



Australian Capital Territory

Court Procedures Rules 2006

SL2006-29

(in 3 volumes)

Volume 1—ch 1 to ch 2, pt 2.17

Volume 2—ch 2, pt 2.18 to ch 4

Volume 3—ch 5 to 7, schedules, dictionary and endnotes

Each volume has a table of contents for the rules

made under the

Court Procedures Act 2004

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About this republication

The republished law

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The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

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- (b) if the person charged is a corporation—\$500.



Australian Capital Territory

Court Procedures Rules 2006

made under the

Court Procedures Act 2004

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Australian Capital Territory

Court Procedures Rules 2006

made under the

Court Procedures Act 2004

Chapter 1 Preliminary

1 Name of rules

These rules are the *Court Procedures Rules 2006*.

3 Overview of rules

The note to this rule provides a general overview of these rules.

Note on general overview of rules

Chapter 1 Preliminary

Ch 1 deals with the application of these rules and dispensing with compliance. It also contains formal provisions.

Chapter 2 Civil proceedings generally

Ch 2 contains rules about civil proceedings generally, including the steps in a civil proceeding eg how to start a civil proceeding.

Chapter 3 Particular civil proceedings

Ch 3 contains rules about particular civil proceedings, eg adoption proceedings and administration and probate proceedings in the Supreme Court.

Chapter 4 Criminal proceedings

Ch 4 contains rules about criminal proceedings, including the steps in a criminal proceeding eg arraignments.

Chapter 5 Appellate proceedings

Ch 5 contains rules about appellate proceedings, including the steps in an appellate proceeding eg when appeal papers must be filed.

Chapter 6 General rules for all proceedings

Ch 6 contains general rules that apply to all proceedings, eg rules about service and documents.

Chapter 7 Transitional

Ch 7 deals with the application of these rules to existing proceedings and contains other transitional provisions.

Schedule 1 Expert witness code of conduct

Sch 1 sets out the code of conduct applying to expert witnesses.

Schedule 2 Interest rates

Sch 2 sets out the interest rates applying to judgments.

Schedule 3 Costs amount—debts and liquidated claims

Sch 3 sets up the prescribed costs amount for claims for debts and liquidated demands and for default judgments.

Schedule 4 Scale of costs

Sch 4 sets out the scale of costs.

Schedule 5 Jurisdiction of registrar

Sch 5 contains provisions about the jurisdiction of the registrar (see also pt 6.5).

Schedule 6 Corporations Rules

Sch 6 contains rules for proceedings under the corporations law.

Dictionary

The dictionary defines certain terms used in these rules.

4 Application of rules

(SCR o 1A r 1; MC (CJ) R s 4; NSW r 1.5; Qld r 3)

- (1) Unless a territory law otherwise provides, these rules apply to all proceedings in the Supreme Court and Magistrates Court, other than proceedings under the *Domestic Violence and Protection Orders Act 2001*.

Note 1 A *territory law* includes these rules (see Legislation Act, s 98).

Note 2 Div 6.8.10 (Service of subpoenas in New Zealand) applies to proceedings under the *Domestic Violence and Protection Orders Act 2001* and also to proceedings in the Coroner's Court (see r 6520 (Application—div 6.8.10)).

- (2) However, these rules do not apply to a proceeding in the Magistrates Court until 1 January 2007.

Note The rules applying to proceedings in the Magistrates Court immediately before 1 July 2006 continue to apply until 1 January 2007 (see r 7010).

- (3) Also, a provision of these rules mentioned in an item in the following table, column 2 does not apply to a proceeding in the Supreme Court until the provision mentioned in the item, column 3 is repealed or otherwise ceases to apply for the purpose of proceedings in that court.

Table 4.1 Provisions with delayed application to Supreme Court proceedings

column 1 item	column 2 provision of these rules	column 3 provision of other law
1	division 2.11.7 (Mediation and neutral evaluation)	<i>Civil Law (Wrongs) Act 2002</i> , part 15.1 (Mediation and neutral evaluation)

- (4) Subrule (2) and this subrule expire on 1 January 2007.
- (5) Subrule (3) (including table 4.1) and this subrule expire on the day the last of the provisions mentioned in the table, column 3 is repealed or otherwise ceases to apply for the purpose of proceedings in the Supreme Court.

5 References to *court*, *judicial officer* etc

(Qld r 3)

- (1) In a provision of these rules, a reference to the *court* is a reference to the Supreme Court, the Magistrates Court or both, whichever is appropriate in the context of the provision.
- (2) Also, in these rules, a reference to the *court*—
- (a) for the exercise of jurisdiction given to the master under a territory law—includes a reference to the master; and

- (b) for the exercise of jurisdiction given to the registrar under a territory law—includes a reference to the registrar.

Note 1 A **territory law** includes these rules (see Legislation Act, s 98).

Note 2 Pt 6.4 deals with the jurisdiction of the master and pt 6.5 deals with the jurisdiction of the registrar (see also sch 5).

- (3) In these rules, a reference to a **judicial officer** is a reference to—
- (a) in relation to the Supreme Court—any of the following:
 - (i) a judge;
 - (ii) as far as these rules provide for the exercise of the court’s jurisdiction by the master, the master;
 - (iii) as far as these rules provide for the exercise of the court’s jurisdiction by the registrar, the registrar; and
 - (b) in relation to the Magistrates Court—any of the following:
 - (i) a magistrate;
 - (ii) as far as these rules provide for the exercise of the court’s jurisdiction by the registrar, the registrar.
- (4) In these rules, a reference to the **registrar** in relation to a court is a reference to the registrar or a deputy registrar of the court.
- (5) In a provision of these rules, a reference to the **deputy registrar** is a reference to a deputy registrar of the Supreme Court or a deputy registrar of the Magistrates Court, whichever is appropriate in the context of the provision.
- (6) In a provision of these rules, a reference to the **registry** is a reference to the registry of the Supreme Court or Magistrates Court, whichever is appropriate in the context of the provision.

6 Dispensing with rules

(SCR o 80 r 2; NSW s 14)

- (1) The court may, by order, dispense with the application of a provision of these rules to a particular proceeding, before or after the provision applies and on any conditions it considers appropriate.

Examples

- 1 Rule 111 (5) (Conditional notice of intention to respond) provides that, not later than 14 days after the day a conditional notice of intention to respond becomes an unconditional notice of intention to respond, the defendant must file a defence. The court may order that the defendant must file the defence not later than 21 days instead.
- 2 Rule 6009 (Application in proceeding—filing and service of supporting material) requires the supporting material for an application in a proceeding to be filed and served with the application. The court may order that the applicant may file the supporting material at time other than when the application is filed.
- 3 Rule 6350 (3) (Time—certain days excluded in working out) provides that any day in the period beginning on 25 December and ending on 1 January is excluded in working out when a thing must or may be, or is, done. In an urgent matter, the court may order that those days are not excluded when working out when a document is served.

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) If an application for an order under this rule in relation to a proceeding is made during the proceeding or after judgment is given in the proceeding, the application must be made in accordance with part 6.2 (Applications in proceedings).
- (3) Without limiting rule 6016 (Application in proceeding—oral application), an application for a decision or order under this rule may be made orally, unless the court otherwise orders on its own initiative.

- (4) For the Supreme Court, if an application for an order under this rule in relation to a proceeding is made before the proceeding starts, the application must be made by originating application.
- (5) An express reference in a provision of these rules to the court dispensing with the application (however expressed) of a provision of these rules (an *affected provision*) does not, by implication, limit the operation of this rule to the affected provision or to any other provision of these rules.

Example

Rule 1002 (3) and (4) (Payment into court—bond) are as follows:

- (3) The bond remains in effect unless the court otherwise orders.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

Note 2 The parties to the proceeding may consent to the discharge of the bond under r 1611 (Orders—by consent).

- (4) If the bond is given by an authorised person, a copy of the person's authority must be filed with the bond unless the authority has already been filed.

Rule 6 applies to rule 1002 (3). However, the operation of rule 6 is not limited to rule 1002 (3). For example, the court may make an order in a proceeding dispensing with the requirement in rule 1002 (4) to file a copy of the person's authority with the bond. Instead, the court may order that the authority be filed no later than 3 days after the day the bond is filed.

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

7 Dictionary

The dictionary at the end of these rules is part of these rules.

Note 1 The dictionary at the end of these rules defines certain terms used in these rules, and includes references (*signpost definitions*) to other terms defined elsewhere in these rules.

For example, the signpost definition '*earnings redirection order*—see rule 2350.' means that the term 'earnings redirection order' is defined in that rule.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire rules unless the definition, or another provision of these rules, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

8 Notes

- (1) A note included in these rules is explanatory and is not part of these rules.

Note See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

- (2) In this rule:

note includes material enclosed in brackets under rule headings.

Note For comparison, a number of rules of these rules contain bracketed notes under their headings drawing attention to equivalent or comparable (though not necessarily identical) provisions of other legislation, practice directions and notices to practitioners. Abbreviations in the notes include the following:

- CL(W)A: *Civil Law (Wrongs) Act 2002*
- CPA: *Court Procedures Act 2004*
- FCR: *Federal Court Rules (Cwlth)*
- FEA: *Foreign Evidence Act 1994 (Cwlth)*
- MCA: *Magistrates Court Act 1930*
- MC(CJ)R: *Magistrates Court (Civil Jurisdiction) Rules 2004*
- MCR: *Magistrates Court Rules 1932*
- MCPD: ACT Magistrates Court Practice Direction

- NP: ACT Supreme Court Notice to Practitioners
- NSW: *Uniform Civil Procedure Rules 2005* (NSW)
- NSWA: *Civil Procedure Act 2005* (NSW)
- NSWECA: *Evidence on Commission Act 1995* (NSW)
- NSW Prob: *Supreme Court Rules 1970* (NSW), pt 78
- NSWSCA: *Supreme Court Act 1970* (NSW)
- NSWSCR: *Supreme Court Rules 1970* (NSW), other than pt 78
- NT: *Supreme Court Rules* (NT)
- PD: ACT Supreme Court Practice Directions
- Qld: *Uniform Civil Procedure Rules 1999* (Qld)
- QldJRA: *Judicial Review Act 1991* (Qld)
- QldSCA: *Supreme Court Act 1995* (Qld)
- QldSCQA: *Supreme Court of Queensland Act 1991* (Qld)
- SA: *Supreme Court Rules 1987* (SA)
- SCA: *Supreme Court Act 1933*
- SCR: *Supreme Court Rules 1937*
- SC(ALP)R: *Supreme Court (Admission of Legal Practitioners) Rules 1998*
- SEPA: *Service and Execution of Process Act 1992* (Cwlth)
- Vic: *Supreme Court (General Civil Procedure) Rules 1996* (Vic)
- Vic Prob: *Supreme Court (Administration and Probate) Rules 2004* (Vic)
- Vic Misc: *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998* (Vic).

(3) Subrule (2) and this subrule expire on 1 July 2009.

Chapter 2 Civil proceedings generally

Part 2.1 Introductory provisions—ch 2

20 Meaning of *plaintiff* and *defendant*

(Qld, dict, def *plaintiff* and def *defendant*)

- (1) For a proceeding (other than an application in the proceeding or a proceeding on a counterclaim or third-party notice)—
- (a) a reference in these rules to the *plaintiff* is a reference to the party claiming relief; and
 - (b) a reference in these rules to the *defendant* is a reference to the party against whom relief is sought or who otherwise responds to the originating process.

Note 1 **Third-party notice** includes a fourth-party notice, a fifth-party notice etc (see r 322 (2) (c)).

Note 2 Rule 6007 (Application in proceeding—contents) requires an application in a proceeding to identify the person making the application and each person against whom relief is sought.

- (2) For a proceeding on a counterclaim or third-party notice (the *process*)—
- (a) a reference in these rules to the *plaintiff* includes a reference to the party who files and serves the process; and
 - (b) a reference in these rules to the *defendant* includes a reference to the person on whom the process is served.

21 Purpose of ch 2 etc

(Qld r 5; NSW s 60; *Civil Procedure Rules 1998* (UK) s 1.1)

- (1) The purpose of this chapter, and the other provisions of these rules in their application to civil proceedings, is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense.
- (2) Accordingly, these rules are to be applied by the courts in civil proceedings with the objective of achieving—
 - (a) the just resolution of the real issues in the proceedings; and
 - (b) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.
- (3) The parties to a civil proceeding must help the court to achieve the objectives.
- (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

Example for r (4)

The court may dismiss a proceeding or make a costs order if a plaintiff fails to proceed as required by the rules in ch 2 or an order of the court.

Note 1 See esp div 2.14.2 (Failure to comply with rules or order).

Note 2 An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

22 Application—ch 2

(SCR o 1A r 1; MC(CJ)R s 4; NSW r 1.5 and r 1.6; Qld r 3 (1))

- (1) This chapter applies to every proceeding in the Supreme Court or Magistrates Court to which these rules apply.

Note 1 Rule 4 (Application of rules) deals with the proceedings to which these rules apply.

Note 2 The Magistrates Court includes the Childrens Court (see *Children and Young People Act 1999*, s 53) and the Small Claims Court (see *Magistrates Court Act 1930*, s 279).

- (2) However, this chapter applies to a criminal proceeding or appellate proceeding only as far as a territory law provides that it applies.

Note 1 **Criminal proceeding** and **appellate proceeding** are defined in the dictionary.

Note 2 Ch 4 deals with criminal proceedings and ch 5 deals with appellate proceedings.

Note 3 A **territory law** includes these rules or a provision of these rules (see Legislation Act, s 98 and s 97 (1), def **ACT law**).

- (3) Also, this chapter does not apply to another proceeding as far as—
- (a) this chapter provides that it does not apply to the proceeding; or
 - (b) chapter 3 (Particular civil proceedings) provides that this chapter does not apply to the proceeding or otherwise makes provision for the proceeding inconsistent with this chapter; or
 - (c) another territory law (including another provision of these rules) provides that this chapter does not apply to the proceeding.

Note Ch 6 has provisions applying to all proceedings (see r 6000 (Application—ch 6)).

Part 2.2 Starting civil proceedings

Division 2.2.1 How civil proceedings are started

30 Who may start and carry on a proceeding

(SCR o 8 r 1 (1); MC(CJ)R s 482; NSW r 7.1, r 7.2 and r 7.23)

- (1) An individual may start and carry on a proceeding in the court—
 - (a) in person; or
 - (b) by a solicitor acting for the individual.

Note Rule 275 (1) (Person with legal disability—litigation guardian to start proceeding etc) provides that a person with a legal disability may start or defend, and carry on, a proceeding only by the person's litigation guardian.

- (2) However, a relator may only start and carry on a proceeding by a solicitor acting for the relator.

Note A relator is a person who starts and carries on a proceeding in the Attorney-General's name. A person may bring a proceeding as relator with the Attorney-General's permission (or fiat) where the proceeding involves the public interest and the person would otherwise not have standing to bring the proceeding.

- (3) A solicitor may act for a relator in a proceeding only if—
 - (a) the relator has given the solicitor written authority to act in the proceeding; and
 - (b) the authority is filed in the court.

- (4) A corporation may start and carry on a proceeding in the Supreme Court—
- (a) by a solicitor acting for the corporation; or
 - (b) with the court’s leave, by an officer or employee of the corporation authorised by the corporation to represent it.
- (5) If an application for leave under subrule (4) is made during the proceeding or after judgment is given in the proceeding, the application must be made in accordance with part 6.2 (Applications in proceedings).
- (6) For the Supreme Court, if an application for leave under subrule (4) is made before the proceeding starts, the application must be made by originating application.
- (7) A corporation may start and carry on a proceeding in the Magistrates Court—
- (a) by a solicitor acting for the corporation; or
 - (b) by an officer or employee of the corporation authorised by the corporation to represent it.
- (8) An officer or employee mentioned in subrule (7) must file with the first document that is filed in the court for the corporation in the proceeding—
- (a) an affidavit stating—
 - (i) the position the person holds in the corporation; and
 - (ii) that the person has been authorised by the corporation to represent the corporation in the proceeding; and
 - (iii) that the authority has not been revoked; and
 - (iv) that the person is aware that the person may be liable to pay some or all of the costs of the proceeding; and

- (b) a copy of an instrument authorising, or evidencing the authorisation of, the person to represent the corporation in the proceeding.

