

## CIVIL LITIGATION IN CRISIS – WHAT CRISIS

### The Way Forward – An Australian Perspective

#### What is happening in Australia in terms of addressing issues concerning the way civil litigation is conducted?<sup>1</sup>

*“The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms.”<sup>2</sup>*

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#### Precis

1. The last four decades have seen an increasing focus on the Australian judiciary taking a hands-on approach to managing the cases which come before the courts. This has been a response to the long delays and high costs which have bedevilled the justice system since long before, but at least when, Charles Dickens penned his memorable account of the iniquities of the 19th-century English legal system in 1853 in *Bleak House* as manifested in *Jarndyce v Jarndyce*, a case about the fate of a large inheritance which drags on for so long that by the time it is resolved the legal costs have taken the entire estate. As Dickens wrote in the first chapter:

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<sup>1</sup> This paper is written from the perspective of a judge of the New South Wales Court of Appeal, the Honourable Justice Ruth McColl AO, who, prior to appointment in 2003, practised at the New South Wales Bar for 23 years. The paper necessarily, therefore, largely deals with the way civil litigation is conducted in New South Wales, a perspective it is hoped will be considered relevant, particularly in light of the fact that New South Wales courts deal with substantially more matters than the other States and territories of the Commonwealth. I thank David Nguyen, my 2008 legal researcher, for his invaluable assistance in the preparation of this paper.

<sup>2</sup> J Resnik, “Precluding appeals” (1985) 70(4) *Cornell Law Review* 603, 624.

“Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.”

2. *Bleak House* was written just two or so decades before the procedural reforms introduced by the *Judicature Act* of 1873 (UK). It took Australian courts some time to catch up even with the *Judicature Act* reforms, but since the 1970s the New South Wales courts have tackled the issues *Bleak House* highlighted with increasing zeal. This paper seeks to present an overview of those procedural reforms and the effect those reforms are having on the adversarial system. It also touches on the extent to which procedural reforms and the delivery of substantive justice must be balanced to ensure the ultimate objective of delivering justice, rather than merely administering it with increasing efficiency.

### **The adversarial system**

3. The term, “adversarial system”, according to the Australian Law Reform Commission (the “ALRC”) refers to the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the case.<sup>3</sup>

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<sup>3</sup> Commonwealth Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, (2000) (the “Managing Justice Report”) at [1.117].

4. More colloquially the ALRC described the adversarial system thus (footnotes omitted):<sup>4</sup>

“1.119 The term ‘adversarial’ also connotes a competitive battle between foes or contestants and is often associated in popular culture with partisan and unfair litigation tactics. Battle and sporting imagery are commonly used in reference to our legal system. Lawyers’ anecdotes about the courtroom are ‘war stories’. The term ‘adversarial’ has become pejorative. The comparison is the perceived harshness of our own system with an idealised, cooperative dispute resolution model (not a conflict model) associated with ADR, or the ‘games’ and tactics of adversarial systems set against ‘truth finding’ inquisitorial processes of civil code systems.”

5. As the following discussion reveals, the procedural reforms which have been implemented continue to leave the responsibility for defining issues and investigating and advancing the case in the parties’ hands, however they are concerned to ensure that only “real” issues are advanced and, too, with marshalling the parties towards the end goal of a settlement or a trial efficiently and cost effectively.

### **Crisis! What crisis?**

6. In 1996 the then Chief Justice of the High Court of Australia, Sir Gerard Brennan, said:

“[t]he courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant; governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis.”<sup>5</sup>

7. Four years later, after the Australian Law Reform Commission had conducted an exhaustive study of the federal justice system in Australia, in 2000 it released its

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<sup>4</sup> Managing Justice Report at [1.119].

<sup>5</sup> G Brennan, “Key issues in judicial administration”, Paper delivered at the Fifteenth Annual Conference of the Australian Institute of Judicial Administration, Wellington 20-22 September 1996.

report, “Managing Justice: A review of the federal civil justice system”.<sup>6</sup> It noted Sir Gerard’s remarks, but observed that its investigation did not support the crisis theory, at least not in relation to the federal courts and tribunals. It found a “rise in case loads in some areas of federal jurisdiction, but no ‘litigation explosion’; small numbers of cases taking two to three years to finality, evident room for improvement in case duration, but no systemic, intractable delay in case processing or resolution; and a range of very high and medium legal costs and much litigation assistance from lawyers and government.” Its empirical research led it to conclude that “[t]he adage that the justice system is open only to the very rich and very poor was not confirmed”.<sup>7</sup> It acknowledged, however, that other issues such as the volume of personal injury work and issues connected with the criminal law tended to cause “significant controversy and disquiet” in relation to state jurisdictions.<sup>8</sup>

8. The latter observation might be borne out by the fact that in the 1990’s, at about the time Sir Gerard spoke, the NSW Supreme and District Courts<sup>9</sup> used acting judges to an unprecedented extent to cope with serious delays which had greatly exceeded delays which had been experienced in the federal arena.<sup>10</sup> This measure was, no doubt, taken at least in the Supreme Court because Chief Justice Gleeson ascertained just before his appointment as Chief Justice of the

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<sup>6</sup> The Managing Justice Report inquired into courts and tribunals exercising federal jurisdiction including the High Court of Australia, the Federal Court of Australia and the Family Court of Australia.

<sup>7</sup> Managing Justice Report (at [1.47] – [1.48]).

<sup>8</sup> Managing Justice Report (at [1.50])

<sup>9</sup> Respectively the largest superior court of general jurisdiction and the largest trial court in Australia.

<sup>10</sup> The Hon Murray Gleeson AC, Chief Justice of Australia, “*Managing Justice in the Australian Context*”, speech to the Australian Law Reform Commission Conference, 19 May 2000: [http://www.hcourt.gov.au/speeches/cj/cj\\_alrc19may.htm](http://www.hcourt.gov.au/speeches/cj/cj_alrc19may.htm); a similar blitz, took place in October and November 1992 when judges of the Supreme Court of Victoria conducted “the spring offensive” to get rid of as many simple cases as they possibly could in the space of two months: see *Sali v SPC Ltd* [1993] HCA 47; (1993) 67 ALJR 841.

New South Wales Supreme Court in 1988,<sup>11</sup> that by the end of 1990, two years into his term of office, “in the absence of radical change, the average time from commencement to finalisation of cases in the Common Law Division of the Court would be 10 years”. As his Honour later observed, “[s]uch news, received in such circumstances, concentrates the mind”.<sup>12</sup>

9. Some of the ALRC’s observations set the present topic in context. In particular the ALRC recognised that issues of cost, timeliness, efficiency and accessibility had bedevilled civil justice systems around the world. It quoted Adrian Zuckerman’s observation that:

“[a]lthough excessive delay and high cost have serious effects on the system of justice, they have been persistent in most civil justice systems for a very long time. Every country boasts a long history of attempts to reduce delay and cost, yet few have been even moderately successful in reaching a sensible balance.”

and (at [1.73]) the dismal statement that:

“... [d]espite some sixty reports in England on aspects of civil procedure since 1851, there has been no lasting solution to the twin problems of cost and delay. The same is true of North America. Our predecessors were neither foolish dullards nor acting in bad faith; reform is simply very difficult. The challenge is not simply to propose change: it is to propose reforms which significantly improve the current position.”

10. With those observations in mind, it is pertinent to examine steps taken in Australia to address costs and delay.

### **Procedural reform in New South Wales**

11. In 1899 the public perception was that law was “uncertain, dilatory and costly”. Lawyers dismayed by this bleak view attributed it, in part at least, to the “cumbersome, complicated and confusing rules framed to regulate legal

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<sup>11</sup> His Honour was Chief Justice of the Supreme Court of New South Wales from 1988 until 1998 when he was appointed Chief Justice of the High Court of Australia.

<sup>12</sup> The Hon Murray Gleeson AC, Chief Justice of Australia, “*Outcome, Process and the Rule of Law*”, Address to the Administrative Appeals Tribunal 30th Anniversary, Canberra 2 August 2006, p 7. [http://www.hcourt.gov.au/speeches/cj/cj\\_2aug06.pdf](http://www.hcourt.gov.au/speeches/cj/cj_2aug06.pdf)

procedure”.<sup>13</sup> There was pressure for the reforms implemented by the *Judicature Act* of 1873 to be followed up by a “thorough, trenchant, [and] far reaching system of law reform,<sup>14</sup> for more legislation whose “speed, simplicity and finality attracted litigants and commanded their confidence”.<sup>15</sup>

12. The procedural reforms viewed as so desirable by the English legal profession in New South Wales at the turn of the nineteenth century were not implemented in New South Wales until the passing of the *Supreme Court Act* 1970 (NSW) (the “1970 Act”) (described by the Bar as “the great leap forward to 1873”), the product of a work by the New South Wales Law Reform Commission directed to achieving:

- the simplification of court procedures;
- the reduction of technicalities;
- eliminating unnecessary work in the conduct of proceedings in the court; and
- reducing the costs of court proceedings.<sup>16</sup>

13. One of the principal barriers to justice the 1970 Act was intended to overcome arose from the division of the civil jurisdiction of the Supreme Court into various “sub-jurisdictions” of common law, equity, matrimonial causes, probate, protective and admiralty. A plaintiff failed if proceedings were commenced in the wrong jurisdiction, could only obtain the relief which was available in that jurisdiction and could not obtain incidental relief outside the jurisdiction.<sup>17</sup> This technical obstacle

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<sup>13</sup> Rubenstein, “Law Reform” (1899) 107 *Law Times* 528.

<sup>14</sup> T Snow, “The Near Future of Law Reform (Part I)” 16 *LQR* 129 at 133.

<sup>15</sup> T Snow, “The Near Future of Law Reform (Part II)” 16 *LQR* 229.

<sup>16</sup> Report 7 (1969) - Supreme Court procedure. The Report recites the sorry history of attempts to implement procedural reforms in New South Wales dating back to 1880.

