impecuniosity and his actions in avoiding his creditors[38]. A third was Mr Justice Boothby, of the Supreme Court of South Australia, who was removed by the Governor in 1865, upon address of both the South Australian houses, although he could probably have been removed, without any form of Parliamentary address[39]. There have been at least three judges of superior courts subject to such process in recent times. The first was Mr Justice Murphy of the High Court of Australia in the 1980s, who died before the matter proceeded to finality[40]. The second was Mr Justice Vasta of the Queensland Supreme Court, who was removed in 1989 on an address of that State's unicameral Parliament[41]. Recently in New South Wales, in circumstances mentioned below, proceedings were brought in Parliament against Justice Vince Bruce of the Supreme Court, but failed, after a written defence[42] and a spirited speech by the Judge, to gain an affirmative vote (16-24) in the upper house (the Legislative Council), where the motion for the address was first moved. The practical problems thrown up revolve around the unsuitability of parliamentary houses as adjudicative bodies and the problem of the establishment in a satisfactory way of the proved incapacity or misconduct sought to be relied on. In the cases from the High Court and Queensland mentioned above, the procedure adopted was the appointment by special legislation of ad hoc commissions of judges or retired judges to report upon the allegations[43].

Again it is New South Wales that has essayed a more radical solution[44]. By the Judicial Officers Act 1986 ("the JO Act") there was created the Judicial Commission of New South Wales. The Commission has eight members of whom six are the heads of jurisdiction of the New South Wales Courts, one is a legal practitioner nominated by the Minister after consultation with the professional bodies, and one a person who in the opinion of the Minister has high standing in the community. The President is the Chief Justice of the Supreme Court of New South Wales: s 5. The Judicial Commission has a permanent staff: s 6. The Commission has functions other than disciplinary functions. In particular, it has three principal functions. The first is to assist in the monitoring of criminal sentencing: s 8. The second is a function of judicial education: s 9. For instance, the Commission provides and organises annual conferences for New South Wales Courts, which provide opportunities for the receipt by and exchange among judicial officers of ideas. It co-organises an orientation course for new Judges and Masters, which is widely attended by new Judges not only from New South Wales, but also from all other Australian jurisdictions and even, in some instances, by Judges from other countries in the region. However, a principal function is to provide for the monitoring of complaints against judicial officers and in the case of serious complaints which could potentially lead to removal proceedings, the factual adjudication upon those complaints before Parliamentary proceedings are taken.

By s 15(1) any person may complain "about a matter that concerns or may concern the ability or behaviour of a judicial officer". "Judicial officer" is defined to mean, in effect, all Judges, Masters and Magistrates in NSW: s 3 (1). A complaint is examined by the Judicial Commission (or a committee thereof) which may initiate such inquiries as it thinks fit (as far as practicable in private): s 18. Thereafter the complaint must be summarily dismissed, or classified by the Judicial Commission as a serious complaint (which if substantiated could justify parliamentary consideration of removal from office) or as a minor complaint: ss 19, 30. A minor complaint may be referred to the relevant head of jurisdiction: s 21(2). Otherwise the complaint is referred to a panel of three judicial officers (one of whom may be retired), who constitute the Conduct Division for the purposes of the complaint: s 22.

The Conduct Division must examine the complaint, may initiate such investigations as it thinks appropriate (as far as practicable in private) (s 23), and may hold hearings (s 24(1)), which in the case of a serious complaint are normally in public: s 24(2). Most of the provisions of the Royal Commissions Act 1923 apply to a hearing: s 25. By s 34 the Conduct Division may request the judicial officer to undergo medical examination if it is of the opinion that he or she "may be physically or mentally unfit to exercise efficiently the functions of a judicial office." If the Conduct Division decides that a minor complaint is wholly or partly substantiated, it so informs the judicial officer concerned, or decides that no action need be taken: s 27. Sections 28, 29 and 41 are set out in full:

"28 Substantiation of serious complaint

If the Conduct Division decides that a serious complaint is wholly or partly substantiated, it may form an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer complained about from office.

29 Reports

(1) The Conduct Division shall, in relation to a serious complaint, present to the Governor a report setting out the Division's conclusions.

(2) If the Conduct Division decides that a serious complaint is wholly or partly substantiated and forms an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office, the report shall set out:

- (a) the Division's findings of fact; and

(b) that opinion.

(3) The Minister shall lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after the report is presented to the Governor.

(4) The Minister may present the report to the Clerks of both Houses of Parliament when Parliament is not sitting, and thereupon the report shall for all purposes be deemed to have been laid before both Houses of Parliament, but the Minister shall nevertheless lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after Parliament resumes.

(5) A report presented to the Clerk of a House of Parliament may be printed by authority of the Clerk of the House and shall for all purposes be deemed to be a document published by order or under the authority of the House.

(6) A copy of any report presented to the Governor shall also be furnished forthwith to the Commission.

(7) The Conduct Division shall, in relation to a minor complaint, furnish a report to the Commission setting out the action taken by the Division.

(8) A copy of any report referred to in this section shall also be furnished to the judicial officer concerned.

.....

41 Removal of judicial officers

(1) A judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor under this Act that sets out the Division's opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity.

(2) The provisions of this section are additional to those of section 53 of the Constitution Act 1902." By ss 40 and 43 the relevant head of jurisdiction may suspend a judicial officer from the exercise of judicial functions in any of four events, namely if the judicial officer is:

(a) the subject of a complaint, or

(b) the subject of a report by the Conduct Division containing its opinion that a matter could justify parliamentary consideration of removal from office, or

(c) charged with an offence which in New South Wales would be punishable by imprisonment for at least 12 months, or

(d) convicted of such an offence[45].

The JO Act provides for the determination of the facts of complaints a tribunal, the constitution of which is beyond the control of the Executive. This avoids the risk of a partial tribunal, or at the very least the appearance of such, which was a distressing feature of the dismissal of the Malaysian Judges[46]. Judges' conduct was also made examinable in NSW by the Independent Commission against Corruption Act 1988, which established an Independent Commission against Corruption ("the ICAC") with wide ranging powers to examine the conduct of or matters relating to "public officials". The definition of "public officials" expressly includes judges. A principal function of the Commission is to investigate "any circumstances implying, or any allegations, that corrupt conduct may have occurred, may be occurring or may be about to occur" (s 13(1)), and "corrupt conduct" is defined to mean "any conduct of any person that adversely affects the honest or impartial exercise of official functions by any public official or any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions": s 8.

It is interesting that, as Dr Guillotin during the French Revolution died by his own machine, Nicholas Greiner, the then Premier of New South Wales and the principal author of the ICAC, had his political career destroyed by his own invention. The political destruction was permanent, although the findings of the ICAC in relation to him were subsequently struck down by the New South Wales Court of Appeal, although on the basis of lack of power to make findings in the form in which they were made, rather than by attack on the factual basis of the findings[47]. In practice it is to the Judicial Commission that the bulk of complaints against Judges and Magistrates have gone, although the potential for complaint under the ICAC Act cannot be ignored.

These provisions were critically examined in an article by the Hon Malcolm McLelland, then Chief Judge in

Equity of the Supreme Court of New South Wales and a highly respected Judge[48]. McLelland CJ in Eq, whilst conceding that provision needed to be made for adjudication of the facts relating to allegations of serious judicial misconduct, made acute and compelling criticisms of the machinery in fact provided by the JO Act. The criticisms proceeded in part by reference to the problem of the encouragement of trivial and distracting complaints likely to be attracted by the provision of a mechanism in this form. He also drew attention to the lack of provision for the costs of a judicial officer called upon to appear before the Conduct Division upon a complaint, which was a possible source of injustice, whether or not the complaint proved to be justified. The power of suspension, he suggested, was a derogation from judicial independence, and disturbed the traditional position of a Chief Justice or Chief Judge as primus inter pares. He proposed a solution somewhere between the creation of ad hoc commissions in response to particular allegations, represented by the Commonwealth, Queensland and ACT Acts cited above, and the provision of formal machinery to deal with complaints, however trivial, which was, in effect, a sledgehammer to crack a nut. He suggested a permanent tribunal, but one which could deal with complaints only upon the initiation of the Attorney General, who would first examine all complaints and ensure that they were of substance, both in their nature and as to the supporting material available, before proceedings could be initiated against a judicial officer. His proposal is thought provoking and its features were set out as follows in his article[49]:

"1 The tribunal should exercise judicial, and not inquisitorial or investigatory functions.

2 Proceedings before the tribunal should be initiated only by the Attorney General of the relevant jurisdiction, upon a statement of the facts alleged to constitute misbehaviour or incapacity of a judge, accompanied by a certificate of the Attorney General that in his opinion:

- (a) the facts alleged, if established, could warrant removal of the judge from office, and
- (b) there is credible evidence available to support these facts.

3 The function of the tribunal should be to determine whether facts are established, in accordance with the initiating statement, which constitute misbehaviour or incapacity which could warrant removal of the judge from office.

4 The proceedings before the tribunal should be conducted in accordance with the principles of natural justice and the rules of evidence.

5 The judge should not be called on to answer an allegation of misbehaviour or incapacity unless and until the tribunal determines that the evidence adduced in support of the allegation is capable of supporting a finding of misbehaviour or incapacity which could warrant removal from office.

6 The proceedings should be conducted in private.

7 The reasonable costs of the judge's legal representation in the proceedings before the tribunal and in any appeal from, or judicial review of, those proceedings, should be borne by the relevant government.

8 The tribunal should be subject to the supervisory jurisdiction of, and an appeal should lie from the tribunal to, the High Court of Australia."

This has not been implemented in New South Wales, although the constitutional amendments in 1992 and 1995 already mentioned are to the credit of the Government of that State.

In practice the operation of the complaints procedure under the JO Act does not seem to date to have caused in any major way the consequences feared by McLelland CJ in Eq. Many of the complaints made have, as anticipated by his Honour, been of a trivial nature and/or made by the disgruntled losers of litigation. The filtering process appears to have worked reasonably well and such complaints have as a routine matter been summarily dismissed. The number of complaints commenced at between 20 and 30 per annum. They peaked at 55 in the late 1980s. They fell again to the mid 20s until well into the 1990s. However, there has been a sharp rise in complaints of recent years. The figures appearing in the Judicial Commission of New South Wales Annual Reports up to 1995 - 1996 are tabulated by Justice Thomas in his book[50].

The two latest annual reports list and categorise the year's complaints as follows:

1996 - 1997 [51]

Complaint particulars	Number
Complaints examined and dismissed under ss 18 & 20 of the Act	1

Minor complaints disposed of during the year	
Serious complaints disposed of during the year	
Complaints withdrawn	

1997 - 1998 [52]

Complaint particulars	Number
Complaints examined and dismissed under ss 18 & 20 of the Act	1
Minor complaints disposed of during the year	
Serious complaints disposed of during the year	
Complaints withdrawn	

The Commission's summary of the nature of the complaints finalised in the 1997- 1998 year may be of some interest [53]:

"The most common ground of complaint involved apprehension of bias, failure to give a fair hearing, or conduct which was said to display hostility to discourtesy towards the complainant. In the period under consideration a high proportion of complaints alleged that the judicial officer in question unfairly or improperly prevented the losing party to litigation from properly putting his or her case, or favoured the winning party.

Complaints of this nature are assessed by examining the detail of the record and, where appropriate, seeking an explanation from the judicial officer involved. In the case of many of these complaints, a sound recording of the proceedings is listened to, or a written transcript is examined.

Some complaints involved allegations of incompetence. In evaluating these complaints the members of the Commission considered the issues and evidence in the case in question, and took into account their own knowledge and judicial experience, where appropriate.

Other matters, in essence, amounted to a complaint that a judicial officer had made a wrong decision. Frequently, complaints of this kind are made in apparent substitution for appeals to a higher court. Standing alone, this is not a proper basis of complaint. However, where the complainant goes on to allege that not merely was the decision wrong, but also that it was such that no reasonable person could have made it, and for that reason it reveals some impropriety on the part of the judicial officer, then the Commission gives close consideration to the material that was before the judicial officer in order to see whether such a charge can be substantiated.

As in past years, a high proportion of complaints arose out of applications for apprehended violence orders. This is not surprising, as these proceedings usually involve emotional stress and frequently one party is not legally represented. Sometimes both parties are unrepresented. Judicial officers who deal with these applications are obliged to behave in an impartial manner, but this is sometimes construed as a failure to show appropriate concern for the situation of one of the parties. As a result, this form of litigation generates many complaints to the Commission."

There have been serious complaints instituted against six judicial officers, only one being a Judge of the Supreme Court. Of these one proceeded to report and the judicial officer involved resigned after the report and before the matter was brought before parliament. Three others have resigned before the report was completed. The matter in which the machinery was fully put into operation was that of Justice Vince Bruce of the Supreme Court. The complaint was of incapacity rather than misconduct. Justice Bruce had a serious backlog of undecided cases totalling 33 at one stage. Many of them had been reserved for more than 12 months. It appeared from the evidence in that case that, while the backlog was accumulating, the Judge was suffering from a depressive illness. One of the symptoms of this illness is the patient's unawareness of the state of depression, so that it was only quite recently that he had sought treatment. The evidence that he led was that the treatment had been successful, so that he was no longer subject to the depressive condition and

was therefore fit and not under any disability. Another psychiatrist, however, gave evidence that he did not accept that the disability had been resolved in that way, but was of the belief that the problem arose not simply from the depressive illness but from inbuilt habits of procrastination. The Conduct Division which heard the case was composed of Mr Justice Cole, then a Judge of the New South Wales Court of Appeal; Mr Justice Lloyd, a Judge of the New South Wales Land and Environment Court (a Court of the same status as the New South Wales Supreme Court); and the Hon Dennis Mahoney QC, a retired President of the New South Wales Court of Appeal. A report signed by all three members accepted that the established disability had not been cured and that there was therefore a case that the Judge might be dismissed by Parliament for incapacity[54]; however, a dissenting report prepared by Mr Mahoney QC, accepted the evidence that the disability had been cured and that there was therefore no incapacity by reference to which the Houses of Parliament might pass an address for the Judge's removal[55]. An interlocutory injunction was sought from the New South Wales Court of Appeal restraining the report being laid before Parliament but this relief was refused[56]. On the final hearing of the proceedings, the Court of Appeal did not accede to an argument that the opinion in s 28 and the report in s 29 had to be unanimous. Nor would they hold that the majority's finding of fact was without any basis[57]. The result in Parliament was as set out above. The Judge has since resigned.

7 Acting or Short Commission Judges

This is a vexed question[58]. Often Judges are needed on a temporary basis. This is sometimes necessitated by the absence of Judges on leave or by reason or illness. Sometimes it is necessitated by a bulge in the case load which a Court has to deal with, ie, there is some temporary increase of work which it can be foreseen will not necessitate the more expensive course of appointing additional permanent judicial officers. This is a situation perceived to occur more frequently by Governments than by Judges. The objection is plainly that the temporary Judge may have something to hope for from the Government, namely, permanent appointment in the case of the Acting Judge, renewal of the commission in the case of the short term Judge. The objection is less where the appointee is a retired Judge. Some jurisdictions do not use Acting Judges at all. In the NSW Supreme Court, there has been a custom extending over decades of the sparing use of Acting Judges, generally senior members of the Bar. Of recent years there has been extensive use of Acting Judges. I myself was an Acting Judge of the Court from July to November 1996, before my permanent appointment in March 1997. This extensive use was opposed by the Bar, and did not meet the approval of the Judges of the Court. In 1999, considerable use is being made of Acting Judges, but now all Acting Judges are retired judicial officers. However, in the District Court of NSW, there is current a disturbing practice. That Court is the principal criminal trial Court of the State (generally only murders are indicted in the Supreme Court), and has a very large civil jurisdiction including virtually all actions for damages for tort, and commercial actions to recover sums up to \$A750,000. The Court has about 65 permanent Judges. During 1999 it has 55 Acting Judges. Of these, only some 15 are retired judicial officers. The balance are legal practitioners, barristers or solicitors. What is worse, these Acting Judges are not full time. Their commissions are for a fixed term, but during that term they sit only from time to time, as called on. In the case of the practitioners, they practise for the balance of the time. There have been plenty of instances of other practitioners finding themselves appearing in Court before a person one day, and opposed to him or her in Court in a similar type of case the next day. No amount of protest has yet been able to deflect the Government from this course.

Conclusion

The principles of judicial independence are, in general terms, long established and well respected. They have received international formulation. They are, in general terms, observed in most jurisdictions. However, as with freedom, the price of judicial independence is eternal vigilance. The tensions that arise from time to time between government and judiciary are a natural and inevitable part of life. So far as novelty is concerned, probably the most important recent innovations have been in the area of fact finding where allegations of misconduct or incapacity arise. The NSW Judicial Commission is an interesting experiment in this regard. It has provided a useful mechanism for finding facts when necessary. It has also in fact provided a satisfactory filtering process for vexatious complaints. The jury is still out on whether or not its value in this regard outweighs its propensity to attract such complaints.

There is a price for the position of independence accorded to Judges. It is that they must adhere punctiliously to their oath to do right "without fear or favour, affection or ill will". This was recently re-emphasized thus by Spigelman CJ in the decision of *Bruce v Cole* itself[59]:

"In cases which engage the sense of compassion of a judge such as this, it is necessary to avoid the temptation to express a conclusion in terms of one of the recognised grounds for judicial review, whilst in truth making a decision based on the merits. In a democratic society such conduct transgresses the proper limits of judicial intervention. It will, if often repeated, undermine the basis for judicial independence and the fundamental role which judicial impartiality plays in the social stability of the nation and the maintenance of personal freedom of its citizens.

Where, as here, the case directly involves the independence of the judiciary, it is particularly important that this Court be, and be seen to be, punctilious in this regard."