Note An *instrument* is defined in the Legislation Act, s 14 as any writing or other document. *Writing* and *document* are defined in the Legislation Act, dict, pt 1.

31 Kinds of originating processes

(NSW r 6.2 (1) and (2); Qld r 8 (2) and (3))

- (1) A proceeding may be started by an originating claim or originating application in accordance with these rules.
- (2) An application in a proceeding is not an originating process.

Note An *originating process* means an originating claim or originating application (see dict). An *application* in a proceeding is defined in r 6006 to include an application to the court about the proceeding.

32 When civil proceeding starts

(SCR o 2 r 1 and r 2; MC(CJ)R s 17; NSW r 4.10 (3); Qld r 8)

- (1) A proceeding started by an originating process starts on the day the originating process for the proceeding is filed.

Note 1 Rule 6145 (5) (Filed documents initially rejected) provides that, if a document is rejected by the registrar, it is taken to have been filed on the day it was first filed.

Note 2 Rule 301 deals with when a third-party proceeding starts.

- (2) However, if a proceeding is started by oral originating application under rule 37 (When oral originating application may be made in Supreme Court), the proceeding starts on the day the oral originating application is made.

- (3) For this rule, it does not matter—
- (a) that the originating process later ceases to be valid for service or is renewed under rule 74 (Originating process—duration and renewal); or
 - (b) that the proceeding started by the originating process is later struck out under rule 75 (When proceeding struck out); or
 - (c) that the proceeding started by the originating process is reinstated under rule 76 (Reinstating struck out proceeding).

33 When originating claim must be used

(SCR o 2 r 1; MC(CJ)R s 17; NSW r 6.3; Qld r 9)

- (1) A proceeding must be started by originating claim if a territory law requires the proceeding to be started by originating claim.

Note A *territory law* includes these rules (see Legislation Act, s 98).

- (2) A proceeding must also be started by originating claim unless a territory law requires or allows the proceeding to be started by originating application.

34 When originating application must be used

(SCR o 54 r 5; MC(CJ)R s 22; NSW r 6.4 (1); Qld r 10)

- (1) A proceeding must be started by originating application if a territory law requires the proceeding to be started by originating application.

Note 1 A *territory law* includes these rules (see Legislation Act, s 98).

Note 2 For cases in which an originating application is required under these rules, see the following provisions:

- r 6 (4) (Dispensing with rules)
- r 30 (6) (Who may start and carry on a proceeding)
- r 211 (4) (Including parties—common issues of law or fact)
- r 280 (10) (Litigation guardian—appointment and removal by court)
- r 650 (2) (Discovery to identify potential defendant)

- r 651 (2) (Discovery to identify right to claim relief)
- r 706 (4) (Urgent orders before start of proceeding)
- r 728 (1) (Div 2.9.4 order—procedure)
- r 1016 (2) (Person with legal disability—approval of settlement etc)
- r 2600 (3) (Interpleader—application by stakeholder)
- r 2746 (3) (Estate and trust accounts—order requiring examination and passing of accounts)
- r 3005 (1) (Grant of representation—application)
- r 3020 (1) (Reseal of foreign grant—application)
- r 3069 (3) (Caveat—setting aside)
- r 3080 (3) (Revocation of grant—urgent order before start of proceeding)
- r 3092 (1) (Division 3.1.9 proceeding—starting)
- r 3114 (3) (Failure of executor to prove will—Administration and Probate Act)
- r 3115 (3) (Failure by executor, administrator or trustee to comply with beneficiary's request etc)
- r 3303 (2) (Cross-vesting—application for transfer or removal of proceedings)
- r 3454 (1) (Foreign confiscation orders—proceedings for registration)
- r 3463 (1) (Interstate confiscation orders—proceedings for registration)
- r 3473 (1) (Foreign judgment—application for registration)
- r 3252 (Commercial arbitration—application)
- r 3504 (1) (Habeas corpus—application and service)
- r 3556 (1) (Judicial review—application)
- r 3608 (1) (Admission—application for admission)
- r 6522 (b) (Application for leave to serve subpoena in New Zealand).

Note 3 See also r 3353 (Election application etc originating application).

- (2) A proceeding must also be started by originating application if—
- (a) a territory law requires or allows a person to apply to the court for an order or another kind of relief; and
 - (b) the law does not state the kind of originating process to be used.

35 When originating application may be used

(SCR o 57 r 1 and r 2 and o 58 r 1; NSW r 6.4 (2) and (4); Qld r 11)

- (1) A proceeding may be started by originating application if—
- (a) the only or main issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely; or
 - (b) there is no opposing party to the proceeding or it is not intended to serve anyone with the originating process; or
 - (c) there is not enough time to prepare an originating claim because of the urgent nature of the relief sought; or
 - (d) a territory law allows the proceeding to be started by originating application.

Note 1 A *territory law* includes these rules (see Legislation Act, s 98).

Note 2 Rule 2501 (Contempt—applications generally) allows a contempt application to be made by originating application.

- (2) Without limiting subrule (1), a proceeding may be started by originating application if—
- (a) the only or main issue in the proceeding is the interpretation of legislation and a substantial dispute of fact is unlikely; or
 - (b) the only or main issue in the proceeding is the interpretation of a deed, will, contract or other document and a substantial dispute of fact is unlikely; or
 - (c) the relief sought is a declaration of right and there is no opposing party to the proceeding; or

- (d) for a question or matter in relation to the estate of a deceased person or a trust, without administration of the estate or trust—
- (i) the only or main issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely; or
 - (ii) there is no opposing party to the proceeding or it is not intended to serve anyone with the originating process.

Examples for r (2) (d)

- 1 a question affecting the rights or interests of someone claiming to be a creditor, domestic partner or next of kin of the deceased person or beneficiary of the trust
- 2 finding out any class of creditors, next of kin or others
- 3 producing any particular accounts by the executors, administrators or trustees, and verifying the accounts (if necessary)
- 4 paying into court any amount held by the executors, administrators or trustees
- 5 directing the executors, administrators or trustees to do or not do something as executor, administrator or trustee
- 6 approving any sale, purchase, compromise or other transaction
- 7 deciding any question arising in the administration of the estate or trust

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) Also, a proceeding may be started by originating application if—
- (a) a territory law requires or allows a person to apply to the court for an order or another kind of relief; and
 - (b) a particular kind of originating process (other than an originating claim or originating application) is required or allowed under a territory law.

36 When originating application taken to be used

A proceeding is taken to be started by originating application if—

- (a) a territory law requires or allows a person to apply to the court for an order or another kind of relief; and
- (b) a particular kind of originating process (other than an originating claim or originating application) (the *particular originating process*) is required or allowed under a territory law; and
- (c) the proceeding is started by the particular originating process.

37 When oral originating application may be made in Supreme Court

(SCR o 2 r 3; Qld r 12)

- (1) This rule applies only in relation to the Supreme Court.
- (2) The court may give leave for a proceeding to be started by oral originating application if satisfied that it is necessary to start the proceeding in this way.

Example of necessity

urgent relief is sought

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) An application for leave to start a proceeding or for an order under this rule must be made in accordance with part 6.2 (Applications in proceedings).
- (4) Without limiting rule 6016 (Application in proceeding—oral application), an application for a decision or order under this rule may be made orally, unless the court otherwise orders on its own initiative.

- (5) The plaintiff must file a written originating application in the same terms as the oral originating application.
- (6) The written originating application must be filed—
 - (a) as soon as practicable after the oral originating application is made; or
 - (b) if the court makes an order about when it must be filed—in accordance with the order.

38 Proceeding incorrectly started by originating claim

(NSW r 6.5; Qld r 13)

- (1) This rule applies if the court considers that a proceeding started by originating claim should have been started by originating application or may more conveniently continue as if started by originating application.
- (2) The court may—
 - (a) order that the proceeding continue as if started by originating application; and
 - (b) give the directions it considers appropriate for the conduct of the proceeding; and

Note See r 1401 (Directions generally).

 - (c) make any other order it considers appropriate.

Example

the court may order that the content of any pleadings filed in the proceeding be put before the court as affidavits

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for an order or direction under this rule.

Note 2 An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) If the court makes an order under subrule (2) (a)—
- (a) the originating claim is taken to be an originating application; and
 - (b) the proceeding is taken to be a proceeding started by originating application.

39 Proceeding incorrectly started by originating application

(NSW r 6.6; Qld r 14)

- (1) This rule applies if the court considers that a proceeding started by originating application should have been started by originating claim or may more conveniently continue as if started by originating claim.
- (2) The court may do all or any of the following:
- (a) order that the proceeding continue as if started by originating claim;
 - (b) give the directions it considers appropriate for the conduct of the proceeding;
 - (c) order that any affidavits filed in the proceeding be treated as pleadings, alone or supplemented by particulars;
 - (d) order that the plaintiff file and serve a statement of claim;
 - (e) make any other order it considers appropriate.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order or direction under this rule.

- (3) If the court makes an order under subrule (2) (a)—
- (a) the originating application is taken to be an originating claim; and
 - (b) the proceeding is taken to be a proceeding started by originating claim.

40 Setting aside originating process etc

(SCR o 13 r 17; NSW r 12.11 (1); Qld r 16 and r 373)

- (1) The court may—
- (a) declare that a proceeding for which an originating process has been issued has not, for want of jurisdiction, been properly started; or
 - (b) declare that an originating process has not been properly served; or
 - (c) set aside an order for service of an originating process; or
 - (d) set aside an order extending the period for service of an originating process; or
 - (e) set aside an originating process; or
 - (f) set aside service of an originating process; or
 - (g) stay a proceeding; or
 - (h) amend or set aside leave under rule 6505 (Service outside Australia—leave for service); or
 - (i) make an order protecting or releasing—
 - (i) property seized, or threatened with seizure, in a proceeding; or
 - (ii) property subject to an order restraining its disposal or in relation to which an order restraining its disposal is sought; or
 - (j) make an order declining to exercise jurisdiction in a proceeding; or

(k) make any other order it considers appropriate.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Note 2 Rule 6015 (Application in proceeding—application under r 40) provides that an application for an order under this rule must be filed within the time mentioned in r 102 (Notice of intention to respond or defence—filing and service) for filing a notice of intention to respond or, if no notice of intention to respond is filed, a defence.

Note 3 The registrar may reject an originating process that is filed (see r 6140 (Rejecting documents—noncompliance with rules etc) and r 6142 (Rejecting documents—abuse of process etc).

(2) However, the court must not—

(a) set aside a proceeding only because the proceeding was started by the incorrect originating process; or

(b) set aside an originating process only because the incorrect originating process was used.

Division 2.2.2 Originating claims

50 Originating claim—content etc

(SCR o 2 r 9 (1) and r 10; MC(CJ)R s 18; NSW r 6.12; Qld r 17, r 18 and r 22)

(1) An originating claim must state briefly and specifically the nature of the claim made and relief sought.

Note See approved form 2.1 (Originating claim) [AF2006-246](#).

(2) A statement of claim must be attached to the originating claim.

Note 1 See

- approved form 2.2 (Statement of claim—debt or liquidated demand) [AF2006-247](#)
- approved form 2.3 (Statement of claim—motor vehicle death or personal injury) [AF2006-248](#)
- approved form 2.4 (Statement of claim—employment death or personal injury) [AF2006-249](#)

- approved form 2.5 (Statement of claim—death or personal injury other than motor vehicle or employment-related) [AF2006-250](#)
- approved form 2.6 (Statement of claim—general) [AF2006-447](#).

Note 2 Rule 52 sets out requirements for the statement of claim for a motor vehicle death or personal injury claim and r 53 sets out requirements for a statement of claim for an employment death or personal injury claim.

Note 3 A statement of claim is a pleading (see dict, def *pleading*) and therefore must comply with pt 2.6 (Pleadings).

Note 4 *Attached* to a document is defined in the dictionary.

- (3) An originating claim filed in the Magistrates Court, or the attached statement of claim, must show that the court has jurisdiction to decide the claim.

Note The *Magistrates Court Act 1930*, pt 4.2 (Civil jurisdiction) deals with the civil jurisdiction of the Magistrates Court under that Act.

- (4) An originating claim must state—
- (a) whether the plaintiff is represented by a solicitor; and
 - (b) if the plaintiff is represented by a solicitor—the name of the solicitor; and
 - (c) the plaintiff’s address for service; and
 - (d) if the plaintiff is suing in a representative capacity—the representative capacity in which the plaintiff is suing; and
 - (e) if a defendant is being sued in a representative capacity—the representative capacity in which the defendant is being sued.

Note *Address for service* is defined in the dictionary.

- (5) An originating claim must state specifically any claim for—
- (a) exemplary damages or aggravated damages; and
 - (b) interest up to the day of judgment.

- (6) An originating claim need not specifically claim costs unless the claim is for a debt or liquidated demand.

Note **Liquidated demand** is defined in the dictionary.

- (7) If the relief sought requires the court's decision or direction on any question, the originating claim must state the question.

51 Originating claim—additional matters for claims for debt and liquidated demands

(SCR o 2 r 11)

- (1) This rule applies to an originating claim that includes a claim for a debt or liquidated demand.

Note **Liquidated demand** is defined in the dictionary.

- (2) A claim for interest up to the day of judgment—
- (a) must state the period or periods for which interest is claimed; and
 - (b) may state the rate or rates at which interest is claimed.
- (3) If a rate is not claimed under subrule (2) (b), the rate is taken to be the rate of interest applying, from time to time, under schedule 2, part 2.1 (Interest up to judgment).
- (4) The costs amount applying under schedule 3, part 3.1 (Claim for debt or liquidated demand) must be specifically claimed for costs.

52 Originating claim—statement of claim for motor vehicle death and personal injury claims

(SCR o 2 r 12; NSW r 15.12; Qld r 547)

- (1) This rule applies in relation to an originating claim that includes a claim for damages for death or personal injury caused by, or arising out of, the negligent use of a motor vehicle (the **accident**).

- (2) The statement of claim for the originating claim must include, and is sufficient if it includes, the following:
- (a) the time, date, place and circumstances of the accident (including, if possible, the registration details of all motor vehicles involved);
 - (b) precise particulars of the negligence claimed;
 - (c) for a claim for personal injury—details of the nature and extent of the injuries and disabilities resulting from the accident, as far as is known, that is enough (if possible) to enable the defendant to nominate the kind of expert required to examine the plaintiff;
 - (d) the name of each health professional who has treated the plaintiff for the injuries and disabilities, and for any condition exacerbated by the injury or disability;
 - (e) the nature of any claim for past or future economic loss, as far as is known, including (if relevant) the name and address of each employer of the plaintiff during a reasonable period before and since the accident.

Note 1 See approved form 2.3 (Statement of claim—motor vehicle death or personal injury) [AF2006-248](#).

Note 2 A statement of claim is a pleading (see dict, def *pleading*) and therefore must comply with pt 2.6 (Pleadings).

53 Originating claim—statement of claim for employment death and personal injury claims

(SCR o 2 r 13; NSW r 15.12; Qld r 547)

- (1) This rule applies in relation to an originating claim that includes a claim for damages for death or personal injury caused by, or arising out of, negligence or breach of statutory duty by an employer (the *incident*).

- (2) The statement of claim for the originating claim must include, and is sufficient if it includes, the following:
- (a) if the cause of action is based on negligence—the time, date, place and circumstances of the negligence claimed, including the acts or omissions making up the negligence;
 - (b) if the cause of action is based on negligence and the negligence claimed was that of someone (other than the defendant) for whose negligence the defendant is vicariously liable—particulars of the person, and particulars of the claim for vicarious liability;
 - (c) if the cause of action is based on breach of statutory duty—the name and provision of the statute and a precise statement of the acts or omissions making up the breach claimed;
 - (d) for a claim for personal injury—details of the nature and extent of the injuries and disabilities resulting from the incident, as far as is known, that is enough (if possible) to enable the defendant to nominate the kind of expert required to examine the plaintiff;
 - (e) the name of each health professional who has treated the plaintiff for the injuries and disabilities, and for any condition exacerbated by the injury or disability;
 - (f) the nature of any claim for past or future economic loss, as far as is known, including (if relevant) the name and address of each employer of the plaintiff during a reasonable period before and since the incident.

Note 1 See approved form 2.4 (Statement of claim—employment death or personal injury) [AF2006-249](#).

Note 2 A statement of claim is a pleading (see dict, def *pleading*) and therefore must comply with pt 2.6 (Pleadings).