<sup>17</sup> Introduction, *Ritchie’s Supreme Court Procedure NSW*, Butterworths (at [1003]). This work has been superseded with the passing of the *Civil Procedure Act* 2005, which is dealt with in *Ritchie’s Uniform Civil Procedure NSW*.

to obtaining substantial justice was overcome by ss 51, 54 and 55 of the 1970 Act.

14. The adversarial system proper flourished prior to the introduction of the 1970 Act. Trial by ambush was *de rigueur*.<sup>18</sup> The following account illustrates the way civil litigation was conducted then:

“Any technical point taking was regarded as valid, no matter how lacking in merit or dilatory. I participated in the famous criminal trial in Rabaul in 1972 of defendants accused of murdering the District Commissioner of East New Britain, Jack Emanuel, at a land rights demonstration. The first week was taken up by Lusher QC, subsequently Lusher J of the NSW Supreme Court, taking such points as that the person who presented the indictment was not the person who had signed it: *R v Tovarula* [1973] PNGLR 140. (There was perhaps some excuse in that this was a capital trial, but most of the defects were easily curable.) One of my colleagues in the Equity Division remembers participating somewhat later in a civil trial where weeks were taken up proving the writing and sending of letters, although there was no real issue that the correspondence had in fact passed. Dealing with correspondence in this way in a civil trial in New South Wales today is inconceivable.”<sup>19</sup>

15. Other reforms which were made to minimise strains on the justice system were the substantial elimination of juries in civil cases (a reform substantially achieved in New South Wales in the 1960’s) and enabling some criminal cases to be heard by a judge alone.<sup>20</sup>
16. The courts also moved to greater use of external decision-makers. The *Arbitration (Civil Actions) Act* 1983 (NSW) was passed empowering the Supreme, District and Local Courts to appoint arbitrators who could hear matters referred under the relevant legislation of each court. Such arbitrations flourished in the 1980’s and 1990’s, the period when the Supreme and District Courts were under the strain to which I have already referred. An allied development was the

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<sup>18</sup> A colourful account of the way civil litigation was conducted prior to the introduction of the 1970 Act can be read in “Thirty years of civil procedure reform in Australia: A personal reminiscence”, (2005) 26 *Australian Bar Review* 258, Justice John Hamilton, Supreme Court of New South Wales.

<sup>19</sup> *Ibid.*

<sup>20</sup> See Chapter 4, Part 5, *Criminal Procedure Act* 1986 (NSW).

adoption of Part 72 of the Supreme Court Rules 1970 (NSW) which enabled proceedings to be referred to an expert referee for inquiry and report either on the whole of the proceedings or merely one issue. The referee conducted the reference as he or she thought fit. The rules of evidence did not apply. The report had to be adopted by the Supreme Court, but it was established that the power of a trial judge to reject a report, whether in whole or in part, should not be exercised too readily.<sup>21</sup>

17. The Supreme Court also incorporated mediation into its procedures. In 1994 the Supreme Court and other courts in New South Wales were empowered to refer matters for mediation or neutral evaluation if the parties to the proceedings agreed.<sup>22</sup> In 2000 the 1970 Act was amended to insert s 110K which permitted the Court, in all but criminal cases, if it considered the circumstances appropriate, to make an order referring any proceedings, or part of any proceedings before it for mediation or neutral evaluation, with or without the consent of the parties to the proceedings concerned. The mediation or neutral evaluation was to be undertaken by a mediator or evaluator agreed to by the parties or, if the parties could not agree, by a mediator or evaluator appointed by the Court. It was the duty of each party to proceedings referred for mediation to participate, in good faith, in the mediation: s 110L.<sup>23</sup> This amendment was opposed by the Bar as being inimical to a citizen's fundamental right to have a matter, commenced bona fide in the Supreme Court, determined according to law and as expeditiously as

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<sup>21</sup> See *Ryde City Council v Tourtouras* [2007] NSWCA 218 (at [22]) per Basten JA (Santow and McColl JJA agreeing) and *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 (at 562-564) per Gleeson CJ (with whom Mahoney and Clarke JJA agreed).

<sup>22</sup> *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW).

<sup>23</sup> The provisions were repeated in the *Civil Procedure Act 2005*: see Part 4, Mediation of Proceedings, esp. ss 26 – 27.



the Court's processes permitted and as having the potential to increase costs,<sup>24</sup> but the objection fell on deaf ears.

18. Between 2002 and 2006 the number of cases referred for court-annexed mediation<sup>25</sup> in the Common Law Division of the Supreme Court increased from 8 to 12, while in the Equity Division, in non-probate cases, it increased from 133 to 262. The percentage of cases which settled at the mediation has fallen slightly, from 64% in 2002 to 58% in 2006.<sup>26</sup>

### Case management

19. In the 1980s the courts also began implementing case management procedures which involved the court managing the time and events involved in the movement of cases from commencement to disposition.<sup>27</sup> The ALRC quoted Justice Wood's identification of the objectives of case management (caseflow and caseload<sup>28</sup>) as including:

- early resolution of disputes ;
- reduction of trial time;

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<sup>24</sup> Bret Walker SC and Andrew S. Bell, "Justice according to compulsory mediation: Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW)", *Bar News, The Journal of the NSW Bar Association*, Spring 2000 7 at 8: [http://www.nswbar.asn.au/docs/resources/publications/bn/bn\\_spring00.pdf](http://www.nswbar.asn.au/docs/resources/publications/bn/bn_spring00.pdf).

<sup>25</sup> Mediations conducted by Registrars of the Court qualified as mediators.

<sup>26</sup> Supreme Court of New South Wales, Annual Review 2006, p 56. An indication of the extent to which Australian Courts and Tribunals have embraced a range of alternative dispute resolution techniques can be seen in "ADR Statistics Published Statistics on Alternative Dispute Resolution in Australia", published by the National Alternative Dispute Resolution Advisory Council in 2003: see <http://www.nadrac.gov.au/>.

<sup>27</sup> Commonwealth Australian Law Reform Commission, "Judicial and case management", Adversarial Background Paper 3, (December 1996): <http://www.austlii.edu.au/au/other/alrc/publications/bp/3/management.html>

<sup>28</sup> Caseflow management involves the control of movement of cases through a court, caseload management involves the control of the total workload of a court: Dr Tania Sourdin, "Judicial Management and Alternative Dispute Resolution\* Process Trends" (1996) 14 *Australian Bar Review* 185 (at 190 – 191).

- more effective use of judicial resources;
- the establishment of trial standards;
- monitoring of case loads;
- development of information technology support;
- increasing accessibility to the courts;
- facilitating planning for the future;
- enhanced public accountability; and
- the reduction of criticism of the justice system by reason of perceived inefficiency.<sup>29</sup>

20. In 1993 Justice Wood observed that unless the trend towards the adoption of judicial management techniques as well as ADR processes continued and further reforms were adopted, the legal system as practised in Australia, and in other countries with a similar jurisprudential foundation, was likely to collapse.<sup>30</sup>

21. Case management has been said to go hand in hand with a new philosophy of distributive justice in procedure, according to which:

“... the function of the courts is not only to decide cases according to the law and the facts, but also to ensure that the limited resources of the system of civil justice are justly distributed between all those seeking justice. Accordingly, judges must ensure that the resources given to individual disputes are proportionate to the complexity and importance of each dispute. In so doing judges must take into account not only the interests of the litigants before the court, but also the interests of all others waiting in the queue. The aim of judicial control is, therefore, to avoid unnecessary cost and delay and ensure that the court resources are economically managed. This philosophy of distributive justice brings to the administration of civil justice the practical considerations of cost-effectiveness and of efficient management of public resources, which play an important part in the provision of most other public services.”<sup>31</sup>

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<sup>29</sup> Justice James Wood, “The changing face of case management: The New South Wales experience” (1995) 4 *Journal of Judicial Administration* 121.

<sup>30</sup> Justice James Wood, “Litigation Through the 1990s: Alternative Dispute Resolution and Case Management”, paper delivered at International Legal Conference, Whistler, Canada, January 1993, p 3 quoted in Sourdin (op cit).

<sup>31</sup> J Roemer, *Theories of distributive justice* (1996) Harvard University Press, quoted in *Managing Justice Report* (at [1.94]).

22. Case management in the Supreme Court was facilitated by the adoption of a rule (SCR P26 r 1) which permitted the court to give such pre-trial directions as appeared “convenient” (whether or not inconsistent with the rules) for the “just, quick and cheap disposal of the proceedings”.<sup>32</sup>
23. In January 2000 “just, quick and cheap” became the catchcry of the Supreme Court. Chief Justice Spigelman announced amendments to the Supreme Court Rules intended to inaugurate a new standard for civil procedure.<sup>33</sup> He described the emergence of case management in place of the traditional hands-off approach to the conduct of litigation, as the judicial response to public expectations with regard to accountability for public funds, the restrictions on availability of resources and the necessity that courts perform in a manner which avoids imposing costs on litigants and third parties. He observed that the thrust of the development of case management over recent decades had been for the Court to accept increased responsibility for ensuring that matters are made ready for trial and that trials focus on the real issues and are conducted expeditiously.
24. Chief Justice Spigelman announced reforms designed to improve the administration of justice by changing practices and adopting realistic costs sanctions. The principal changes his Honour described were:

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<sup>32</sup> This rule embodied the ambitions of the Supreme Court’s Commercial Division as expressed in its Practice Note 39 that “procedures for the preparation and hearing of cases” had been restricted by the judges of that Division and reinforced the drive towards the speedy, inexpensive and hopefully, legally correct resolution of the real dispute between the parties”: Justice A Rogers, “The New Practice and Procedure in the Commercial Division of the Supreme Court of New South Wales”, paper delivered to the Young Lawyers Section of the Law Society of New South Wales, 10 December 1986, p 1, cited in Sourdin, *op cit*, (at 195).