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- 1 Browne-Wilkinson p 44
- 2 McGarvie (1991) p 6
- 3 King pp 3 - 4
- 4 Montesquieu Vol 1 pp 185 - 6

5 Prohibitions del Roy (1607) 12 Co Rep 63 at 64 - 5; 77 ER 1342 at 1343; and see Tanner pp 36 - 7
 6 that the King ought not be under any man, but under God and the law.
 7 12 & 13 Wm III c 2
 8 During good behaviour
 9 King p32; Roberts-Wray pp 485, 486-7; Mason p 22; McCawley v The King (1918) 26 CLR 9 at 58 - 9 per Isaacs & Rich JJ
 10 McLelland p 402
 11 Hamilton Paper LXXVIII Vol 2 p 291
 12 The continuing practical relevance of Hamilton's views is demonstrated by his reference to the power of the purse, which is always held by the Executive. Relations between the Executive and the Judiciary relating to the administration of the Courts is a continuing vital issue, but one too large to discuss here. Some aspects are dealt with in Justice Beaumont's paper presented at this Conference. In Australia, the Federal superior courts and the South Australian Supreme Court have control of their own administration, but in the other jurisdictions it remains in the hands of the Government: see McGarvie (1991) pp 21 - 32; King pp 51-8; Moloney, Church & Sallmann generally
 13 Stephen (1981) passim
 14 Art III.1
 15 Art II.4
 16 1 Cranch 137 (1803)
 17 Resolution 40/32
 18 As to its nascence, see Malcolm
 19 Similarly, in Samoa, the provisions of art 68(1) and (5) of the Constitution. There is only one House in Samoa, but a two-thirds majority is required for the address.
 20 Eg, Queensland: Constitution Act 1867 ss 15 - 17; South Australia: Constitution Act 1934 ss 34, 35; Tasmania: Supreme Court (Judges' Independence) Act 1857 s 1; Victoria: Constitution Act 1975 s 77; WA: Constitution Act 1889 ss 54, 55
 21 Kirby (1995) pp 190 - 204
 22 Macrae v A-G for NSW (1987) 9 NSWLR 268
 23 Quin v A-G (NSW) (1988) 16 ALD 550
 24 A-G for NSW v Quin (1990) 170 CLR 1
 25 Kirby (1995) pp 199-200
 26 Entrenched in the sense that an Act to alter the provisions requires not only to be passed by both houses of the legislature, but must receive majority approval at a referendum of the electors, before being assented to by the Governor: s 7B.
 27 NSWCA 12 June 1998 unreported pp 4 - 5
 28 Gleeson (1995) pp 124-5; Sirros v Moore [1975] QB 118; Moll v Butler (1985) 4 NSWLR 231; Yeldham v Rajski (1989) 18 NSWLR 48.
 29 Mackeigan v Hickman [1989] 2 SCR 796
 30 Knowles' Trial (1692) 12 How St Tr 1179
 31 [1989] 2 SCR 796 at 830
 32 [1985] 2 SCR 673
 33 [1986] 2 SCR 56
 34 Gleeson (1979) p 339
 35 Gibbs p 145
 36 Gleeson (1979) p 340; and see generally Mason pp 10 - 12
 37 See generally Behan Chs 23, 24. This removal (and Montague's) were under the Colonial Judges Leave Act 1782, which gave a right of appeal to the Privy Council. Willis in fact succeeded on an appeal on the ground of a denial of natural justice (Willis v Gipps (1846) 5 Moo PC 379; 13 ER 536), but never resumed office.
 38 Montague failed in his appeal to the Privy Council: Montague v The Lieutenant-Governor of Van Dieman's Land (1849) 5 Moo PC 489; 13 ER 773
 39 Kirby (1995) p 184; McPherson p 9
 40 Thomas pp 178 - 188; Campbell pp 70 - 2
 41 Thomas pp 127 - 130. That removal has been the subject of criticism: International Commission of Jurists.
 42 Judicial Commission of New South Wales Conduct Division (1998/3)
 43 Parliamentary Commission of Inquiry Act 1986 (Cth); Parliamentary (Judges) Commission of Inquiry Act 1988 (Qld). Two reports were made under the latter Act, the First Report relating to Mr Justice Vasta, The Second Report relating to Judge Eric Pratt of the Queensland District Court. Judge Pratt was exonerated.
 44 A modified version has been introduced in the Australian Capital Territory: Judicial Commissions Act 1994.
 45 The common law as to suspension is itself a vexed topic which has not been considered in this paper: see Rees v Crane [1994] 2 AC 173; McPherson pp 12 -14; and see generally Campbell.
 46 McGarvie (1991) pp 15-20; Trindade generally.
 47 Greiner v Independent Commission against Corruption (1992) 28 NSWLR 125.
 48 McLelland; see also Shetreet (1987); Thomas pp 209 - 213; McPherson pp 15- 16.
 49 McLelland p 402
 50 Thomas p 211
 51 Judicial Commission of New South Wales Annual Report 1996 - 1997 p 20
 52 Judicial Commission of New South Wales Annual Report 1997 - 1998 p 39
 53 Ibid pp 38 - 39
 54 Judicial Commission of New South Wales Conduct Division (1998/1)
 55 Judicial Commission of New South Wales Conduct Division (1998/2)
 56 Bruce v Cole NSWCA 26 May 1998 unreported.
 57 Bruce v Cole NSWCA 12 June 1998 unreported.
 58 Thomas pp 208 - 209
 59 Bruce v Cole NSWCA 12 June 1998 unreported p 38

The NSW Civil Procedure Bill 2004 And The Uniform Civil Procedure Rules - An Introduction

22ND AIJA ANNUAL CONFERENCE, 17-19 SEPTEMBER 2004 SYDNEY
PROPORTIONALITY – COST-EFFECTIVE JUSTICE

THE NSW CIVIL PROCEDURE BILL 2004 AND THE UNIFORM CIVIL PROCEDURE RULES

An Introduction

John P Hamilton

Mr Glanfield has already spoken of the inception and aims of the project.

1 SCHEMA

As with the Supreme Court Rules in 1970 (“the SCR”), the new Uniform Civil Procedure Rules (“the UCPR”) will be promulgated in a Schedule to a Bill, the Civil Procedure Bill 2004 (“the CPB”). The CPB contains some provisions moved from the Supreme Court Act 1970, the District Court Act 1973 and the Local Courts (Civil Claims) Act 1970. In fact, the Local Courts (Civil Claims) Act will be repealed and the constitutive provisions in it incorporated in the Local Courts Act 1982.

The sections moved from other Acts into the CPB are largely sections governing common procedural, as opposed to substantive, matters. They include matters of common concern to the Courts, such as case management regimes, costs and interest. In some cases statutory powers have been included to remove any doubt as to the powers of the lower courts, which have less ample inherent jurisdiction than the Supreme Court. The Bill has also gathered the provisions of miscellaneous legislation relating to litigation such as the Arbitration (Civil Actions) Act 1983, the Damages (Infants and Persons of Unsound Mind) Act 1929 and the Judgment Creditors’ Remedies Act 1901. The CPB incorporates a provision, as recommended by the Law Reform Commission, to restore the effect of the statutes of set-off, erroneously repealed by the Imperial Acts Application Act 1969. It also gives a statutory basis for the issue of Practice Notes and regulates the relationship between itself, the UCPR and the remaining balance of the present rules.

As to the UCPR, roughly Parts 1 – 50 of the SCR (and the corresponding parts of the District Court Rules (“the DCR”) and Local Court (Civil Claims) Rules) covering the conduct of civil proceedings have been moved into the UCPR. In the Local Court, the existing rules will be wholly repealed. Any balance relevant to other proceedings will be reenacted in the Local Court Rules. The balance of the rules of the higher Courts (including rules as to specialist lists) have for the moment been left where they are. The Court of Appeal rules at present remain in the SCR, but new Court of Appeal rules will be introduced into the UCPR in 2005. A further exercise will be carried out in 2005 to determine what other sections and rules should be moved to the new legislation.

2 POLICY OR PHILOSOPHY

The aim has been to provide a common set of rules, simplified where possible, but without radical changes in substance or in form. To this end:

1 In general changes of substance have been resisted.

2 There has been some modernisation of language and drafting style, but to the intent that existing bodies of interpretative or procedural law not be disturbed.

3 It has been attempted to guard against unnecessary sophistication in simple proceedings: small claims up to \$10,000 in Local Courts are left to simplified special rules as at present.

4 The order of the SCR and the DCR has essentially been maintained, working through a proceeding from beginning to end. This has been done to keep the rules both logical and familiar to users.

5 The main changes in organisation have been:

To embody the overriding purpose rule and general provisions on case management in the Bill to mark their importance and, similarly, to promote directions and case management rules to an early position in the UCPR. This will highlight the importance of the overriding requirement of just, quick and cheap disposal of proceedings.

To draw to the beginning of the UCPR preliminary matters relating to preparation and filing of documents, representation and parties.

3 CHANGES AND CONTINUITIES

Changes of substance include:

the appearance is retained to provide notice of address for service and to act, where appropriate, as submission to jurisdiction, but may be included in the defence, where there is one, rather than filed as a separate document;

the concepts of close of pleadings and setting down for trial have been abolished as otiose under the modern regime of case management;

the time during which originating process remains good for service (without extension by the Court) is to be six months (instead of 12 months) in the Supreme Court and the Local Court; in the District Court, where all defendants are to be served in NSW, it will be one month, otherwise six months.

Continuities:

in all three courts there are to be two forms only of originating process, ie, statement of claim and summons, as at present in the Supreme Court; even appeals to a Court in its civil jurisdiction (except for the Court of Appeal) are to be commenced by summons;

the rules as to pleadings are to be maintained;

so are the rules as to discovery and interrogatories;

the new harmonised rules as to subpoenas being adopted widely across Australia (which have been adopted by the Federal Court and the Supreme Court of NSW) are to be adopted;

the distinction between the giving and entry of judgment has been maintained but the method of entry of judgments and orders has been simplified.

4 FORMS

There will be a simplified set of common forms for use in all three Courts. This will mean that practitioners will have to keep only one set of forms in their computers and fill in blanks according to which Court the proceedings are in. The forms are designed for use in the CourtLink system which is in the course of introduction.

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Nuts And Bolts For Judicial Officers

JUDICIAL COMMISSION OF NSW

THE NEW PROCEDURE

NUTS AND BOLTS FOR JUDICIAL OFFICERS

The Hon Mr Justice Hamilton

Of the Equity Division of the Supreme Court, Chair of the Attorney General's Working Party on Civil Procedure

16 August 2005

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APPEALS

ABBREVIATIONS AND EXPRESSIONS

Court Acts Supreme Court Act 1970, District Court Act 1973, Local Courts Act 1982

CPA Civil Procedure Act 2005

DCA District Court Act 1973

DCR District Court Rules 1973

FCR Federal Court Rules 1979

LCA Local Courts Act 1982

LCCCA Local Courts (Civil Claims) Act 1970

LCCCR Local Courts (Civil Claims) Rules 1988

LCCPR Local Courts (Civil Procedure) Rules 2005

SCA Supreme Court Act 1970

SCR Supreme Court Rules 1970

UCPR Uniform Civil Procedure Rules 2005

APPLICATION OF NEW REGIME

The CPA and the UCPR are in force as of yesterday. They are now the procedural regime applicable to all civil proceedings in the Supreme, District and Local Courts and the Dust Diseases Tribunal. The only major exception is proceedings in the Small Claims Division of the Local Courts, where a much simplified procedure applies to claims under \$10,000: UCPR Schedule 1. Schedule 6 cl 5(1) of the CPA provides that the CPA and the UCPR apply to all proceedings already commenced as well as to proceedings commenced after the Act and Rules came into force. Any anomaly that this might create is ameliorated in two ways:

(1) Anything begun before the commencement of the new legislation under a provision of the old legislation may be completed under the old legislation: CPA Schedule 6 cl 10. Thus, discovery under an order already made or execution under a writ of execution already issued will be completed under the old regime.

(2) A court may dispense with the requirements of the UCPR (wholly or partly) in respect of pending proceedings and make consequential orders: Schedule 6 cl 6(2). This no doubt includes an order that the old rules apply, if this is appropriate.

SCHEME OF THIS PAPER

The content of this paper is governed by the fact that it is delivered in the first week of the new regime, as we all come to apply it on a daily basis to proceedings before us. Particularly bearing in mind the constraints of time, I do not propose to traverse the whole of the legislation. In this paper, I shall say a few things about the relations between the old and the new Rules. I shall then point out a few of the innovations of the CPA. But the bulk of the paper will be devoted to a progress through a set of proceedings, as they come before the courts, concentrating on the provisions which will be dealt with by judicial officers in court in their daily lives. In the course of this, I shall refer to relevant provisions of both the CPA and the UCPR.

A more comprehensive account is given in the paper by Jenny Atkinson and Stephen Olischlager, "An Introduction to Civil Procedure Act 2005 Uniform Civil Procedure Rules 2005" August 2005 available at:

http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_publications

Concerning the context in which the new regime has been introduced, see my short article "The New South Wales Uniform Civil Procedure Rules Gradualism or Revolution?" in the Judicial Officers' Bulletin, Vol 17 No 7, August 2005 and the paper by G C Lindsay SC,

"Dynamics of the Civil Procedure Regime" available at:

<http://www.thomson.com.au/NSWUCP/analysis.asp>

THE OLD AND THE NEW

Not all of the old legislation has been repealed. In the Local Courts, the LCCCA and the LCCCR have been totally repealed, but a few necessary provisions have been removed into the LCA and the LCCPR respectively. In the SCA and the DCA, constitutive and administrative provisions remain and will remain, but what can generally be characterised as procedural provisions, which have been removed to the CPA, have been repealed. The Court Acts will continue indefinitely in their present form. In the DCR, some rules remain. In the SCR, a larger number of rules remain. Some of these relate to criminal proceedings. More relate to the Court of Appeal and to specialist lists and jurisdictions. Criminal rules have no place in the UCPR. But the Working Party, in a second project, will in the next twelve months work to bring the remaining civil rules into the UCPR, except for such nationally uniform rules as the Corporations Rules and the Admiralty Rules. The Working Party will also attend to formulating any amendments thought to be necessary to the CPA and the UCPR as they settle down in practice. Any suggestions will be welcome and should be directed to Jenny Atkinson, who will continue to provide secretariat support to the Working Party and who has also been appointed as secretary to the Uniform Rules Committee constituted under the CPA: see s 8. Also, anyone who wishes to discuss any provisions with me is welcome to do so.

In general terms, where there is a conflict between the UCPR and any local rules, the UCPR will prevail: s 11. Some deliberately retained local rules will, however, prevail over the UCPR: r 1.7, Schedule 2.

The UCPR generally maintain the order of the old rules. There are two reasons for this. The first is that this order has a logic for users, in that it follows the course of an action. The second is the preservation of the familiar, to aid the transition. The main changes are the grouping of certain related subjects. For instance, in Part 7, Parties to proceedings, are pulled together rules relating to parties of particular types, eg, persons sued under business names. In Part 20, Resolution of proceedings without hearing, are gathered rules relating to various modes of the early resolution of proceedings without trial by the court, including mediation, statutory arbitration and reference to a referee.

The CPA is drawn so that the existing powers of the Supreme Court are not limited in any way, fully preserving its inherent jurisdiction. Correspondingly, it is intended that the jurisdiction of the other courts not be expanded, to prevent arguments arising from the application in those courts of rules appropriate to jurisdiction which they do not have, eg, an argument, when the probate rules are brought into the UCPR, that Local Courts have probate jurisdiction. See s 11.

Existing expressions and language have been retained so far as possible to preserve existing authority as to interpretation and preclude unnecessary arguments as to meaning. However, changes have been necessitated by changes in drafting style since the promulgation of the superseded legislation. In the Second Reading Speech, the Attorney General said (Hansard, Legislative Assembly, 6 April 2005, p15116):

"The bill and rules largely reflect existing provisions and continue to use phrases that have a settled legal meaning. Where there is change, much of it can be attributed to the fact that drafting styles have changed over the past 30 years. Parties should not be arguing that a rule has changed because a modern drafting style has been adopted if the substance of the rule remains the same. This approach is designed to minimise unnecessary litigation about the meaning of a clause or rule."

INNOVATIONS OF THE CPA

Definition of civil proceedings s 3

In s 3(1), "civil proceedings" are defined as any proceedings other than criminal proceedings. "Criminal proceedings" are defined as "proceedings against a person for an offence (whether summary or indictable)". They are specifically defined to include proceedings relating to committal and sentence and on appeal, which probably are criminal proceedings on any reckoning. They also include proceedings relating to bail, which may not be in their nature criminal, but civil, proceedings. This is particularly so where bail is applied for in separate proceedings, as in an application to the Supreme Court for bail, where bail has been refused in a lower court. This definition is intended to ensure that there are not any proceedings which do not fall within the definition of either civil proceedings or criminal proceedings for the purposes of the CPA. There are further exclusions from the UCPR of proceedings analogous or related to criminal proceedings in r 1.6(b).

Set-off s 21

The concept of set-off was either deliberately or accidentally abolished by the repeal without replacement of the 18th century Statutes of Set-off by the Imperial Acts Application Act 1969. The NSW Law Reform Commission has pointed to the deficiencies which this created and recommended replacement legislation in its Report on Set-off, Report No 94 (February 2000). This is now effected in s 21, which is, generally, in the terms recommended by the Law Reform Commission. Note the special transitional provision relating to s 21 in CPA Schedule 6 cl 6.

Reading affidavits in advance of hearing s 69

A common practice has grown up of judicial officers reading affidavits to prepare themselves ahead of hearing applications or, indeed, trials. This helps shorten hearings. To foreclose any suggestion that this practice is inappropriate, s 69 provides that proceedings are not to be challenged by reason of a judge or magistrate engaging in this practice.

Power to determine validity of settlements s 73

Traditionally, if there was a dispute as to whether an agreement to settle or compromise proceedings was binding, that question could not be determined in those proceedings, but only in separate proceedings brought for that purpose. There has been some suggestion of recent years that the validity of the compromise could be determined by the court on a motion brought in the proceedings alleged to have been settled, but the correctness of this has remained the subject of doubt: **Darling Downs Investments Pty Ltd v Ellwood** (1988) 18 FCR 510; **Phillips v Walsh** (1990) 20 NSWLR 206. That doubt is removed by the provisions of s 73.

Power to determine whether person is under legal incapacity for purpose of approving settlement s 76

The Damages (Infants and Persons of Unsound Mind) Act 1929 as to approval of settlements is repealed and is replaced in Part 6 Div 4 of the CPA. A novel provision is that the court to which application is made for approval of a settlement may make a finding that a person is a person under legal incapacity on the basis of evidence given in those proceedings, so that a settlement may be approved promptly, without the matter being referred to, say, the Supreme Court exercising protective jurisdiction for a finding to be made. Section 76 provides, however, that such a finding made by the approving court has effect only in the proceedings in which it is made.

Protection against self-incrimination in relation to interlocutory orders s 87

This deals with a problem that arises in relation to Mareva relief and Anton Piller orders. There is no doubt that courts with power to grant such relief have power to order that defendants disclose information concerning their disposition of property and its whereabouts. This, however, may breach their privilege against self-incrimination. A practice was developed whereby this situation was sought to be dealt with by a mechanism employing the certificate provisions contained in s 128 of the Evidence Act 1995 by Judges in the Equity Division of the Supreme Court: see the judgment of Young J (as his Honour then was) in **HPM Industries Pty Ltd v Graham** NSWSC 17 July 1996 unreported; my judgment in **National Australia Bank Ltd v Rusu** NSWSC 6 April 1998 unreported; and the judgment of Austin J in **Bax Global (Australia) Pty Ltd v Evans** (1999) 47 NSWLR 538. This procedure was, not surprisingly, held inappropriate by the Court of Appeal in **Ross v Internet Wines Pty Ltd** (2004) 60 NSWLR 436. This left a situation where attempts to use this jurisdiction to obtain information (often in situations of serious fraud) could be met without redress by a claim of privilege.

CPA s 87 attempts to remedy this situation by the creation of a certificate process parallel to s 128 of the Evidence Act 1995 for use in these circumstances.

Fresh trial ss 88 and 89

Section 88 addresses the situation where a judicial officer through death, resignation or incapacity is unable to continue a trial or give judgment in proceedings, which that judicial officer has commenced to hear. Sometimes this has occurred in circumstances where evidence has been taken over a period of months. Previously, if the parties agreed, the new trial judge could advert to the evidence already taken. But one party could, by disagreement, create the necessity to take all the evidence afresh. Section 88 provides that, in the circumstances mentioned, the head of jurisdiction may appoint a new trial judge or magistrate. Both where this occurs, and also where an appellate court has made an order for a new trial generally and where a judicial officer has discharged himself or herself from a trial without having given judgment, the court may, under s 89, order which evidence formerly taken may be used without need for the recall of witnesses and which of the witnesses are to be recalled for examination or cross examination.

THE COURSE OF AN ACTION: CASE MANAGEMENT

In turning to the course of an action under the new regime, I shall deal first with the provisions relating to case management. These must be viewed against the rise of case management in the courts over the last 30 years. This has occurred largely without major amendment to legislation or rules. What amendments there have been have been piecemeal and fragmentary. Yet virtually all civil proceedings in all courts are now case managed to some degree and in some form.