54 Originating claim—filing and service

(SCR o 2 r 18A; MC(CJ)R s 23; NSW r 6.2 (3) and r 10.20 (2); Qld r 22 and r 105 (1))

- (1) An originating claim and attached statement of claim must be filed in the court and a sealed copy then served on each defendant.
- (2) The originating claim and attached statement of claim must be served personally on each defendant, unless otherwise provided by these rules.

Note See r 6405 (How document is personally served). A number of rules provide that particular kinds of non-personal service are taken to be personal service eg r 6412 (Service of originating process by post—Magistrates Court) and r 6431 (Service on corporations—generally). Also, service may be made in another way eg by substituted service (see r 6460 (Substituted service)).

55 Originating claim—abandonment of excess in Magistrates Court

(MC(CJ)R s 21)

- (1) This rule applies if a person has a cause of action against another person for more than \$50 000.
- (2) The person may start a proceeding for the cause of action in the Magistrates Court if the person—
 - (a) abandons the excess and limits the claim to \$50 000; and
 - (b) states in the claim that the excess is abandoned.
- (3) Judgment in a proceeding under this rule—
 - (a) is in full discharge of all demands in relation to the cause of action; and
 - (b) must record the abandonment.

Division 2.2.3 Originating applications

60 Originating application—content etc

(SCR o 2 r 14, o 54 r 6; o 57 r 3 and r 4 and o 58 r 7; MC(CJ)R s 22; NSW r 6.12 and r 6.15; Qld r 17, r 18 and r 26)

- (1) Subject to division 2.4.6 (Representation—trustees and personal representatives), an originating application must name as defendants everyone directly affected by the relief sought in the application.

Note See approved form 2.7 (Originating application) [AF2006-252](#).

- (2) Subrule (1) does not apply if—

- (a) a territory law allows the hearing of the originating application without it being served on anyone; or

Note A *territory law* includes these rules (see Legislation Act, s 98).

- (b) the relief sought in the application is a declaration of right.

- (3) The originating application must state specifically the orders or other relief sought in the proceeding.

- (4) The originating application must list the affidavits to be relied on by the plaintiff (the *supporting affidavits*).

- (5) The court may order the plaintiff to an originating application to file supporting affidavits for the application.

- (6) An originating application filed in the Magistrates Court, or the supporting affidavits, must show that the court has jurisdiction to decide the application.

Note The *Magistrates Court Act 1930*, pt 4.2 (Civil jurisdiction) deals with the civil jurisdiction of the Magistrates Court under that Act.

- (7) An originating application must state—

- (a) whether the plaintiff is represented by a solicitor; and

- (b) if the plaintiff is represented by a solicitor—the name of the solicitor; and
- (c) the plaintiff’s address for service; and
- (d) if the plaintiff is suing in a representative capacity—the representative capacity in which the plaintiff is suing; and
- (e) if the defendant is being sued in a representative capacity—the representative capacity in which the defendant is being sued.

Note **Address for service** is defined in the dictionary.

- (8) If an originating application is made under a statute, the application must state the name and provision of the statute under which the application is made.
- (9) The originating application, and any copies of the application for service, must state a return date for the application unless a territory law requires that a return date not be set for the application.

Note 1 **Return date** for an application is defined in the dictionary.

Note 2 Some provisions of these rules require that a return date not be set for an application under the rule unless the court otherwise orders. See the following provisions:

- r 3005 (5) (Grant of representation—application)
- r 3020 (4) (Reseal of foreign grant—application)
- r 3454 (4) (Foreign confiscation orders—proceedings for registration)
- r 3463 (4) (Interstate confiscation orders—proceedings for registration)
- r 3473 (4) (Foreign judgment—application for registration).

61 Originating application—filing and service

(SCR o 2 r 18A and r 18B, o 54 r 9; o 57 r 3 and o 58 r 3 and r 6; MC(CJ)R s 22 (5) and s 23; NSW r 6.2 (3), r 6.15 (3), r 10.15 and r 10.20 (2); Qld r 27 (1))

- (1) An originating application must be filed in the court and a sealed copy then served on each defendant and anyone else the court directs.
- (2) For an originating application for a question in relation to the estate of a deceased person or a trust, without administration of the estate or trust—
 - (a) if the application is by a personal representative of the estate or a trustee of the trust—the application must be served on everyone directly affected by the relief sought in the application; or
 - (b) if the proceeding the subject of the application is started by someone other than a personal representative of the estate or a trustee of the trust—the application must be served on the personal representatives or trustees.
- (3) The originating application must be served personally on each defendant or each person mentioned in subrule (2), unless otherwise provided by these rules.

Note See r 6405 (How document is personally served). A number of rules provide that particular kinds of non-personal service are taken to be personal service eg r 6412 (Service of originating process by post—Magistrates Court) and r 6431 (Service on corporations—generally). Also, service may be made in another way eg by substituted service (see r 6460 (Substituted service)).

- (4) For an originating application for which there are no defendants, the court may order that the application be served on anyone the court directs.

Example

an originating application in which the relief sought is a declaration of right

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (5) The court may give a direction under subrule (1) or (4) on application or its own initiative.

Note Pt 6.2 (Applications in proceedings) applies to an application for a direction.

62 When originating application must be served

(SCR o 54 r 9; MC(CJ)R s 22 (5); NSW r 6.15 (3) and (4); Qld r 27 (1) and (2))

- (1) An originating application must be served at least 5 days before the return date for the application.

Note **Return date** for an application is defined in the dictionary.

- (2) However, subrule (1) does not apply if—

- (a) a territory law allows the originating application to be heard and decided without being served; or

Note A **territory law** includes these rules (see Legislation Act, s 98).

- (b) the plaintiff proposes in the originating application that it be decided without a hearing; or

- (c) another time is provided for under these rules; or

- (d) the court otherwise orders.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (3) If the court makes an order under subrule (2) (d), a sealed copy of the order must be served with the application.

63 What happens if originating application not served in time

(SCR o 54 r 11; Qld r 27 (3))

- (1) This rule applies if—
- (a) an originating application is served on a defendant; but
 - (b) it is not served at least 5 days before the return date for the application.

Note **Return date** for an application is defined in the dictionary.

- (2) The court may only hear and decide the application on the return date if the court considers it just to hear and decide the application on that date and—
- (a) the court is satisfied that the defendant will suffer no significant prejudice if it hears and decides the application on the return date; or
 - (b) the defendant agrees to the court hearing and deciding the application on the return date.
- (3) The court may make an order on the return date if the plaintiff gives an undertaking acceptable to the court.
- (4) On application by a person affected by the order, the court may set aside the order.

Note Pt 6.2 (Applications in proceedings) applies to an application to set aside the order.

64 Originating application—filing and service of supporting affidavits

(SCR o 54 r 2; NSW r 10.2; Qld r 28)

- (1) The supporting affidavits for an originating application must be filed in the court and a stamped copy then served with the application.

- (2) However, the court may give leave for an affidavit not served as required by subrule (1) to be relied on at the hearing.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave.

Division 2.2.4 Rules about originating process

70 Originating process to be sealed

(SCR o 2 r 16 (1); MC(CJ)R s 478 (3); Qld r 978 (2))

The registrar must seal the original and filed copies of an originating process.

Note The registrar may reject an originating process that is filed (see r 6140 (Rejecting documents—noncompliance with rules etc) and r 6142 (Rejecting documents—abuse of process etc)).

71 Numbering etc of proceedings

(SCR o 2 r 16 (2); MC(CJ)R s 14; NSW r 4.11; Qld r 964)

- (1) When an originating process is sealed, the registrar must give a distinguishing number or other unique identifier to the proceeding started by the process.
- (2) The registrar must ensure that the original and each copy sealed under rule 70 is endorsed with—
- (a) the distinguishing number or other unique identifier given to the proceeding; and
 - (b) the date when—
 - (i) the process was filed in the court; or
 - (ii) if the proceeding was started by an oral originating application—the application was made.

Note See r 37 (When oral originating application may be made in Supreme Court).

72 Originating process—solicitor’s statement about filing

(SCR o 2 r 20)

- (1) This rule applies if—
 - (a) it appears from an originating process that the plaintiff is represented by a solicitor; and
 - (b) a defendant to the proceeding asks the solicitor in writing whether the process was filed by the solicitor.
- (2) The solicitor must tell the defendant in writing whether the process was filed in the court by the solicitor.
- (3) If the solicitor tells the defendant that the solicitor did not file the process, the defendant may apply to the court to stay the proceeding.

Note Pt 6.2 (Applications in proceedings) applies to an application to stay the proceeding.

- (4) On the defendant’s application, the court may stay the proceeding.

73 Defendant taken to be served by filing notice of intention to respond or defence

(SCR o 2 r 18C; MC(CJ)R s 33)

- (1) This rule applies to a defendant in a proceeding if the defendant has not been served with the originating process for the proceeding, but files a notice of intention to respond (other than a conditional notice of intention to respond) or a defence.
- (2) The defendant is taken to have been served with the originating process on the day the defendant files the notice of intention to respond or defence.

74 Originating process—duration and renewal

(SCR div 2.2; MC(CJ)R pt 5; NSW r 6.2 (4) and (5); Qld r 24)

- (1) An originating process is valid for service for 1 year starting on the day it is filed in the court.

- (2) The plaintiff may apply to the court to renew the originating process if the process has not been served on the defendant.

Note Pt 6.2 (Applications in proceedings) applies to an application to renew the originating process.

- (3) If the court is satisfied that reasonable efforts have been made to serve the defendant or that there is another good reason to renew the originating process, the court may renew the process for a further period, of not longer than 6 months at a time, starting on the day after the day the process would otherwise end.
- (4) The originating process may be renewed whether or not it is valid for service.
- (5) Before an originating process renewed under this rule is served, it must be stamped and show the period for which the process is renewed.
- (6) Despite subrule (1), for any time limit (including a limitation period), an originating process that is renewed is taken to have started on the day the process was filed in the court.
- (7) Failing to serve an originating process within the time limited by these rules does not prevent the plaintiff from starting a fresh proceeding by filing another originating process.

75 When proceeding struck out

(SCR o 2 r 31; MC(CJ)R s 22A and s 141; NSW r 12.7, r 12.8 and r 12.9)

- (1) A proceeding is taken to be struck out in relation to a defendant if—
- (a) at the end of 1 year after the day the originating process is issued, an affidavit of service of the process on the defendant has not been filed in the court; or
- (b) at the end of 1 year after the day the originating process is served on the defendant—

- (i) a notice of intention to respond or defence has not been filed in the court by the defendant; and
 - (ii) judgment has not been entered in relation to the defendant; and
 - (iii) the proceeding has not otherwise been disposed of in relation to the defendant.
- (2) Also, a proceeding is taken to be struck out in relation to a party if the party does not take a step in the proceeding before the end of 1 year after the day the last step was taken in the proceeding.

- (3) A proceeding is taken to be struck out under subrule (1) or (2) on the day after the day the relevant 1-year period mentioned in the subrule ends.

Example

There is 1 plaintiff and 1 defendant to a proceeding. The defendant takes a step in the proceeding on 1 July 2006. If the plaintiff fails to take the next step on or before 1 July 2007, the proceeding is taken to be struck out on 2 July 2007.

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

76 Reinstating struck out proceeding

(SCR o 2 r 31; MC(CJ)R s 22A and s 141; NSW r 12.7, r 12.8 and r 12.9)

- (1) A person whose proceeding has been struck out under rule 75 may apply to the court to reinstate the proceeding.

Note Pt 6.2 (Applications in proceedings) applies to an application to reinstate the proceeding.

- (2) The court may reinstate the proceeding if it is in the interests of justice to reinstate the proceeding.
- (3) For any time limit (including a limitation period), a proceeding that is reinstated is taken to have started on the day the originating

process for the proceeding was filed in the court and is taken never to have been struck out.

Part 2.3 **Notice of intention to respond and defence**

Division 2.3.1 **Notice of intention to respond and defence—general**

100 **No step without notice of intention to respond or defence**

(SCR o 13 r 1; MC(CJ)R s 37; NSW r 6.1; Qld r 135)

- (1) Except with the court's leave, a defendant to an originating claim may take a step in a proceeding only if the defendant has filed in the court—
- (a) a notice of intention to respond; or
 - (b) if the defendant chooses not to file a notice of intention to respond—a defence.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for leave under this rule.

Note 2 A defendant who proposes to challenge the court's jurisdiction or to assert an irregularity must file a conditional notice of intention to respond (see r 111).

Note 3 A defendant who intends to take no active part in a proceeding must file a notice of intention to respond (see r 106).

Note 4 See

- approved form 2.8 (Notice of intention to respond) [AF2006-253](#)
- approved form 2.9 (Defence and counterclaim) [AF2006-254](#).

- (2) Subject to rule 106 (Defendant may submit to judgment by notice of intention to respond), if a defendant to an originating claim files an unconditional notice of intention to respond in the court, the defendant must also file a defence.

Note 1 Rule 111 (Conditional notice of intention to respond) provides that, if a defendant files a conditional notice of intention to respond, the defendant must apply for an order under r 40 (Setting aside originating process etc). If the defendant fails to apply, or the defendant applies but the application is refused, the conditional notice of intention to respond becomes an unconditional notice of intention to respond, and the defendant must file a defence.

Note 2 See div 2.11.3 (Default by defendant) for the possible consequences of not filing a notice of intention to respond or defence.

Note 3 See also r 279 (Person with legal disability—effect of no notice of intention to respond or defence).

- (3) Except with the court's leave, a defendant to an originating application may take a step in a proceeding only if the defendant has filed in the court a notice of intention to respond.

101 Notice of intention to respond or defence—details to be included

(SCR o 13 r 2 (1) and (2); MC (CJ)r s 38; Qld r 140)

- (1) A notice of intention to respond filed by the defendant must state—
- whether the defendant is represented by a solicitor; and
 - if the defendant is represented by a solicitor—the name of the solicitor; and
 - the defendant's address for service; and
 - if any particulars of the defendant stated in the originating process are incorrect—the correct particulars.

Note 1 See approved form 2.8 (Notice of intention to respond) [AF2006-253](#).

Note 2 **Address for service** is defined in the dictionary.

- (2) If the defendant to an originating claim chooses not to file a notice of intention to respond, but files a defence, the defence must state—
- (a) whether the defendant is represented by a solicitor; and
 - (b) if the defendant is represented by a solicitor—the name of the solicitor; and
 - (c) the defendant’s address for service; and
 - (d) if any particulars of the defendant stated in the originating process are incorrect—the correct particulars.

Note See approved form 2.9 (Defence and counterclaim) [AF2006-254](#).

- (3) If the defendant includes corrected particulars of the defendant’s name in the notice of intention to respond or defence, the court may amend the originating process accordingly.

102 Notice of intention to respond or defence—filing and service

(SCR o 2 r 7 and o 13 r 2 (3) and r 3; MC(CJ)R s 37; NSW r 6.10 and r 14.3; Qld r 137 and r 142)

- (1) In a proceeding started by an originating claim, a defendant must file any notice of intention to respond, defence, or notice of intention to respond and defence, not later than the later of the following:
- (a) 28 days after the day the claim is served on the defendant;
 - (b) if the defendant makes an unsuccessful application under rule 40 (Setting aside originating process etc) to have the claim set aside—7 days after the day the application is refused.

- (2) However, if, before the defendant files a defence, an application for summary judgment under rule 1146 (Summary judgment—for plaintiff) is served on the defendant, but the court does not on the application dispose of all the claims for relief against the defendant, the court may set a time within which the defendant must file a defence.

Note Pt 6.2 (Applications in proceedings) applies to an application to set a time.

- (3) In a proceeding started by an originating application, a defendant must file a notice of intention to respond not later than the later of the following:
- (a) on or before the return date for the application;
 - (b) if the defendant makes an unsuccessful application under rule 40 to have the originating application set aside—7 days after the day the application is refused.

Note **Return date** for an application is defined in the dictionary.

- (4) The registrar must seal the original and filed copies of the notice of intention to respond or defence.

Note The registrar may reject a notice of intention to respond or defence that is filed (see r 6140 (Rejecting documents—noncompliance with rules etc) and r 6141 (Rejecting documents—inconvenient address for service)).

- (5) The defendant must serve a sealed copy of the notice of intention to respond or defence on the plaintiff at the plaintiff's address for service on the day it is filed in the court.