<sup>33</sup> The Honourable JJ Spigelman, Chief Justice of NSW, “Just, Quick and Cheap - A Standard for Civil Justice”, Address at Opening of Law Term Dinner, Parliament House, Sydney, 31 January 2000, [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman\\_310100](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_310100)

- A statement of overriding purpose, inserted at the commencement of the Supreme Court Rules stating that the objective of the Rules was to facilitate the just, quick and cheap resolution of the real issues in civil proceedings.<sup>34</sup>
- The adoption of specific time targets for the disposal of cases, together with a plan for the progressive reduction of delays.
- Rules imposing on all parties an obligation to refrain from making allegations, or maintaining issues, unless it is reasonable to do so. A new summary procedure was created for the payment of costs on an indemnity basis by parties who breach this obligation.
- A range of specific directions set out in the Supreme Court Rules which the Court may make in the course of managing cases, including the imposition of time limits on the evidence of witnesses, or on submissions, or on the whole, or part, of a case.
- Rules empowering the Court to direct a legal practitioner to give a party a memorandum providing an estimate of the length of the trial, of the costs and disbursements of that practitioner and of the estimated costs that would be payable by the party to another party, if the party were unsuccessful.
- Rules empowering the Court to specify the maximum costs that may be recovered by one party from another, to avoid the injustices that can occur when one party has “deep pockets”.
- Rules empowering the Court to order that costs be payable forthwith, in any case in which a party has been subject to unreasonable delay or default, or the proceedings are unreasonably protracted, or justice otherwise demands such an order.
- Rules empowering the Court to order a person to pay the costs occasioned by the failure of that person to comply with a direction of the Court.
- The establishment via a Practice Note of procedures complementing Rules identifying circumstances in which a legal practitioner can be ordered to pay costs. Such orders may flow from breach of duties to the Court.
- A Code of Conduct for expert witnesses establishing that an expert witness has an overriding duty to assist the Court impartially, that an expert witness’

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Gleeson CJ famously observed at the time that “[t]hat phrase demonstrate[d] the importance of punctuation” and hoped “that Chief Justice Spigelman [would] be able to resist any attempts to remove the comma from his mission statement”): Gleeson, *op cit*. For a discussion of principles relating to the overriding purpose, see *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 338; (2000) 49 NSWLR 51.

paramount duty is to the Court and that he or she is not as an advocate for a party to the proceedings.

- The Code was also to establish a system by which experts make full disclosure of relevant matters in their reports and, upon direction by the Court, confer with other expert witnesses in an endeavour to reach agreement on material matters. An expert is obliged to state any qualification without which, in his or her opinion, a report may be incomplete or inaccurate. Furthermore, where the expert had insufficient data or research to state a concluded opinion, he or she must say so.

25. As his Honour observed, a number of these measures replicated or adapted rules and practices that already existed in other courts, specifically the Supreme Courts of Western Australia and of Queensland and the Federal Court.<sup>35</sup>

26. The changes Chief Justice Spigelman announced were incorporated in the New South Wales Supreme Court Rules and applied only in that Court. However in 2005 New South Wales adopted the *Civil Procedure Act 2005* (the “CPA”) and Uniform Civil Procedure Rules 2005 (“UCPR”) which apply, subject to certain local

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<sup>35</sup> Clause 4A of the Western Australian Rules of The Supreme Court 1971 provides that the practice, procedure and interlocutory processes of the Court shall have as their goal the elimination of any lapse of time from the date of initiation of proceedings to their final determination beyond that reasonably required for interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties and the preparation of the case for trial. Clause 4B provides that actions, causes and matters in the Court will, to the extent that the resources of the Court permit, be managed and supervised in accordance with a system of positive caseload management with the objects of (a) promoting the just determination of litigation; (b) disposing efficiently of the business of the Court; (c) maximising the efficient use of available judicial and administrative resources; and (d) facilitating the timely disposal of business at a cost affordable by parties. The Rules are to be construed and applied and the processes and procedures of the Court conducted so as best to ensure the attainment of the objects referred to in paragraph (1).

Clause 5 of the Queensland Uniform Civil Procedure Rules 1999, headed “Philosophy - overriding obligations of parties and court” describes the purpose of the rules as being to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense, requires the rules to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules. It also provides that in a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way and that the court may impose appropriate sanctions if a party does not comply with these rules or an order of the court. Examples given are that the court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court. A discussion of the Queensland procedural reforms can be read in B C Cairns, “A review of some innovations in Queensland civil procedure” (2005) 26 *Australian Bar Review* 158.

rules,<sup>36</sup> to all courts in the New South Wales hierarchy: the Supreme, District and Local Courts.<sup>37</sup>

27. Part 6 of the Act deals with Case Management and Interlocutory Matters. Division 1 sets out the “Guiding principles”, the first one being:

**“56 Overriding purpose**

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

28. Section 57 sets out the objects of case management, while s 58 requires the court to follow the dictates of justice in discharging its case management role. Section 58(2) explains how this is to be done:

- (2) For the purpose of determining what are the dictates of justice in a particular case, the court:
  - (a) must have regard to the provisions of sections 56 and 57, and
  - (b) may have regard to the following matters to the extent to which it considers them relevant:
    - (i) the degree of difficulty or complexity to which the issues in the proceedings give rise,

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<sup>36</sup> *Civil Procedure Act*, s 11; UCPR 1.7

<sup>37</sup> The idea of uniform civil procedure rules seems to have been drawn from recommendations made by Lord Woolf in his *Access to Justice*, Final Report, July 1996, section 1, para 9; see Natasha Thomson, “*Life after Woolf: The impact of the civil procedure reforms*”, (2001) 11 *Journal Of Judicial Administration* 81 (at 86).

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

29. Section 59 requires the practice and procedure of the court to be implemented “with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial”.

30. Section 60 requires the practice and procedure of the court to be implemented “with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute”.

### **Expert evidence**

*“1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v Jordan [1981] 1 WLR 246 at 256, per Lord Wilberforce).*

*2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd v Commercial Union Assurance Co Plc [1987] 1 Lloyd's Rep 379 at 386 per Mr Justice Garland and Re J, [1990] FCR 193 per Mr Justice*

*Cazalet*). An expert witness in the High Court should never assume the role of an advocate.”

*National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The “Ikarian Reefer”)* [1993] 2 Lloyd’s Reports 68 (at 81) per Cresswell J.

31. In 2006 Chief Justice Gleeson observed that the “effective and fair use of expert evidence [was] an issue currently facing the court system”. His Honour described the topic as a “large” one, but did not elaborate.<sup>38</sup>

32. Perhaps he did not need to. The profession has often been concerned that reality belied the ideal of an expert witness Cresswell J identified in the *Ikarian Reefer*.<sup>39</sup> In 1995 Lord Woolf said of expert witnesses:

“Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.”<sup>40</sup>

33. In his 1996 report, Lord Woolf singled out expert evidence as a major issue in civil justice and proposed such evidence be controlled pursuant to case management and only be used where it provided assistance to the court. This was to be achieved by using single joint experts, and, further, by imposing on experts an overriding duty to the court impelling impartiality.<sup>41</sup> The idea of the single expert appears to be sourced from civil law jurisdictions.<sup>42</sup>

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<sup>38</sup> The Hon AM Gleeson AC, Chief Justice of Australia, “Outcome, Process and the Rule of Law”, Address to the Administrative Appeals Tribunal 30th Anniversary; Canberra 2 August 2006

<sup>39</sup> See for example *Vakauta v Kelly* (1989) 167 CLR 568 where before hearing the evidence of the appellant’s doctors in an assessment of damages for personal injuries suffered by the respondent, the trial judge referred to them as an “unholy trinity”, and said that he was not usually very impressed with their views because they were almost inevitably slanted in favour of the Government Insurance Office, which he said was notoriously inefficient in its conduct of personal injury litigation. The High Court held that the trial judge’s remarks constituted ostensible bias.

<sup>40</sup> Lord Woolf MR, “Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales”, HMSO, London, 1995, (at 183).

<sup>41</sup> *Access to Justice*, Final Report, July 1996, Ch 13.

<sup>42</sup> Thomson, *op cit*, (at 85).



34. In New South Wales the courts have been exercising increasing control over the manner in which expert evidence can be given. In 2000 the Supreme Court Rules were amended to insert a rule (Pt 36 r 13C) which required a person engaging an expert to provide the expert with a copy of the expert witness code of conduct set out in Schedule K to the Rules (see Appendix 1). Service of an expert witness's report was not valid, nor was the report or oral evidence from the expert admissible, unless the report contained an acknowledgment by the expert witness that he or she had read the code and agreed to be bound by it and a copy of the acknowledgment had been served on all parties affected by the evidence: SCR Pt 36 r 13C(2)(b) and (c). The court was also given power to order experts to confer, including specifying the matters on which they are to confer; to order them to endeavour to reach agreement on outstanding matters; and to provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement: SCR Pt 36 r 13CA. Where expert witnesses had conferred pursuant to the rule and provided a joint report agreeing on any matter, a party affected by that report could not, without leave of the Court, adduce expert evidence inconsistent with the matter agreed: SCR Pt 36 r 13CA(6).
35. The courts have sought to enforce strict compliance with the Schedule K (and corresponding) requirements. In *Commonwealth Development Bank of Australia Pty Ltd v Claude George Rene Cassegrain* [2002] NSWSC 980 the defendants sought to adduce evidence from an expert who had not acknowledged his obligations under Sch K. In oral evidence, the expert said that he adhered to the evidence in his report having regard to the obligations imposed under Sch K. Einstein J held that the Court should not admit the report in those circumstances. He said (at [11]) that the Court should not generally countenance attempts by experts retrospectively to adopt the obligations imposed under Sch K.
36. These rules and a like Schedule were substantially repeated in r 31.23 of the Uniform Civil Procedure Rules 2005 and the code of conduct set out in Schedule 7 (see Appendix 2), although they have been fine-tuned to ensure they cover the

position where the expert whose evidence was tendered had not been engaged to provide opinion evidence in the proceedings: see *Investmentsource Corp Pty Ltd v Knox Street Apartments Pty Ltd* [2007] NSWSC 1128 (at [25]) per McDougall J. In the latter case McDougall J held (at [43]) that the Rules had been structured to ensure that expert reports that did not acknowledge Sch 7, whether prepared by an expert engaged for the purpose of giving evidence in the proceedings or otherwise, should not be admitted unless the Court otherwise orders. His Honour said:

“[44] In my view, the clear intention of this change in the regulatory framework is to reinforce the proposition that, as a general rule, expert evidence should not be admitted unless the expert has at the relevant time subscribed to the obligations that are now to be found in Sch 7.”