Because of their importance, provisions relating to case management are now elevated to a leading position in the rules: Part 2. However, the governing provisions relating to case management are now embodied, not in the UCPR, but in the CPA. This is both to mark their central importance in modern procedure and to ensure that no argument can be raised that a case management procedure or sanction is beyond rule making power. The pinnacle provision is the overriding purpose provision of s 56, previously contained in SCR Part 1 r 3. I must admit that I was something of a sceptic (although not an opponent) when Part 1 r 3 was introduced in 2000, avowedly as a culture changing measure. I have since become a devotee. I have found the ability to refer to the rule in court very useful in dealing with recalcitrant parties. I have also found it a useful way of reminding practitioners of their duties in this regard, without the appearance of personal criticism of one side's representatives. I should be interested in the experience of other judicial officers in relation to this rule.

CPA s 56 retains the NSW "just, quick and cheap" formula: cf UK Civil Procedure Rules 1998 r 1.1(1) and Queensland Uniform Civil Procedure Rules 1999 r 5(1). CPA s 56 leads Div 1, Guiding principles, in Part 6, Case management and interlocutory matters. The following sections are s 57, Objects of case management, s 58, Court to follow dictates of justice, s 59, Elimination of delay and s 60, Proportionality of costs. Sections 57 and 58 are congruent with "just", s 59 with "quick" and s 60 with "cheap". These provisions are largely new (although s 59 echoes WA Supreme Court Rules Order 1 r 4A). It is to be noted that s 57 and s 58(1) and (2)(a) are mandatory, whereas s 58(2)(b) is discretionary. The latter is to avoid too long a checklist of mandatory matters, which may encourage applications for review of discretionary decisions based on **House v The King** (1936) 55 CLR 499.

Section 58 attempts to deal with a problem which is perceived to arise from the decision of the High Court in **The State of Queensland v J L Holdings Pty Ltd** (1997) 189 CLR 146. It has been argued to be the effect of the majority judgment in that case that the dictates of justice (which undoubtedly control and will continue to control the situation: CPA s 58(1)) are limited to the dictates of justice only as between the parties to the proceedings in which the application is made. This section validates adversion to wider considerations. It will be interesting to see how the section works in practice.

Division 2 of Part 6 deals with the powers of the court to give directions. Sections 61 to 63 largely contain provisions gathered from the Court Acts and superseded rules. They do not differ largely from their predecessors. For instance, in s 62, the only addition to the provisions of SCR Part 34 r 6AA is the power to make a direction limiting the overall time that may be taken by the hearing: s 62(3)(g). This would facilitate the introduction of the "stop watch" trial, to any extent that anyone feels like giving it a go. Even without that, the rule may operate as a threat to those who are otherwise unduly protracting a trial (which I have found to be a use for the limitation of cross examination rule, which already exists). Section 61(3) gives statutory authority for draconian sanctions for disobedience of directions.

Division 3, Other powers of court, provides for the powers of amendment, adjournment and stay. The power to amend is now statutory: CPA s 64. Section 65 grapples with the problem of amendment of originating process after expiry of a limitation period. These provisions have been moved from the rules because of doubts as to the sufficiency of rule making power, especially bearing in mind the effect of the provision in s 65 on the operation of the Limitation Act 1969: see **Air Link Pty Ltd v Paterson (No 2)** (2003) 58 NSWLR 388 (currently on appeal to the High Court). Any further comments on s 65 would be particularly welcome, as it will be reviewed during the ongoing Working Party process.

It is to be noted that s 67, relating to stays, does not include a power to stay indefinitely, but only permanently or to a specified day. This is to avoid proceedings, which are not ongoing but have not been formally terminated, from falling into a "black hole". The intention is that, if proceedings are to be stayed till, say, the provision of security for costs, the period estimated to be necessary should be ascertained and the proceedings stood over for the relevant period. They will then be back in court. A further finite stay can be applied for, if necessary. If it is plain that security will not be given, the proceedings can be dismissed. Earlier provision of the security can be dealt with by a liberty to restore at an earlier time. The Supreme Court, because it is not deprived of any jurisdiction, will retain an inherent power to stay for an indefinite time. But it is hoped that Supreme Court Judges will, except in a very exceptional case, proceed under the statutory power in the manner outlined above.

PREPARING AND FILING DOCUMENTS

Not a great deal need be said concerning this: see Part 4. In Local Courts, commercial agents, real estate agents, strata managing agents and on-site residential property managers may sign a limited number of documents: see r 4.4(3). Defences and cross claims must now be in separate documents, to facilitate electronic handling: r 4.8. Part 3 deals with electronic case management and should be read in conjunction with the Electronic Transactions Act 2000.

PRELIMINARY DISCOVERY

This is provided for in Part 5. It generally follows the form of FCR Order 15A rather than SCR Part 3 or DCR Part 4. This is because the FCR are wider. What is available now that was not available earlier is discovery from a prospective defendant, not only as to the identity of the defendant, but as to whether or not a cause of action exists: r 5.3. Also, the Part extends to third party discovery: r 5.4. The basic rule is now also wider than the FCR, in that it extends to the whereabouts, as well as the identity, of the prospective defendant: r 5.2.

COMMENCING PROCEEDINGS

There are now only two forms of originating process, by which all proceedings under the UCPR must be commenced. These are the statement of claim and the summons: r 6.2(1). The separate forms of ordinary statement of claim and statement of liquidated claim in the District Court and Local Courts are abolished. Even appeals to the court are now to be commenced by summons, praying for the setting aside of the order or decision appealed from and the making of the order sought in lieu. Anyone to whom this at first blush seems strange needs to be reminded that this system has worked in the Supreme Court for 30 years without difficulty.

There is assistance in rr 6.3 and 6.4 as to when a statement of claim and when a summons is appropriate. In general terms, a statement of claim is appropriate where there are contested issues of fact and a summons where there are not. However, some proceedings, where the issues are comparatively simple, are always tried on summons, even though there is factual contest, eg, family provision proceedings.

Selection of the wrong originating process is never fatal. Rules 6.5 and 6.6 govern the situation where the wrong originating process is chosen. In the Equity Division of the Supreme Court, it is routine for proceedings to be commenced by summons to deal with urgent aspects and for the proceedings then to be ordered to continue on pleadings: r 6.6(2). In general terms, no step may be taken in proceedings before the filing of originating process, but the practice of the Equity Division in relation to ex parte applications in urgent matters is continued: rr 6.1(2)(c) and 25.2.

Generally an originating process need not claim costs. But it must claim exemplary or aggravated damages and an order for interest up to judgment, when these are sought: r 6.12. An amount for

unliquidated damages must not be claimed in a pleading. In the District Court and the Local Courts the upper limit of damages will be determined by their jurisdictional limits. There is an exception in relation to claims for damage to motor vehicles and other property. See r 14.13.

The formerly available summons without a return day had already been abolished in the Supreme Court. All summonses under the UCPR must contain a return day. This is to avoid a "black hole" and also to ensure, in these days of case management, that summons cases are brought promptly under case management.

APPEARANCE

The appearance is retained and extended to all courts, because it is necessary in summons matters and operates as acknowledgement of service and submission to jurisdiction, as well as recording a defendant's address for service. However, to save hundreds of thousands of pieces of paper annually, an appearance is taken to have been entered upon the filing of a defence: r 6.9(2). Default judgment may not now be entered in the Supreme Court for want of an appearance, but only for want of a defence: r 16.2(1).

The submitting appearance is retained and extended to all courts. This facilitates an early indication that a defendant does not wish to contest proceedings except to the extent that costs are claimed against that defendant: r 6.11.

PARTIES

These are dealt with in Parts 6 and 7. Divisions 5 to 7 of Part 6 carry over from the SCR the rules as to joinder of causes of action and joinder and removal of parties. Part 7 gathers together (in many cases from a later place in the former rules) rules relating to particular types of parties, eg, corporations, legal representatives of estates, persons under legal incapacity, business names and relators.

A natural person may carry on proceedings in any court by a solicitor or in person: r 7.1(1). A litigant in person may not issue a subpoena except by leave of the court: r 7.3. As to corporations, different provisions are made in different courts. A Corporations Act company may carry on proceedings in any court by a solicitor or by a director. In the Supreme Court, in proceedings commenced by a director, the director must also be a plaintiff. In a Local Court, proceedings by a company may be commenced by a duly authorised officer or employee. Certain ancillary proceedings may be commenced in a Local Court by a commercial agent or sub-agent, a real estate agent, strata managing agent or on-site residential property manager. See generally r 7.1.

CROSS CLAIMS

Some introductory remarks are needed. CPA s 22 corresponds with the former SCA s 78. All claims by a defendant may be and are to be made by cross claim. Formerly, the expression "cross claim" was used to denote different things. Sometimes it denoted the claim made, as defined in the section. Sometimes it denoted the piece of paper by which the claim was made. And, in the latter case, it denoted indifferently two types of piece of paper, namely, a cross claim in pleaded form, corresponding with a statement of claim, and a cross claim not in pleaded form, corresponding with a summons: r 9.1. An attempt has been made to remove this ambiguity by using "cross claim" to refer only to the claim and describing the pieces of paper respectively as a statement of cross claim and a cross summons. It has already been noted that a cross claim may not now be included in the same document as a defence: r 4.8.

A consequence is that the procedure by third party notice provided for in DCR Part 21 and LCCCR Part 19 is abolished. All claims for contribution and indemnity in all courts must now be made by way of cross claim: see s 22 and r 9.1.

SERVICE

There is little difference from the present regime. Parts 10 and 11 of the UCPR deal with the subject matter. Rule 10.1 requires service of all documents filed on all active parties. An "active party" is defined in the Dictionary as a party who has an address for service other than a party against whom no further claim in the proceedings subsists. This rule imposes a general obligation, so that a requirement does not have to be made elsewhere in the rules for service of particular documents (cf

the provisions as to whose motion an order may be made on and the power to impose terms and conditions on any order: see CPA s 86). Rule 10.2 makes a general requirement of service in respect of affidavits, which, mostly, are now not to be filed at the time of service: r 35.9. Service is generally the responsibility of the party filing, but a Local Court *may* serve an originating process and *must* serve a defence: r 10.1(2).

Service of originating process must be personal in the Supreme Court and the District Court. In a Local Court, originating process may be served personally; it may be left, addressed to the defendant, at the defendant's residential or business address with a person apparently over the age of 16 years; or it may be served by post by the court: r 10.20(2).

A subpoena for production in the District Court or the Local Court may be served in any of the manners just recorded for the service of Local Court originating process: r 10.20(4). This is a relaxation of the nationally uniform subpoena rules, which are contained in Part 33. But this system has worked successfully in the District Court and Local Courts for many years and the insistence on personal service of documentary subpoenas was thought to be too onerous. However, personal service of subpoenas to give evidence is required in all courts: r 33.5.

The regime will continue under which Supreme Court process may be served outside New South Wales but in Australia under the rules as well as under the Service and Execution of Process Act 1992 (Cth): r 10.3. Part 11 deals with service of Supreme Court process outside Australia.

DISCONTINUANCE, DISMISSAL FOR WANT OF PROGRESS AND SUMMARY DISPOSAL OF PROCEEDINGS

The first two subjects are dealt with in Part 12 of the UCPR. Discontinuance is by consent or leave, except in respect of parties who have not been served: rr 12.1 and 12.2. As to proceedings in which the claim or the defence is conducted with lack of due despatch, the court has a general power to dismiss the claim or to strike out the defence: r 12.7. Additionally, the differing regimes, whereby a registrar may dismiss proceedings that are dormant, are carried over in slightly different forms in the Supreme Court and the lower courts. The differences are that, in the Supreme Court, the period of dormancy is six months and, in the other courts, nine months. In the Supreme Court, the registrar must give notice of the intention to dismiss, but in the other courts need not do so. See rr 12.8 and 12.9.

Part 13 of the SCR as to summary disposal is carried virtually without change into Part 13 of the UCPR, with the intention that it apply in all courts.

PLEADINGS AND PARTICULARS

The pleading rules have been carried over from superseded rules into Part 14 of the UCPR with little change. The system is familiar and appears to work satisfactorily in practice.

Verification of pleadings is generally required in the Supreme Court and the District Court, except in proceedings for defamation, malicious prosecution, false imprisonment, trespass to the person, or death or personal injury: rr 14.22 and 14.23. It was decided not to require verification in Local Courts, as an unnecessary complication and expense. One change that has been made is that the concept of close of pleadings contained in SCR Part 15 r 22 has been abolished, as have also provisions for setting down for trial. These related provisions under older systems arose from the fact that cases were not managed, and provided for the creation of a list out of which cases were in turn administratively fixed for trial. They are otiose, now that cases are fixed for hearing through the process of case management. The pleading rules are (and always were) adequate to define when pleadings were complete, by the provisions as to joinder of issue: UCPR r14.27.

The provision from SCR Part 15 r 26 as to striking out pleadings which are inadequate, embarrassing or an abuse of process is carried into UCPR r 14.28, to be used along with the summary disposal provisions of Part 13.

As to particulars, the general requirement is in r 15.1 and other rules are carried over from the SCR: see rr 15.3 – 15.10. Scott Schedules are specifically provided for in r 15.2, modelled on previous rules in the DCR and LCCCR. Although always used in the Supreme Court, Scott Schedules were not previously provided for in the SCR. A detailed regime for particulars in personal injury and death cases has been carried over into Part 15 Div 2 from the DCR, since it is in the District Court that most

of such litigation is now conducted.

DEFAULT JUDGMENT, ADMISSIONS AND AMENDMENT

The pre-existing regimes as to the administrative entry of default judgment have essentially been carried over from pre-existing rules into Part 16 of the UCPR. In the Supreme Court, as already noted, default of defence remains a relevant event of default, but default of appearance does not. Pre-existing regimes as to Admissions are essentially carried over into Part 17 of the UCPR.

It has already been noted that the power to amend is now statutory: CPA s 64. The provisions of the UCPR relating to amendment are contained in Part 19. There was a view that there should no longer be any amendment without court order, in accordance with modern case management principles. However, the possibility of one amendment without leave has been retained because of its frequent use in Local Courts to correct parties or other elementary errors. If these had to be dealt with in court, it would involve an unnecessary waste of time. See rr 19.1 and 19.2.

MOTIONS

Under the UCPR, all interlocutory or other applications to the court are to be made by motion unless the rules provide otherwise: r 18.1. In fact, there are few provisions to the contrary. The policy is to have only one method of initiating an application. This even applies to such administrative matters as the application for a writ of execution, which formerly, in the Supreme Court for instance, was initiated by producing a form of the writ to the registrar and filing a copy of the writ: SCR Part 34 r 7. The reason for requiring even administrative applications such as this to be initiated by motion is the requirements of the CourtLink computer system, which is to be introduced. It is difficult for a computer system to recognise varied ways of initiating steps in the proceedings, even where that recognition was simple and easy, when pieces of paper were presented to a human clerk. The complication produced by the change is that there will be many more instances in which notices of motion will be filed and, particularly, many more instances of applications initiated by notice of motion, which will not be dealt with in court, but dealt with administratively in the office, eg, an application for a writ of execution. The UCPR therefore contain a requirement that a notice of motion must state that the motion is to be dealt with in the absence of the public, if it is a motion of that kind: r 18.3(3).

As to nomenclature, the requirement is that, if a person making the application or against whom the application is made is already a party to the proceedings, the person must be identified as that party (eg, first plaintiff or second defendant). Only a moving party who is not a party to the proceedings (eg, a person seeking to be made a party or a liquidator or receiver) is to be described as an applicant and only a person who is to be served with the motion who is not already a party to the proceedings is to be described as a respondent: r 18.3(1).

As with originating process, costs need not be claimed in a notice of motion: r 18.3(2). On the hearing of a notice of motion, any party may make any application in relation to the proceedings: r 18.6. The court has a general discretion as to the order and conduct of the hearing of an application, as at a trial: r 18.9.

Among the limited instances in which applications may be made without filing and serving a notice of motion are cases where this would cause undue delay or prejudice, where orders are made by consent, or where the motion may be made without prior filing or service under the UCPR or the practice of the court: r 18.2(2). An example of the last mentioned is an application to arrest a person for disobedience of a subpoena: see **Schnabel v Lui** (2002) 56 NSWLR 119. Another example is an ex parte application for urgent relief under r 25.2.

RESOLUTION OF PROCEEDINGS WITHOUT HEARING

Gathered in Part 20, Resolution of proceedings without hearing, are rules relating to such matters as mediation (Div 1), statutory arbitration (Div 2), referees (Div 3) and offers of compromise (Div 4).

The power of all courts to order mediation is now contained in CPA s 26. A number of procedural matters relating to mediation have now been moved from the Court Acts into the Rules. Mediations can continue to be held outside the court structure and this will often occur when parties desire to engage a particular private mediator: s 34. Provisions that are new to the CPA include a specific provision that evidence may be called from the mediator and any other person engaged in the mediation in support of an application to give effect to an agreement arising out of a mediation: ss 29

(2) and 31(b). Furthermore, a mediator to whom proceedings are referred by the court has in the exercise of his or her functions as a mediator the same protection and immunity as a judicial officer in the exercise of his or her judicial functions: s 33.

So far as arbitration is concerned, the Arbitration (Civil Actions) Act 1983 has been repealed and corresponding provisions incorporated in Part 5 of the CPA. As already noted, the relevant rules are found in UCPR Part 20 Div 2. The provisions as to rehearing have been simplified. The provisions of SCR Part 72 as to Referees have been moved into Part 20 Div 3, to the intent that they apply in all courts. Similarly, the rules for all courts as to Offers of compromise have been removed from their rules and are now contained in Part 20 Div 4.

DISCOVERY AND INTERROGATORIES

Discovery is provided for in UCPR Part 21. In accordance with case management principles, discovery must be obtained by order of the court; there is no provision allowing discovery to be required by notice. The form of order for discovery which is provided for is an order for discovery of documents within a class or classes specified in the order or of one or more samples of documents within such a class: r 21.2. There is no provision for the making of an order for general discovery. Although an order for general discovery was possible under the SCR, the practice had changed to such an extent that such orders were rarely, if ever, made. I have not made an order for general discovery in more than eight years as a Judge of the Equity Division. In view of the terms of r 21.2(3), I do not think an order for general discovery could be made under r 21.2 by specifying as a class of documents all documents relevant to all issues in dispute in the proceedings. Whilst the Supreme Court retains the power to make such an order in its inherent jurisdiction (CPA s 5(1)), I do not think this should or will be done.

Interrogatories, which are dealt with in UCPR Part 22, are now also to be administered only by order specifying the particular interrogatories: r 22.1. Interrogatories can still be an indispensable tool, but have already come to be only sparingly used. In any case, the court must not order interrogatories unless it is satisfied that the order is necessary at the time it is made: r 22.14. In personal injuries cases, discovery and interrogatories may be ordered only if the court finds that there are "special reasons" for doing so: rr 21.8, 22.13. Whilst Local Courts now have power to order discovery and interrogatories, bearing in mind the size of the claims they may now entertain, it is hoped that in the interests of proportionality of costs, such orders will be rarely made.

MISCELLANEOUS INTERLOCUTORY PROCEDURES

From this point on there is less change in both the provisions and the ordering of the rules in the UCPR as against the old rules. In Parts 23 to 27 of the UCPR, various interlocutory procedures are dealt with, mostly by translation of existing rules. Attention is drawn to the fact that in Part 24, relating to evidence on commission, the rules have been modernised by omitting reference to the taking of depositions, thus discarding a hangover from centuries of the recording of depositions in courts of petty sessions. Rule 24.12 refers instead to the recording in writing of the evidence. Rule 24.14 requires the person who prepares a transcript of the evidence to certify that it is a correct transcript. Rule 25.2 carries over the practice in the Equity Division of the Supreme Court as to ex parte applications.