Note **Address for service** is defined in the dictionary.

103 Notice of intention to respond or defence—late filing or service

(SCR o 13 r 11; MC(CJ)R s 37 (1); Qld r 138)

- (1) A defendant may file and serve a notice of intention to respond or defence at any time before judgment, even if the notice or defence is served or filed after the time limited by rule 102.

Note For a defendant to an originating claim, see div 2.11.3 (Default by defendant) for the possible consequences of not filing within the time limited for filing.

- (2) If a defendant to an originating claim files and serves a notice of intention to respond after the time limited by rule 102, the defendant is not entitled to any extra time for filing and serving a defence or for any other purpose, unless the court otherwise orders.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

104 Ground of defence arising after defence filed etc

(SCR o 28 r 2)

- (1) This rule applies if a ground of defence to an originating claim arises after—

(a) a defendant files a defence; or

(b) the time limited by rule 102 (1) (Notice of intention to respond or defence—filing and service) for a defendant to file a defence ends.

- (2) The defendant may file a further defence not later than 7 days after the day the ground of defence arises or at a later time with the court's leave.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave under this subrule.

- (3) The registrar must seal the original and filed copies of the further defence.

Note The registrar may reject a further defence that is filed (see r 6140 (Rejecting documents—noncompliance with rules etc)).

- (4) The defendant must serve a sealed copy of the further defence on the plaintiff at the plaintiff's address for service on the day it is filed in the court.

Note *Address for service* is defined in the dictionary.

105 Defence—reliance on defence not disclosed

(MC(CJ)R s 40)

A defendant in a proceeding started by originating claim may rely at the hearing of the proceeding on a ground of defence not stated in a defence or further defence filed and served by the defendant only if—

- (a) the plaintiff agrees; or
- (b) the court gives leave.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for leave.

Note 2 Rule 6902 (Leave may be given on conditions) provides that, if the court gives leave under these rules, it may give the leave on the conditions it considers appropriate.

106 Defendant may submit to judgment by notice of intention to respond

(SCR o 13 r 2 (6) to (8); NSW r 6.11)

- (1) This rule applies if a defendant in a proceeding intends to—
- (a) submit to the orders of the court; but
 - (b) take no active part in the proceeding.

- (2) The defendant must—
- (a) file a notice of intention to respond; and
 - (b) include in the notice a statement to the effect that the defendant submits to all orders sought and to judgment in relation to all claims made.
- (3) However, the defendant may add to the statement words to the effect that the defendant does not submit in relation to costs.

Example of addition

except as to costs

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (4) Except with the court's leave, a defendant who has filed a notice of intention to respond that includes the statement mentioned in subrule (2) (b) may not file a defence or affidavit or take any other step in the proceeding.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave.

- (5) The court may order that a plaintiff pay a defendant's costs as a submitting party if the defendant—
- (a) files a notice of intention to respond that includes the statement mentioned in subrule (2) (b); and
 - (b) takes no active part in the proceeding.

- (6) If—
- (a) a defendant files a notice of intention to respond; and
 - (b) the defendant is entitled to include in the notice the statement mentioned in subrule (2) (b), but does not include the statement; and
 - (c) the defendant takes no active part in the proceeding;
- the court may order that a plaintiff pay the defendant's costs, but, unless it otherwise orders, the amount awarded for the costs must not be more than the amount that could have been awarded if the statement had been included in the notice.
- (7) The court may make an order under subrule (5) or (6) on application by the defendant or on its own initiative.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for an order under r (5) or r (6).
- (8) If a plaintiff has been ordered to pay costs under subrule (5) or (6), the costs must be included in any costs payable to the plaintiff by any other defendant or opponent of the plaintiff in the proceeding.

107 Notice of intention to respond or defence—several defendants with same solicitor

(SCR o 13 r 9)

- (1) This rule applies if 2 or more defendants in the same proceeding are represented by the same solicitor at the same time.
- (2) The names of all the defendants may be included in a single notice of intention to respond or defence.

108 Notice of intention to respond or defence—person sued under partnership name

(SCR o 50 r 5; NSW r 7.21 (1) and (2); Qld r 85)

- (1) This rule applies if a proceeding is started against a person under a partnership name.

Note See also div 2.4.10 (Partnerships).

- (2) Any notice of intention to respond or defence must not be filed in the partnership name.
- (3) The person may file a notice of intention to respond or defence only in the person's own name.
- (4) If the person files a notice of intention to respond or defence in the person's own name—
- (a) the proceeding continues in the partnership name; and
 - (b) the person must also file a statement of the names and home addresses of all the people who were carrying on business under the partnership name when the cause of action arose (a ***partnership statement***).
- (5) The court may order that a notice of intention to respond or defence filed by the person be struck out if the person fails to comply with subrule (4) (b).

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this subrule.

- (6) Subrules (4) (b) and (5) do not apply if a partnership statement has been filed in the proceeding by another defendant who is a partner in the partnership.

109 Notice of intention to respond or defence—person incorrectly served as partner

(Qld r 86)

- (1) If a proceeding is started against a person under a partnership name, the person may file a conditional notice of intention to respond stating—
 - (a) the person files the notice because the person was served as a partner; and
 - (b) the person denies being a partner at the relevant time or being liable as a partner.
 - (2) On application, the court may, by order—
 - (a) set aside service of the originating process on the person on the ground that the person is not a partner or is not liable as a partner; or
 - (b) set aside a conditional notice of intention to respond on the ground that the person is a partner or is liable as a partner.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for an order or direction under this rule.
- (3) The court may give directions about how to decide the liability of the person or the liability of the partners.
 - (4) This rule does not limit rule 111 (Conditional notice of intention to respond).

110 Notice of intention to respond or defence—person sued under business name

(NSW r 7.21 (1); Qld r 91)

- (1) This rule applies if a proceeding is started against a person in a business name that is not the person's own name, whether or not the business name is registered under the *Business Names Act 1963*.

Note See also div 2.4.11 (Business names).

- (2) Any notice of intention to respond or defence must not be filed in the business name.
- (3) The person may file a notice of intention to respond or defence only in the person's own name.
- (4) If the person files a notice of intention to respond or defence in the person's own name—
- (a) the proceeding continues in the business name until the amendments mentioned in rule 292 (3) (Business names—amendment about parties) are made; and
- Note* Rule 292 (3) provides that the plaintiff must make the amendments necessary for the proceeding to be continued against a named defendant and not in the business name.
- (b) the person must also file a statement of the names and home addresses of all the people who were carrying on business under the business name when the cause of action arose (a ***business name statement***).
- (5) The court may order that a notice of intention to respond or defence filed by the person be struck out if the person fails to comply with subrule (4) (b).
- Note* Pt 6.2 (Applications in proceedings) applies to an application for an order under this subrule.
- (6) Subrules (4) (b) and (5) do not apply if a business name statement has been filed in the proceeding by another defendant who is carrying on business under the business name.

111 Conditional notice of intention to respond

(SCR o 13 r 16A; MC(CJ)R s 37 (2); Qld r 144)

- (1) If a defendant proposes to challenge the court's jurisdiction or to assert an irregularity, the defendant must file a conditional notice of intention to respond.

Note See also r 109 (Notice of intention to respond or defence—person incorrectly served as partner).

- (2) If a defendant files an unconditional notice of intention to respond or defence, the defendant is taken to have submitted to the court's jurisdiction, and waived any irregularity in the proceeding or defect in service of the originating process.
- (3) If a defendant files a conditional notice of intention to respond, the defendant must apply for an order under rule 40 (Setting aside originating process etc) not later than 28 days after the day the notice is filed.
- (4) If the defendant does not apply for an order under rule 40 before the end of the 28-day period, or the defendant applies but the application is refused, the conditional notice of intention to respond becomes an unconditional notice of intention to respond.
- (5) If the conditional notice of intention to respond becomes an unconditional notice of intention to respond and the proceeding was started by originating claim, the defendant must file a defence not later than 14 days after the day the conditional notice becomes an unconditional notice.

Division 2.3.2 Notice of intention to respond and defence—proceedings in Supreme Court for possession of land

150 Application—div 2.3.2

(SCR o 13 rr 12-15; Qld r 143)

This division applies only in relation to a proceeding in the Supreme Court for the possession of land.

151 Proceeding for possession of land—leave to file defence etc

(SCR o 13 r 12 and r 15; NSW r 6.24 (2); Qld r 143)

- (1) If a person who is in possession of the land, or part of it, (either directly or by a tenant) is not named in the originating process for the proceeding, the person may apply to the Supreme Court for leave to file a notice of intention to respond or defence.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave.

- (2) The application must be supported by an affidavit—
 - (a) showing the person is in possession of the land or part of it; and
 - (b) stating how the person is in possession.
- (3) The court may give leave for the person to file the notice or defence.

Note Rule 6902 (Leave may be given on conditions) provides that, if the court gives leave under these rules, it may give the leave on the conditions it considers appropriate.

- (4) If the person is in possession of only part of the land, the leave may be limited to that part of the land.

152 Proceeding for possession of land—filing defence etc

(SCR o 13 r 12 and 14; Qld r 143)

- (1) If the court gives a person leave under rule 151 to file a notice of intention to respond or defence, the person must file the notice or defence—
 - (a) not later than 7 days after the day the leave is given; or
 - (b) if the court makes an order about when it must be filed—in accordance with the order.

Note See

- approved form 2.8 (Notice of intention to respond) [AF2006-253](#)
- approved form 2.9 (Defence and counterclaim) [AF2006-254](#).

- (2) If the person files the notice or defence as lessor of the land, the person must include in the notice or defence a statement that the person is responding to the claim as lessor.
- (3) On the filing by a person of a notice of intention to respond or defence under this rule, the person is taken, for all purposes, to be a defendant in the proceeding.

153 Proceeding for possession of land—service of defence etc

(SCR o 13 r 12; Qld r 143)

- (1) If a person files a notice of intention to respond or defence under rule 152, the person must serve the following (the *relevant documents*) on every other active party to the proceeding:
 - (a) a sealed copy of the notice or defence;
 - (b) a stamped copy of the affidavit mentioned in rule 151 (2) (Proceeding for possession of land—leave to file defence etc).

Note *Active party* is defined in the dictionary.

Chapter 2	Civil proceedings generally
Part 2.3	Notice of intention to respond and defence
Division 2.3.2	Notice of intention to respond and defence—proceedings in Supreme Court for possession of land

Rule 153

- (2) The person must serve the relevant documents—
- (a) not later than 7 days after the day the notice or defence is filed;
or
 - (b) if the court makes an order about when they must be served—
in accordance with the order.

Part 2.4 **Parties and proceedings**

Division 2.4.1 **Including causes of action**

200 **Including causes of action**

(SCR o 22 rr 1-5 and r 7; MC(CJ)R s 19 (1); NSW r 6.18; Qld r 60)

- (1) A plaintiff may, whether seeking relief in the same or different capacities, include in the same proceeding as many causes of action as the plaintiff has against a defendant.
- (2) However, for the Magistrates Court, causes of action may be included in the same proceeding only if the total amount claimed in the proceeding is not more than the maximum amount for which the court has jurisdiction.
- (3) Also, a claim by a trustee in bankruptcy must not be included with a claim by the trustee in any other capacity except with the court's leave.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave.

- (4) This rule is subject to rule 202 (Including causes of action inconveniently etc).

201 **Joint and separate claims**

(SCR o 22 r 6)

Claims by plaintiffs jointly may be included with claims by them or any of them separately against the same defendant.

202 Including causes of action inconveniently etc

(SCR o 22 r 1 and r 8 and 9; MC(CJ)R s 19 (3); NSW r 6.22; Qld r 68)

- (1) This rule applies if the court considers that including a cause of action in a proceeding—
- (a) may unfairly prejudice another party; or
 - (b) may delay the conduct of the proceeding; or
 - (c) is otherwise inconvenient.
- (2) The court may—
- (a) order separate trials; or
 - (b) make any other order (including about costs) it considers appropriate.

Examples for par (b)

- 1 an order for costs in favour of a party for attending a part of a trial in which the party has no interest
- 2 an order relieving a party from attending a part of a trial in which the party has no interest
- 3 an order staying the proceeding against a defendant until the trial between the plaintiff and another defendant is decided, on condition that the defendant is bound by the findings of fact in the trial against the other defendant

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) The court may make an order under this rule on application by a defendant to the proceeding or on its own initiative.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Division 2.4.2 Including and substituting parties

210 Necessary parties

(SCR o 19 r 12; NSW r 6.24 (1); Qld r 62)

Each person whose presence as a party is necessary to enable the court to adjudicate effectively and completely on all issues in dispute in a proceeding must be included as a party to the proceeding.

211 Including parties—common issues of law or fact

(SCR o 19 r 1 (1), r 2 and r 5; MC(CJ)R s 142; NSW r 6.19; Qld r 65 (1))

- (1) Two or more people may be included as plaintiffs or defendants in a proceeding—
 - (a) if—
 - (i) separate proceedings by or against each of them may give rise to a common issue of law or fact; and
 - (ii) any of the rights to relief claimed in the proceeding (whether joint, several or alternative) are in relation to, or arise out of, the same transaction or event or series of transactions or events; or
 - (b) if the court orders that they be included.
- (2) A person included as a plaintiff under subrule (1) must not start a proceeding against the defendant in relation to the same cause of action unless the court gives leave.
- (3) If an application for an order under subrule (1) (b) or leave under subrule (2) is made during the proceeding, the application must be made in accordance with part 6.2 (Applications in proceedings).
- (4) For the Supreme Court, if an application for an order under subrule (1) (b) or leave under subrule (2) is made before the

proceeding starts, the application must be made by originating application.

212 Including parties—defendants may be sued jointly, severally, or in alternative

(SCR o 19 r 5)

- (1) If a plaintiff claims a right to relief against a person in a proceeding (whether jointly, severally or in the alternative), the person may be included as a defendant in the proceeding.
- (2) The court may enter judgment against any defendant found to be liable in accordance with the defendant's proportionate liability.
- (3) This rule is subject to the *Civil Law (Wrongs) Act 2002*, chapter 7A (Proportionate liability).

213 Including parties—joint entitlement

(MC(CJ)R s 143; NSW r 6.20; Qld r 63)

- (1) If a plaintiff seeks relief to which someone else is entitled jointly with the plaintiff, everyone entitled to the relief must be parties to the proceeding.
- (2) A person entitled to seek relief who does not agree to be a plaintiff must be included as a defendant.
- (3) This rule does not require a person to be included if another law provides that the person need not be included or must not be included.

Example

The *Bankruptcy Act 1966* (Cwlth), s 62 (Actions on joint contracts) provides that if a bankrupt is a contractor in relation to a contract jointly with someone else or other people, the person or people may sue or be sued in relation to the contract without joining the bankrupt.

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

214 Including parties—joint or several liability

(SCR o 19 r 7; MC(CJ)R s 144; NSW r 6.21; Qld r 64)

- (1) If a plaintiff seeks relief against a defendant who is liable jointly and severally with someone else, the other person need not be made a defendant to the proceeding.
- (2) If people are liable jointly, but not severally, and a plaintiff seeks relief in a proceeding against some but not all of them, the court may stay the proceeding until the others are included as defendants.

Note Pt 6.2 (Applications in proceedings) applies to an application for a stay.

215 Including parties—plaintiff in doubt about defendant etc

(SCR o 19 r 8; Qld r 65 (2))

Two or more people may be included as defendants in a proceeding if—

- (a) there is doubt about—
 - (i) the person from whom the plaintiff is entitled to relief; or
 - (ii) the respective amounts for which each may be liable; or
- (b) they have all caused damage or loss to the plaintiff, whether or not there is a factual connection between the claims apart from the involvement of the plaintiff.

216 Including defendants—identical interest in relief unnecessary

(SCR o 19 r 6; Qld r 66)

- (1) It is not necessary for every defendant to be interested in all the relief sought or in every cause of action included in a proceeding.

- (2) However, the court may make any order it considers appropriate to stop the defendant being prejudiced or put to expense by being required to attend any proceeding in which the defendant has no interest.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

217 Including parties inconveniently etc

(SCR o 19 r 1 (2) and (3); MC(CJ)R s 145; NSW r 6.22; Qld r 68)

- (1) If the court considers that including a party to a proceeding may unfairly prejudice another party, may delay the conduct of the proceeding or is otherwise inconvenient, it may—
- (a) order separate trials; or
- (b) make any other order (including about costs) it considers appropriate.