37. Subdivision 2 of Part 31 of the Uniform Civil Procedure Rules has created a new regime for expert evidence.<sup>43</sup> The aim of the Subdivision<sup>44</sup> is to ensure that the court has control over the giving of expert evidence, to restrict expert evidence in proceedings to that which is reasonably required to resolve the proceedings, and to avoid unnecessary costs associated with parties to proceedings retaining different experts. Significantly the Subdivision intends to ensure “if it is practicable to do so without compromising the interests of justice” that expert evidence on an issue in the proceedings be given by a single expert engaged by the parties or appointed by the court. Further experts will only be permitted “if it is necessary to do so to ensure a fair trial of proceedings”. The Subdivision also declares the duty of an expert witness in relation to the court and the parties to proceedings.

38. Parties intending to call expert evidence must promptly seek directions from the court: UCPR 31.19. The Court has wide powers as to the direction it can give,

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<sup>43</sup> These rules largely reflect the recommendations of the NSW Law Reform Commission’s Report No 109 on Expert Witnesses.

<sup>44</sup> See Uniform Civil Procedure Rules, 31.17

including limiting the number of expert witnesses who may be called to give evidence on a specified issue, requiring the engagement and instruction of a party's single expert in relation to a specified issue, directing the appointment and instruction of a court-appointed expert in relation to a specified issue, requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue and directing that an expert who has prepared more than one expert's report in relation to any proceedings is to prepare a single report that reflects his or her evidence in chief: UCPR 31.20. Experts are required to comply with the code of conduct in Schedule 7: UCPR 31.23.

39. The court may direct expert witnesses to confer, either generally or in relation to specified matters, and to endeavour to reach agreement on any matters in issue, and to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, and to base any joint report on specified facts or assumptions of fact. It can also direct that a conference be held between the experts with or without the attendance of the parties affected or their legal representatives: UCPR 31.24. The format of a joint report is prescribed: UCPR 31.26.
40. The rules also expressly provide for the practice of "hot tubbing", namely experts being sworn at the same time and give evidence, in effect, as a panel (UCPR 31.35), a procedure well established in the area of competition law in relation to economic evidence. This rule adopted a rule which had been introduced in the Federal Court in 1998: Federal Court Rules, Order 34A, rule 3.
41. The *Managing Justice Report* noted the Federal Court's advice about the success of "hot tubbing", that being that having both parties' experts present their views at the same time was very valuable and, in contrast to the conventional approach, where an interval of up to several weeks may separate the experts' testimony, enabled the judge to compare and consider the competing opinions on a fair basis. The Court concluded that experts approved of the procedures and

welcomed it as a better way of informing the Court. The Court was also of the view that the procedure was of “symbolic and practical importance in removing the experts from their position in the camp of the party who called them”.<sup>45</sup> The ALRC recommended that “[p]rocedures to adduce expert evidence in a panel format should be encouraged wherever appropriate”.<sup>46</sup>

### **Changing the legal culture**

42. An integral aspect of the legal practitioner's duty to the court is to ensure the business of the courts is conducted with the expediency consistent with the due administration of justice: *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153; (2005) 63 NSWLR 300 (at [97]).

43. A concern that this aspect of the legal practitioner's duty to the court may not be as entrenched in legal culture as desirable has seen a number of legislative changes and amendments to the rules governing the conduct of the legal profession as part of the process of moving the culture of the legal profession towards the concept of the expeditious disposition of proceedings.

44. This also reflects the ALRC's conclusion that it was necessary “to engage the legal profession, the academy, government, and others in the task of reshaping legal practice and professional culture in aid of meaningful reform of the civil justice system”.<sup>47</sup> At the moment it might be thought the process of engaging the legal profession has involved use of a big stick.

45. In 2000 the NSW Barristers' Rules were amended to require:

“17A. A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available

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<sup>45</sup> *Managing Justice Report* (at 6.117).

<sup>46</sup> The Supreme Court of Victoria took up hot-tubbing in its Commercial List in 2004: see Practice Note No 4 of 2004 (at [11.4]): (2004) 8 VR 480; I see that hot-tubbing was used by Baragwanath J in *P v Police* [2007] 2 NZLR 528.

<sup>47</sup> *Managing Justice Report* (at [1.14]).

to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

....

36. A barrister must not allege any matter of fact in:

- any court document settled by the barrister;
- any submission during any hearing;
- the course of an opening address; or
- the course of a closing address or submission on the evidence;

unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.

### **Efficient administration of justice**

41. A barrister must seek to ensure that:

the barrister does work which the barrister is briefed to do, whether expressly or impliedly, specifically or generally, in relation to steps to be taken by or on behalf of the client, in sufficient time to enable compliance with orders, directions, rules or practice notes of the court; and

warning is given to the instructing solicitor or the client, and to the opponent, as soon as the barrister has reasonable grounds to believe that the barrister may not complete any such work on time.

42. A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to:

- confine the case to identified issues which are genuinely in dispute;
- have the case ready to be heard as soon as practicable;
- present the identified issues in dispute clearly and succinctly;
- limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and
- occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

42A. A barrister must take steps to inform the opponent as soon as possible after the barrister has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application,

and must try with the opponent's consent to inform the court of that application promptly.”

46. In 2002, Division 5C, “Costs in civil claims where no reasonable prospects of success” was inserted in Part 11 of the *Legal Profession Act 1987*. Part 11 deals with “Legal fees and other costs”. It was inserted contemporaneously with the introduction of the *Civil Liability Act 2002*. Section 198J provided that a solicitor or barrister must not provide legal services on a claim or defence of a claim for damages unless the solicitor or barrister reasonably believed on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) had reasonable prospects of success. Division 5C applied despite any obligation that a solicitor or barrister may have to act in accordance with the instructions or wishes of his or her client: s 198J(3). The provision of legal services without reasonable prospects of success was not an offence but was capable of being professional misconduct or unsatisfactory professional conduct: s 198L. A solicitor or barrister could not file court documentation on a claim or defence of a claim for damages unless the solicitor or barrister certified that there were reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success: s 198L. A court could not accept court documentation on a claim or defence of a claim for damages for lodgement unless it was accompanied by the certification required by s 198L. These provisions continue to apply in New South Wales after the enactment of the *Legal Profession Act 2004*: see Pt 3.2, Division 10.<sup>48</sup>

47. Section 99 of the *Civil Procedure Act* continues the power of the Court, after giving a legal practitioner a reasonable opportunity to be heard, to order the legal

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<sup>48</sup> The operation of the provisions under the 1987 Act was considered in *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153; (2005) 63 NSWLR 300 which examined the development in England of the “wasted costs” jurisdiction under which a legal practitioner may be ordered to pay the costs of proceedings in which they have represented parties and in which their conduct is found to have been “quite plainly unjustifiable”.

practitioner whose serious neglect, serious incompetence or serious misconduct has led to costs being incurred to pay those costs whether to the client, another legal practitioner or another party. Such an order may also be made where costs have been incurred improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible. Section 99 is complemented in the Supreme Court by Practice Note 5 which warns practitioners that compliance with directions and rules will be confirmed by the use of costs sanctions in appropriate cases, including costs orders against practitioners personally and costs ordered on a payable forthwith basis, reminds them of their duty to the Court to ensure the efficient and expeditious conduct of proceedings, warns that late amendment of pleadings may attract a costs order against a practitioner and that in appropriate cases, particularly those involving repeated defaults, the Court may refer an incident or incidents of default to the Law Society, Bar Association or Legal Services Commissioner.

48. The courts recognise that “[t]he jurisdiction to order a legal practitioner to pay the costs of legal proceedings in respect of which he or she provided legal services must be exercised ‘with care and discretion and only in clear cases’.”: *Lemoto* (at [92]). Nevertheless the Court of Appeal has warned that “[i]f ...the facts clearly showed that a solicitor [in winding up proceedings] had given very bad advice to an unsophisticated client who had accepted it without question with the result that the company concerned had incurred substantial legal costs, that may well be a case where the Court would, after giving the solicitor due notice to explain, make an order that the solicitor pay the costs personally”: *Re The Black Stump Enterprises Pty Ltd and Associated Companies (No 2)* [2006] NSWCA 60 (at [14]) per Young CJ in Eq (Santow and Bryson JJA agreeing).
49. In *Karwala v Skrzypczak Re Estate of Ratajczak* [2007] NSWSC 931 Windeyer J ordered a barrister to indemnify his client against costs incurred by her in circumstances where his Honour concluded a ten day hearing took two days longer than it should have through the barrister’s serious incompetence.

## Case management versus individualised justice

50. The procedural reforms the Supreme Court has adopted have been accompanied by a developing jurisprudence concerning the role of case management in the administration of substantive justice.

51. In *Ketteman v Hansel Properties Ltd* [1987] AC 189 (at 220), Lord Griffiths said:

“Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.”

52. As Kirby J has observed, the introduction of systems of case management throughout Australia in the 1980s coincided with Lord Griffiths’ remarks and stimulated new attention to broader consideration of justice, beyond the claims of the parties.<sup>49</sup>

53. The High Court appeared to indicate a tendency to go down this route in *Sali v SPC Ltd* [1993] HCA 47; (1993) 67 ALJR 841 where the majority held (Brennan, Deane and McHugh JJ, Toohey and Gaudron JJ dissenting) that a refusal to grant the appellant an adjournment of an appeal pending in the Full Court of the

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<sup>49</sup> *Queensland v J L Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146 (at 165- 166).