SEPARATE DECISION OF QUESTIONS, TRIALS AND ASSESSMENTS

Again, Parts 28 and 29 are largely a carrying over of preexisting rules as to Separate decision of questions and consolidation and as to Trials respectively. Part 30 provides for assessment of damages and value of goods. It is to be noted that a new nomenclature relating to trials, hearings and interlocutory hearings is adopted. In CPA s 3 a "trial" is defined as "any hearing that is not an interlocutory hearing" and "hearing" is defined as including both trial and interlocutory hearing.

EVIDENCE

UCPR Part 31 generally carries over existing rules in all three courts in relation to evidence. One subject matter of debate was whether the general prescription as to the mode of evidence at trials in proceedings which have been pleaded should continue to be for oral evidence, as prescribed in SCR Part 36 r 2. This is against a background that the evidence in chief of witnesses at trials is now so frequently given in written form, by affidavit or witness statement, that, in more than eight years as a Judge in the Equity Division of the Supreme Court, I have never heard a trial at which the evidence in

chief of witnesses was given orally. The time is clearly approaching when the rules should reflect this reality. However, for lack of time to survey the situation in all jurisdictions, it was determined to repeat the present rule, whereby oral examination is prescribed as the usual mode, with a power, almost always exercised, to order otherwise: r 31.1. In all other hearings, final and interlocutory, evidence in chief should be given in writing.

The existing rules carried over also include rules as to expert witnesses. The expert witness code of conduct is contained in UCPR Schedule 7. A notable innovation in relation to the giving of expert evidence is contained in r 31.26, which provides for the calling of more than one expert witness at the same time. This process is known as "hot tubbing". It is generally based on FCR Order 31A r 3. The process has been extensively and successfully used in the Land and Environment Court. The new rule is wider than the Federal Court rule, in that it provides for the experts to ask each other questions.

Perhaps the matter as to which there was greatest controversy in the Working Party was as to the form of the rule governing, in the case of expert witnesses, whose duty it was to procure the attendance of an expert required for cross examination. The District Court was adamant that it should retain its existing rule, imposing this responsibility on the party seeking cross examination, although, *ex hypothesi*, the expert involved was not that party's witness and was not retained by it. The application of this rule in all courts was advocated. However, the almost universal view of Judges of the Supreme Court was that the traditional system of the person calling the expert witness being responsible for the attendance of that witness should be retained in the Supreme Court: this has now been embodied in r 31.18A, applying to the Supreme Court. The Local Court has, understandably, adhered to the District Court regime, contained in r 31.19.

SUBPOENAS AND NOTICES TO PRODUCE

UCPR Part 33 and the approved form of subpoena conform to the national model adopted in the Supreme Court as a result of the work of the Chief Justices' Rules Harmonisation Committee. Whilst Part 33 itself conforms with this model, exceptions required by the exigencies of local practice are, as has already been noted, incorporated in r 7.3, requiring a litigant in person to have leave to issue a subpoena, and r 10.20(4), as to the relaxed service requirement for subpoenas to produce documents in the District Court and the Local Courts.

The practice which had developed, in the course of the evolution of case management, to permit the production of documents for use in proceedings to be compelled, with the leave of the court, otherwise than at hearings, is maintained under these rules: r 33.3(6). This is contrary to the attitude in the old practice that it was an abuse of process to require a document to be produced otherwise than for the purposes of a hearing that was actually pending: **Botany Bay Instrumentation & Control Pty Ltd v Stewart** [1984] 3 NSWLR 98.

Part 34 maintains the provision of SCR Part 36 r 16 permitting a party to be required by notice to produce documents without the necessity for a subpoena. Again, the production can be required, with the leave of the court, at any time: r 34.1(b).

AFFIDAVITS

These are dealt with in UCPR Part 35. One of the main changes effected in relation to affidavits is as to filing. Previously all affidavits were filed. As we have progressed from oral to written examination in chief in civil proceedings, this has meant an enormous proliferation of paper for storage. Formerly, the evidence in chief in a trial did not even go on to paper until taken down and incorporated in the transcript. In relation to a matter settled before trial, the paper did not even come into existence. The new regime contained in r 35.9 is that, generally, affidavits are not to be filed, except where their filing is necessary to permit applications to be dealt with administratively. Examples of these are applications for the signing of default judgment (r 16.3) and applications for the issue of writs of execution (r 39.3). Practice Notes will govern the filing of affidavits for use at hearings before or, in court, at the trial and with other cases in which affidavits must be filed: see, eg, Practice Note SC Gen 4. Prior service will, of course, be necessary in all cases: see rr 10.1 and 10.2.

ORDERS

The making and entry of orders are dealt with in the UCPR in Divs 1 - 3 of Part 36. The setting aside and variation of judgments and orders are dealt with in Div 4.

The distinction has been maintained between the giving or making and the entry of a judgment or order. This is despite the fact that the judgments and orders of virtually all courts are already recorded in computer systems. It is anticipated that, when the CourtLink system comes into operation, it is in CourtLink that all judgments and orders will be recorded and, what is more, the computer record in CourtLink will be the court's official record of those orders, which will prevail in the case of any conflict between computer and paper records. It may be thought that the opportunity should have been taken to elide the difference between the making and entry of orders. However, this would be a very dangerous and complex task, in view of the extensive jurisprudence concerning orders, entry and finality. It has been thought safer to maintain the distinction, but to provide that entry takes place when the order is recorded in a court's computerised court record system: r 36.11(2). For the purpose of those systems operating in this way, it has been necessary to provide that all judgments be recorded and entered: r 36.11(1). This will probably mean that there will be many fewer unentered orders and that the time gap between order and entry will be reduced. This will have consequences as to the readiness with which judgments and orders may be set aside. Where there are reasons why an order should not be regarded as entered, although it is desirable to record it, the court will have power to direct that the order, although recorded, should be taken not to have been entered until the further order of the court: r 36.11(2).

Some people contend that there never was provision for entry of judgment in the District Court or the Local Courts. Certainly there was not a system for the settlement of minutes of orders by a registrar, such as prevailed in the Supreme Court. However, the process of formally recording judgments and orders in the records of the courts acted as entry for the purpose of the rules as to the finality of judgments: **Bailey v Marinoff** (1971) 125 CLR 529.

Now the same rule as to entry applies across all three courts. The recording in the present computer systems will stand as the entered judgment or order until CourtLink is introduced. If a paper record of the judgment is required, a sealed copy may be obtained from the registrar: r 36.12. It is such a sealed copy which must, for instance, be served with a warning note before the enforcement of an injunction by committal or sequestration: r 40.7.

Note the provisions of CPA s 86 as to whose motion an order may be made on and the power to impose terms and conditions on any order. These general provisions obviate the need to advert to these matters in specific provisions of the CPA and the UCPR.

There is also a general provision as to the effect of orders of dismissal. This, in general terms, carries over the provisions of SCR Part 40 r 8, which had the effect that a dismissal did not bar fresh proceedings, except after a hearing on the merits: **Farella v Otvosi** [2005] NSWSC 678. This effect is now specifically enshrined in CPA s 91.

As to the setting aside of judgments and orders, it has been thought safer for the present time simply to bring across all the provisions applying in the different jurisdictions. In the Supreme Court, there were already various overlapping provisions relating to the setting aside of judgments. This situation is maintained for the present. What is more convenient than the old provisions is that, in respect of all courts, these are all gathered together in Div 4 of Part 36: rr 36.15 – 36.18.

COSTS AND INTEREST

Costs are dealt with in CPA Part 7 Div 2 and UCPR Part 42. There is no great change in the new regime. Essentially, preexisting limitations as to the ordering of costs against non-parties are carried over in r 42.3. The CPA adopts the Supreme Court regime, whereby there is no liability for costs without specific order and costs are always in the discretion of the court: CPA s 98. This means that the correct order where each party is to bear its own costs is, No order as to costs.

There is some simplification of the circumstances in which costs can be ordered against legal practitioners: see CPA s 99. Those circumstances are that costs, first, have been incurred by the serious neglect, serious incompetence or serious misconduct of a practitioner, or, secondly, have been incurred improperly, or without reasonable cause, in circumstances for which a practitioner is responsible. Remember that costs can also be ordered against a practitioner under the provisions of s 198M of the Legal Profession Act 1987 ("the LPA 1987"), which is soon to be replaced by s 348 of the Legal Profession Act 2004 ("the LPA 2004").

An attempt has been made to rationalise a confusion in terminology, which has arisen in respect of

costs. Prior to 1987 the two principal bases for the quantification of costs were called the party and party basis and the (more ample) solicitor and client basis. After the enactment of the LPA 1987, the more ample basis came to be called the indemnity basis. Furthermore, "party/party" and "solicitor/client" came to have a new meaning under that legislation as referring respectively to assessments of costs under court orders and assessments of costs between solicitor and client. These expressions referred (and refer) to the parties between whom the assessment took place, rather than to the basis of quantification. Courts, however, go on making reference to "party and party" costs as the lower basis of quantification. An attempt has been made to remove this anomaly by defining the lower basis of quantification as the "ordinary basis", so that "party/party" will be left to refer only to the identification of persons between whom an assessment under the LPA 1987 or the LPA 2004 is taking place. See CPA s 3(1). This is very logical but, in the face of the ingrained conservatism of lawyers in the use of language, I do not know how it will fare.

Specific provision has been made for the making of "Smyth orders". These are named after that very good Judge of the District Court, Judge John Smyth QC. They have over the years been made from time to time by other judges and magistrates. They are orders that a party's legal representative serve on the party a notice of the best and worst outcomes (particularly of a monetary nature) which a party may gain or suffer if the proceedings are contested to finality. They are, of course, a tool to facilitate settlement in face of intransigence.

The pre-existing regimes as to pre and post judgment interest have essentially been carried over from the Court Acts into CPA ss 100 and 101.

ENFORCEMENT

The provisions as to the enforcement of judgments have been gathered together and rationalised: see CPA Part 8 and UCPR Parts 39 and 40. Reference to the various forms of enforcement has been gathered together and placed in order. The Judgment Creditors' Remedies Act 1901 has been repealed and the necessary provisions transferred to the CPA. The courts are given a general power to give directions with respect to the enforcement of their judgments and orders: CPA s 135. There is specific provision for the appropriation of payments towards a judgment debt (first to interest and then to principal), which may not be varied except by court order: CPA s 136. I do not intend to deal fully with these matters, which are not the daily fare of judges and magistrates.

TRANSFERS BETWEEN COURTS

Flexible provisions have been made for the transfer of proceedings up and down between the three principal levels of courts in CPA Part 9 and UCPR Part 44. Proceedings may now be transferred by the Supreme Court direct to the Local Court: CPA s 146. If a higher court chooses to transfer proceedings to a lower court, then the lower court has and may exercise all of the jurisdiction of the higher court in relation to those proceedings: CPA s 149.

APPEALS

Reviews and appeals within a court are dealt with in UCPR Part 45. Appeals to a court are dealt with in UCPR Part 46 (this does not include appeals to the Court of Appeal, whose rules are not yet within the UCPR, but remain for the moment in the SCR). I have already observed that appeals to the court are in all cases to be commenced by summons (and cross appeals by cross summons), which may seem strange at first blush, but has functioned in the Supreme Court for 30 years without a problem.

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Developments In Civil Procedure

NEW SOUTH WALES YOUNG LAWYERS ANNUAL LITIGATION ONE DAY SEMINAR 2006 11 MARCH 2006

DEVELOPMENTS IN CIVIL PROCEDURE

The Honourable Mr Justice Hamilton

THE NEW LEGISLATION

As this is said to be an annual event, I suppose that all the developments of the last twelve months are caught in its ambit. These are indeed major. During the twelve months, the Civil Procedure Act 2005 (CPA) was enacted which brought into force the Uniform Civil Procedure Rules 2005 (UCPR). This effected the greatest revolution in procedure in New South Wales since the 1970s. The CPA draws together procedural provisions taken from the Supreme Court Act 1970, the District Court Act 1973 and the Local Courts (Civil Claims) Act 1970 and also from various procedural statutes, some of which have been able to be completely repealed, eg, the Judgment Creditors' Remedies Act 1901 and the Arbitration (Civil Actions) Act 1983. The UCPR (along with the CPA) for the first time provide a common set of rules of procedure in civil actions in the Supreme Court, the District Court, the Local Courts and also the Dust Diseases Tribunal. The task is not yet complete. By reason of time constraints, the rules brought into the UCPR were the rules dealing with the ordinary course of an action. It is intended in a second exercise to bring into the UCPR the balance of the local rules, which are still in operation. These include the Court of Appeal Rules and rules relating to specialist lists and jurisdictions such as probate and the protective jurisdiction.

A REVOLUTION?

The very existence of a common set of rules for the civil courts of the State is in itself a revolution. However, the new regime is not as revolutionary in philosophy or approach as are the English Civil Procedure Rules 1998, consequent on the Woolf Report. There are at least two reasons for this.

The first is that a gradual process of procedural innovation had taken place in Australia from the mid 1970s in a way that did not occur in England. Thus, looking at the situation in 1997, the English procedure had a much greater leap forward to make in 1998 than did the NSW law in 2005. The extent and importance of Australian innovation was always generously conceded by Lord Woolf himself.

The second reason is that a policy of retaining existing terminology was deliberately adopted in NSW, as contrasted with a policy of "modernisation" of terminology in England. Thus "discovery" became "disclosure" in England, but remains "discovery" in NSW. The view taken here has been that, on the one hand, the change of name does not demystify for the lay reader what remains a complex and technical body of rules. On the other hand, change of terminology threatens to throw into doubt the continued application of existing law and interpretation, even where change is not intended. The NSW legislation proceeds on the basis that the legal profession is the more important audience of the legislation than the lay readership, which will not in any event be advantaged by "simplification" of terminology.

SCOPE OF THIS PAPER

On August 16 2005 I delivered a paper to a Twilight Seminar for Judicial Officers held by the Judicial Commission of NSW. The paper was entitled "The New Procedure -- Nuts and Bolts for Judicial Officers" ("my paper"). It is to be published in (2006) 7 TJR 449. The basis on which that paper proceeded was to record what might be regarded as significant changes both in the statute law and the procedural regime, rather than recording or summarising all the provisions of the legislation. I have not rehashed that paper, which essentially remains current. Instead, I have arranged for you to be

provided with copies. See also the list of Further Reading at the end of this paper. Apart from repeating some remarks on terminology, what I propose to deal with shortly in this paper is developments effected and contemplated since that time.

Those developments fall into three categories:

- 1 Amendments to the UCPR.
- 2 Transfer of the local rules to the UCPR.
- 3 New developments: proposed future amendments to the UCPR, including the Attorney General's reference re expert evidence.

CHANGES OF TERMINOLOGY

These matters I have already addressed in my paper. I there expressed despair at the likelihood of the adoption of new terminology by old lawyers (7 TJR 468). I propose to emphasise these changes to the young, who may be better able to accommodate themselves to them.

1 Cross claim

"Cross claim" was ambiguous under the old legislation because it applied to both the claim made and to the piece of paper by which the claim is made. It is sought to avoid this by using "cross claim" only for the claim and by referring to the piece of paper as a "statement of cross claim" or a "cross summons" (s 22; r9.1 (2); 7 TJR 458).

2 Applicant/Respondent

All parties are to be referred to by their denotation as parties, eg, "plaintiff", "third defendant", "fourth cross defendant", etc. "Applicant" and "respondent" are to be used only of persons involved in a notice of motion who are not already parties to the proceedings, eg, a person to be joined as a party, a receiver, etc (r 18.3 (1); 7 TJR 461).

3 Trial and hearing

In the Supreme Court Rules, "trial" was the final hearing of proceedings in which there were pleadings. Now trial means any hearing that is not an interlocutory hearing, ie, final hearings of both pleadings and summons matters, and "hearing" includes both trials and interlocutory hearings (s 3(1); 7 TJR 464).

4 Costs – ordinary/indemnity basis

This is perhaps the most important of these changes from the point of view of clarity. The profession (and even judges) keep referring to party and party costs as contrasted with indemnity costs or, worse still, solicitor and client costs. This has been deceptive since the Legal Profession Act adopted party/party as referring to the assessment of costs between opposing litigants as opposed to assessment between lawyer and client. Now adopted are "the ordinary basis" and "the indemnity basis" as describing the different bases of assessment. "Solicitor/client costs" should not now be referred to in the terminology of litigation. Clarity requires the new terminology to be adopted (Thomson's NSW Civil Practice & Procedure Uniform Civil Procedure [42.0.20]; 7 TJR 468).

FURTHER DEVELOPMENTS: THE WORKING PARTY

The Attorney General's Working Party on Civil Procedure is continuing its work. It has developed the amendments that have been made to the UCPR by the Uniform Rules Committee (URC). It is working on the transfer of the balance of the local rules to the UCPR. It is considering amendments to the UCPR in some further areas, largely thrown up by the working of the new scheme in practice. It has also had referred to it by the Attorney General the question of whether the Law Reform Commission's Report on Expert Witnesses (LRC 109), which proposes amendments to the UCPR, should be implemented.

AMENDMENTS MADE TO THE UCPR

The URC has passed seven amendments to the UCPR. Amendment No 1 and Amendment No 2 were gazetted on 5 August 2005, to commence on 15 August 2005 with the UCPR. Amendment No 7 was gazetted on 10 March 2006. These amendments deal mostly with matters of detail and are generally consonant with the scheme outlined in my paper. The only subject matters which I think merit particular discussion are:

1 Electronic case management rules.

Late in 2005 an amendment was made to the Electronic Transactions Act 2000 and to Part 3 of the UCPR. This was to facilitate the inception of electronic filing and of electronic case management. This is not the place to go into details of the new CourtLink system, which is not yet operative in relation to civil proceedings. However, electronic filing is now available under a stand alone pilot Eservices system in the Corporations Law List and the Possession List in the Supreme Court. A pilot scheme of case management conferences in an ecmCourt is about to commence in the Supreme Court (see r 3.9). The principal amendments that were necessary were provisions requiring a person who directs another to effect an electronic filing to keep a record of the direction and a solicitor who files an affidavit electronically to keep the original signed affidavit for production if necessary (eg, to put to the deponent in cross examination that he or she did in fact make the affidavit) (rr 3.4A, 3.5).

2 Defamation rules.

The introduction of new defamation rules was necessitated by the commencement of the Defamation Act 2005 on 1 January 2006. The application of the old law and the new law is as follows. The old law applies to publications up to the commencement of the new law and the new law to publications after that commencement. Because actions may continue to be brought under the old law for some time, it has been necessary to incorporate parallel rules applying to actions under the old and new laws. Rather than have a separate part in the UCPR relating to defamation as heretofore (SCR Part 67), the philosophy adopted has been to distribute the rules to the various parts of the UCPR consistent with the subject matter. Thus, the pleading rules are contained in Part 14 (Div 6 rr 14.30 – 14.40) and the particulars rules in Part 15 (Div 4 rr 15.22 – 15.32).