Examples for par (b)

- 1 an order for costs in favour of a party for attending a part of a trial in which the party has no interest
- 2 an order relieving a party from attending a part of a trial in which the party has no interest
- 3 an order staying the proceeding against a defendant until the trial between the plaintiff and another defendant is decided, on condition that the defendant is bound by the findings of fact in the trial against the other defendant

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) The court may make an order under this rule on application by a party to the proceeding (other than a plaintiff) or on its own initiative.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

218 Including parties—parties incorrectly included or not included

(SCR o 19 r 12 (1); MC(CJ)R s 146; NSW r 6.23; Qld r 67)

Despite rule 213 (Including parties—joint entitlement), the court may decide a proceeding even if a person is incorrectly included or not included as a party and may deal with the proceeding as it affects the rights of the parties before it.

219 Counterclaim or set-off when co-plaintiff wrongly included

(SCR o 19 r 4)

- (1) This rule applies if—
 - (a) a person has been incorrectly or unnecessarily included as a co-plaintiff in a proceeding; and
 - (b) the defendant has set up a counterclaim or set-off.
- (2) The defendant may get the benefit of the counterclaim or set-off by proving the claim or set-off against the parties other than the co-plaintiff.
- (3) The defendant's entitlement under subrule (2) is not affected by—
 - (a) the inclusion of the co-plaintiff; or
 - (b) any proceeding resulting from the inclusion.

220 Court may include party if appropriate or necessary

(SCR o 19 r 3 and r 12 (2) (b) and (3); MC(CJ)R s 147 (1); NSW r 6.24 and r 6.27; Qld r 69)

- (1) The court may order that a person be included as a party to a proceeding if—
 - (a) the person ought to have been included as a party; or

- (b) including the person as a party is necessary to enable the court to adjudicate effectively and completely on all issues in dispute in the proceeding.
- (2) The court may make an order under this rule—
- (a) at any stage of the proceeding; and
 - (b) on application by the person or a party to the proceeding or on its own initiative; and
 - (c) whether the person to be included should be a plaintiff or defendant.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Note 2 Rule 6901 (Orders may be made on conditions) provides that the court may make an order under these rules on any conditions it considers appropriate.

221 Plaintiffs may be included or substituted

(SCR o 19 r 3)

- (1) This rule applies if a proceeding has been started in the name of the wrong person as plaintiff or there is doubt whether the proceeding has been started in the name of the right person as plaintiff.
- (2) The court may order that someone else, or other people, be included or substituted as plaintiff if satisfied—
 - (a) that starting the proceeding in the wrong name was a genuine mistake; and
 - (b) that it is necessary to enable the court to adjudicate effectively and completely on all issues in dispute in the proceeding.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Note 2 Rule 6901 (Orders may be made on conditions) provides that the court may make an order under these rules on any conditions it considers appropriate.

222 Inclusion or substitution as plaintiff requires agreement

(SCR o 19 r 12 (4); MC(CJ)R s 147 (2); NSW r 6.25)

A person may be included or substituted as a plaintiff in a proceeding only if the person agrees to be included or substituted.

223 Including parties—procedure

(Qld r 70)

- (1) An application by a person to be included as a party to a proceeding must be supported by an affidavit showing the person's interest in—
 - (a) the issues in dispute in the proceeding; or
 - (b) an issue in dispute to be decided between the person and a party to the proceeding.
- (2) An application to include a person as a defendant must be served on all active parties to the proceeding and on the person.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application mentioned in this rule.

Note 2 *Active party* is defined in the dictionary.

224 Including parties—inclusion to recover costs

(NSW r 6.26)

- (1) A party must not include someone else as a party to a proceeding for the purpose of applying for costs against the person.
- (2) This rule does not apply if—
 - (a) the person would otherwise be an appropriate or necessary party to the proceeding; or

- (b) the party includes the person by way of a third-party notice in relation to a claim for costs against the party.

Division 2.4.3 Changing parties

230 Removing parties

(SCR o 19 r 12 (2) (a) and (3); MC(CJ)R s 148; NSW r 6.29; Qld r 69 (1) (a))

- (1) The court may order that a person be removed as a party to a proceeding if the person—
- (a) has been inappropriately or unnecessarily included as a party; or
 - (b) has stopped being an appropriate or necessary party.
- (2) The court may make an order under this rule—
- (a) at any stage of the proceeding; and
 - (b) on application by a party to the proceeding or on its own initiative; and
 - (c) whether the person to be removed is a plaintiff or defendant.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Note 2 Rule 6901 (Orders may be made on conditions) provides that the court may make an order under these rules on any conditions it considers appropriate.

231 Party becomes bankrupt, dies or becomes person with mental disability

(SCR o 21 rr 1-4; MC(CJ)R s 149; NSW r 6.30; Qld r 72)

- (1) This rule applies if—
- (a) a party to a proceeding becomes bankrupt, or dies, during the proceeding, but a cause of action in the proceeding survives; or

(b) a party to a proceeding becomes a person with a mental disability during the proceeding.

Note **Person with a mental disability** is defined in the dictionary.

- (2) The proceeding is not suspended and does not end.
- (3) However, a person must not take a further step in the proceeding for or against the party unless—
- (a) the court gives the person leave to continue the proceeding; and
 - (b) the person complies with the conditions (if any) of the leave.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for leave and an order or directions under this rule.
- (4) The court may make any order it considers appropriate about including, removing, substituting or rearranging parties.
- (5) However, if someone is made a party in place of a party who has become bankrupt or died, but the person is already a party on the other side of the proceeding, the court must order the person to cease to be a party on the other side.
- (6) The court may make an order under this rule—
- (a) on application by a party to the proceeding or anyone to whom an interest or liability in the proceeding has passed; or
 - (b) on its own initiative.
- (7) An application for an order under this rule must be served on everyone who could be affected by the order.
- (8) Before making an order under this rule because a party has died, the court may require notice to be given to—
- (a) an insurer of the deceased party who has an interest in the proceeding; and

- (b) anyone else who has an interest in the deceased party's estate.
- (9) An insurer or other person given notice is entitled to be heard on the hearing of the application.
- (10) A sealed copy of an order made under this rule must be served on all parties, including a party (other than any applicant for the order) who has been included, removed or substituted.
- (11) The court may give directions about the service of the order.
- (12) If—
 - (a) a party who has died does not have a personal representative and the court orders that a person be substituted as a party for the party; and
 - (b) a grant of probate or administration is later made;the person must give the personal representative a copy of all documents in the person's possession relating to the proceeding.

232 Amending or setting aside order for new party made on death etc of party

(SCR o 21 r 4)

- (1) If a person is made a party under rule 231 (4), the person may apply to have the order making the person a party amended or set aside.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.
- (2) The application must be made not later than 14 days after—
 - (a) if the person is a person with a legal disability who does not have a litigation guardian—the day a litigation guardian is appointed; or

- (b) in any other case—the day a sealed copy of the order is served on the person.

Note 1 **Person with a mental disability** is defined in the dictionary.

Note 2 Div 2.4.9 deals with the appointment of a litigation guardian.

- (3) On application under this rule, the court may amend or set aside the order.
- (4) If the person made a party under rule 231 (4) is a person with a legal disability who does not have a litigation guardian, the order under the subrule does not apply to the person during the period an application can be made to the court under this rule.

233 Failure to proceed after death of party

(SCR o 21 r 6; MC(CJ)R s 151; NSW r 6.31 and Qld r 73)

- (1) This rule applies to a proceeding if—
- (a) a party to the proceeding dies during the proceeding, but a cause of action in the proceeding survives the party's death; and
- (b) an order to substitute a person for the deceased party has not been made at the end of 3 months after the day of the death.
- (2) If the deceased party is a plaintiff, the court may order that the proceeding in relation to the cause of action be dismissed in relation to the plaintiff, and the defendant have judgment on any counterclaim against the plaintiff, if an application to substitute a person for the deceased party is not made within a stated time.
- (3) If the deceased party is a defendant, the court may order that judgment be entered for the plaintiff against the defendant, and any counterclaim by the defendant be dismissed, if an application to substitute a person for the deceased party is not made within a stated time.

Chapter 2	Civil proceedings generally
Part 2.4	Parties and proceedings
Division 2.4.4	Included or changed parties—future conduct of proceedings

Rule 240

- (4) An application for an order under this rule may be made by anyone to whom the deceased party's interest or liability in relation to the cause of action has passed (whether or not a party to the proceeding).

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Division 2.4.4 Included or changed parties—future conduct of proceedings

240 Application—div 2.4.4

This division applies if the court makes an order under division 2.4.2 (Including and substituting parties) or division 2.4.3 (Changing parties) in a proceeding.

241 Included or substituted defendant—filing and service of amended originating process

(SCR o 19 r 14 (1) and o 21 r 2 (7); Qld r 74 (1) to (3))

If the court orders that a person be included or substituted as a defendant in the proceeding—

- (a) the plaintiff must—
- (i) file an amended originating process in the court; and
 - (ii) serve the person with a sealed copy of the amended originating process in accordance with these rules as if the person were an original defendant to be served with the originating process; and

Note An originating process must be served personally, unless otherwise provided by these rules (see r 54 (2) and r 61 (3)). See pt 6.8 (Service) about other ways an originating process may be served.

- (b) the person must file a notice of intention to respond or defence as required by the order.

242 Included or substituted parties—date proceeding taken to start

(SCR o 19 r 14 (2) and o 21 r 2 (8); MC(CJ)R s 150 (3); NSW r 6.28; Qld r 74 (4) and (5))

- (1) This rule applies if the court orders that a person be included or substituted as a party in the proceeding.
- (2) The date the proceeding starts in relation to the person is taken to be—
 - (a) the date when the order is made; or
 - (b) if another date is stated in the order—that date.
- (3) However, an earlier date must not be stated in the order if the inclusion or substitution of the person on that date would be outside a limitation period applying to the person.

243 Included or substituted parties—effect of action previously taken in proceeding

(NSW r 6.32 (2); Qld r 74 (6) and (7))

- (1) Unless the court otherwise orders—
 - (a) if the court orders that a person be included as a party in the proceeding—the proceeding continues as if the person were an original party to the proceeding; and
 - (b) if the court orders that a person be substituted for a party or former party in the proceeding—everything previously done in the proceeding has the same effect in relation to the new party as it had in relation to the previous party.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

Rule 244

- (2) If the previous party was a defendant, subrule (1) (b) does not apply to the following:
- (a) the filing of a notice of intention to respond or defence by the previous party;
 - (b) an admission made by the previous party;
 - (c) an order for costs in favour of, or against, the previous party.

244 Included or changed parties—other orders about future conduct of proceeding

(MC(CJ)R s 150 (1); NSW r 6.32; Qld r 69 (3) and r 74 (6))

The court may also make any order it considers appropriate for the future conduct of the proceeding, including, for example, an order about—

- (a) serving the order, and other documents; and
- (b) amending documents; and
- (c) filing a notice of intention to respond or defence by a person included or substituted as a defendant.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Note 2 An example is part of the rule, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

Division 2.4.5 Proceedings under Civil Law (Wrongs) Act 2002, pt 3.1

250 One proceeding for benefit of members of deceased person's family

(CL(W)A s 28)

- (1) Not more than 1 proceeding under the *Civil Law (Wrongs) Act 2002*, part 3.1 (Wrongful act or omission causing death) may be started against a person in relation to a death.
- (2) The proceeding must be started by the deceased person's personal representative for the benefit of the members of the person's family (the *beneficiaries*) who suffered damage or loss because of the death.
- (3) However, if the proceeding has not been started by the personal representative at the end of 6 months after the day of the death, any 1 or more of the beneficiaries may start the proceeding.
- (4) The proceeding mentioned in subrule (3) must be for the benefit of the same people and subject to the same provisions and procedures (with any necessary changes) as if it were started by the deceased person's personal representative for the benefit of the beneficiaries.

251 Orders in proceedings for compensation to relatives in death claims

(CL(W)A s 31)

- (1) If—
 - (a) a proceeding under the *Civil Law (Wrongs) Act 2002*, part 3.1 (Wrongful act or omission causing death) is started in the court; and

- (b) the court is satisfied that a person whose name is not included in the names of the people for whose benefit the proceeding is stated to have been started is a person whose name should have been included;

the court may order that the proceeding continue as if the name of the person had been included.

- (2) The court may make an order under subrule (1)—
- (a) on application by the person; or
- (b) on its own initiative.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (3) In a proceeding under the *Civil Law (Wrongs) Act 2002*, part 3.1, the court may order that any 1 or more of the people for whose benefit the proceeding has been started must be separately represented by a legal practitioner.
- (4) If the court makes an order under this rule, it may, at the same time or later, make the orders about procedure in the proceeding that it considers appropriate.
- (5) The powers of the court under this rule are additional to any other powers of the court.

Division 2.4.6 Representation—trustees and personal representatives

255 Application—div 2.4.6

This division does not apply to a proceeding to which division 2.4.5 (Proceedings under Civil Law (Wrongs) Act 2002, pt 3.1) applies.

256 Representation—by trustees and personal representatives

(SCR o 19 r 9; FCR o 6 r 14; NSW r 7.9)

- (1) A proceeding in relation to a trust, or a deceased person's estate, may be started or continued by or against the trustees, or personal representatives, without including anyone with a beneficial interest in or claim against the trust or estate (a *beneficiary*).
- (2) Subrule (1) has effect despite rule 213 (Including parties—joint entitlement).
- (3) In a proceeding mentioned in subrule (1)—
 - (a) the trustees or personal representatives are taken to represent every beneficiary; and
 - (b) an order made in the proceeding is binding on every beneficiary.
- (4) However, the court may order that an order does not bind a beneficiary if satisfied that the trustee or personal representative did not in fact represent the beneficiary.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.
- (5) Also, the court may, at any stage in the proceeding, order that a beneficiary be made a party to the proceeding in addition to or instead of an existing party.
- (6) This rule applies to trustees and personal representatives in a proceeding to enforce a security by foreclosure or otherwise.

257 Representation—trustees and personal representatives must be parties

(NSW r 7.11)

- (1) In a proceeding in relation to a deceased person's estate, all personal representatives must be parties.
- (2) In a proceeding in relation to a trust, all trustees must be parties.
- (3) In a proceeding started by trustees or personal representatives, a trustee or personal representative who does not agree to being included as a plaintiff must be made a defendant.

258 Representation—beneficiaries and claimants

(NSW r 7.12)

- (1) In a proceeding in relation to a deceased person's estate, everyone having a beneficial interest in or claim against the estate need not be parties, but the plaintiff may make parties of any of them the plaintiff considers appropriate.
- (2) In a proceeding in relation to a trust, everyone having a beneficial interest under the trust need not be parties, but the plaintiff may make parties of any of them the plaintiff considers appropriate.
- (3) This rule has effect despite rule 213 (Including parties—joint entitlement).

259 Representation—proceeding about administration of deceased person's estate or trust property

(SCR o 19 r 37 and r 37A; NSW r 7.6 and r 7.8)

- (1) If 2 or more people are or may be interested in or affected by a proceeding in relation to either or both of the following matters, the court may appoint 1 or more of them to represent all or some of them:
 - (a) the administration of a deceased person's estate;

(b) property subject to a trust.

Note Pt 6.2 (Applications in proceedings) applies to an application for an appointment.

- (2) The court must not appoint a person under subrule (1) unless satisfied—
- (a) that the interested or affected people (or some of them) cannot, or cannot readily, be identified; or
 - (b) that the interested or affected people (or some of them), although identified, cannot be found; or
 - (c) that, although all of the interested or affected people have been identified and found, it is appropriate for a representative to be appointed to represent all or some of them.
- (3) If the court makes an order under subrule (1) appointing 2 or more people, it may give the conduct of the proceeding, or any part of the proceeding, to the person it considers appropriate.
- (4) For this rule, people may be taken to have an interest or liability even if—
- (a) in relation to 1 or more of them—the interest or liability is a contingent or future interest or liability; or
 - (b) 1 or more of them is an unborn child.
- (5) This rule does not limit the operation of rule 261 (Representation—interests of deceased person’s estate).

260 Representation—orders bind represented people in estate or trust proceeding

(NSW r 7.7)

- (1) This rule applies if a person (the *appointed person*) has been appointed under rule 259 (1) to represent another person or other people in a proceeding.