Supreme Court of Victoria did not result in a miscarriage of justice. The Full Court had refused a general adjournment application and, after that application had been rejected, also refused an application to stand the matter down to 2.15 pm. While the majority recognised that “an adjournment which, if refused, would result in a serious injustice to the applicant should only be refused if that is the only way that justice can be done to another party in the action”, (*Carryer v Kelly* (1969) 90 WN (Pt 1) (NSW) 566, at 569 per Asprey JA) they observed that such “propositions were formulated when court lists were not as congested as they are today and the concept of case management had not developed into the sophisticated art that it has now become”. They then said:

“In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties. As Deane J pointed out in *Squire v Rogers* (1979) 27 ALR 330, at 337 this ‘may require knowledge of the working of the listing system of the particular court or judge and the importance in the proper working of that system of adherence to dates fixed for hearing’. What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.”

54. Toohey and Gaudron JJ were also concerned about the implications of an adjournment for the management of the court’s business. After referring to the general principle which the majority had cited (see [53] above) they said (footnotes omitted):

“The contemporary approach to court administration has introduced another element into the equation or, more accurately, has put another consideration onto the scales. The view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court’s lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard are pressing concerns to which a court may have regard. Because these considerations are singularly within the knowledge of the court to which an application for an adjournment is made, there is an added reason why this court should not interfere with a decision made on such an application.”

55. While their Honours accepted that the rejection of the general adjournment application was correct, they held that the refusal to stand the appeal down until 2.15 pm “was only warranted on the basis that the application to do so was no

more than a ploy”, a proposition they held was not supported by the evidence. They concluded there had been a serious injustice to the appellant.

56. It is important to note that the majority in the High Court approved the Full Court’s decision in circumstances where that Court had held that the appellant’s application was a delaying tactic. Nevertheless, and not surprisingly, the majority’s apparent statement of principle concerning the consideration of issues not germane to the particular litigation had a resonance in the legal community. Thus in *Byron v Southern Star Group Pty Ltd* (1995) 123 FLR 352 (at 353) Kirby P (as his Honour then was) commented (referring to *Sali*) that:

“Justice in the modern connotation, may extend to the community’s interest in the efficient and timely disposal of litigation which sustains the community’s faith in its judicial institutions. The contemporary approach to court administration has, in the language of the High Court, ‘introduced another element into the equation or, more accurately, has put another consideration into the scale’ ”

57. Most significantly the approach in *Sali* was applied in *J L Holdings Pty Ltd v State of Queensland* [1995] FCA 1302 to refuse an application to amend a defence made six months before a trial fixed for a four month hearing. The trial judge’s decision was upheld by a majority (Whitlam and Sundberg JJ, Carr J dissenting) in the Full Court of the Federal Court of Australia (*State of Queensland v J L Holdings Pty Ltd* [1996] FCA 932) but an appeal to the High Court was successful: *Queensland v J L Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146. In refusing the appeal, Whitlam and Sundberg JJ had referred, with approval, to the passage from Toohey and Gaudron JJ’s reasons in *Sali* (above). Of this, Dawson, Gaudron and McHugh JJ said:

“It may be said at once that in the passage which we have cited from *Sali v SPC Ltd* Toohey and Gaudron JJ are not to be taken as sanctioning any departure from the principles established in *Cropper v Smith* and accepted in *Clough and Rogers v Frog*. *Sali v SPC Ltd* was a case concerning the refusal of an adjournment in relation to which the proper principles of case management may have a particular relevance. However, nothing in that case suggests that those principles might be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court

is the attainment of justice and no principle of case management can be allowed to supplant that aim.”

58. The effect of the incorporation of the provisions as to overriding purpose, objects of case management and the requirement to follow the dictates of justice in discharging the case management role have not yet been explored at length, although there have been indications those provisions may lead to considerable shifts in procedural law.

59. In *Newmont Yandal Operations Pty Limited v The J Aron Corp* [2007] NSWCA 379 (at [25] – [27]) (a case concerning the question of the Court’s power to vary orders under the slip rule) Spigelman CJ (with whom Santow JA and Handley AJA agreed) held that the requirement to have regard to the overriding purpose in s 56 of the CPA constituted a substantive difference which required the Court to treat prior case law and the case law from other jurisdictions concerning the application of the “slip rule” with some care. He observed:

“116 By reason of the insertion of the overriding objective into the Civil Procedure Act 2005 words such as ‘error’ and ‘correct’ in the slip rule should not be given a narrow interpretation. In my opinion, carrying into effect the actual intention of the judge making the order, and making sure that the order did not have a consequence which the judge clearly intended to avoid, falls within the natural and ordinary meaning of the word ‘correction’, particularly as understood in the light of the overriding purpose. The ‘real issues in the [2004] proceedings’, within the meaning of s 56(1), did not extend in the direction for which, let alone as far as, Newmont seeks to contend in its new defence in the 2003 proceedings.”

60. In *NSW v Mulcahy* [2006] NSWCA 303 (at [25]), Bryson JA (with whom Hodgson and Tobias JJA agreed) observed that *J L Holdings Pty Ltd* supported the view that “only in extreme circumstances should case management principles shut a party out from litigating an issue which is fairly arguable”. However his Honour observed that *J L Holdings* was not decided on legislation such as now controlled the power of amendment since the adoption of ss 56 – 58 of the CPA. The power of amendment in s 64 of the CPA is subject to s 58. In his Honour’s view (at [29]) the effect of the CPA was to significantly alter the approach to amendments which the judgments in *J L Holdings* treated as appropriate. The CPA required consideration of the early history of the proceedings, as well as the “claims on

public resources” made by the plaintiff. That being said, the Court indicated it would dismiss the State’s application for leave to appeal from a decision permitting the plaintiff to amend his statement of claim one month before the trial was due to commence.

### **Changing the trial process**

61. Whether as a function of the changing procedural landscape, or the changing of the legal culture, or a combination of the two, the legal profession in New South Wales could be under no illusions that trial by ambush no longer has a place in the new legal world. In case any doubts lingered they were firmly dispelled by the decision of the NSW Court of Appeal in *Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346; (2001) 53 NSWLR 116, which was an application for an extension of a limitation period in a personal injury case. Heydon JA (as his Honour then was, and with whom Mason P agreed) observed (at [21]) that the conduct of the original and the appeal, suggested “that a particular attitude to this kind of litigation prevails, even in the 21st century, among the profession and perhaps the bench ...[which] reflect[ed] the forensic system of an earlier age ... [and] was described in *Donaldson v Harris* (1973) 4 SASR 299 (at 302) by Wells J thus:

“... the old common law ... was based, with rigorous logic, upon the system of litigation by antagonists. By virtue of the underlying principles of that system, it was the treasured right of each litigant to store up, in secret, as many unpleasant surprises for his opponent as he could muster, and only reveal them at the last minute at the trial (or contest) in the presence of the judicial umpire: *nemo tenetur armare adversarium suum contra se* (1628) Co. Litt. 36a. As Wigmore has put it (Evidence, 3rd ed (1940), vol. VI, p376) the common law regarded ‘the concealment of one’s evidential resources and the preservation of the opponent’s defenceless ignorance as a fair and irreproachable accompaniment of the game of litigation’.”

62. His Honour gave a number of reasons (at [22] – [25]) as to why this was no longer acceptable, perhaps the most telling of which for present purposes was his Honour’s statement that:

“[26] Fourthly, the conduct of litigation as if it were a card game in which opponents never see some of each other’s cards until the last moment is out of line with modern

trends. Those trends were developed because the expense of courts to the public is so great that their use must be made as efficient as is compatible with just conclusions. Civil litigation is too important an activity to be left solely in the hands of those who conduct it.

[27] To begin with, if practitioners in personal injury work are accustomed to maintain poker faces, to keep their guards up at all times, and to let opponents who are proceeding in ignorance continue in that course, they should perhaps, as Sir George Jessel used to say, move over to "what is known as the other side of Westminster Hall" to observe what procedures prevail there.

[28] Allsop J has valuably expounded the appropriate approach to commercial litigation in the Federal Court in *White v Overland* [2001] FCA 1333 at [4]:

‘However, by way of general principle I would simply like to make perfectly plain my view that in the efficient and proper conduct of civil litigation, even civil litigation hard fought between parties, it should always be recognised that in the propounding of issues for trial the parties should take steps to ensure that all relevant parties to the dispute are cognisant of what the issues are. Any practice of quietly leaving footprints in correspondence or directions hearings to be uncovered some time later in an attempt to reveal that a matter was always in issue should be discouraged firmly. Even if something has been said, where it is evident, or indeed suspected, that the other side is proceeding on the basis of a misconception or has not appreciated something, as a general rule, efficiency, common sense and an appreciation of the costs and resources (both public and private) likely to be wasted by confusion in litigation will mandate that a party through his or her representative ensure that the other is not proceeding on a misconception or that the other does appreciate something that has been said. Litigation is not a game. It is a costly and stressful, though necessary, evil. To paraphrase Roscoe Pound from 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1906) 29 ABA Rep 395, 404-406, the 'sporting theory of justice' and any behavioural manifestation of it should be seen as a survival, or better, a relic, of the days when a lawsuit was a fight between two clans: cf *Jackamara v Krakouer* (1998) 195 CLR 516 at 526-527 per Gummow and Hayne JJ. Representatives do not owe duties to the other side's client. They owe duties to their own client. But no one's interests are advanced by litigation proceeding on assumptions which are seen or suspected to be false. This is very much the case when an issue, if it is to be propounded, might endanger the instructions of those acting for the other side. In saying this I need make no reference to the well-known responsibility of the Crown and emanations of the Crown to act at all times as model litigants beyond referring to what was said by the Full Court of this Court in *Scott v Handley* [1999] FCA 404 at [43] ff. I would expect no less than that which I have indicated of bitterly competitive commercial parties in the hardest fought of cases. In the long run, the only consequence of keeping issues hidden or not clearly identifying them is to disrupt the business of the court leading to the waste of valuable public resources and to lead to the incurring of unnecessary costs by the parties, costs which ultimately have to be borne by someone.’