3 Process of entry of judgments.

The need for these amendments has arisen not from new developments of the law but from the exigencies of the operation of the registries, particularly the Supreme Court Registry, where the orders to be entered are routinely more complex than those in other jurisdictions. The pattern originally provided is that, where a court has an existing computer system (in the Supreme Court Courtnet), a judgment should be taken to be entered when recorded in that system (r 36.11). It was found in practice that, rather than entry being faster by recording in the present computer system, paper entry was faster – it was often four or five days before orders were in fact, in the registry, typed into the computer system. This necessitated the provision of an alternative process of paper entry by the sealing of a minute. The speed was necessitated in the case of the grant of urgent injunctions, extensions of caveat and other orders, particularly in the Equity Duty List. Equally, r 36.12 required the registrar to prepare and seal service copies of entered orders upon request. Again, for the sake of speed, it has been clarified that this may be done by the party presenting a document embodying the order to the registrar to be sealed. This helps speed matters. But it does not avoid the payment of the relevant fee!

TRANSFER OF THE LOCAL RULES TO THE UCPR

The rules to be transferred include, in the Supreme Court, the Court of Appeal rules, the rules relating to specialist lists such as the Commercial, Building and Technology, Possession and Administrative Law Lists and the rules relating to probate and protective business. They include, in the District Court, the Construction List, the Commercial List, the Coal Miners' Workers Compensation List and the Statutory Special Compensation List.

Bearing in mind the nature of the bulk of these rump rules, two approaches to them were possible. Since they largely relate to specialist jurisdictions vested in only one level of the courts, one view is that they should remain with the local rules, as must be the case with the Corporations Law Rules and the Admiralty Rules. The other view is that it is better that, so far as possible, all rules relating to civil proceedings should be gathered in one place in the UCPR, whether they are applicable in one court or more than one court. Philosophically, I think the latter view is more sound and consonant with the purpose of the reforms. Since the new legislation has been in force I have been congratulated and thanked by a number of solicitors for the improvement in their lives arising from the fact that the rules of all courts are now in the one place. This has confirmed my conclusion that the latter course is the better course. The drafting of rules to give effect to this is under way and the task should be completed by the end of 2006.

NEW DEVELOPMENTS

There are five areas which I wish to discuss under this heading. The first four arise from practical considerations which have been thrown up either by the operation of the new legislation or planning for the implementation of CourtLink.

1 Rejection of documents lodged for filing

Monitoring of the new system has revealed complaints as to the criteria by which documents are rejected for filing. With paper documents, this is the result of the exercise of discretion by counter clerks or duty registrars. There has probably always been inconsistency in the criteria applied and consequent dissatisfaction, but the existence of the Working Party provides a forum where such complaints may be aired. And they are. The need for consistency is emphasised by the application of consistent rules across all the courts in the State.

Some complaints are about rejections for matters as trifling as failure to bold or underline names of parties. Whilst there is good reason for this requirement, documents should not be rejected and parties put to expense for trifling failures. The desirability of consistency throughout the system is now clear. But an even greater pressure for definition of criteria is created by the approach of CourtLink. There, the acceptance or rejection will be by a machine and a machine cannot exercise discretion. There will therefore have to be clear criteria upon which the automated system will operate. There is no reason why the same criteria should not apply to paper filings and every reason why they should. The UCPR as implemented did not provide for detailed criteria, but it is now clear that they should and work is proceeding on the establishment of criteria.

It should always be remembered that acceptance at the counter does not bind the court, which may always subsequently reject the document (r 4.10 (4)).

2 Filing of affidavits

The decision was taken to abolish the filing of affidavits to be used in open court. The reasons for this are set out in my article (7 TJR 466). Affidavits to be used on applications dealt with administratively such as the signing of default judgment and the issue of writs of execution obviously must be filed to permit their use in the registry. Practice Notes in some cases require presentation to the court ahead of time of affidavits to be used at hearings (eg Practice Note SC Gen 4 pars 9 - 14). A good deal of confusion has ensued and the system is not working entirely satisfactorily. However, there is no intention at the moment to return to the filing of all affidavits and the consequential storage problems. One measure that may be helpful is, instead of or in addition to the general requirement of filing affidavits to be used in matters dealt with out of court (r 35.9), the compulsion to file affidavits should be specified in the rules relating to particular applications, where this is necessary. This whole matter is under further consideration. In the meantime, a useful guide to when filing is permitted or required is contained in Practice Note SC Gen 4 pars 8 and 16 (Thomson's NSW Civil Practice & Procedure Supreme Court Practice 2552 - 2553).

3 Subpoena amendments

Part 33 of the UCPR as to subpoenas was taken directly from Part 37 of the SCR. The SCR were in that form as a result of endeavours by the Australian Council of Chief Justices' Rules Harmonisation Committee to achieve uniform rules and forms for subpoenas throughout the superior courts of Australia. This has been substantially achieved. It would be against the spirit of that agreement and highly undesirable if that regime were to be departed from, particularly as there has now been achieved uniformity not only across the land but at all court levels across NSW. Some practical difficulties have arisen, mainly in the handling of documents that have been brought into court by subpoena. These difficulties relate in part to the question of the custody in which documents must be kept if removed from the court for copying or other purposes (r 33.9 (9), (10)). The restrictive terms of these subrules contrast with the general terms of r 33.8, which gives the court complete discretion. But the narrow provisions of r 33.9 apply when access arrangements are being dealt with administratively. A solution needs to be found, either by agreement with other jurisdictions, or by a special definition of "solicitor" as it appears in r 33.9. That definition would be contained in another part of the UCPR. This technique has been adopted to accommodate some other local practices (7 TJR 465). The other problem relates to the administrative granting of access orders in the District Court and the Local Courts. Those Courts would like to be able to place a proposed access order on the front page of the subpoena (which is what is attached to envelopes and other containers in which documents are produced to the court). This, however, is not suitable in the Supreme Court and would offend against the uniformity principle. Solutions are under consideration.

4 Affidavit in support of default judgment

Formerly solicitors were allowed to swear the affidavit of debt in support of default judgments in the Local Court. The UCPR removed this possibility (r 35.3). The Law Society has asked the URC to consider restoring solicitors as qualified deponents of affidavits of debt. The context is that, out of something over 200,000 civil proceedings commenced every year in NSW, about 170,000 are Local Court actions, mostly for debt and many for comparatively small sums. Consideration is presently being given to the Law Society's request.

5 Expert witnesses

The Law Reform Commission has recently published its Report on Expert Witnesses (LRC 109). It recommends changes to the law by way of amendments to the UCPR. The Attorney General has asked the Working Party to make recommendations as to whether the LRC Report should be implemented and the Working Party has accepted the reference.

Two of the major recommendations are for the adoption of a "permission rule", ie, that no expert evidence should be able to be called in any proceedings without the leave of the court (Recommendation 6.1). This was the solution reached in England in the Civil Procedure Rules 1998 r 35.4 (1). The other major recommendation was for the adoption of a system of appointment of a single joint expert witness, that is a single expert acceptable to both the parties (Recommendation 7.1). These provisions would be parallel to the provisions for court appointed experts, but more under the control of the parties.

The general feeling is that the proposal for the single joint expert witness is unexceptionable and should be given a try.

There is much more controversy about the "permission rule". Many judges and others feel that this is such a departure from the adversarial system, which is still the framework in which litigation is conducted in the common law system (despite some modifications in Australia of recent years), that it either should not be introduced at all or should certainly be introduced only by legislation.

Certainly there have been developments of recent times in the procedure relating to expert witnesses, including compulsory conferences of experts (r 31.25) and "hot tubbing" or concurrent evidence by experts (r 31.26). That said, problems in relation to expert evidence remain. It is vital that in every case there be early directions as to expert evidence and even perhaps a protocol as to the engagement of expert witnesses before the commencement of litigation. I have recently seen a ridiculous example of what can still occur. It was in a case which involved questions of the Italian law as to adoption and "affiliation", a former court implemented system of fostering children. In a case involving a not terribly large estate, the parties, I imagine at a cost of tens of thousands of dollars, qualified four experts, whose opinions as to the state of Italian law were all identical! This is the sort of thing that needs to be controlled and avoided.

There is a regime as to expert evidence embodied in the Queensland Uniform Civil Procedure Rules 1999 (the only uniform rules in Australia which preceded NSW) (Ch 11 Part 5 rr 423 – 429S). This merits and will receive further consideration in the Working Party's deliberations. It is hoped that the Working Party's recommendation to the Attorney General will be made later in the year.

FEEDBACK

The expert witnesses reference has been put out by the Working Party for widespread consultation. However, no one need wait for formal consultation to put forward any views on any of the above subject matters and particularly those mentioned in the new developments section. Any communication can be forwarded to Ms Jennifer Atkinson, Jennifer_Atkinson@agd.nsw.gov.au, who is the Secretary of the URC and forms the secretariat of the Working Party. The ideas of those with young and fresh minds and perhaps a capacity for lateral thinking would be particularly welcome.

...oOo...

FURTHER READING

J Atkinson and S Olischlager, "An Introduction to Civil Procedure Act 2005 Uniform Civil Procedure Rules 2005", August 2005, a PDF version available at: http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_publications click on Information Paper (August 2005) (accessed 9 March 2006).

The Hon Mr Justice Hamilton, "Civil Procedure Reform: Gradualism or Revolution?" (2005) 17(7) Judicial Officers' Bulletin 55.

G C Lindsay SC, "Dynamics of the Civil Procedure Regime", March 2005, available at: <http://www.thomson.com.au/NSWUCP/analysis.asp> (accessed 9 March 2006).

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Containment Of Costs: Litigation And Arbitration

Containment Of Costs: Litigation And Arbitration

The Honourable Mr Justice John P Hamilton
Supreme Court of New South Wales
1 June 2007

This is a co presentation by Professor Ian Bailey SC and myself. Our subject appears in your program as "Reform of Civil Procedure and Lessons for Arbitration". We have found the topic so widely stated as unlikely to lead to meaningful observations if we attempt to cover the whole. We have therefore restricted our consideration to provisions and proposals relating to the containment of costs in litigation and the lessons for arbitration in those provisions and proposals.

GENERAL

The costs of dispute resolution, whether by litigation or arbitration, have been a matter of concern for decades or centuries: Wilfrid R Prest, *The Rise of the Barristers A Social History of the English Bar 1590 – 1640* (1986) 20 - 21. However, amidst the flurry of procedural reform which has occurred in the UK and Australia since 1990, there has been a particular concern about the containment of costs.

Recently, in his address "[Access to Justice and Access to Lawyers](#)" to the 35th Australian Legal Convention in Sydney on 24 March 2007, Chief Justice Spigelman of the Supreme Court of NSW discussed present concerns as to the proportionality of costs. The Chief Justice said:

"There is now a widespread recognition that some sort of test of proportionality is required. The cost of dispute resolution must in some manner be proportionate to what is in dispute. That is difficult to achieve, particularly in circumstances where a civil dispute involves matters that are not able to be computed in terms of money, at least on any objective basis likely to be accepted by all parties. Nevertheless, the principle is a valid one.

Following the English lead [Civil Procedure Rules r 1.1(2)(c)], New South Wales has expressly adopted, in s 60 of the Civil Procedure Act 2005, a requirement that the practices and procedures of courts should be implemented with a view to resolving disputes "in such a way that the costs to the parties is proportionate to the importance and complexity of the subject-matter in dispute". I accept this is a statement of ambition, rather than a description of what occurs."

The sorts of cases where patent disproportionality of costs to subject matter occasions alarm include the example given by the Chief Justice of an English matrimonial case which was adjudicated at five levels, reaching the House of Lords. The total value of the property in issue was 127,400 pounds, but the legal costs were estimated to exceed 128,000 pounds: **Piglowska v Piglowski** [1999] 1 WLR 1360 at 1373. In Australia, examples of disproportionality are often seen in Family Provision Act (FPA) proceedings. For instance, in **Lawrence v Campbell** [2007] NSWSC 126 Macready AsJ dealt with a case which was determined at trial level only. Yet in respect of an estate of only \$600,000 (out of which legacies of \$60,000 and \$140,000 respectively were granted to two claimants), costs had been incurred in the vicinity of \$290,000. I can say from personal knowledge that that is an example of a phenomenon seen in only too many FPA cases.

The problem is thus easily illustrated. The ambition has been stated by Chief Justice Spigelman. What is more difficult is the identification and implementation of a solution or solutions.

It was observed by Bret Walker SC in his article "Proportionality and Cost-Shifting" (2004) 27 UNSWLJ 214 at 216:

"At the outset, we should abandon any search for a panacea. The range of civil litigation measured by the value of the rights and obligations at stake, the importance of them to the parties, the parties' resources, and the social importance of effective legal

representation is far too wide to render credible the notion that one solution (assuming any can be found at all) will indifferently improve the whole variety of civil cases.”

There are two problems in achieving solutions. The first is perceiving the mechanisms of solution. The second is to procure the working of the mechanisms to achieve results in practice. The first stage has its own difficulties. The second runs into difficulties that include the conservatism of lawyers in approaching the new mechanisms and their inexperience in their use.

LITIGATION

Among the measures now available to assist in the containment of costs are the following:

- 1 Sections 56 and 60 of the Civil Procedure Act 2005.
- 2 The power to cap the costs recoverable as between the parties to the proceedings.
- 3 The power to cap the costs that may be charged as between solicitor and client.
- 4 The availability to courts of the power to make costs orders in global sums rather than leaving the quantification of costs to the processes of assessment or taxation.
- 5 The power to order the payment of costs unnecessarily incurred including the power to make those costs immediately payable.
- 6 The power to order stopwatch trials.
- 7 The power to limit expert evidence.

I trust that those from other jurisdictions will pardon the fact that the legislative and other references that I give are principally from New South Wales, my home jurisdiction. This arises from my familiarity with this jurisdiction, rather than any perception of its superiority. The purpose of this paper is, in any event, to promote discussion of possible solutions and mechanisms, rather than to make a catalogue of legislation. On that note, I turn to the particular measures I have collected above.

1 The Civil Procedure Act 2005 (CPA): overriding purpose and proportionality of costs provisions

Section 56 gives statutory effect to a pre existing provision of rules that the overriding purpose of the Act and rules “is to facilitate the just, quick and cheap resolution of the real issues in the proceedings”. Section 60 is the requirement as to proportionality of costs to which Chief Justice Spigelman referred in the passage quoted from his address. These will be the subject of further discussion by Ian Bailey.

2 The power to cap party/party costs

Under this head there are three sets of provisions now available in NSW courts. I shall also refer to the English experience and a local proposal for costs capping which require consideration under this head.

- 2.1 The power to cap costs under the Uniform Civil Procedure Rules 2005 (“UCPR”) r 42.4;
- 2.2 Cost capping: the English experience.
- 2.3 The global costs power: CPA s 98(4)(c);
- 2.4 Local Courts Practice Note.
- 2.5 Bret Walker’s proposal.

2.1 Cost capping: UCPR r 42.4

This power has been available for some time in the NSW courts but has been little used. The central provision in r 42.4(1) is that the Court may, of its own motion or on the application of a party, make an order specifying the maximum costs that may be recovered by one party from another. Its ambit was discussed by Palmer J in **Re Sherborne Estate (No 2): Vanvalen v Neaves** (2005) 65 NSWLR 268; [2005] NSWSC 1003. That case involved three claims for provision under the Family Provision Act 1982 (“the FPA”). Two were successful and one failed. There was a multiplicity of issues about costs. The defendant alleged that the costs of the successful plaintiffs were excessive, and sought a cost capping order under r 42.4 to limit the costs that the successful plaintiffs could recover. His Honour ruled that a costs capping order under r 42.4 was available only prospectively and not in respect of costs already incurred. His Honour said at [23]-[26] and [31]:

“[23] This Rule reproduces the former SCR 52A r.35A. Neither Counsel’s researches nor my own have found any case in which this rule has been discussed or applied.

[24] While UCPR 42.4(1), read in isolation, would seem to empower the Court to fix a maximum sum recoverable by one party under a costs order to be made against another party, the terms of sub-rules (2) and (3) suggest that an order under sub-rule (1) may be made only in advance of a hearing, in order to set limits to what parties may ultimately expect to recover in costs at the end of the day if the proceedings are conducted with due economy and in accordance with the Court's directions. This intention emerges from the fact that a maximum costs order under sub-rule (1) is not to limit costs occasioned by breaches of the Court's directions, amendments to pleadings AND applications to extend time nor costs resulting from what may generally be described as vexatious conduct by a party in the progress of a matter to trial or during the course of a trial: sub-rule (2).

[25] Further, sub-rule (3) envisages that an order under sub-rule (1) will be made at the same time as directions for the progress of the matter towards trial. Sub-rule (4) envisages that a maximum costs order may be varied by reason of circumstances which have occurred after the date that the order was first made. Such a change of circumstances could rarely, if ever, occur at the time that the Court was pronouncing a final costs order at the conclusion of the proceedings.

[26] I conclude that UCPR 42.4 is intended as a means whereby the Court may, if the need arises, curb the tendency of one or all parties to engage in disproportionate expenditure on legal costs by making it clear, at an early stage of the proceedings, that beyond a certain limit the parties will have to bear their own costs – win or lose.

[31] ... the remedy provided by UCPR 42.4 is prophylactic: it cannot be used as a cure for excessive expenditure at the time of making a final costs order at the conclusion of proceedings: other powers of the Court must be engaged."

I cannot trace a subsequent case in which the NSW cost capping rule has been put to the use anticipated as valid by Palmer J. However, there are similar provisions in the rules of the Federal Court of Australia and the Federal Magistrates Court: see FCR O 62A r 1; FMCR r 21.03. The use of the Federal Court rule was discussed by Drummond J in **Hanisch v Strive Pty Ltd** (1997) 74 FCR 384. His Honour ruled that the Court was not empowered by O 62A r 1 to fix the maximum costs recoverable by one party only, should it succeed, but must fix the maximum costs recoverable by both. His Honour said at 387-388:

"The principal object of O 62A is to arm the Court with power to limit the exposure to costs of parties engaged in litigation in the Federal Court which involves less complex issues and is concerned with the recovery of moderate amounts of money, although it may be appropriate for an order to be made under O 62A in other cases, of which **Woodlands v Permanent Trustee Co Ltd** (1995) 58 FCR 139 is an example. See **Sacks v Permanent Trustee Australia Ltd** (1993) 45 FCR 509 at 512."

In the particular case his Honour declined to fix maximum amounts recoverable by reference to an amount. But, being of the view that the action should have been brought in the District Court, his Honour limited the costs recoverable to those that would be recoverable on a party/party taxation in an action in that Court.

In the Federal Magistrates Court, application was made in **Flew v Mirvac Parking Pty Ltd** [2006] FMCA 1818 under r 21.03 to limit the costs recoverable as between the parties in a disability discrimination case to \$5000. Barnes FM declined to make the order. His Honour referred to the limited scale on which costs in the Federal Magistrates Court are usually allowed. In short, his Honour ruled that there was nothing to take this case out of the ordinary run.

2.2 Cost capping: the English experience

In England of recent times there has been a bold endeavour developed in the courts relating to the capping of costs. This is not based on any direct provision of legislation or rules to that effect, but upon powers spelt out of the policy of modern procedural legislation. Interestingly, the cases in which the power was first discussed were group proceedings. For those interested, cases in which orders of this sort have been considered or made include:

- **Griffiths v Solutia UK Ltd** [2001] All ER (D) 196 (Apr); [2001] EWCA Civ 736;
- **AB v Leeds Teaching Hospitals NHS Trust, In the matter of the Nationwide Organ Group Litigation** [2003] 3 Costs LR 405; [2003] EWHC 1034 (QB);

- **Various Ledward Claimants v Kent and Medway Health Authority** [2003] All ER (D) 12 (Nov); [2003] EWHC 2551 (QB);
- **Smart v East Cheshire NHS Trust** [2003] EWHC 2806 (QB);
- **Leigh v Michelin Tyre Plc** [2004] 1 WLR 846; [2004] 2 All ER 175; [2003] EWCA Civ 1766;
- **King v Telegraph Group Ltd** [2005] 1 WLR 2282; [2004] EWCA Civ 613;
- **Eirikur Mar Petursson v Hutchinson 3G UK Ltd** [2004] EWHC 2609 (TCC);
- **Armstrong v Times Newspapers Ltd** [2004] All ER (D) 283; [2004] EWHC 2928 (QB);
- **Campbell v MGN Ltd (No 2)** [2005] 1 WLR 3394; [2005] 4 All ER 793; [2005] UKHL 61;
- **Sheppard v Mid Essex Health Authority** [2006] 1 Costs LR 8;
- **Henry v BBC** [2005] EWHC 2503 (QB);
- **Weir v Secretary of State for Transport** [2005] All ER (D) 274 (Apr); [2005] EWHC 812 (Ch);
- **Tierney v Newsgroup Newspapers Ltd** [2006] EWHC 50 (QB);
- **Knight v Beyond Properties Pty Ltd** [2007] 1 WLR 625; [2007] 1 All ER 91; [2006] EWHC 1242 (Ch).