- (2) An order made in the proceeding is binding on everyone represented by the appointed person as if the represented person were a party to the proceeding.

261 Representation—interests of deceased person’s estate

(SCR o 19 r 51; NSW r 7.10)

- (1) This rule applies to a proceeding if the court is satisfied—
- (a) that a deceased person’s estate has an interest in or is affected by the proceeding, but is not represented in the proceeding; or
 - (b) that the personal representative of the deceased person has an interest in the proceeding adverse to the interests of the deceased person’s estate.
- (2) The court may—
- (a) order that the proceeding continue in the absence of the personal representative; or
 - (b) by order, appoint a personal representative for the deceased person’s estate for the proceeding.
- (3) The court may make an order under this rule on the application of a person interested in the deceased person’s estate or on its own initiative.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (4) The court must not appoint a person under subrule (2) (b) unless the person agrees to the appointment.
- (5) If the court orders that the proceeding continue in the absence of a personal representative for the deceased person’s estate, any order made under this rule, and any order subsequently made in the proceeding, is binding on the estate as if a personal representative were a party to the proceeding.

- (6) Before making an order under this rule on application, the court may order that notice of the application be given to anyone with an interest in the estate it considers appropriate.

Division 2.4.7 Representation—numerous concurrent interests

265 Application—div 2.4.7

(MC(CJ)R s 152 (7); FCR o 6 r 13 (7); NSW r 7.4 (5))

This division does not apply to a proceeding to which either of the following divisions applies:

- (a) division 2.4.5 (Proceedings under Civil Law (Wrongs) Act 2002, pt 3.1);
- (b) division 2.4.6 (Representation—trustees and personal representatives).

266 Representation—numerous concurrent interests

(SCR o 19 r 10; MC(CJ)R s 152 (1) to (3); FCR o 6 r 13 (1) to (3); NSW r 7.4 and r 7.8; Qld r 75 and r 76)

- (1) If numerous people have the same interest or liability in a proceeding, the proceeding may be started and, unless the court otherwise orders, continued by or against any 1 or more of them as representing all of them.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (2) At any stage in the proceeding, the plaintiff may apply to the court for an order appointing any 1 or more of numerous defendants, or other people whom the defendants represent in the proceeding, to represent all defendants in the proceeding.
- (3) If the court appoints a person under subrule (2) who is not a defendant in the proceeding, it must include the person as a

defendant in the proceeding under rule 220 (Court may include party if appropriate or necessary).

- (4) If the court appoints 2 or more people under subrule (2), it may give the conduct of the proceeding, or any part of the proceeding, to the person it considers appropriate.

267 Orders in div 2.4.7 proceeding bind represented people

(MC(CJ)R s 152 (4) to (6); FCR o 6 r 13 (4) to (6); NSW r 7.5; Qld r 77)

- (1) An order made in a proceeding against or in favour of a party who represents others under this division—
- (a) is binding on everyone represented by the party in the proceeding; but
 - (b) is not enforceable against or by a person who is not a party to the proceeding without the court's leave.
- (2) An application for leave under subrule (1) (b) must be served on the person against whom the enforcement of the order is sought as if the application were an originating process.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for leave.

Note 2 Rule 6902 (Leave may be given on conditions) provides that, if the court gives leave under these rules, it may give the leave on the conditions it considers appropriate.

- (3) This rule does not prevent a person against whom an order is sought to be enforced from disputing liability because of circumstances peculiar to the person.

Division 2.4.8 Multiple proceedings

270 Consolidation etc of proceedings

(SCR o 51 r 1; MC(CJ)R s 155; Qld rr 78-81)

- (1) This rule applies if, in relation to 2 or more proceedings, it appears to the court that—
 - (a) a common issue of law or fact arises; or
 - (b) the relief sought in each of the proceedings is in relation to, or arises out of, the same transaction or event or series of transactions or events; or
 - (c) a decision in a proceeding will decide or affect the other proceeding or proceedings; or
 - (d) it is otherwise desirable to make an order under this rule.
- (2) The court may order that—
 - (a) the proceedings be consolidated; or
 - (b) the proceedings be heard together or in a particular sequence; or
 - (c) any of the proceedings be stayed until any other of the proceedings have been decided.

Note Consolidation results in the proceedings becoming a single proceeding and, for example, only 1 judgment is given in the consolidated proceeding.

- (3) The court may make an order under this rule on application by a party to any of the proceedings or on its own initiative.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for an order or direction under this rule.

Note 2 Rule 6901 (Orders may be made on conditions) provides that the court may make an order under these rules on any conditions it considers appropriate.

- (4) If the court orders that proceedings be consolidated or heard together or in a particular sequence, it may give the directions it considers appropriate for the conduct of the proceeding or proceedings.
- (5) Before or during the hearing of a consolidated hearing or of hearings ordered to be heard together or in a particular sequence, the court may order that the proceedings be separated or heard in another sequence.

Division 2.4.9 People with a legal disability

275 Person with legal disability—litigation guardian to start proceeding etc

(SCR o 8 r 1 (2) and o 19 rr 17-19 and r 22; MC(CJ)R s 86 and s 496; NSW r 7.14 and r 7.15 (6); Qld r 93)

- (1) Unless a territory law otherwise provides, a person with a legal disability may start or defend, and carry on, a proceeding only by the person's litigation guardian.

Example of territory law otherwise providing

The *Children and Young People Act 1999*, section 23 provides that, in a proceeding under that Act, chapter 7 (Children and young people in need of care and protection) in relation to a child or young person, the child or young person may be represented by a lawyer or litigation representative, or both.

Note 1 **Person with a legal disability** is defined in the dictionary.

Note 2 A **territory law** includes these rules (see Legislation Act, s 98).

Note 3 An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) However, a child may start, and carry on, a proceeding in the Magistrates Court to recover wages, salary or any other amount owing to the child in relation to the child's employment, or a

contract for services for the doing of work by the child, as if the child were an adult.

- (3) Anything in a proceeding (including a related enforcement proceeding) required or allowed by these rules to be done by a party may be done only by the party's litigation guardian if the party is a person under a legal disability.
- (4) However, part 2.8 (Disclosure) applies to a party who is a person under a legal disability as if the person were not a person under a legal disability.
- (5) An act required to comply with an order under part 2.8 may be performed by—
 - (a) if the party can perform it—the party; or
 - (b) in any other case—the party's litigation guardian.
- (6) A party's litigation guardian who is not a legal practitioner may act only by a solicitor.

276 Who may be litigation guardian

(SCR o 19 r 21 (1); MC(CJ)R s 88 (2)-(5); NSW r 7.15 (2)-(4); Qld r 94)

- (1) A person may be a litigation guardian of a person with a legal disability for a proceeding if the person—
 - (a) is an individual, the public trustee, or a trustee company under the *Trustee Companies Act 1947*; and
 - (b) is not a person with a legal disability; and
 - (c) has no interest in the proceeding adverse to the interests of the person with a legal disability; and
 - (d) has agreed to be the person's litigation guardian.
- (2) If a person is authorised under a territory law to conduct a proceeding in the name of or for (however described) a person with

a legal disability, the authorised person is entitled to be litigation guardian of the person with a legal disability in any proceeding to which the authorised person's authority extends, unless the court otherwise orders.

Examples

- 1 The *Guardianship and Management of Property Act 1991*, section 7 (3) provides that a person's guardian may be given the power by the guardianship tribunal to bring or continue a proceeding for or in the name of the person.
- 2 That Act, section 8 provides that the guardianship tribunal may appoint a manager to manage a person's property. The powers that may be given to a person's manager are the powers that the person would have if the person were legally competent to exercise powers in relation to the person's property.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

Note 2 A *territory law* includes these rules (see Legislation Act, s 98).

Note 3 An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

277 Litigation guardian—liability for costs

(MC(CJ)R s 87; NSW r 42.24)

- (1) A litigation guardian for a plaintiff is liable for any costs for which the plaintiff would have been liable if the plaintiff were not a person with a legal disability.
- (2) An order for costs against the plaintiff or the litigation guardian may be enforced against the litigation guardian.
- (3) A litigation guardian for a defendant is not liable for any costs in a proceeding unless the costs are incurred because of the litigation guardian's negligence or misconduct.

278 **Becoming a litigation guardian**

(SCR 19 r 20 (1) and r 21; MC(CJ)R s 88 (1), s 89 and s 90 (1); NSW r 7.15 (1) and r 7.16; Qld r 95)

- (1) Unless a territory law otherwise provides, a person may become the litigation guardian of a person with a legal disability without the need for any formal instrument of appointment or any order of a court.

Note A *territory law* includes these rules (see Legislation Act, s 98).

- (2) Unless a person is appointed as a litigation guardian by the court, a person becomes the litigation guardian of a person with a legal disability for a proceeding by filing in the court—
- (a) an affidavit by the solicitor for the person with a legal disability, or someone else with knowledge of the facts, stating that the person—
- (i) has agreed to be the litigation guardian; and
- (ii) is an appropriate person to be the litigation guardian; and
- (iii) does not have an interest in the proceeding adverse to the interest of the person with a legal disability; and
- (b) the person's written consent to be the litigation guardian of the person with a legal disability; and
- (c) if the person with a legal disability is a plaintiff in the proceeding—an undertaking by the person that the person will be liable for any costs that the person with a legal disability might otherwise be required to pay in the proceeding.

Note See

- approved form 2.10 (Affidavit for person to act as litigation guardian) [AF2006-255](#)
- approved form 2.11 (Consent and undertaking by person to act as litigation guardian) [AF2006-256](#).

279 Person with legal disability—effect of no notice of intention to respond or defence

(SCR o 14 r 3; MC(CJ)R s 90 (3); NSW r 7.17 (1); Qld r 96)

- (1) If a defendant who is a person with a legal disability does not file a notice of intention to respond or defence within the time limited by these rules, the plaintiff may not continue the proceeding unless someone is made litigation guardian of the defendant.
- (2) This rule has effect despite division 2.11.3 (Default by defendant).

280 Litigation guardian—appointment and removal by court

(SCR o 14 r 3; MC(CJ)R s 90 (4) and (5) and s 92; NSW r 7.15 (5) and r 7.18; Qld r 95 (2))

- (1) A person may not replace someone else as litigation guardian of a person with a legal disability except by an order of the court.
- (2) If a party to a proceeding is or becomes a person with a legal disability and the party does not have a litigation guardian, the court may, by order, appoint a litigation guardian.
- (3) If a party to a proceeding is or becomes a person with a legal disability and the party has a litigation guardian, the court may, by order, remove the party's litigation guardian and appoint another litigation guardian.
- (4) In a proceeding in relation to a person with a legal disability who is not a party, the court may, by order, appoint a litigation guardian of the person and include the person as a party to the proceeding.
- (5) If the court removes a party's litigation guardian, it may also, by order, stay the proceeding until the appointment of a new litigation guardian.
- (6) An application for an order under this rule must be served on the person with a legal disability and, if the application proposes removal of a litigation guardian, on the litigation guardian.

- (7) In a proceeding on an application for the appointment of a litigation guardian, evidence in support of the application must include evidence—
- (a) that the party for whom a litigation guardian is to be appointed is a person with a legal disability; and
 - (b) that the proposed litigation guardian agrees to being appointed and does not have an interest in the proceeding adverse to the interests of the person with a legal disability.
- (8) The court may make an order under this rule on application by a party to the proceeding or anyone else or on its own initiative.
- (9) If an application for an order under this rule is made during the proceeding or after judgment is given in the proceeding, the application must be made in accordance with part 6.2 (Applications in proceedings).
- (10) For the Supreme Court, if an application for an order under this rule is made before the proceeding starts, the application must be made by originating application.

281 Litigation guardian—accounts

(SCR o 52 r 25)

Division 2.9.5 (Receivers) applies in relation to a litigation guardian's accounts, with any necessary changes, in the same way as it applies to a receiver's accounts.

Division 2.4.10 Partnerships

285 Meaning of *partnership proceeding*—div 2.4.10

(SCR o 50 r 10; Qld r 82)

In this division:

partnership proceeding means a proceeding started by or against a partnership in the partnership name, and includes a proceeding between a partnership and 1 or more of its partners.

Note See also r 108 (Notice of intention to respond or defence—person sued under partnership name) and r 109 (Notice of intention to respond or defence—person incorrectly served as partner).

286 Proceeding in partnership name

(SCR o 50 r 1 and r 2; NSW r 7.20 (1); Qld r 83)

- (1) Two or more partners may start a proceeding in the partnership name.
- (2) A proceeding against people claimed to be partners may be started against the claimed partnership in the partnership name.
- (3) The partnership name used in a partnership proceeding must be the name of the partnership when the cause of action arose.
- (4) For an incorporated limited partnership, the name of the partnership when the cause of action arose is the name in which the partnership was registered under the *Partnership Act 1963*, section 59 (Registration of incorporated limited partnership) when the cause of action arose.
- (5) Unless the court otherwise orders, a partnership proceeding must continue in the partnership name and not in the name of the individual partners.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

287 Disclosure of partners' names

(SCR o 50 r 1 and r 2; Qld r 84)

- (1) At any stage of a partnership proceeding, a party may by notice served on the partnership require the partnership to give the party the names and home addresses of all of the people who were partners in the partnership when the cause of action arose.

Note Rule 6433 deals with service of an originating process on a partnership.

- (2) The notice must state a date for compliance with the notice that is at least 2 days after the day the notice is served on the partnership.
- (3) If the partnership does not give the party the information required by the notice, the court may make any order it considers appropriate, including an order—

- (a) staying the proceeding until the information is given; and
- (b) striking out a pleading or affidavit.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Division 2.4.11 Business names

290 Proceeding in registered business name

(SCR o 50 r 11; Qld r 89)

A proceeding may be started against a name registered under the *Business Names Act 1963*.

291 Proceeding in business name if unregistered etc

(CPA s 140; Qld r 90)

- (1) This rule applies to a business name under which business is being carried on by a person in contravention of the *Business Names Act 1963* because—
- (a) the name is not registered under that Act; or

- (b) the name is registered under that Act, but is not registered in relation to the person; or
 - (c) the name is registered under that Act in relation to the person but the person has not complied with that Act, section 12 (Notification of changes in particulars relating to registered business names etc) in relation to the name.
- (2) If a proceeding is started against the person under the business name, the following provisions apply:
- (a) the proceeding is not invalid only because of the contravention;
 - (b) the business name is a sufficient designation of the person in any process in or in relation to the proceeding until the plaintiff makes the amendments mentioned in rule 292 (3).

Note See r 110 (Notice of intention to respond or defence—person sued under business name).

292 Business names—amendment about parties

(Qld r 92)

- (1) This rule applies to a business name under which business is being carried on by a person in contravention of the *Business Names Act 1963* because—
- (a) the name is not registered under that Act; or
 - (b) the name is registered under that Act, but is not registered in relation to the person.
- (2) If a proceeding is started against the person under the business name, the plaintiff must take all reasonable steps to find out the person's name.
- (3) The plaintiff must also make the amendments necessary for the proceeding to be continued against a named defendant and not in the business name.

- (4) Until the amendments are made, the plaintiff may only take a step in the proceeding with the court's leave.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave.

- (5) Subrule (4) does not apply to—
- (a) the filing or service of an originating process; or
 - (b) the filing or service of an application under rule 650 (Discovery to identify potential defendant) or rule 651 (Discovery to identify right to claim relief); or
 - (c) the filing or service of an application for an order under rule 706 (Urgent orders before start of proceeding); or
 - (d) a step taken to comply with this rule; or
 - (e) the filing or service of an application for leave under subrule (4).
- (6) An amendment for this rule must be made in accordance with rule 509 (Amendment—procedure) and served in accordance with rule 511 (Amendment—service of amended document).
- (7) This rule applies in addition to part 2.7 (Amendment).

Part 2.5 Third-party and similar proceedings

300 Purpose—pt 2.5

(Qld r 191 (1))

The purpose of this part is to provide for a third-party procedure in proceedings started by originating claim.

Note A proceeding incorrectly started by originating application is taken to be a proceeding started by originating claim if the court orders that the proceeding continue as if started by originating claim (see r 39).

301 When a third-party proceeding starts

(Qld r 191 (2))

A third-party proceeding starts on the day the third-party notice for the proceeding is filed in the court.