[29] The same approach operates in commercial and equity litigation in this Court. In that activity it is common for counsel to volunteer to each other what points will be argued and what authorities will be relied on. If one counsel requests that type of information from another, it is usually given. If it is not given, a speedy approach to the court is usually possible in which the difficulty will speedily be remedied. Even as long ago as the time when Mr H H Glass QC and Mr J W Smythe QC had their celebrated conversation about exchanging notes for argument in the course of a murder trial, Mr Smythe may have been right about criminal trials, but Mr Glass was right about equity suits.

[30] Indeed, even in personal injury litigation the ambush theory of life has been abandoned in District Court trials as much as in Supreme Court trials. Matters are readied for reasonably expeditious hearing by a series of interlocutory appearances. Detailed particulars must be supplied under, for example, Pt9 of the District Court Rules. Pleadings are expected to be clear and to be adhered to. Expert reports cannot be relied on unless served well in advance.

[31] If the ambush theory of litigation is permitted to survive in the specific area of time-extension proceedings, it will do no party any good, least of all the potential defendants. In the first place, it will have the effect of imposing on all applicants in this type of litigation a duty to file evidence which is adequate to deal with every conceivable point which might be taken against them. This would generate undue expense, would tend to consume court time unnecessarily, and would produce the undesirable result that applications to extend time would become mini-trials of the contemplated action. Even if the first application failed because the applicant had been surprised, it would be possible for a second application to be made: *Nominal Defendant v Manning* (2000) 50 NSWLR 139. That is an undesirable waste of scarce and valuable judicial time in the District Court, but the court might well hold that the second application is not an abuse of process and should proceed if it was necessitated by the fact that the applicant was ambushed in the course of the first application. Alternatively, an ambushed applicant might decide to do what the present appellant did, and apply to this Court seeking leave to appear and tendering further evidence. Fascinating though the Court finds this type of work, that too is undesirable, since the time of three judges is consumed and not just one, but it may be necessary if justice is to be done to an applicant. It is simpler, cheaper, more efficient and fairer for resort to these manoeuvres to be avoided and for appropriate notice to be given by respondents to applicants before the application to extend time is first heard.

[32] If respondents to this kind of proceeding cannot behave in the manner just indicated as desirable, it may be necessary for the relevant authorities, if they think fit, to amend the rules of court or issue some practice direction in a way which will cause this type of controversy to be resolved without undue expense.

63. In *Glover v Australian Ultra Concrete Floors Pty Ltd* [2003] NSWCA 80, after observing that “the ambush theory of litigation was given its quietus by Heydon JA in *Nowlan*”, Ipp JA (Sheller JA and Hodgson JA agreeing) added:

“60 The ‘cards on the table approach is now common practice in many jurisdictions: See *Boyes v Colins* (2000) 23 WAR 123 at 143 to 144; *Southwell v Tomomoto* (1992) 109 FLR 12 at 17; *Khan v Armaguard Limited* [1994] 1 WLR 1204 at 1209. The public interest in requiring the full disclosure of a party’s case before trial is recognised by Pt 15 r 13 which requires parties to plead specifically any matter which, if not so pleaded, may take the other party by surprise.”

## Epilogue

64. The Australian Productivity Commission conducts an annual review of government services intended to provide information to help governments improve the effectiveness and efficiency of expenditure on, inter alia, “justice ... services”. The tables it produces in relation to courts in each state and territory at all levels of the judicial hierarchy invite inevitable comparisons between the “performance” of the jurisdictions concerned, without significant identification of the wide differences between the disparate jurisdictions relating to case loads etc. The Commission regards performance relative to the timeliness standards as indicating effective management of caseloads, and court accessibility.<sup>50</sup>

65. The Chief Justice of New South Wales has been a frequent critic of the notion that court performance can be measured quantitatively. His Honour has commented about the misleading nature of the raw data used by the Commission and the potential dangers to which it could be put:<sup>51</sup>

“The greater salience given to efficiency values over recent decades raises important issues for the administration of justice. The relevant public discourse necessarily involves conflicts amongst values to which all subscribe: values such as democracy, efficiency, justice, freedom, equity. It is essential to recognise that these values are not necessarily consistent with each other. There is a wide range of permissible opinion as to whether or not, in a particular sphere of discourse, one of these values

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<sup>50</sup> Australian Productivity Commission, Report on Government Services 2008, ch 7, Court administration, at 7.25, <http://www.pc.gov.au/gsp/reports/rogs/2008>

<sup>51</sup> The Honourable J J Spigelman AC Chief Justice of New South Wales, “Judicial Accountability and Performance Indicators”, Paper delivered at the 1701 Conference: The 300th Anniversary of the Act of Settlement Vancouver, British Columbia, Canada, 10 May 2001: [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman\\_1\\_00501](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_1_00501)

operates as the parameter that ought be maximised, with another value as some kind of constraint, or vice versa. Inevitably issues of trade-off between achieving one value at the expense of another will arise. There is rarely a single correct answer.

Those who emphasise the significance of 'value for money' often put aside issues of justice and freedom on the assumption that the process of planning for, and measurement of, performance will not seriously affect the attainment of such values. In my opinion, the pressure of the 'value for money' approach and the use of performance indicators in the way it is frequently advocated they be used - particularly as a basis for allocation for resources or determination of remuneration - will inevitably impinge on the quality of justice, particularly the requirements of a fair trial. The effects may slowly accumulate over a period of time, but it is quite wrong to assume them away as is often done. Public confidence in the administration of justice will be undermined by the creeping bureaucratisation of judicial decision making.

The 'value for money' perspective appears to assume that improvements in productivity are always available without compromising quality. Even in the case of reducing delays there are limits. Speed is like light. Too much of it obscures rather than illuminates ... Some things take time. Justice is one of them. The requirements of open justice, in which the quality of justice is the primary consideration, cannot be measured. Those requirements, not statistics, must continue to be regarded as the basic mechanism of judicial accountability."

66. These statistics can be of some utility, however, if they compare only like with like. The Commission has devised a "backlog indicator" which is an indicator of case processing timeliness derived by comparing the age (in elapsed time) of a court's pending caseload against time standards. It has set national standards for Supreme courts, the Federal Court, District/County, Family and Coroners' Courts and all appellate courts, that no more than 10 per cent of lodgments pending completion are to be more than 12 months old and no lodgments pending completion are to be more than 24 months old.
67. The 2008 statistics for New South Wales demonstrated that in the criminal area only 10 per cent of non-appeal cases and three per cent of appeal cases in the NSW District Court were more than 12 months old, while in the Supreme Court 13 per cent of non-appeal cases and one per cent of appeal cases took longer than a year to complete.
68. Another concern is that the "managerialist ideology" which involves "the explicit identification of goals, which must be measurable so that performance can be



assessed in what is regarded as a 'objective' manner"<sup>52</sup> will extend to the development of a "quality indicator" designed to elicit "client satisfaction" with the risk that "the administration of justice could be perverted in a search for popularity".<sup>53</sup>

69. This is not the topic of this conference, but it is a matter to be borne in mind in the search for the "perfect" system of justice. The reality is there will never be a "perfect" system of justice, just as there will never be a perfect system of government.<sup>54</sup>

70. While we strive to improve court performance to ensure the most efficient disposition of cases, at the lowest cost, we should not lose sight of the overriding objective of doing justice to all who come before the courts. If we lose sight of that goal, we have created a poorer system of justice.

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<sup>52</sup> "Judicial Accountability and Performance Indicators" *op cit.*

<sup>53</sup> The Honourable J J Spigelman AC, Chief Justice Of New South Wales "Measuring Court Performance", Address to the Annual Conference of the Australian Institute Of Judicial Administration, Adelaide, 16 September 2006.

<sup>54</sup> "Measuring Court Performance" *op cit.*

## Appendix 1

### [Sch K] **SCHEDULE K EXPERT WITNESS CODE OF CONDUCT**

P 36 r 13C(1) P 39 r 2(1)

[Sch K insrt Amendment 337: Gaz 9 of 28 January 2000 p 452]

#### **Application of code**

1. This code of conduct applies to any expert engaged to:
  - (a) provide a report as to his or her opinion for use as evidence in proceedings or proposed proceedings; or
  - (b) give opinion evidence in proceedings or proposed proceedings.

#### **General Duty to the Court**

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

#### **The Form of Expert Reports**

5. A report by an expert witness must (in the body of the report or in an annexure) specify:
  - (a) the person's qualifications as an expert;
  - (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed);
  - (c) reasons for each opinion expressed;
  - (d) if applicable — that a particular question or issue falls outside his or her field of expertise;
  - (e) any literature or other materials utilised in support of the opinions; and
  - (f) any examinations, tests or other investigations on which he or she has relied and identify, and give details of the qualifications of, the person who carried them out.
6. If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
7. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
8. An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter shall forthwith

provide the engaging party (or that party's legal representative) with a supplementary report to that effect which shall contain such of the information referred to in 5(b), (c), (d), (e) and (f) as is appropriate.

9. Where an expert witness is appointed by the Court, the preceding paragraph applies as if the Court were the engaging party.

### **Experts' Conference**

10. An expert witness must abide by any direction of the Court to:

- (a) confer with any other expert witness;
- (b) endeavour to reach agreement on material matters for expert opinion; and
- (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.

11. An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

## **Appendix 2**

### **SCHEDULE 7**

#### **Expert witness code of conduct**

(Rule 31.23)

(cf SCR Schedule K)

#### **1 Application of code**

This code of conduct applies to any expert witness engaged or appointed:

(a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or

(b) to give opinion evidence in proceedings or proposed proceedings.

#### **2 General duty to the court**

(1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.

(2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).

(3) An expert witness is not an advocate for a party.

#### **3 Duty to comply with court's directions**

An expert witness must abide by any direction of the court.

#### **4 Duty to work co-operatively with other expert witnesses**

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:

(a) must exercise his or her independent, professional judgment in relation to that issue, and

(b) must endeavour to reach agreement with the other expert witness on that issue, and

(c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.

#### **5 Experts' reports**

(1) An expert's report must (in the body of the report or in an annexure to it) include the following:

(a) the expert's qualifications as an expert on the issue the subject of the report,

- (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
- (c) the expert's reasons for each opinion expressed,
- (d) if applicable, that a particular issue falls outside the expert's field of expertise,
- (e) any literature or other materials utilised in support of the opinions,
- (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
- (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).