The existence of the power was first suggested in the Court of Appeal in **Griffiths v Solutia** supra. It was applied by single Judges in **AB v Leeds Teaching Hospitals** supra and **Ledward** supra and its existence was confirmed in the Court of Appeal in **King v Telegraph Group Ltd** supra in the judgment of Brooke LJ (with whom Jonathan Parker and Maurice Kay LJ agreed). It received approval in the House of Lords in **Campbell v MGN** supra: see at [33], [34] per Lord Hoffmann.

In **AB v Leeds Teaching Hospitals** Gage J said at [19]:

“In my judgment, in cases where GLOs [group litigation orders] are concerned the desirability of ensuring that costs are kept within bounds makes it unnecessary for the court to require exceptional circumstances to be shown before exercising its discretion to make a costs cap order. I see no reason for such a requirement where a costs cap order is sought in a GLO, particularly where there is a risk that costs may become disproportionate and excessive.”

At [23] his Lordship said in relation to formulating an appropriate cost capping order:

“Firstly, the order for costs must be proportionate with the amount at stake and the complexity of the issues. Proportionality is to be judged by a two-fold test namely, initially, whether the global sum is proportionate to the amount at stake. Next, if the global sum is disproportionate the court should look at the component parts in order to determine if they are proportionate (see **Lownds v Home Office** [2002] EWCA Civ 365).”

The general principles as they have emerged were summarised by Mann J in the Chancery Division of the High Court of Justice in **Knight's** case. There his Lordship said at [12]:

“However, the costs-capping jurisdiction has been exercised in other areas [than defamation actions], notably personal injury litigation. Guidance as to the exercise of the jurisdiction in that area can be had from one such case, namely the decision of Gage J in **Smart v East Cheshire NHS Trust** [2003] EWHC 2806 (QB), (2003) 80 BMLR 175. That was an application made in the context of an inquiry as to damages in a clinical negligence case. The learned judge rejected (at [17]) the submission that costs-capping orders should be made only in the case of group litigation orders. He said they could be made in other cases. He considered (at [22]) the question of whether a test of 'exceptional circumstances' should apply before the jurisdiction is invoked. He held it should not. He said:

'Having considered all these factors, my conclusion is that whilst each case must be dealt with on its own facts the test for the court when exercising its discretion on whether to make a costs cap order in cases such as the instant one is closer to that proposed by Mr Moran QC than that proposed by Mr Hutton. In my judgment, the court should only consider making a costs cap order in such cases where the applicant shows by evidence that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred; and that this risk may not be managed by conventional case management and a detailed assessment of

costs after a trial; and it is just to make such an order. It seems to me that it is unnecessary to ascribe to such a test the general heading of exceptional circumstances. I would expect that in the run of ordinary actions it will be rare for this test to be satisfied but it is impossible to predict all the circumstances in which it may be said to arise. Low value claims will inevitably mean a higher proportion of costs to value than high value claims. Some high value claims will involve greater factual and legal complexities than others.'

From this extract I can and do extract two propositions: (i) it must be established on evidence that there is a real risk of disproportionate or unreasonable costs being incurred; and (ii) it must be shown that that risk cannot be satisfactorily provided for by more conventional means (and in particular the usual costs assessment after the trial)."

2.3 The global costs power: CPA s 98(4)(c)

Section 98 of the CPA is the NSW provision that is common to modern court statutes committing costs in proceedings to the discretion of the court. In subs (4)(c) it provides that it may be ordered that the party entitled to costs receive "a specified gross sum instead of assessed costs". An alternative submission made to Palmer J in the **Sherborne Estate** case supra was that his Honour should award costs to the successful plaintiffs only in global sums considerably less than the costs which they had incurred, because of the excessive nature of those costs. This his Honour declined to do.

The use of the global costs power as an assessment mechanism is considered under heading 4 below.

2.4 Local Courts Practice Note

The NSW Local Courts have embarked on a new endeavour this year to contain the costs of small cases. The endeavour is embodied in Practice Note No 2 of 2007, which affects proceedings where the amount claimed is \$20,000 or less. In those cases, unless the Court otherwise determines, the Court's ultimate discretion as to costs will be exercised as if a cost capping order had been made under UCPR r 42.4 effective from the time of filing of the first defence. Costs up to that time will not be affected, but the costs to be awarded in respect of work done thereafter shall not exceed, where the plaintiff succeeds, 25% of the amount recovered and, where the defendant succeeds, 25% of the amount claimed by the plaintiff. The Practice Note also applies to cases transferred to the General Division of a Local Court from the Small Claims Division (where claims up to \$10,000 are determined) limiting recoverable costs to a maximum of \$2,500.

This is a bold endeavour and it remains to be seen how it will work out. But at least it is a real endeavour to achieve proportionality in respect of the costs of small monetary claims.

2.5 Bret Walker's proposal

The Local Court Practice Note is a partial implementation of a larger proposal by Bret Walker SC contained in his article mentioned above as to a prima facie imposition of costs limits applicable at various stages of proceedings. He describes it as a "ratchet". The table he gives as an example at 218 is as follows:

Stage of litigation when result reached	Fraction of stake (or minimum) payable by loser
Before 1 week after	Date for defence (P wins) 2% or \$2,000
	Service of defence (D wins)
Before 1 week after	Service of P's evidence (P wins) 5% or \$5,000
	Service of D's evidence (D wins)

1 month before date fixed for hearing	10% or \$10,000
Thereafter	15% or \$15,000

This table is an illustration of a credible form for a wider or universal prima facie cost capping regime.

3 The power to cap solicitor/client costs

In **Woolf v Snipe** (1933) 48 CLR 677 at 678 Dixon J said:

“The superior Courts of law and equity possess a jurisdiction to ascertain, by taxation, moderation, or fixation, the costs, charges, and disbursements claimed by an attorney or solicitor from his client, and that jurisdiction is derived from three sources and falls under three corresponding heads.

First, a jurisdiction exists founded upon the relation to the Court of attorneys and solicitors considered as its officers. This jurisdiction, commonly called the general jurisdiction of the Court, enables it to regulate the charges made for work done by attorneys and solicitors of the Court in that capacity, and to prevent exorbitant demands. That such a jurisdiction was exercised by the Court of Chancery was never doubted. ... The Courts of law appear to have exercised a like jurisdiction.”

In **Johnson Tiles Pty Ltd v Esso Australia Ltd** (1999) 94 FCR 167 Merkel J in the Federal Court relied in part on these statements by Dixon J in enjoining the plaintiffs’ solicitors in proceedings in a class action under Part IVA of the Federal Court of Australia Act 1976 from giving effect to fee agreements with class members otherwise than in accordance with the order or direction of the Court. This power does not appear to have had recent use otherwise than in this context.

4 Global sum orders

I have noted above the potential difficulties of using global sum orders under CPA s 98(4)(c) as a retrospective cost capping or costs moderation device to which Palmer J referred in the **Sherborne Estate** case as noted above. However, that does not mean that a global award of costs considerably less than those incurred could not be made if there were reasons for the exercise of the discretion in that way, which related to the parties’ conduct of the litigation or by reference to other relevant criteria.

However, whether or not the process of global assessment can or should be used to control excessive expenditure on costs, the making of global sum orders can be used as a device to save the very considerable costs of the costs assessment process itself. Its use in this way has been given a fillip by the recent decision of Einstein J in **Idoport Pty Ltd v National Australia Bank Ltd** [2007] NSWSC 23. This case was notable not only for the amount in which costs were assessed, which was \$50 million, but also for its clarification of the circumstances and manner in which the power may be used. His Honour at [10] rejected a submission that the adoption of a broad brush approach to assessment would mean that the exercise of the discretion under s 98(4)(c) would be arbitrary rather than judicial. As to the principles on which the discretion is to be exercised, his Honour said at [9]:

“For present purposes it seems convenient to commence with a recitation of the principles which inform the exercise of the discretion:

- i. the purpose of the rule is to avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation: *Beach Petroleum NL v Johnson* (1995) 57 FCR 119, Von Doussa J page 265: [following Purchase J in *Leary v Leary* [1987] 1 All ER 261 who described the purpose of the rule allowing the fixing of a gross sum as ‘the avoidance of expense, delay and aggravation involved in protracted litigation arising out of taxation’ (All ER page 265)]
- ii. the touchstone requires that the Court be confident that the approach taken to estimate costs is logical, fair and reasonable: *Beach Petroleum* at [16];
- iii. the fairness parameter includes the Court having sufficient confidence in arriving at an appropriate sum on the materials available: *Harrison v Schipp* (2002) 54 NSWLR 738, per Giles JA at para [22]; [following *Wentworth v Wentworth* (CA, 21 February 1996, unreported, per Clarke JA) and adopted in *Sony Entertainment v Smith* (2005) 215 ALR 788;

[2005] FCA 228; BC200500963 at para [199];

iv. a gross sum assessment, by its very nature, does not envisage that a process similar to that involved in a traditional taxation or assessment of costs should take place: *Harrison v Schipp* at para [22];

v. the gross sum 'can only be fixed broadly having regard to the information before the Court': *Beach Petroleum* at 124;

[In *Hadid v Lenfest Communications Inc* [2000] FCA 628 at [35] it was said that the evidence enabled fixing a gross sum 'only if I apply a much broader brush than would be applied on taxation, but that ... is what the rule contemplates'.]

vi. nevertheless the power to award a gross sum must be exercised judicially, and after giving the parties an adequate opportunity to make submissions on the matter: *Leary v Leary* [1987] 1 WLR 72 at 76, and *Beach Petroleum NL v Johnson (No.2)* (1995) 57 FCR 119 at 120;

vii. In terms of the necessity for the approach taken to be logical, fair and reasonable, Von Doussa J in *Beach Petroleum NL & Anor v Johnson & Ors (No 2)* (1995) 57 FCR 119, put the matter as follows, at paras [16]:

'On the one hand the Court must be astute to prevent prejudice to the respondents by overestimating the costs, and on the other hand must be astute not to cause an injustice to the successful party by an arbitrary "fail safe" discount on the cost estimates submitted to the Court: *Leary v Leary* at 265. ...'

In relation to the application of a broad brush approach by the application of a discount to the claim made for costs, his Honour said at [13]:

"In adopting a broad-brush approach to gross sum awards the Courts have invariably applied a discount to the amounts claimed and in many cases a *substantial* such discount. The authorities treating with discount amounts include:

i. In *Canvas Graphics Pty Ltd v Kodak (Australasia) Pty Ltd* [1998] 23 FCA; BC9800050, Canvas Graphics sought a gross sum costs order from Kodak. Canvas Graphics had prepared three draft bills, which were said to have been prepared on a party/party basis, which totalled \$610,069, against which the sum of \$18,325 had to be set off. Ultimately O'Loughlin J made gross sum costs orders totalling \$233,325. The solicitor client bills had totalled \$1,181,564.50. O'Loughlin J stated:

'It would defeat the exercise of assessing a lump sum if one were to make an individual analysis of the many entries in this draft bill that justify criticism. However, examples can be given in order to show that there must be a substantial mark down ...'

[The reduction applied to Canvas Graphics' solicitor client bills was just over 80%.]

ii. *Spamon v Apand Pty Ltd* (Unreported, Federal Court of Australia, 4 March 1998, Von Doussa J; BC9800513) concerned a trial that occupied 45 sitting days and raised complex issues of fact and law (BC9800513 at 4). The actual bills rendered by the solicitors to Apand were \$1,040,135.80. This sum included \$466,400 for solicitors and \$364,570 for counsel's fees (BC9800513 at 5). Apand sought an order for gross sum costs on a party/party basis of \$971,287 (BC9800513 at 7), a discount of 10%. Von Doussa J found that this was not a reasonable deduction (BC9800513 at 8). He allowed \$252,592.21 for solicitor's fees (55.5% of the solicitor client amount) and \$162,505.44 for counsel's fees and disbursements (44.5% of the solicitor client amount).

iii. In *Sony Entertainment v Smith* (2005) 215 ALR 788; [2005] FCA 228; BC200500963, Jacobson J calculated a gross sum amount as follows:

'196.As to the amount of a gross sum order, the applicants seek \$302,997.89, being 60% of actual costs incurred (\$504,996.47), as detailed in the affidavit of Mr Michael Williams, partner

for Gilbert & Tobin, solicitors for the applicants. They submit that this represents an amount commensurate with taxed party/party costs. They claimed a further \$6,000 of the \$10,000 likely to be incurred on the damages hearing.

...

201. It seems to me appropriate to award 40% of the amount sought by the applicants, being \$205,998.58.'

[The reduction applied to the applicants' actual costs was 40% of 60%, which equates to a reduction of 75%. (For some reason the amount of \$205,998.58 ordered does not equate to a 75% reduction, although it is still a reduction of about 60%).]"

I have recently used the power in much more modest circumstances in an FPA case: **Lo Surdo v Public Trustee** [2005] NSWSC 1290. It also merits greater use in relation to interlocutory costs, for example, the costs of motions or costs thrown away by adjournments, where the determination of amount is comparatively simple.

It is to be hoped that the use of this power will expand. I suggest that judicial officers should consider bestirring themselves out of traditional attitudes, leaving their safety zone and making greater use of this power to save money.

5 Interlocutory costs unnecessarily incurred

This is another area where courts have undoubted powers which, however, they are reluctant to use. It is easier to postpone interlocutory costs and their determination to the end of proceedings rather than to make the additional effort of determining them now. Postponement is encouraged by rules such as UCPR r 42.7, which provides that unless the court otherwise orders, interlocutory costs do not become payable until the conclusion of the proceedings. Even where there is extensive disobedience of court directions by one side, adding to the other side's costs of the proceedings, courts do not often exercise the power to make immediate orders for such costs in global sums and to order immediate payment of those sums.

The principles on which immediate payment may be ordered were set out by Barrett J in **Fiduciary Ltd v Morningstar Research Pty Ltd** (2002) 55 NSWLR 1. This exposition is still relevant, despite the removal from the rules of a partial specification of the applicable criteria. There is no doubt that unreasonable conduct by a party is a relevant criterion. Delinquency as relevant to costs issues in other contexts was discussed in **Leidreiter v Rae** [2006] NSWSC 1043; **Tobin v Ezekiel** [2006] NSWSC 694; **Brittain v Commonwealth of Australia [No.2]** [2006] NSWSC 528.

6 Stopwatch trials

There are now provisions in CPA s 62(3) to limit the length of hearings, the number of witnesses and the time to be taken in examining witnesses and making oral submissions. This has led to some experimentation in NSW in relation to stopwatch trials. The provisions of Practice Note SC Eq 3 Commercial List and Technology and Construction List relating to stopwatch hearings are as follows:

"Stopwatch Hearings

39. An option for matters that are heard by the Court and/or referred to Referees is the stopwatch method of trial or reference hearing. In advance of the trial or reference, the Court will make orders in respect of the estimated length of the trial or reference and the amount of time each party is permitted to utilise. The orders will allocate blocks of time to the aspects of the respective cases for examination in chief, cross-examination, re-examination and submissions. If it is in the interests of justice, the allocation of time will be adjusted by the Court or the Referee to accommodate developments in the trial or reference.

40. This method of hearing is aimed at achieving a more cost effective resolution of the real issues between the parties. It will require more intensive planning by counsel and solicitors prior to trial including conferring with opposing solicitors and counsel to ascertain estimates of time for cross-examination of witnesses and submissions to be

built in to the estimate for hearing.

41. Any party wishing to have a stopwatch hearing must notify the other party/parties in writing prior to the matter being set down for hearing or reference out. At the time the matter is set down for hearing or referred out to a Referee it is expected that solicitors or counsel briefed on hearing will be able to advise the Court:

- whether there is consent to a stopwatch hearing;
- if there is no consent , the reasons why there should not be a stopwatch hearing.

42. If there is consent to a stopwatch hearing counsel and/or solicitors must be in a position to advise the Court of:

- the joint estimate of the time for the hearing of the matter; and
- the way in which the time is to be allocated to each party and for what aspect of the case.”

In a further innovative move in the Local Courts, stopwatch provisions have now been incorporated in Practice Note No 3 of 2007 in those Courts.

7 The power to limit expert evidence

This is another area in which there has recently been reform in NSW by the insertion of a new Division 2 of Part 31 into the UCPR (rr 31.18 – 31.53). Some of these rules replace rules already in force, but there are a number of important innovations. While these provisions do not deal with costs directly, the potential is obvious for diminution of costs by limiting the use of expert evidence. Before I summarise the purport of these rules it should be said that there must be potential under r 42.4 to cap the amounts to be expended on expert evidence in particular cases. See the address by The Chief Judge at Common Law of the Supreme Court of NSW, The Hon Peter McClellan, “[The New Rules](#)”, delivered at a seminar held by the Expert Witness Institute of Australia and the University of Sydney Faculty of Law on 16 April 2007. See also the same author’s “Expert Witnesses – The Recent Experience of the Land and Environment Court” (2005) 17 Judicial Officers’ Bulletin 83.

The new Division 2 commenced operation on 6 December 2006. The occasion for the insertion in it of the novel provisions was the Report of the NSW Law Reform Commission (“the LRC”) on Expert Witnesses (LRC 109). This Report referred to the NSW Attorney General’s Working Party on Civil Procedure (“the WP”) to report on whether the recommendations in the LRC Report should be implemented by amendment of the UCPR. As Chair of the WP, I was the author of its Report to the Attorney General, which is accessible at http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_publications.

The WP’s recommendations were adopted and the recommendations of the LRC implemented in accordance with the WP’s amendments. The interaction between the two is detailed in Chief Judge McClellan’s recent address.

The themes of the WP’s report were, first, that the regime to be implemented should permit “the maximum possible flexibility” (see [4]), and, second, that “the court must seize and maintain control of the situation so far as the giving of expert evidence is concerned” (see [5]).

The first matter dealt with in the WP’s Report was whether there should be a permission rule, that is, a rule that no expert evidence can be given without the leave of the court. This was the English rule introduced as a result of the Woolf Report: CPR r 35.4. The LRC recommended a permission rule. The WP thought this too radical as a matter of principle and unnecessary in light of the case management regime in force in NSW in 2006. However, its recommendation instead, which has been adopted in UCPR r 31.19, was that, as soon as it is apprehended that expert evidence will be called at a trial, the parties must seek the Court’s directions concerning the adducing of expert evidence and no expert evidence may be adduced unless directions are sought and complied with.