Note Rule 6145 (5) (Filed documents initially rejected) provides that, if a document is rejected by the registrar, it is taken to have been filed on the day it was first filed.

302 Third-party proceeding—when available

(SCR o 20 r 1(1); MC(CJ)R s 57 (1); Qld r 192)

A defendant may file a third-party notice if the defendant wants to—

- (a) claim a contribution or indemnity against a person who is not already a party to the proceeding; or
- (b) claim relief against a person who is not already a party to the proceeding that—
 - (i) relates to or is connected with the original subject matter of the proceeding; and

- (ii) is substantially the same as some relief claimed by the plaintiff; or
- (c) require an issue relating to or connected with the original subject matter of the proceeding to be decided not only as between the plaintiff and defendant but also between either of them and a person not already a party to the proceeding.

303 Third-party notice—content etc

(SCR o 20 r 1 (2); MC(CJ)R s 57 (2); Qld r 193)

- (1) A third-party notice must state briefly and specifically the nature of the claim made and relief sought.

Note See approved form 2.12 (Third-party notice) [AF2006-257](#).

- (2) A statement of claim must be attached to the third-party notice.

Note 1 See

- approved form 2.2 (Statement of claim—debt or liquidated demand) [AF2006-247](#)
- approved form 2.3 (Statement of claim—motor vehicle death or personal injury) [AF2006-248](#)
- approved form 2.4 (Statement of claim—employment death or personal injury) [AF2006-249](#)
- approved form 2.5 (Statement of claim—death or personal injury other than motor vehicle or employment-related) [AF2006-250](#)
- approved form 2.6 (Statement of claim—general) [AF2006-447](#).

Note 2 See r 305 (Third-party notice—statement of claim for certain personal injuries claims).

Note 3 A statement of claim is a pleading (see dict, def *pleading*) and therefore must comply with pt 2.6 (Pleadings).

Note 4 *Attached* to a document is defined in the dictionary.

- (3) A third-party notice filed in the Magistrates Court, or the attached statement of claim, must show that the court has jurisdiction to decide the claim.

Note The *Magistrates Court Act 1930*, pt 4.2 (Civil jurisdiction) deals with the civil jurisdiction of the Magistrates Court under that Act.

- (4) A third-party notice must state—
- (a) whether the defendant is represented by a solicitor; and
 - (b) if the defendant is represented by a solicitor—the name of the solicitor; and
 - (c) the defendant’s address for service; and
 - (d) if the defendant is suing in a representative capacity—the representative capacity in which the defendant is suing; and
 - (e) if a third party is being sued in a representative capacity—the representative capacity in which the third party is being sued.

Note *Address for service* is defined in the dictionary.

- (5) A third-party notice must state specifically any claim for—
- (a) exemplary damages or aggravated damages; and
 - (b) interest up to the day of judgment.
- (6) A third-party notice need not specifically claim costs unless the claim is for a debt or liquidated demand.

Note *Liquidated demand* is defined in the dictionary.

- (7) If the relief sought requires the court’s decision or direction on any question, the third-party notice must state the question.

304 Third-party notice—additional matters for claims for debt and liquidated demands

(SCR o 2 r 11 and o 20 r 1)

- (1) This rule applies to a third-party notice that includes a claim for a debt or liquidated demand.

Note **Liquidated demand** is defined in the dictionary.

- (2) A claim for interest up to the day of judgment—
- (a) must state the period or periods for which interest is claimed; and
 - (b) may state the rate or rates at which interest is claimed.
- (3) If a rate is not claimed under subrule (2) (b), the rate is taken to be the rate of interest applying, from time to time, under schedule 2, part 2.1 (Interest up to judgment).
- (4) The costs amount applying under schedule 3, part 3.1 (Claim for debt or liquidated demand) must be specifically claimed for costs.

305 Third-party notice—statement of claim for certain personal injury claims

(SCR o 2 r 12 and r 13 and o 20 r 1)

The following rules apply, with any necessary changes, to a statement of claim for a third-party notice in the same way as they apply to a statement of claim for an originating claim:

- (a) rule 52 (Originating claim—statement of claim for motor vehicle death and personal injury claims);
- (b) rule 53 (Originating claim—statement of claim for employment death and personal injury claims).

306 Third-party notice—filing

(SCR o 20 r 2; MC(CJ)R s 57 (1); Qld r 194)

- (1) Unless the court gives leave, a third-party notice—
- (a) must not be filed by a defendant until the defendant has filed a defence; and
 - (b) must be filed not later than 28 days after the end of whichever of the following periods ends last:
 - (i) the time limited for filing the defence of the defendant who is filing the third-party notice (the *prescribed period*);
 - (ii) if the plaintiff agrees to an extension of the prescribed period—the agreed period.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for leave or directions under this rule.

Note 2 Rule 6351 (Time—extending and shortening by court order) provides for the extending of time by the court.

- (2) The defendant must serve a stamped copy of an application for leave under subrule (1) to file a third-party notice on—
- (a) the plaintiff; and
 - (b) each other active party who has filed a notice of intention to respond or defence.

Note *Active party* is defined in the dictionary.

- (3) If the court gives leave under subrule (1) to the defendant to file a third-party notice, it may give directions about filing and serving the notice.

307 Third-party notice—sealing

The registrar must seal the original and filed copies of a third-party notice.

Note The registrar may reject an originating process that is filed (see r 6140 (Rejecting documents—noncompliance with rules etc) and r 6142 (Rejecting documents—abuse of process etc)).

308 Third-party notice—service

(SCR o 20 r 3; MC(CJ)R s 58; Qld r 195)

- (1) A defendant to a proceeding who files a third-party notice must serve a sealed copy of the notice and attached statement of claim on the third party as if—
- (a) the notice were an originating claim in a proceeding; and
 - (b) the defendant were a plaintiff and the third party were a defendant in the proceeding.

Note Rule 54 (Originating claim—filing and service) deals with service of an originating claim.

- (2) The defendant must serve the following documents with the third-party notice:
- (a) a sealed copy of any order giving leave to file the notice;
 - (b) a sealed copy of any directions about filing and serving the notice;
 - (c) a copy of a sealed copy of any other relevant order made in relation to the proceeding;
 - (d) a copy of a sealed copy of the originating claim and attached statement of claim;
 - (e) a copy of a stamped copy of all other pleadings filed in the proceeding;

- (f) a copy of a stamped copy of all applications in the proceeding not finally disposed of;

Note **Application** in a proceeding is defined in r 6006.

- (g) a copy of all affidavits filed in the proceeding, other than affidavits that are not relevant to the issues arising on the third-party notice;
- (h) a copy of all other documents that have been served by the plaintiff on the defendant, or by the defendant on the plaintiff, and are intended to be relied on;
- (i) a copy of all amendments of any document mentioned in paragraphs (d) to (h) or details of the amendments.

309 Third-party notice—effect of service on third party

(SCR o 20 r 4; MC(CJ)R s 60 (1); Qld r 196)

On being served with a third-party notice, the third party becomes a party to the proceeding with the same rights in relation to the third party's defence to a claim made against the third party in the notice as the third party would have if sued in the ordinary way by the defendant.

310 Third-party notice—setting aside

(Qld r 191 (3))

Rule 40 (Setting aside originating process etc) applies, with necessary changes, to a proceeding started by a third-party notice as if the proceeding were a proceeding started by an originating process.

311 Third-party notice—notice of intention to respond and defence

(SCR o 20 r 5, r 6 and r 7; MC(CJ)R s 60 (2) and (3); Qld r 197 and r 198)

- (1) Part 2.3 (Notice of intention to respond and defence) applies, with necessary changes, to a proceeding started by a third-party notice as if—
 - (a) the proceeding were a proceeding started by an originating process; and
 - (b) the third-party notice were the originating claim in the proceeding; and
 - (c) the defendant were a plaintiff and the third party were a defendant in the proceeding.
- (2) The third party may, in the defence to the third-party notice, deny a plaintiff's claims against a defendant and claim a matter showing a plaintiff's claim against a defendant is not maintainable.

312 Service of pleadings after filing of third-party notice

(Qld r 199)

A party who files a pleading after the filing of a third-party notice must serve the pleading on all other active parties.

313 Counterclaim by third party

(Qld r 200)

- (1) A third party who has a claim against the defendant who included the third party may counterclaim against the defendant.
- (2) The third party may include the plaintiff or someone else as a defendant to the counterclaim if the person could be included as a defendant if the third party brought a separate proceeding.
- (3) Rule 462 (Counterclaim—against additional party) applies, with necessary changes, to a counterclaim by a third party.

314 Third-party notice—default by third party

(SCR o 20 r 8; MC(CJ)R s 60 (3) and s 62; Qld r 201)

- (1) This rule applies if—
- (a) a default judgment is entered for the plaintiff against the defendant who included a third party; and
 - (b) the third party is in default in relation to the third-party notice.

Note Div 2.11.3 (Default by defendant) applies to a third-party notice (see r 1116 (Application—div 2.11.3) and r 1117 (When is a defendant *in default*—generally)).

- (2) The third party—
- (a) is taken to admit a claim stated in the third-party notice or its statement of claim; and
 - (b) is bound by the default judgment between the plaintiff and defendant as far as it is relevant to a claim or issue stated in the third-party notice or statement of claim.

- (3) The defendant—
- (a) at any time after satisfaction of the default judgment, or, with the court's leave, before satisfaction, may obtain a judgment against the third party for a contribution or indemnity claimed in the notice; and
 - (b) with the court's leave, may obtain a judgment against the third party for other relief or remedy claimed in the notice.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave or an order (including an order setting aside, amending or a judgment) under this rule.

- (4) The court may amend or set aside the judgment against the third party.

315 Third parties—disclosure

(Qld r 202)

- (1) A third party to a proceeding may serve on the defendant who included the third party a notice requiring the defendant to disclose discoverable documents for the proceeding only if the third party files a notice of intention to respond or defence.
- (2) A third party to a proceeding may serve on a plaintiff a notice requiring the plaintiff to disclose discoverable documents for the proceeding only if the third party denies the plaintiff's allegations against the defendant or alleges another matter showing the plaintiff's claim against the defendant is not maintainable.
- (3) However, disclosure may be ordered by the court.

Note Pt 6.2 (Applications in proceedings) applies to an application for a disclosure order.

316 Third-party notice—hearing

(SCR o 20 r 9 (a) and (b); MC(CJ)R s 61 (a) and (b); Qld r 203)

- (1) A third party may appear at, and take part in, the hearing of the proceeding as the court directs.

Note Pt 6.2 (Applications in proceedings) applies to an application for a direction or order under this rule.

- (2) At the hearing, the issues between the defendant who included the third party and the third party must be heard with the issues between the plaintiff and the defendant.
- (3) However, the court may, at any time, order that the issues between the defendant who included the third party and the third party be heard separately from the issues between the plaintiff and the defendant if it considers that hearing them together would—
 - (a) unfairly prejudice a party; or
 - (b) embarrass or delay the hearing of the proceeding; or

- (c) be otherwise inconvenient.
- (4) The court may order the separate hearing—
 - (a) on application by a party before the party files and serves a third-party notice; or
 - (b) on its own initiative.
- (5) The court may give the orders it considers appropriate about the conduct of the separate hearing.

317 Third party—extent bound by judgment between plaintiff and defendant

(SCR o 20 r 9 (c); Qld r 204)

In a proceeding, the court may make an order about the extent to which a third party is bound by a judgment between a plaintiff and a defendant.

318 Third-party notice—judgment between defendant and third party

(SCR o 20 r 10; MC(CJ)R s 61 (c); Qld r 205)

- (1) In a proceeding, the court may enter judgment in favour of—
 - (a) a defendant who included a third party against the third party; or
 - (b) the third party against the defendant.
- (2) If—
 - (a) judgment is entered in favour of the plaintiff against a defendant; and
 - (b) judgment is entered in favour of the defendant against a third party;

the defendant must not enforce the judgment against the third party unless the judgment against the defendant is satisfied, or the court otherwise orders.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

319 Notice claiming contribution or indemnity against another defendant

(SCR o 20 r 15; MC(CJ)R s 65; Qld r 206)

- (1) A defendant may file a notice claiming a contribution or indemnity (a *notice claiming contribution or indemnity*) if the defendant wants to—
 - (a) claim against another defendant to the proceeding a contribution or indemnity; or
 - (b) claim against another defendant to the proceeding relief—
 - (i) relating to or connected with the original subject matter of the proceeding; and
 - (ii) substantially the same as some relief claimed by the plaintiff; or
 - (c) require an issue relating to or connected with the original subject matter of the proceeding to be decided not only as between the plaintiff and defendant but also between either of them and another defendant to the proceeding.
- (2) A notice claiming contribution or indemnity must state briefly and specifically the nature of the claim made and relief sought.

Note See approved form 2.13 (Notice claiming contribution or indemnity) [AF2006-258](#).

- (3) A notice claiming contribution or indemnity filed in the Magistrates Court must show that the court has jurisdiction to decide the claim.

Note The *Magistrates Court Act 1930*, pt 4.2 (Civil jurisdiction) deals with the civil jurisdiction of the Magistrates Court under that Act.

- (4) A notice claiming contribution or indemnity must state specifically any claim for interest up to the day of judgment.
- (5) A notice claiming contribution or indemnity need not specifically claim costs.
- (6) Rule 316 (Third-party notice—hearing), rule 317 (Third party—extent bound by judgment between plaintiff and defendant) and rule 318 (Third-party notice—judgment between defendant and third party) apply, with necessary changes, to a notice claiming contribution or indemnity as if—
- (a) the notice were a third-party notice; and
 - (b) the defendant who filed the notice were the defendant; and
 - (c) the defendant to the notice were a third party.

320 Notice claiming contribution or indemnity—filing and service etc

(SCR o 20 r 15; MC(CJ)R s 65; Qld r 206)

- (1) Unless the court gives leave, a notice claiming contribution or indemnity—
- (a) must not be filed by a defendant until the defendant has filed a defence; and
 - (b) must be filed not later than 28 days after the end of whichever of the following periods ends last:
 - (i) the time limited for filing the defence of the defendant who is filing the notice claiming contribution or indemnity (the *prescribed period*);

- (ii) if the plaintiff agrees to an extension of the prescribed period—the agreed period.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for leave or directions under this rule.

Note 2 Rule 6351 (Time—extending and shortening by court order) provides for the extending of time by the court.

- (2) An application for leave under subrule (1) to file a notice claiming contribution or indemnity must be served on—
- (a) the defendant against whom the claim is made; and
 - (b) each other active party.
- (3) If the court gives leave under subrule (1) to the defendant to file a notice claiming contribution or indemnity, it may give directions about filing and serving the notice.
- (4) A defendant who files a notice claiming contribution or indemnity must serve stamped copies of the notice on the defendant against whom the claim is made and each other active party.
- (5) A defendant served with a notice claiming contribution or indemnity need not file a notice of intention to respond or defence to the notice if the defendant has filed a notice of intention to respond or defence in the proceeding.

321 Contribution under Civil Law (Wrongs) Act, s 21

(Qld r 208)

If the only relief claimed by a defendant is a contribution under the *Civil Law (Wrongs) Act 2002*, section 21 (Right of contribution) against another defendant, the defendant may file and serve a notice claiming contribution or indemnity without further pleading.

322 Third-party notice—fourth and subsequent parties

(SCR o 20 r 12; MC(CJ)R s 63; Qld r 207)

- (1) If a third party has filed a notice of intention to respond or defence, this part applies, with necessary changes, as if the third party were a defendant.
- (2) If a person included as a party (the *fourth party*) by a third party by notice (the *fourth-party notice*) files a notice of intention to respond or defence—
 - (a) this part as applied by this rule has effect in relation to the fourth party and any other further person included (as fifth-party and so on successively); and
 - (b) a reference in these rules to a *third party* includes a reference to the fourth party and any other further person included (as fifth-party and so on successively); and
 - (c) a reference in these rules to a *third-party notice* includes a reference to the fourth-party notice and the notice including any other further person (a fifth-party notice and so on successively).

Part 2.6 Pleadings

Division 2.6.1 Application—pt 2.6

400 Application—pt 2.6

(NSW r 14.1; Qld r 145)

- (1) This part applies to—
 - (a) a proceeding started by originating claim or third-party notice; and
 - (b) a counterclaim made in a proceeding started by originating claim or third-party notice.