(2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.

(3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

(4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.

## **6 Experts' conference**

(1) Without limiting clause 3, an expert witness must abide by any direction of the court:

- (a) to confer with any other expert witness, or
- (b) to endeavour to reach agreement on any matters in issue, or
- (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or
- (d) to base any joint report on specified facts or assumptions of fact.

(2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

## Appendix 3

### PRACTICE NOTE SC CL 5

#### Supreme Court Common Law Division – General Case Management List

##### Commencement

1. This Practice Note commences 29 January 2007.

##### Application

2. This Practice Note applies to proceedings mentioned in paragraph 5 of this Practice Note which are in, or to be entered in, the General Case Management List.

##### Definitions

3. In this Practice Note:

**ADR** means Alternative Dispute Resolution

Concurrent expert evidence means two or more expert witnesses giving evidence at the one time.

**CPA** means the Civil Procedure Act 2005

**Evidentiary statement** means a statement by the plaintiff which will form the basis of his or her evidence in chief or where the plaintiff is a corporation or is unable as a result of age or disability to give evidence a statement by an appropriate officer of the corporation or by that person through whom it is intended to provide the factual basis for the plaintiff's case in chief.

**GCM** means General Case Management

**GCM document** means the document in Appendix A of this Practice Note.

**List** means the General Case Management List

**Single expert witness** means an expert witness jointly retained by the parties or appointed by the Court in accordance with UCPR Part 31 r 31.37(2).

**UCPR** means Uniform Civil Procedure Rules 2005 (as amended)

##### Introduction

4. The purpose of this Practice Note is to explain the operation of the General Case Management List.

##### Proceedings covered by GCM

5. GCM applies to the following proceedings in the Common Law Division:

- all active proceedings commenced by statement of claim;
- proceedings transferred from another court or from another division of the Supreme Court; and

- any other proceedings the court directs that it applies to.

6. GCM does not apply to:

- proceedings in the Defamation List;
- proceedings in the Professional Negligence List;
- proceedings in the Possession List; and
- proceedings that are commenced in the Administrative Law List.

7. The court may, at any time after the commencement of proceedings, direct that GCM apply to those proceedings.

### **Removal from the list**

8. Upon proceedings being removed from the List, this Practice Note shall, subject to paragraph 9 not apply to the proceedings from the making of the order.

9. The Court may direct that this Practice Note shall continue to apply to the proceedings to the extent stated in the direction.

10. The making of an order removing proceedings from the List shall not affect any orders made or directions given prior to such removal.

### **The GCM document**

11. In relation to any party, the GCM document refers to the document which, by virtue of this Practice Note, may be required to be filed by that party. The form and content of the GCM document are explained in Appendix A.

12. A plaintiff must file the GCM document at the same time as filing the originating process unless the proceedings are only for a liquidated demand or only for a liquidated demand and interest under Section 97 of the Civil Procedure Act (“default proceedings”).

13. Where a defence or cross claim is filed in default proceedings the plaintiff must file the GCM document within one month after being served with an appointment for Directions Hearing and a defence and/or cross claim.

14. Each other party must file the GCM document not later than one month before the date of the Directions Hearing.

### **Directions Hearings**

15. Proceedings in the List will generally be managed by way of Directions Hearings conducted by a Judge or Registrar.

16. The first Directions Hearing will be appointed for approximately 3 months after proceedings are entered in the List. The date of the first Directions Hearing will be given by the registry in a notice issued at the time of filing the statement of claim to be served by the filing party.

17. Upon a defence or a statement of cross claim being filed in default proceedings, the registry will give notice to all parties with an address for service in the proceedings of the date of the first Directions Hearing.

18. Where proceedings are transferred to the Common Law Division from another division of the Court or from another court, the Court appoints a date for the Directions Hearing upon receipt of the transferred file. The registry will advise parties with an address for service of the date.

19. At a Directions Hearing, proceedings may be listed at a specified future date for a further Directions Hearing.

20. Directions Hearings, other than the first Directions Hearing for cases to be heard in Sydney, may be conducted by online court or by telephone.

21. Parties who wish to use online court shall do so in accordance with Practice Note SC Gen 12.

22. Parties wishing to avail themselves of telephone facilities must advise the Sydney Registry in writing at least 7 days prior to the date scheduled for the Directions Hearing. This written advice is to be marked to the attention of "The Common Law List Clerk" and must indicate the telephone number that the party or the relevant legal representative wants to be called at for the Directions Hearing. This advice can be forwarded by facsimile transmission to (02) 9230 8234 or by email to [supreme\\_court@courts.nsw.gov.au](mailto:supreme_court@courts.nsw.gov.au). Directions Hearings involving parties to be contacted by telephone may have to be re-scheduled to a different time. The registry will contact those parties seeking a telephone Directions Hearing, and the other parties if the Directions Hearing has to be re-scheduled, to confirm the date and time of the Directions Hearing. Parties seeking a telephone Directions Hearing must ensure that the telephone number nominated is available from 10 minutes before the confirmed time of the Directions Hearing. A telephone Directions Hearing may not be available if the case involves multiple defendants that are separately represented and it is thought impractical to use the facility.

### **Action prior to first directions hearing**

23. The originating process and pleadings should be as brief and precise as the nature of the case allows.

24. It is expected that the parties' legal representatives will have discussed the case before the first Directions Hearing and will have:

- narrowed issues and identified any matters of agreement.
- agreed on suitable interlocutory orders, directions or arrangements;
- prepared a draft timetable for the future management of the proceedings;
- prepared draft short minutes of any orders or directions to be sought at the Directions Hearing; and
- discussed the possibility of settling the dispute by ADR.



## **Representation**

25. Each party not appearing in person must be represented at the Directions Hearing by a barrister or a solicitor familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.

## **Actions at a directions hearing**

26. The purpose of a Directions Hearing is to ensure the just, quick and cheap disposition of proceedings in accordance with the overriding purpose set out in section 56 of the CPA. Each party is obliged to notify the Court and the other parties if they are aware of any substantial default that cannot be cured by the making of consent variations to directions or timetables.

27. The tasks at a Directions Hearing include, but are not limited to:

- considering whether the proceedings would more appropriately be heard in the District Court and making a consent order accordingly;
- defining the matters in issue, including liability. If no defence (or defence to cross-claim) has been filed the Registrar may direct that there be judgment as to liability on that claim;
- considering whether there should be a separate trial of the liability issue held before the trial of issues as to quantum, especially in the case of a child plaintiff where the assessment of damages may take some time before being able to be determined;
- directing that a party or all parties serve or file and serve witness statements - the purpose of such a direction being to facilitate clarification of issues and realistic negotiations for settlement;
- considering whether ADR is suitable;
- establishing whether any party requires a trial by jury (bearing in mind the provisions of UCPR 29.2);
- making consent orders for the completion at the earliest possible time of interlocutory steps such as discovery, interrogatories, views, medical examinations and expert reports;
- directing that a party or all parties serve or file a statement of damages – the purpose of such a direction being to facilitate what heads of damage are genuinely in dispute and to provide a basis for realistic negotiations for settlement.

28. At the first Directions Hearing a plaintiff is to provide to each party an evidentiary statement. A plaintiff is not precluded from supplementing the evidentiary statement with oral evidence. If it is intended to raise by oral evidence issues not covered by the evidentiary statement an amended evidentiary statement is to be served on each party as soon as practicable after the need to amend the evidentiary statement arises.

29. Each defendant is to serve on the plaintiff within 28 days of the receipt of the evidentiary statement a statement of issues in dispute. The statement of issues in dispute is to concisely set out those facts which the defendant intends to establish in respect of each issue in dispute.

30. Each defendant is to notify the plaintiff within 28 days of the receipt of the evidentiary statement of those parts of the evidentiary statement which the defendant requires to be given orally.

31. A plaintiff is to serve on each party within 14 days of the receipt of the statement of issues in dispute a statement identifying those issues which are agreed and not agreed.

### **Expert witnesses in personal injury actions**

32. The Court is concerned about the number of experts often expected to give evidence in personal injury cases. The practice of having a large number of experts qualified, both medical and otherwise, whose opinions may be overlapping and whose reports either are not used or are of little assistance to the Court when tendered, is costly, time consuming and productive of delay. The attention of practitioners in cases in which a claim is made for personal injury or disability is drawn to Practice Note PN SC Gen 10 which deals with "Single Expert Witnesses".

33. Where it is considered that an unnecessary expert has been qualified or is sought to be called to give evidence, the Court may:

- reject the tender of the expert's report;
- refuse to allow the expert to be called; and
- disallow any costs incurred in qualifying, in having the expert's report prepared or in calling the expert to give evidence.

34. As a guide, the number of expert witnesses giving evidence on behalf of a party shall be limited to:

(a) one medical expert in any speciality, unless there is a substantial issue as to ongoing disability, in which case the number shall be limited to two in any relevant speciality concerning that disability; and

(b) two experts of any other kind.

35. Actuarial reports will as a rule be considered unnecessary except in special circumstances where they are shown to be of assistance in the assessment of damages, for example in proceedings under the Compensation to Relatives Act 1897 or where a claim is made for the costs of future fund management.

### **Concurrent expert evidence**

36. This part of the Practice Note applies to all proceedings in which a claim is made for damages for personal injury or disability.

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.

38. At the first Directions Hearing the parties are to produce a schedule of the issues in respect of which expert evidence may be adduced and identify whether those issues potentially should be dealt with by a single expert witness appointed by the parties or by expert witnesses retained by each party who will give evidence concurrently.

39. In the case of concurrent experts, within 14 days of all expert witness statements/reports being filed and served, the parties are to agree on questions to be asked of the expert witnesses. If the parties cannot reach agreement within 14 days, they are to arrange for the proceedings to be re-listed before the Court for directions as to the questions to be answered by the expert witnesses.