There was a graphic example of the operation of r 31.19 in proceedings before me for directions recently. A party in FPA proceedings had gone off and obtained, no doubt at great expense, two experts’ reports without seeking directions. The first was a full valuation of a \$400,000 property, despite the policy in the Equity Division of the Supreme Court that in FPA proceedings real estate agents’ estimates of value are generally received as adequate to obviate the cost of formal valuations. The other was a psychologist’s report about the plaintiff’s employability obtained in response to one

clearly inadmissible sentence in one affidavit. I was able to point out that, by reason of r 31.19, both reports were clearly inadmissible, and that I certainly had no intention at that stage of giving leave for their use. If they are not rendered admissible during the further course of the proceedings, the cost of obtaining them is unlikely to be recovered from the opposing party, whatever the result of the proceedings.

The institution of the court appointed expert was already embedded in the UCPR and has been refined in some ways: rr 31.46 – 31.53. The WP concurred with the LRC's recommendation of the institution of a parties' single expert, more under the control of the parties than a court appointed expert: rr 31.37 – 31.45. The rules provide for the selection by the court of the parties' single expert if the parties are unable to agree on the identity of that expert. Where the court orders either form of single expert, there is to be no other expert evidence at the trial without the leave of the court. That leave will, I apprehend, be readily granted if it is demonstrated that there are in reality conflicting expert views on particular subject matters that are really in issue. But in my experience, albeit limited, of the use of a court appointed expert, the production of a well reasoned expert report will often quell disputation, even in cases which are otherwise embattled.

One controversial aspect of the new rules as implemented was as to whether fee arrangements with all expert witnesses must be disclosed. This was the LRC's recommendation. The WP struck a compromise and mandated compulsory disclosure in the case only of speculative arrangements, on the basis that universal disclosure was too draconian and might lead to the diminution of the pool of available expert witnesses. There are those who feel that this regime is unfair to plaintiffs, particularly in personal injuries cases, who needs must rely on contingency arrangements. Their experts are turned, complain the critics, into second class citizens. The WP's recommendation has for the moment been adopted in r 31.22. Its progress will be monitored.

I draw attention to three provisions that are repeated in the new Division 2. These were already contained in the UCPR but are of importance in the present context. The first is that all experts who give evidence must acknowledge that they are bound by a code of conduct prescribed by the UCPR: r 31.23. The second is the provision that the court may direct that experts confer to attempt to resolve or minimise issues and to produce a report to the court summarising their conclusions: rr 31.24 – 31.26. The third is the "hot tubbing" provision, that is, the provision for two or more experts to be sworn together and to give evidence concurrently: r 31.35. This practice was developed in the Land and Environment Court while Chief Judge McClellan was the Chief Judge of that Court. The conference provisions are widely used and the hot tubbing provisions are being used increasingly in the Supreme Court of NSW. For those interested in hot tubbing, a useful video has been produced by the Judicial Commission of NSW, from which, I am sure, copies can be obtained by those interested.

Chief Judge McClellan also draws attention to the new General Case Management Practice Note in the Common Law Division of the Supreme Court, the innovations of which his Honour summarised as follows in his recent address:

"The revised practice note took effect from 29 January 2007. It makes a number of significant changes to the pre-trial management of civil cases, particularly in claims for damages for personal injury or disability. The most significant change in relation to expert evidence is contained in paragraph 37:

'All expert evidence will be given concurrently unless there is a single expert appointed or the Court grants leave for expert evidence to be given in an alternate manner.'

The practice note also confronts the problem of multiple experts and suggests as a guide the following [Practice Note SC CL 5 at [34]]:

- 'one medical expert in any specialty and two, if and only if, there is a substantial issue as to ongoing disability; and
- two experts of any other kind.'

The practice note reinforces the use of single expert witnesses in relation to any head of damages in respect of which a party seeks to adduce expert evidence [Practice Notes SC CL 5 at [41] – [43]]."

ARBITRATION

I shall deal with the lessons for arbitration under the following three heads.

1 Present costs power: Commercial Arbitration Acts ("CAA") s 34

2 Possible legislative amendments

2.1 Indemnity costs

2.2 The UK Arbitration Act 1996 s 65

2.3 Security for costs

3 The New Arbitration Rules

1 Present costs power

The present power for arbitrators to award costs is contained in s 34. Section 34(1) is as follows:

"Unless a contrary intention is expressed in the arbitration agreement, the costs of the arbitration (including the fees and expenses of the arbitrator or umpire) shall be in the discretion of the arbitrator or umpire, who may:

(a) direct to and by whom and in what manner the whole or any part of those costs shall be paid,

(b) settle the amount (or any part of the amount) of costs to be so paid, or arrange for the assessment of those costs (or any part of them), and

(c) award costs to be assessed or settled as between party and party or as between legal practitioner and client."

It seems clear that s 34 confers a power to make a costs award only at the conclusion of the arbitration. The IAMA Rules for the Conduct of Commercial Arbitrations ("RCCA") proceed on this basis: see r 15.

The discretion of an arbitrator in relation to costs is essentially the same as the judicial discretion under the CPA s 98 and similar sections vesting the costs discretion in courts: **Panmal Constructions Pty Ltd v Warringah Formwork Pty Ltd** [2004] NSWSC 204 per Einstein J at [10].

By s 34(1)(c) the costs may be awarded on a party and party or solicitor and client basis. The latter basis is not now available in NSW courts, having been replaced by the indemnity basis: CPA s 98(1)(c). Obviously, even in NSW, the solicitor and client basis should be retained in arbitrations to maintain the uniformity of the CAA. In **York Bros (Trading) Pty Ltd v Five Star Cruises Pty Ltd** NSWSC 4 December 1992 unreported, Cole J found that there was in NSW a power to award costs on an indemnity basis through the provisions of s 34(6), in effect incorporating the court rules as to offers of compromise. In South Australia the Full Court found that there was no jurisdiction through s 34(6) to award costs on an indemnity basis because of the non existence of that basis in that State: **South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd** (1996) 66 SASR 509. The difference between solicitor and client costs is more in terminology than in actuality, as was pointed out by Debelle J in **Pirrotta v Citibank Ltd** (1998) 72 SASR 259 at 264. See generally Vicki Wayne, ed, *A Guide to Arbitration Practice in Australia* (2nd ed, 2006) at [10.8.3].

Section 34 does, however, provide a power for arbitrators themselves to determine the quantum of costs. In my view, this confers a power to assess costs in a global sum, insofar as that may be useful in the containment of the costs of assessment.

What has been said makes it plain that there is no power in an arbitrator to order security for costs, although presumably such an order can be made by the court on an application under s 47 of the CAA: **Boulderstone Hornibrook Engineering Pty Ltd v State Constructions Pty Ltd** (1993) 61 SASR 94.

In my view, s 34 empowers an arbitrator to direct the payment of interim costs for unreasonable conduct. However, it is doubtful that such a direction could be enforced by immediate award. It may be, however, that other sanctions are available, such as refusing to proceed with the arbitration until the costs are paid. Such a direction could probably be made under existing directions powers. If there are any doubts as to the views I have expressed concerning an arbitrator's powers, an appropriate

amendment to s 34 or otherwise could be added to those mentioned for consideration below.

2 Legislative amendments

2.1 Indemnity costs

In my view, indemnity costs should not be introduced in relation to arbitrations, as the concept of solicitor and client costs continues in jurisdictions other than NSW and this concept should be maintained in CAA s 34 to maintain uniformity.

2.2 The UK Arbitration Act 1996 s 65

Section 65 is as follows:

“Power to limit recoverable costs.

(1) Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.

(2) Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.”

For the reasons stated above, it is suggested that it would be desirable for a provision to this effect to be included in CAA s 34, or otherwise inserted in the CAA, to confirm a cost capping power in arbitrators.

2.3 Security for costs

It may be worth considering investing arbitrators with power to order for security for costs, to obviate the necessity for applications to the court.

3 The New Arbitration Rules

There are at present under consideration in IAMA New Arbitration Rules (“New AR”) for adoption to supersede the 1999 RCCA. The New AR contain provisions that are important to the subject matter under consideration. Those provisions include the following.

The New AR adopt for the first time an Overriding Objective provision as introduced into court rules and now embodied in s 56 of the CPA. Rules 10 and 11 provide that both the arbitrator and the parties shall conduct the arbitration in a manner consistent with the Overriding Objective. The Overriding Objective is defined as follows in r 16:

“the Overriding Objective’ shall mean conducting the arbitration:

- a. fairly, expeditiously and cost effectively;
- b. in a manner which is proportionate to:
 - i. the amount of money involved;
 - ii. the complexity of the issues;
 - iii. the financial position of each party; and
 - iv. any other relevant matters, including the importance of the arbitration.”

In Schedule 1 “General Arbitration Procedure” there is provision, in item 3, for directions, in item 3, for meetings between experts or Experts’ Conclaves “to define and narrow the issues in dispute” and, in item 4, for the preparation of joint reports by experts. In item 9 there is provision for directions imposing limitations on oral hearings, including reasonable limits on oral evidence and cross examination. In Schedule 2 as to “Fast Track Arbitration Procedure” there are, in items 7 and 8,

provisions for directions as to joint experts' reports and Experts' Conclaves, for the imposition of time limits on oral evidence and for the conduct of an arbitration as a "stop clock arbitration".

THE WAY FORWARD

It seems to me that one way forward is by the implementation, generally, or in specified classes of case, of prima facie costs limits, subject always to a tribunal's power to vary them, such as are now experimented with in the NSW Local Courts and suggested by Bret Walker in his article.

I have already foreshadowed my view of the need for greater boldness and more imaginative use of tools by judicial officers and arbitrators. Those exercising adjudicative functions tend to be conservative and adhere to practices that they have pursued in the past, even where new avenues are opened to them. To some degree, this arises from natural inclination. To some degree, it arises from a reluctance to engage in novelty and take risks that may lead to successful appeals or reviews. This is not motivated solely by the personal pride of adjudicators. Risking the intervention, or even resort to, appellate or reviewing bodies potentially exposes the parties to increased delay and expenditure of costs. Nonetheless, it may be that this natural reluctance should be balanced against the need for some boldness if the objective of costs containment is to be realised.

COLLEGE OF LAW
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The 2008 Judges Series
Lawyer-Client Privilege in Litigation

John P Hamilton*

THE PRACTICALITIES OF MAKING OR TESTING A CLAIM FOR PRIVILEGE

- 1 Two different matters are relevant to this topic. One of them relates to the procedure that is involved in having the court decide a disputed claim for privilege. The other relates to the evidence by which disputed claims of privilege are decided by the court.
- 2 In the preparation of these notes I am heavily indebted to a paper prepared by Justice Campbell, "Some Aspects of Privilege Concerning Communications with Lawyers." presented as part of the College of Law's Judges Series on 8 March 2006 which can be accessed at:

http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_campbell080306

I am also indebted to a recent paper prepared by Justice McDougall, "The Evolving Principles Governing Client Legal Privilege." presented to a seminar of the Commercial Law Association on 22 June 2007 which can be accessed at:

http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcdougall220607

PROCEDURE FOR MAKING A CLAIM FOR PRIVILEGE

- 3 Such claims arise most frequently in practice in relation to answering subpoenas, notices to produce and orders to produce documents and applications for access to documents produced. Section 68 of the Civil Procedure Act 2005 authorises courts to command the production to the court, at any time, of any document or thing by order made by the court, as well as by subpoena. A form is provided for such an order in Form 29. Although made only orally, such an order must be obeyed by a person aware of the order. Such orders are quite commonly made during the course of hearings. And see in the Federal Court Rules ("FCR") O 15 r 13.
- 4 Such claims also arise in relation to discovery and inspection; to answering interrogatories; and to rulings on questions asked or tenders of documents made at hearings. I shall deal with these matters in the order in which they are mentioned in [3] and in this paragraph.

5 The provisions of the Uniform Civil Procedure Rules 2005 (“UCPR”) relevant to the procedure for determining such questions are r 1.8 and r 1.9 which provide as follows:

- “1.8 Determination of questions arising under these rules (cf SCR Part 23, rule 4 (b) and (d))
The court may determine any question arising under these rules (including any question of privilege) and, for that purpose:
- (a) may inspect any document in relation to which such a question arises, and
 - (b) if the document is not before the court, may order that the document be produced to the court for inspection.
- 1.9 Objections to production of documents and answering of questions founded on privilege (cf SCR Part 36, rule 13; DCR Part 28, rule 16)
- (1) This rule applies in the following circumstances:
 - (a) if the court orders a person, by subpoena or otherwise, to produce a document to the court or to an authorised officer,
 - (b) if a party requires another party, by notice under rule 34.1, to produce a document to the court or to an authorised officer,
 - (c) if a question is put to a person in the course of an examination before the court or an authorised officer,
 - but does not apply in circumstances in which Part 3.10 of the Evidence Act 1995 or Part 3.10 of the Evidence Act 1995 of the Commonwealth applies.
 - (2) In subrule (1), authorised officer means:
 - (a) any officer of the court, or
 - (b) any examiner, referee, arbitrator or other person who is authorised by law to receive evidence.
 - (3) A person may object to producing a document on the ground that the document is a privileged document or to answering a question on the ground that the answer would disclose privileged information.
 - (4) A person objecting under subrule (3) may not be compelled to produce the document, or to answer the question, unless and until the objection is overruled.
 - (5) For the purpose of ruling on the objection:
 - (a) evidence in relation to the claim of privilege may be received from any person, by affidavit or otherwise, and
 - (b) cross-examination may be permitted on any affidavit used, and
 - (c) in the case of an objection to the production of a document, the person objecting may be compelled to produce the document.
 - (6) This rule does not affect any law that authorises or requires a person to withhold a document, or to refuse to answer a question, on the ground that producing the document, or answering the question, would be injurious to the public interest.”

In the Federal Court see, for instance, FCR O 15 rr 11 and 14, O 33 r11.

Subpoenas, Notices to Produce and Orders to Produce

6 If the addressee of a subpoena, notice to produce or order for production wishes to claim that privilege exists in a document called for the first question that arises is whether it is that person's obligation to bring the document to court in answer to the requisition. Although the traditional view was that the document should be brought and produced to the court, so that the question for privilege could then be determined upon an application for access, it is arguable that by reason of UCPR 1.9(3) and (4) objection may be made to

production. However, r 1.9(5)(c) empowers the court to insist upon production of the document. In my view, although it may be possible to object to the production of the document to the court, bearing in mind r 1.9(5)(c) and to avoid possible delays, the document ought be brought to court so that it can be available to the court if production is insisted upon. The usual way of taking the objection is by affidavit evidence that sets out the facts by reference to which the claim for privilege is made. The document may be exhibited to an affidavit – usually as a confidential exhibit that is not served on the other side.

7 The traditional approach taken by the courts was laid down by the Court of Appeal in **National Employers' Mutual General Association Limited v Waind and Hill** [1978] 1 NSWLR 372. Whilst details of procedure have changed considerably since that time, this is still a useful statement as to the general manner in which these questions should be dealt with. Because of its utility I propose to follow the example of Campbell J, who in his paper mentioned above quoted at length from the judgment of Moffitt P. At 381 - 385 his Honour said that when a person was obliged by subpoena to bring documents to court:

“ ... there are three steps. The first is obeying the subpoena, by the witness bringing the documents to the court and handing them to the judge. This step involves the determination of any objections of the witness to the subpoena, or to the production of the documents to the court pursuant to the subpoena. The second step is the decision of the judge concerning the preliminary use of the documents, which includes whether or not permission should be given to a party or parties to inspect the documents. The third step is the admission into evidence of the document in whole or in part; or the use of it in the process of evidence being put before the court by cross-examination or otherwise. It is the third step which alone provides material upon which ultimate decision in the case rests. In these three steps the stranger and the parties have different rights, and the function of the judge differs.

Upon the first step the person to whom the subpoena is addressed may seek to, and have, the subpoena set aside on the ground that it was improperly issued and an abuse of the power to compel the production of documents in any one of a number of ways. Such a case is where the subpoena is used for the purpose of discovery....

The issue of a subpoena may involve an abuse of the power in other ways ... Thus, it would be an improper use of the subpoena if it were not sought for the purpose of the litigation, but for some spurious purpose, such as to inspect the documents in connection with other proceedings, or for some private purpose, or in collusive proceedings to give them publicity. A witness might argue the documents must be sought for some undefined spurious reason, as they have no conceivable relation to the proceedings. The court would jealously consider any of such submissions having regard to the invasion of the private rights of the stranger occasioned by the operation of the subpoena.

The second step is when the documents are produced to the court by the witness, the subpoena not having been set aside, *and any other objection to their production, such as on the ground they were privileged*, having been rejected. At this point documents are in the control of the court, pursuant to the valid order of the subpoena. As pointed out in *Small's* case ((1938) 38 S.R. (N.S.W.) 564, at p. 574; 55 W.N. 215) at this time the witness may state he objects to their being handed to the parties for inspection. If he

states he does not object to the parties inspecting the documents, or by lack of objection is taken to have no objection, no doubt normally there would be little reason not to permit inspection by either party. However, the documents are under the control of the judge and, even if the witness has not objected, there may be good reason in the elucidation of the truth why the judge may e.g. defer inspection by one party or the other.... There may be good reason why he may, or indeed should, refuse inspection of irrelevant material of a private nature, concerning a party to the litigation, or, concerning some other person who is neither a party nor the witness. It may well be that the documents are the property of some institution, but relate to private matters concerning some person and the officers of the institution do not take objection on the basis that the responsibility for disclosure rests with the court. The documents are in its control and are used on its responsibility so far as properly required for the purpose of the proceedings...

The crucial question in relation to the exercise of the discretion to permit inspection in the second step is whether the documents have apparent relevance to the issues. It is at the third step that questions between the parties of relevance in fact and admissibility are ruled upon. The judge is in some difficulty in determining whether the documents are relevant prior to the presentation of the evidence or at the commencement of the case. If there is particular objection from the witness, or questions of privacy are involved, no doubt procedures can be adopted to ensure that only relevant documents are inspected. In other cases, it would appear appropriate to proceed to exercise the discretion, provided the documents are apparently relevant or are on the subject matter of the litigation. However, the limitation on the exercise of the judge's discretion to allow inspection is that the document contains information of apparent relevance to the issues. Once the judge has that opinion, inspection will normally be allowed, notwithstanding that the document is not admissible as it stands, and notwithstanding that the party seeking inspection has not given any undertaking to tender it, or use it in cross-examination." (emphasis added)

- 8 As appears from that passage, it is as part of the second step that the court decides whether an objection based upon privilege ought be upheld. At this preliminary stage of proceedings, that should be done on affidavit evidence establishing the claim. As to the necessary content of that evidence see below.
- 9 The traditional approach of the courts was not to permit cross examination on an affidavit supporting a claim of privilege: see *Bray on Discovery* (1885) 211; **Fruehauf Finance Corporation Pty Ltd v Zurich Australian Insurance Ltd** (1990) 20 NSWLR 359 at 366 per Giles JA. However, the practice has changed so that cross examination on an affidavit read to establish privilege, either upon the production of documents or upon discovery, may now be allowed. Gummow J as a Judge of first instance allowed cross examination in **Hartogen Energy Ltd (in liq) v Australian Gas Light Co** (1992) 36 FCR 557 at 560 – 561. See also **Falk v Finlay** [1999] NSWSC 1284 at [48] – [52] per Austin J. That approach has now been endorsed by the majority of the High Court in **Esso Australia Resources Limited v Commissioner of Taxation** (1999) 201 CLR 49 at [52] per Gleeson CJ, Gaudron and Gummow JJ; [65] per McHugh J. You may still meet resistance on the part of some Judges to allowing cross examination on such an affidavit: see eg **Seven Network Limited v News Limited** [2005] FCA 915 per Graham J. Do not hesitate to remind such a Judge of what has been said by the High Court. On the other hand remember

that the allowance of cross examination on the affidavit remains discretionary, as, indeed is all cross examination on interlocutory applications in the practice of the Supreme Court of New South Wales.