40. In the case of concurrent experts the experts in each area of expertise are to confer and produce a report on matters agreed and matters not agreed within 35 days of the first Directions Hearing or such other time as the Court may order.

### **Single expert witness**

41. This part of the Practice Note applies to all proceedings in which a claim is made for damages for personal injury or disability.

42. At the first Directions Hearing, a single expert direction will be made in respect of those issues considered to be appropriate for a single expert. In all proceedings in which a claim is made for damages for personal injury, a single expert direction as to damages will be taken to have been made at the first Directions Hearing unless otherwise ordered.

43. A single expert direction, when made in those terms, means that the following directions are to be taken as having been made, with such variations as may be specified at that time or subsequently:

- Any expert evidence is confined to that of a single expert witness in relation to any one head of damages, including but not limited to the nature, extent and cost of required nursing care or domestic care (including claims under *Griffiths v Kerkmeyer*), physiotherapy, speech therapy, home modification, motor vehicle or aids and equipment, being evidence of the kind customarily given (by way of example) by rehabilitation consultants, occupational therapists, nursing and domestic care providers, architects, builders, motor vehicle consultants, and by aids and equipment suppliers.
- Evidence may be provided by the same single expert in relation to more than one head of damages provided the expert is appropriately qualified. It is contemplated, however, that there may be a number of single expert witnesses retained or appointed in the one proceedings.
- In relation to any head of damages as to which any party wishes expert evidence to be adduced, the parties are to agree on a single expert to be retained and are to obtain the consent of the expert together with an estimate of the time required by the expert to complete the report within 14 days from a date specified in the order as the commencement date of the direction, otherwise within 14 days from the making of the direction.
- If the parties are unable to agree on a single expert or obtain the consent of the expert within the 14 day period referred to in the previous paragraph, the parties are to notify the Court within a further 3 days and the Court will pursuant to Part 31 of the UCPR appoint a Court expert to be the single expert.
- Within 14 days from the selection or appointment of a single expert witness the parties are to brief the expert in such manner as the parties may agree with material sufficient to

enable the expert to prepare a report. If the parties do not agree as to the manner of briefing the expert or as to the material to be provided to the expert or as to the questions to be put to the expert, the parties are to notify the Court within 3 days for the purpose of having the matter re-listed for further directions as to briefing the single expert.

- If the parties agree or the single expert witness so requests, the plaintiff in the proceedings is to submit to clinical examination by the single expert witness.
- Within 21 days from the date on which a single expert witness is so briefed or within the time estimate provided by the single expert witness, the expert is to send his or her report to each of the parties to the proceedings, through their legal representatives.
- A single expert witness may be requested to provide a supplementary report taking into account any new or omitted factual material. The provisions of this part of the practice note apply to such a supplementary report *mutatis mutandis*.
- Any party may, within 14 days from receipt of the report, put a maximum of 10 written questions to the expert, but for the purpose only of clarifying matters in the report unless the court otherwise grants leave. The expert is to answer the questions within 14 days.
- The report of a single expert witness and any question put to the expert and the expert's answer thereto may be tendered by any party at the trial subject to all just exceptions.
- A single expert witness may be cross-examined at the trial by any party.
- A single expert witness's fee for preparation of the report and any supplementary report and for attending Court, if required to do so, is to be paid by the parties equally, subject to other agreement or direction and subject to any later order concerning the costs of the proceedings. A single expert witness's fee for answering questions put by a party is to be paid by the party, subject to the same qualification.
- A single expert witness may apply to the Court for directions.

### **Alternative Dispute Resolution**

44. At any Directions Hearing, the Court may consider whether the proceedings are suitable for ADR.

45. ADR includes:-

- mediation pursuant to the provisions of Part 4 of the CPA or otherwise;
- arbitration pursuant to the provisions of Part 5 of the CPA.

46. If the matter appears to the Court to be appropriate for resolution by mediation or arbitration, the Court will refer the proceedings for mediation or arbitration.

47. The Court may give directions requiring statements from parties including a timetable to enable parties to be prepared for mediation.

48. Where proceedings involve a claim for damages in respect of personal injuries or in respect of the death of any person, the Court may, at a Directions Hearing, refer the proceedings for arbitration by a single arbitrator.

49. Where the court refers proceedings for arbitration, the court may give directions for the conduct of the arbitration.

#### **Variation of directions and timetable**

50. Case management directions given at a Directions Hearing and times set for compliance with any direction, may be varied:

(a) by consent of all parties, so long as such variation does not extend the time for compliance with any direction beyond the day specified by the Court for compliance with the last direction made; or

(b) by the Court.

51. Where a party seeks a variation of the directions and timetable which is not consented to by all other parties or, where a party is in default in timely compliance with any direction, any party may apply to have a further Directions Hearing listed.

#### **Listing for hearing**

52. When ready for trial, for proceedings in which a claim is made for damages for personal injury or disability, standard directions in the form of Appendix B are deemed to have been made, unless the Court otherwise orders.

#### **APPENDIX A**

53. Each party files the GCM document in order to provide the Court with information which will ensure that the Directions Hearings are efficient and effective.

54. A GCM document is not a pleading. It may be amended at any time without leave, but any amendment may be taken into consideration upon the question of costs.

55. In addition to the matters specifically required by this Practice Note to be included in the GCM document, any party may include in that document, for the information of the Court and the other parties, any further information which that party wishes to be taken into account for any purpose at the Directions Hearings.

56. If a report or other document which is annexed to a party's GCM document has already been served on another party, a further copy of that report or document need not be annexed to the copy of the GCM document which is to be served on that party. That copy of the GCM document must however include a schedule listing the reports and documents which have been served and the date of service.

#### **Plaintiff's GCM document**

P1.1 The plaintiff's GCM document is to contain:-

P1.1.1 a concise narrative of the facts the plaintiff intends to prove on the issue of liability, so drafted as to expose the specific matters of fact, but not law, upon which liability is likely to depend;

P1.1.2 where the plaintiff's claim arises out of an event that has been the subject of previous proceedings, such as a prosecution, a coronial inquest or an inquiry – a statement clearly identifying the previous proceedings.

P.1.1.3 where the plaintiff's claim is for damages for personal injuries:-

(a) a statement about any other proceedings the plaintiff has brought in any court for damages for personal injuries which may be relevant to the assessment of damages in the proceedings in which the GCM document is filed. The statement must clearly identify the other proceedings even if they are not related to the event out of which the present proceedings arise; and

(b) full particulars of any accident or injury the plaintiff has suffered which is not the subject of a claim in the proceedings in which the GCM document is to be filed and which may be relevant to the assessment of damages;

### **Defendant's GCM document**

D2.1 The defendant's GCM document is to contain:-

D2.1.1 a concise narrative of the facts the defendant intends to prove on the issue of liability, including contributory negligence, so drafted as to expose the specific matters of fact which are in issue;

D2.2 Where the plaintiff's claim against the defendant is for damages for personal injuries, the defendant is to annex to the GCM document:-

D2.2.1 a copy of any claim form or written report of the injury or accident the defendant or its insurer has received from the plaintiff;

D2.2.2 where the defendant or its insurer has interviewed the plaintiff, and one of the purposes of that interview was to prepare for potential or existing litigation, a copy of any statement made by the plaintiff in that interview, relating to liability or contributory negligence in relation to the claim;

D2.2.3 any documents referred to in P1.2.1 in the possession of the defendant that have not already been served by any other party;

D2.2.4 a list only of any medical certificate or medical report held by the defendant, issued by a doctor who has treated the plaintiff in respect of the injuries alleged in the statement of claim; and

### **Cross-Claimant's GCM document**

XC3.1 A cross-claimant's GCM document is to contain:-

XC3.1.1 a concise narrative of the facts the cross-claimant intends to prove on the issue of the cross-defendant's liability, so drafted as to expose the specific matters of fact which are in issue;

XC3.1.3 any information of the type referred to in P1.2.1 that the cross-claimant knows;

### **Cross-Defendant's GCM document**

XD4.1 A cross-defendant's GCM document is to contain:-

XD4.1.1 a concise narrative of the facts the cross-defendant intends to prove on the issue of liability, including contributory negligence, so drafted as to expose the specific matters of fact which are in issue;

XD4.2 Where the plaintiff's claim is for damages for personal injuries:-

XD4.2.1 a copy of any claim form or written report of the injury or accident the cross-defendant or its insurer has received from the plaintiff or the cross-claimant;

XD4.2.2 where the cross-defendant or its insurer has interviewed the plaintiff or the cross-claimant, and one of the purposes of that interview was to prepare for potential or existing litigation, a copy of any statement made by the plaintiff or the cross-claimant in that interview relating to liability or contributory negligence in relation to the claim;

XD4.2.3 any documents referred to in P1.2.1 and P1.2.2 of this Appendix in the possession of the cross-defendant that have not already been served by any other party.

## **APPENDIX B**

57. Within 7 days of a hearing date having been allocated:

(i) The plaintiff's legal representative is to prepare a draft chronology of relevant events and serve a copy of it upon other parties which have an address for service;

(ii) Each party is to prepare a draft schedule of damages, outlining in detail the heads of damages, and identifying the evidence which supports that head of damage.

(iii) Each party is to prepare its final schedule of issues in dispute.

58. Within 28 days of a hearing date having been allocated a plaintiff is to file and serve a joint chronology, a schedule of damages and a schedule of issues which identify the areas of agreement and the areas in dispute.

J J Spigelman AC

Chief Justice of New South Wales

5 December 2006

### **Related information**

This Practice Note was issued on 5 December 2006 and commenced on 29 January 2007.

This Practice Note replaces Practice Note SC CL 5 issued on 17 August 2005.

Practice Note SC CL 5 replaced former Practice Note No. 128 on 17 August 2005.

See also:

Practice Note SC Gen 1 Supreme Court – Application of Practice Notes

Practice Note SC Gen 6 Supreme Court - Mediation

Practice Note SC Gen 10 Supreme Court – Single Expert Witnesses

*Civil Procedure Act 2005*

*Uniform Civil Procedure Rules 2005 (as amended)*