- 10 In both the Federal Court and the Supreme Court, there is a specific power which enables the court to inspect the documents in question, for the purpose of deciding any question of privilege: UCPR r 1.8, FCR O 15 r 14 and O 33 r 11(1). The common law itself allowed the court to inspect documents for the purpose of determining a disputed claim of privilege: **Grant v Downs** (1976) 135 CLR 674 at 689; **Esso Australia** supra at [52].
- 11 Sometimes, if it is undesirable for the Judge who will hear the case to see the document in relation to which the claim of privilege is made, it may be appropriate for the question of privilege to be decided by a different Judge.

Discovery

- 12 A list of documents giving discovery must identify any document that is claimed to be a privileged document and specify the circumstances under which the privilege is claimed to arise: see, eg, UCPR r 21.3(2)(d) and Form 11. The list of documents must be accompanied by an affidavit stating the facts relied on as establishing the existence of the privilege: UCPR r 21.4(2). As to cross examination on the affidavit, see [9] above. The obligation to produce documents for inspection relates only to documents in respect of which a claim for privilege has not been made: UCPR r 21.5. In the Federal Court, the FCR contain similar provisions: O 15 rr 6 and 9 and Form 22.
- 13 If the party upon whom the list of documents has been served wishes to challenge a claim for privilege, that party must file and serve a notice of motion seeking an order that the relevant document for which privilege is claimed be produced for inspection. The notice of motion should be accompanied by affidavit evidence setting out any facts upon which the moving party relies in support of its contention that the documents are not privileged or that privilege has been lodged.
- 14 The question can then be determined under UCPR r 1.8 in the same fashion as with claims for privilege upon production of documents.

Objections to Interrogatories

- 15 The same considerations also arise in relation to testing a claim for privilege made in an answer to interrogatories. The mechanism for raising the objection is for the opposing party to file a notice of motion for a further answer to the interrogatory. As with objections on production or in relation to discovery any question about the adequacy of the answer to an

interrogatory does not occur in the midst of a hearing and hence there can be greater focus and more time taken on that particular question, as opposed to a question of admissibility arising in the course of a hearing.

Objection to Questions in Oral Examination and Documents Tendered

16 These objections, particularly in relation to the answer to a question asked orally, raise quite different procedural considerations from the objections considered above, because of the very different context in which they arise.

17 There are serious practical difficulties in devising a procedure, analogous to the court inspecting a disputed document for itself, which can be used to decide a claim of privilege concerning a question asked in oral examination. It would, theoretically, be possible to close the court and for the judge to hear the answer in the absence of the representatives of the other side, and to decide whether it really would disclose privileged information. However, that radical departure from the usual principle of an open trial is one which the courts in practice have not adopted. That is why, in relation to questions asked in oral examination,

“If a lawyer swears that a question cannot be answered without disclosing communications made professionally by the client, that oath is conclusive unless it appears from the nature of the question (or indeed the proven circumstances in which the communications were made) that the privilege cannot be applicable.”
(*Cross on Evidence* (Australian Edition, current electronic version) par [25270]).

18 But there are ways of testing a claim for privilege, by examination of the circumstances surrounding the occasion when the disputed communication was made, which do not involve disclosure of the communication itself. It will be a matter for a trial Judge to decide by reference to the circumstances of an individual case whether this sort of path should be gone down at all and, if so, how far and subject to what limitations

19 Evidence concerning the admissibility of the answer to a question or of a document tendered may be taken either orally or by affidavit on the voir dire, a practice that is continued by the Evidence Act 1995 (“the EA”) s 189. And if the opposite party wishes to have the court take into account any facts which tend to suggest that there never was privilege, or that privilege has been lost, that opposite party may on the voir dire use oral or affidavit evidence that proves those facts.

THE EVIDENCE BY WHICH DISPUTED CLAIMS FOR PRIVILEGE ARE DECIDED

20 Unless the parties to a dispute agree that the court can act on the basis of informal material, like agreed facts or statements from the bar table, any disputed question concerning privilege needs to be decided upon evidence put before the court relevant to that disputed question. This may occur on an

argument relating to access to documents, upon a motion to determine privilege in relation to discovery or interrogatories or, if the matter arises during the course of a hearing, upon a voir dire as to the admissibility of a question asked or a document tendered.

Can Hearsay Evidence be Used?

- 21 Subject to what follows, the evidence to be used on enquiries as to the subsistence of privilege must, in general terms, itself be evidence that is admissible according to the usual rules of evidence.
- 22 Under s 75 of the EA, the hearsay rule does not apply in an interlocutory proceeding if the party who adduces the evidence also adduces evidence of its source. In general terms, the proceeding in which the existence of privilege is determined will be an interlocutory proceeding. It will either be part of another interlocutory proceeding, as in the case of the production of or access to documents, or of discovery or interrogatories or, if given at a trial, it will be an interlocutory proceeding by way of a voir dire within the trial. It will be otherwise if the existence of privilege is the substantive question to be determined in the proceedings.
- 23 However, in many instances where hearsay evidence is admissible, that evidence would not be satisfactory on this subject matter, eg, if it dealt with a person's evidence as to the purpose for which that person created a document, since the giving of hearsay evidence would preclude cross examination as to that person's own thought processes in creating the document and the absence of the opportunity to cross examine would diminish the value of the evidence.
- 24 Just because hearsay evidence is admissible does not necessarily mean that the case for a particular document or communication being privileged can safely be made on the basis of hearsay evidence alone. It is still necessary for the court to be satisfied that it is more likely than not that the elements of the claim for privilege are made out. And in taking into account whether sufficient evidence has been presented on a topic to satisfy the onus of proof, the court always takes into account the capacity of a particular party to call or present evidence on a particular topic: **Ho v Powell** (2001) 51 NSWLR 572 at [15] per Hodgson JA.

The Substance of the Evidence Needed

- 25 The evidence that is needed to sustain a claim of privilege is evidence that will make out each element of the particular privilege that is being claimed. Examples of the elements which are frequently in contention are:
 - (1) whether or not the person claiming the privilege is a client bearing in mind the definition in s 117 of the EA;

- (2) whether or not a communication or a document is confidential, again bearing in mind the statutory definitions;
 - (3) whether or not a communication was made or a document was prepared for the dominant purpose of providing legal advice to the client;
 - (4) whether or not a communication was made or a document was prepared for the dominant purpose of the client being provided with professional legal services relating to a relevant proceeding; and
 - (5) whether or not a proceeding is anticipated in which the client may be a party.
- 26 In relation to the loss of privilege evidence may be necessary to establish:
- (1) whether the disclosure to another person is of the substance of the evidence;
 - (2) whether the disclosure was under compulsion of law; and
 - (3) whether the disclosure was made in circumstances that are to be taken to imply consent on the part of the client to the adducing of the evidence.
- 27 The process and the issues involved were compendiously and usefully discussed by Austin J in **Re Southland Coal Pty Ltd (Receivers And Managers Appointed) (In Liq)** (2006) 203 FLR 1 at [14]. I have set this very useful passage out in full for reference in an appendix to this paper. I shall add my own commentary on some particular points.
- 28 “A claim for privilege is not conclusively established by the use of a verbal formula”: **Esso Australia** supra at [52] per Gleeson CJ, Gaudron and Gummow JJ. That is, a statement by a person that that person prepared a document for a “dominant purpose” that is within s 118 or s 119 of the EA is not of itself sufficient to establish that purpose. Evidence, as appropriate, will need to be led of the facts surrounding the creation of the document or of the context in which the document is created, in order for the necessary inference to be drawn.
- 29 Of a protracted and detailed process concerning a privilege issue, **Southland** supra itself provides an instructive example: see also the decision of Johnson J in **Priest v State of New South Wales** [2006] NSWSC 1281. However, the issue often arises in circumstances where it must be decided peremptorily and without detailed debate or opportunity for research. An example of this sort of process is provided by my own recent decision in **New Cap Reinsurance Corp Ltd (In Liq) v G S Christensen** [2008] NSWSC 93 (“my judgment”). There the trial of the proceedings was fixed to commence before White J on a Monday. The parties wished the privilege question to be decided by a Judge other than the trial Judge. The matter was referred to me on the preceding Thursday and I delivered judgment on the same day.

- 30 Peremptorily decided, the case is of no lasting legal interest. But it may act as a useful illustration of the process as it must often be carried out. In that case, the accountant who had prepared documents including draft expert reports swore in a formulaic way that those documents were created for the dominant purpose of preparing his final expert report. No application was made to cross examine the accountant. The draft reports, for instance, were for submission to and were submitted to lawyers for discussion as to the appropriateness of the form of the report. It was quite clear from the evidence that they were part of the process of the preparation of the final expert report. In those circumstances, I was prepared to accept that the whole purpose of the exercise was to prepare in the end an expert report for use in the proceedings and that that was the dominant purpose overall of the preparation of the documents: see my judgment at [9]. That illustrates how the formulaic statement of the creator of the document, taken in the context of the way the document was in fact created and then used, can establish the requisite dominant purpose.
- 31 The other issue dealt with in my judgment was whether privilege had been given away by the service, pursuant to the direction of the Court, of the expert report as ultimately formulated. This turned on the question of whether the report had been disclosed under compulsion of law. I held, without citation to me or by me of authority, that the disclosure was under compulsion of law and did not give away the privilege that had been established. Whether or not this is a desirable rule is questionable, since, if the expert report is used at trial, it is likely that privilege in the subjacent material will be lost and the trial may be disrupted by the necessity of giving opportunity at that stage for the examination of the previously privileged documents. However, subsequent research has disclosed that upon existing authority my decision was sound: see per Mason P in **Akins v Abigroup Ltd** (1998) 43 NSWLR 539 at 552; the decision of the Full Court of the Federal Court in **Bell Group Ltd (in liq) v Westpac Banking Corporation** (1998) 86 FCR 215; and the further decision of the Court of Appeal in **Dubbo City Council v Barrett** [2003] NSWCA 267 at [17], [20].
- 32 Two important points drawn from the above are to be borne in mind when preparing for the contest of a privilege argument.
- 33 The first is that careful legal analysis is needed to identify just what are the elements that need to be established to make out the particular claim of privilege, or to show that the particular privilege has been lost. If you have not worked out all the elements of the legal right you are seeking to establish, you are unlikely to prove each of those elements.
- 34 The second is that you must consider carefully what evidence is adequate to establish each element. Just having witnesses state your case is not enough.

The facts need to be presented in a way that establishes in accordance with the principles referred to above all the elements that are necessary.

ALRC REVIEW OF LEGAL PROFESSIONAL PRIVILEGE AND FEDERAL INVESTIGATORY BODIES ALRC 107

35 As appears from the title, this Australian Law Reform Commission Review published in December 2007 deals with the rather specific topic of legal professional privilege in relation to federal investigatory bodies. In Chapter 9 it dealt with the issue of client legal privilege claims and legal practitioner responsibility. It found that there was at least a case that needed response of lawyers knowingly making excessive claims of client legal privilege to delay or obstruct investigations.

36 To address this issue, the ALRC recommended in general terms:

that professional conduct rules be amended to:

- (a) provide guidance about a practitioner's duties with regard to claims of privilege;
- (b) specifically proscribe the misuse of client-legal privilege;
- (c) require claims for privilege to be certified as having reasonable prospects of success;

and that University and CLE programs include:

- (a) specific consideration of the ethical responsibility of lawyers in relation to making and maintaining claims of client legal privilege;
- (b) information regarding the ethical responsibility of lawyers in relation to making and maintaining claims of client legal privilege; and
- (c) a regular review of the law and responsibilities in relation to the making and maintaining of claims of client legal privilege.

37 The making of these recommendations emphasises, not just in relation to statutory investigations, but in relation to all proceedings, the need not only for stringent analysis to assist in the making out of claims for privilege, but also the need for stringent scrupulosity on the part of practitioners in ensuring that they do not bring forward claims of privilege that do not in reality have any proper basis.

* The Honourable John Perry Hamilton is a Judge of the Supreme Court of New South Wales. The author is indebted to his tipstaff Kaushalya Mataraaratchi for assistance in preparing this paper.

Appendix

Re Southland Coal Pty Ltd (Receivers And Managers Appointed) (In Liq) (2006) 203 FLR 1

“ [14] A formulation of the uncontested principles about client legal privilege which the parties drew to my attention, adequate for present purposes, is set out in paras (a)-(j) below.

(a) *Rule of substantive law* -- "Legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice and the provision of legal services, including representation in legal proceedings" (Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543 at [9] per Gleeson CJ, Gaudron, Gummow and Hayne JJ). The "rule of substantive law" is, of course, affected by the terms of the Evidence Act where the Act applies.

(b) *Two-stage process* -- Assessing a claim for privilege under s 118 or s 119 is a two-stage process. The first step is for the court to be satisfied that the communication or contents, disclosure of which is sought to be prevented, satisfies the requirements set out in s 118 or s 119 or both sections. The second step is for the court to be satisfied that the production of the document or the unredacted part of it would result in the disclosure of a confidential communication or the confidential contents of a document.

(c) *Onus* -- The party claiming privilege bears the onus of establishing the basis of the claim and the party seeking production does not bear the onus of excluding privilege (Mitsubishi Electric Australia Pty Ltd v WorkCover Authority (Vic) (2002) 4 VR 332 at 337; Australian Securities and Investments Commission v Rich [2004] NSWSC 1089 at [2]; Re Bauhaus Pymont Pty Ltd (in liq) [2006] NSWSC 543 at [24]). The party claiming privilege must establish the facts from which the court can determine that the privilege is capable of being asserted (National Crime Authority v S (1991) 29 FCR 203 at 211). The facts are to be proved on the balance of probabilities (Evidence Act, s 142).

(d) *Legal advice* -- Section 118 protects certain confidential communications and the contents of confidential documents made or prepared for the dominant purpose of a lawyer providing legal advice to a client. In this context, "legal advice" is understood in a pragmatic sense. In WorkCover Authority (NSW) v Law Society of NSW (2006) 65 NSWLR 502 at [77]-[78], McColl JA quoted, evidently with approval, the observation of Taylor LJ in Balabel v Air India [1988] Ch 317 at 330, that "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context". This assumes, of course, that the advice is professional advice given by a lawyer in his or her capacity as such. Taylor LJ's dictum was applied in Three Rivers District Council v Governor and Company of the Bank of England (No 5) [2005] 1 AC 610 at 648 per Lord Scott of Foscote, 657 per Lord Rodger of Earlsferry and 678 per Lord Carswell. There the House of Lords held that the Bank was entitled to claim legal professional privilege in respect of communications with its solicitors not only concerning its legal rights and obligations, but also concerning the presentation of its evidence to an inquiry so as to minimise criticism. See also DSE (Holdings) Pty Ltd v InterTAN Inc (2003) 135 FCR 151; AWB Ltd v Cole (2006) 152 FCR 382.

(e) *Whether disclosure would result from adducing the evidence* -- Under both ss 118 and 119 the evidence is not to be adduced if adducing evidence would result in disclosure of certain confidential communications or the contents of certain confidential documents. The question is whether what is disclosed by adducing the evidence explicitly reveals the confidential communication or the contents of the confidential document, or supports an inference of fact as to the content of the confidential communication or document, which has a definite and reasonable foundation. Disclosure does not occur if what is adduced in evidence merely causes

the reader to "wonder or speculate whether legal advice has been obtained and what was the substance of that advice" (AWB Ltd v Cole at [133], per Young J).

(f) *Communications between third party and client* -- Communications by a third party with a client, not directed to the client's lawyers, may be protected by legal advice privilege, if the function of the communications is to enable the client to obtain legal advice and the third party is so implicated in communications made by the client to its legal adviser as to bring the third party's work product within the rationale of the privilege (Pratt Holdings Pty Ltd v Commissioner of Taxation (Cth) (2004) 136 FCR 357 at [41] per Finn J and [105] per Stone J).

(g) *Purpose is a question of fact* -- The purpose for which a communication is made or a document is created is a question of fact (Esso Australia Resources Ltd v Commissioner of Taxation (Cth) (1999) 201 CLR 49; Waterford v Commonwealth (1987) 163 CLR 54; Bauhaus at [24]). Purpose and intended use must be determined objectively, having regard to all of the evidence (AWB Ltd v Cole at [122]). Purpose cannot be proved by mere assertion by a third party. Normally (but not always) the relevant purpose is that of the maker of the communication for which privilege is sought.

(h) *Dominant purpose* -- The dominant purpose of the communication must be determined objectively, having regard to all the circumstances in which the communication was made and its nature (Grant v Downs (1976) 135 CLR 674 at 689, per Stephen, Mason and Murphy JJ; Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd (2005) 60 ATR 466 at [30] per Kenny J; AWB Ltd v Cole at [110], per Young J). What is required is an objective view of all of the evidence, taking into account the evidence not only of the author of the communication but of the person or authority under whose direction the document was prepared. If the document would have been prepared irrespective of the intention to obtain professional legal services, it will not satisfy the test (Grant v Downs at 688, per Stephen, Mason and Murphy JJ). The existence of an ancillary purpose is not fatal to a claim for privilege, but if there are two purposes of equal weight, it is unlikely that one would dominate the other -- Odgers S, *Uniform Evidence Law* (6th ed, Lawbook Co, 2004) at [1.3.10500]-[1.3.10520].

(i) *A claim for privilege will not succeed if all that emerges is that the document is a commercial document or has been brought into existence in the ordinary course of business* -- In these circumstances, unless the court is satisfied that the dominant purpose is that identified in s 118 or s 119, no privilege applies. It is necessary to distinguish between documents brought into existence to communicate legal advice, and documents brought into existence to allow the party seeking to maintain privilege to invite comment on commercial alternatives available to it or to allow it to make a decision in the ordinary course of its insurance business as to whether or not to grant indemnity. The former may be privileged, but the latter is not, as it does not satisfy the dominant purpose test (see Seven Network Ltd v News Ltd [2005] FCA 1342 at [27]). The nature or character of the documents may illuminate the purpose (Seven Network at [38]). Passages from Sutton K, *Insurance Law in Australia* (3rd ed, LBC, 1999) at [15.98] were cited with approval in Re Southland Coal Pty Ltd (2005) 189 FLR 297 at [70] and [71], per Young CJ in Eq, as follows:

Documents created so that the insurer can be informed generally and can in the ordinary course of business investigate any claim that might be made before deciding what to do ... are not privileged in contrast to the situation where the reports are prepared at a time when litigation is either likely or anticipated.

(See also Vardas v South British Insurance Co Ltd [1984] 2 NSWLR 652 at 656.)

(j) *Failure to call relevant witnesses* -- If the party asserting privilege over a communication has the capacity to call direct evidence on the issue of purpose, but does not do so, the tribunal of fact is entitled to infer that this evidence would not have assisted the person's case (Ho v Powell (2001) 51 NSWLR 572 at 576; Hawksford v Hawksford [2005] NSWSC 796 at [19], per Campbell J).

(k) *Inspection by the court* -- The court has the power to inspect the document itself to determine a claim for privilege, especially where differing kinds of claim about the basis of privilege are made (Grant v Downs at 689; Hawksford v Hawksford at [21], per Campbell J). It should not be hesitant to exercise that power (Esso Australia Resources Ltd v Commissioner of Taxation (Cth) at 70, per Gleeson CJ, Gaudron and Gummow JJ). That is especially the case where the judge hearing the application relating to privilege is not the trial judge."