Note 1 A proceeding incorrectly started by originating application is taken to be a proceeding started by originating claim if the court orders that the proceeding continue as if started by originating claim (see r 39).

Note 2 **Third-party notice** includes a fourth-party notice, fifth-party notice etc (see r 322 (2) (c)).

- (2) However, despite rule 39 (3) (Proceeding incorrectly started by originating application), this part applies to a proceeding started by an originating application only if the court orders the plaintiff to file and serve a statement of claim.

Division 2.6.2 Rules of pleading

405 Pleadings—formal requirements

(SCR o 23 r 4 (1), r 4A and r 10 and o 24 r 5; MC(CJ)R s 99; NSW r 14.6; Qld r 146)

- (1) Each pleading must be in writing.
- (2) If a pleading alleges or otherwise deals with several matters—
 - (a) the pleading must be divided into paragraphs; and

- (b) each matter must, as far as convenient, be put in a separate paragraph; and
 - (c) the paragraphs must be numbered consecutively.
- (3) If a plaintiff seeks relief in relation to 2 or more distinct claims based on different grounds, they must be stated, as far as possible, separately.
- (4) If a defendant relies on 2 or more distinct grounds of defence, set-off or counterclaim based on different facts, they must be stated, as far as possible, separately.
- (5) If a pleading is settled by counsel, it must state—
- (a) that it was settled by counsel; and
 - (b) counsel's name.

Note Div 6.3.1 (General provisions about documents for filing) contains provisions about formal requirements for documents (including pleadings) to be filed, see esp r 6103 (1) (Documents—layout etc) and r 6106 ((Documents—signing).

406 Pleadings—statements in

(SCR o 23 r 2; r 4 (1), r 15 and o 29 r 2; MC(CJ)R s 100, s 101, s 106 (b) and s 110; NSW r 14.7, r 14.8, r 14.14 (1) and r 14.19; Qld r 149)

- (1) Each pleading must—
- (a) be as brief as the nature of the case allows; and
 - (b) contain a statement in a summary form of the material facts on which the party relies but not the evidence by which the facts are to be proved; and
 - (c) state specifically any matter that if not stated specifically may take another party by surprise; and
 - (d) subject to rule 419 (Pleadings—other relief), state specifically any relief the party claims; and

- (e) if a claim or defence under a statute is relied on—identify the specific provision of the statute.
- (2) A party may raise a point of law in a pleading if the party also pleads the material facts in support of the point.

407 Pleadings—matters to be specifically pleaded

(SCR o 23 r 6 (1) and r 15; MC(CJ)R s 106, s 107 and ss 116-119; NSW r 14.14 (2) (b) and (c) and (3), r 14.16, rr 15.3, 15.4, 15.6-15.8; Qld r 150 (1), (2) and (4))

- (1) Without limiting rule 406, the following matters must be specifically pleaded:
 - (a) an accident the cause of which is unknown and undiscoverable;
 - (b) breach of contract or trust;
 - (c) breach of statutory duty;
Note See r 432 (Pleadings—negligence and breach of statutory duty).
 - (d) damages of every kind claimed, including, for example, special and exemplary damages;
Note See also r 417 (Pleadings—kind of damages etc).
 - (e) duress;
 - (f) estoppel;
 - (g) extinction of right or title;
 - (h) fraud or illegality;
 - (i) interest (including the rate of interest and method of calculation) claimed;
 - (j) malice or ill will;
 - (k) misrepresentation;
 - (l) motive, intention or other condition of mind, including knowledge or notice;

(m) negligence or contributory negligence;

Note See r 432 (Pleadings—negligence and breach of statutory duty).

(n) payment;

(o) performance or part performance;

(p) release;

(q) statute of limitations;

(r) a statute requiring that contracts be in, or evidenced by, writing (for example, statute of frauds);

(s) undue influence;

(t) voluntary assumption of risk;

(u) waiver;

(v) want of capacity, including disorder or disability of mind;

(w) that a testator did not know and approve of the contents of a will;

(x) that a will was not properly made;

(y) wilful default;

(z) anything else required by a practice note to be specifically pleaded.

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(2) Also, any fact from which any of the matters mentioned in subrule (1) is claimed to be an inference must be specifically pleaded.

- (3) In a defence or pleading after a defence, a party must specifically plead any matter that—
- (a) the party alleges makes a claim or defence of the opposite party not maintainable; or
 - (b) shows a transaction is void or voidable; or
 - (c) raises an issue of fact not arising out of a previous pleading.

408 Pleadings—money claims short form

(MC(CJ)R s 105; NSW r 14.12)

- (1) This rule applies if the plaintiff claims an amount payable by the defendant to the plaintiff for any of the following:
- (a) goods sold and delivered by the plaintiff to the defendant;
 - (b) goods bargained and sold by the plaintiff to the defendant;
 - (c) work done or materials provided by the plaintiff for the defendant at the defendant's request;
 - (d) money lent by the plaintiff to the defendant;
 - (e) money paid by the plaintiff for the defendant at the defendant's request;
 - (f) money had and received by the defendant for the plaintiff's use;
 - (g) interest on money owing by the defendant to the plaintiff;
 - (h) interest for forbearance by the plaintiff at the defendant's request on money owing by the defendant to the plaintiff;
 - (i) money found to be owing by the defendant to the plaintiff on accounts stated between them.
- (2) The plaintiff may plead the facts using the form of words set out in the relevant paragraph of subrule (1).

- (3) The defendant may file a notice requiring the plaintiff to plead the facts on which the plaintiff relies in accordance with the provisions of this part other than this rule (the *facts in full*).
- (4) The defendant must file any notice under subrule (3) within the time limited by these rules for the defendant to file a defence.

Note Rule 102 provides that, in a proceeding started by an originating claim, a defendant must file a defence not later than the later of the following:

- (a) 28 days after the day the claim is served on the defendant;
- (b) if the defendant makes an unsuccessful application under r 40 to have the claim set aside—7 days after the day the application is refused.

However, if, before the defendant files a defence, an application for summary judgment under r 1146 is served on the defendant, but the court does not on the application dispose of all the claims for relief against the defendant, the court may set a time within which the defendant must file a defence.

- (5) If the defendant files a notice under subrule (3), the defendant must serve a stamped copy of the notice on the plaintiff at the plaintiff's address for service on the day it is filed.

Note *Address for service* is defined in the dictionary.

- (6) If the defendant files a notice under subrule (3)—
- (a) the plaintiff must, not later than 28 days after the day the notice is served on the plaintiff—
- (i) file an amended statement of claim pleading the facts in full; and
- (ii) include in the amended statement of claim a note to the effect that the statement has been amended in response to the notice; and
- (b) if the defendant has not already filed a defence—the time for filing the defence is extended until 14 days after the day a

stamped copy of the plaintiff's amended statement of claim is served on the defendant.

- (7) The plaintiff is not prevented from amending the statement of claim under rule 505 (Amendment—of pleadings before close of pleadings) only because the plaintiff has amended the statement of claim under this rule.

409 Pleadings—certain facts need not be pleaded

(SCR o 23 r 25; MC(CJ)R s 103; NSW r 14.10; Qld r 151)

- (1) A party need not plead a fact if—
- (a) the law presumes the fact in the party's favour; or
 - (b) the burden of proving the fact does not lie with the party.
- (2) This rule does not apply if it is necessary to plead the fact—
- (a) to comply with rule 406 (Pleadings—statements in); or
 - (b) to meet a specific denial of the fact pleaded by another party.

410 Pleadings—technical objections

(SCR o 23 r 27)

A technical objection must not be raised to any pleading on the ground of want of form.

411 Pleadings—references to spoken words and documents

(SCR o 23 r 21; MC(CJ)R s 102; NSW r 14.9; Qld r 152)

- (1) This rule applies if spoken words or a document is referred to in a pleading.
- (2) The effect of the spoken words or document must be stated as far as material.
- (3) The precise terms of the spoken words or document need not be stated, except as far as the terms are themselves material.

412 Pleadings—conditions precedent

(SCR o 23 r 14; MC(CJ)R s 104; NSW r 14.11; Qld r 153)

- (1) An allegation of the performance or happening of a condition precedent necessary for a party's case is implied in the party's pleadings.
- (2) A party who denies the performance or happening of a condition precedent must specifically plead the denial.

Examples of conditions precedent

- 1 a thing has been done
- 2 an event has happened
- 3 a state of affairs exists, or has existed at some time or times
- 4 the party is ready and willing, or was at all relevant times ready and willing, to perform an obligation

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

413 Pleadings—matters arising after start of proceeding

(SCR o 28 r 1; MC(CJ)R s 108; NSW r 14.17; SA 46A.12)

- (1) A party to a proceeding may plead a matter that arose after the proceeding started.
- (2) A party to a proceeding may plead facts giving rise to a cause of action that arose after the proceeding started only—
 - (a) if it is not unjust to any other party; and
 - (b) with the court's leave.

Note 1 See r 502 (3) (Amendment—of documents) about including a cause of action arising after a proceeding is started.

Note 2 See also r 104 (Ground of defence arising after defence filed etc), r 467 (Counterclaim—defence arising after answer) and r 481 (3) (Pleadings—after reply).

Note 3 Pt 6.2 (Applications in proceedings) applies to an application for leave.

414 Pleadings—inconsistent allegations etc

(SCR o 23 r 16; MC(CJ)R s 109; NSW r 14.18; Qld r 154)

- (1) A party may make inconsistent allegations or claims in a pleading only if they are pleaded as alternatives.
- (2) However, a party must not make an allegation or new claim that is inconsistent with an allegation or claim made in another pleading of the party without amending the pleading.

Note Pt 2.7 (Amendment) deals with amendment of pleadings.

415 Pleadings—notice pleaded as a fact

(SCR o 23 r 23)

- (1) This rule applies if—
 - (a) notice to someone of something is to be stated in a pleading; and
 - (b) the form or the precise terms of the notice, or the circumstances from which the notice is to be inferred, are not material.
- (2) The pleading may state the notice as a fact.

416 Pleadings—implied contracts or relations

(SCR o 23 r 24)

- (1) This rule applies if a contract or any relation between people is to be implied from letters or conversations or from a number of circumstances.
- (2) The pleading may state the contract or relation as a fact.
- (3) The pleading may refer to the letters, conversations or circumstances as briefly as possible without setting out all or part of them.

417 Pleadings—kind of damages etc

(Qld r 155)

- (1) If damages are claimed in a pleading, the pleading must state—
 - (a) each kind of damages claimed; and
 - (b) for any damages that are not general damages—the amount of the damages claimed.
- (2) Without limiting rule 407 (1) (d) (Pleadings—matters to be specifically pleaded), a party claiming general damages must include the following particulars in the party’s pleading:
 - (a) the nature of the loss or damage suffered;
 - (b) the exact circumstances in which the loss or damage was suffered.
- (3) If practicable, the party must also plead each kind of general damages and state the nature of the damages claimed for each kind.

418 Pleadings—amount of unliquidated damages

(NSW r 14.13)

- (1) A pleading must not claim an amount for unliquidated damages.
- (2) However, a pleading in a proceeding in the Magistrates Court may claim an amount for unliquidated damages if—
 - (a) the claim is for the recovery of 1 or more of the following if it is or they were a consequence of damage alleged to have happened because of the defendant’s negligence:
 - (i) the cost of repairing a motor vehicle;
 - (ii) a motor vehicle’s value, less any salvage value;
 - (iii) the cost of towing a motor vehicle; or

- (b) the claim is for the recovery of 1 or both of the following if it is or they were a consequence of damage alleged to have happened because of the defendant's negligence in driving, riding or controlling a motor vehicle:
- (i) the cost of repairing property;
 - (ii) property's value, less any salvage value.
- (3) In this rule:
property does not include a motor vehicle.

419 Pleadings—other relief

(SCR o 24 r 4; Qld r 156)

The court may grant relief other than that stated in the pleadings whether or not other relief is expressly claimed in the pleadings.

Division 2.6.3 Pleadings—general

425 Pleadings—striking out

(SCR o 23 r 28 and o 29 r 4; MC(CJ)R s 113; NSW r 14.28; Qld r 162 and r 171)

- (1) The court may, at any stage of a proceeding, order that a pleading or part of a pleading be struck out if the pleading—
- (a) discloses no reasonable cause of action or defence appropriate to the nature of the pleading; or
 - (b) may tend to prejudice, embarrass or delay the fair trial of the proceeding; or
 - (c) is frivolous, scandalous, unnecessary or vexatious; or

(d) is otherwise an abuse of the process of the court.

Note 1 The registrar may also reject a document that is filed if it does not comply with these rules (see r 6140 (Rejecting documents—noncompliance with rules etc) or if it is an abuse of the court’s process or is frivolous or vexatious (see r 6142 (Rejecting documents—abuse of process etc)).

Note 2 Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Note 3 Rule 6901 (Orders may be made on conditions) provides that the court may make an order under these rules on any conditions it considers appropriate.

- (2) The court may receive evidence on the hearing of an application for an order under this rule.
- (3) If the court makes an order under this rule, it may also make any other order it considers appropriate, including, for example—
- (a) if the court makes an order under subrule (1) (a)—an order staying or dismissing the proceeding or entering judgment; and
 - (b) an order about the future conduct of the proceeding.

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

426 Pleadings—trial without

(SCR o 37A r 1; NSW r 14.2; Qld r 479, r 480 and r 481)

- (1) This rule applies if, in a proceeding, the court considers that—
- (a) the issues between the parties can be defined without pleadings or further pleadings; or
 - (b) for any other reason the proceeding may properly be tried without pleadings or further pleadings.

- (2) The court may order that the proceeding be tried without pleadings or further pleadings.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (3) If the court makes an order under subrule (2), it may order the parties to prepare a statement of facts and issues involved in the proceeding or, if the parties do not agree on a statement, may settle a statement itself.

Division 2.6.4 Particulars

430 Pleadings—all necessary particulars must be included

(SCR o 23 r 6; MC(CJ)R s 115; NSW r 15.1; Qld r 157)

- (1) A party must include in a pleading particulars necessary to—
- (a) define the issues for, and prevent surprise at, the trial; and
 - (b) enable the opposite party to identify the case that the pleading requires the opposite party to meet; and
 - (c) support a matter specifically pleaded under rule 407 (Pleadings—matters to be specifically pleaded).
- (2) This rule does not require a party to include in a pleading particulars of any claim for interest up to judgment other than those required by rule 51 (2) (Originating claim—additional matters for claims for debt and liquidated demands) or rule 304 (2) (Third-party notice—additional matters for claims for debt and liquidated demands).

431 Pleadings—use of ‘Scott schedule’

(NSW r 15.2)

- (1) This rule applies to a proceeding involving a building, technical or other matter in which a number of items of a claim are in dispute in relation to liability, amount or both.

- (2) The party making the claim—
- (a) may prepare and file a ‘Scott schedule’; and
 - (b) if the court orders—must prepare and file a ‘Scott schedule’.

Note 1 See approved form 2.14 (Scott schedule) [AF2006-259](#).

Note 2 Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (3) A party on whom a Scott schedule is served must complete and file the schedule.

Note A ‘Scott schedule’ is a document that contains a summary of the parties’ claims and defences. The summary is set out in columns so that it is easy to see the issues on which the parties agree and those on which they do not agree.

432 Pleadings—negligence and breach of statutory duty

(MC(CJ)R s 118; NSW r 15.5)

- (1) If a party pleads negligence (whether contributory or otherwise) or breach of statutory duty, the particulars must state the facts and circumstances of the negligent act or omission or breach of statutory duty.
- (2) Also, if the party alleges 2 or more negligent acts or omissions or breaches of statutory duty, the particulars must, as far as practicable, state separately the facts and circumstances of each negligent act or omission or breach of statutory duty.

433 Pleadings—how particulars must be given

(SCR o 23 r 6; MC(CJ)R s 121 (1); NSW r 15.9; Qld r 160)

- (1) The particulars to be given by a pleading must be stated in the pleading or, if that is inconvenient, in a separate document mentioned in, and filed and served with, the pleading.
- (2) Further particulars may be given by correspondence.

- (3) A party giving further particulars must file a copy of the particulars.

434 Pleadings—application for better particulars

(SCR o 23 r 7 and r 9; MC(CJ)R s 122; NSW r 15.10; Qld r 161)

- (1) A party may apply to the court for an order for better particulars of the opposite party's pleading.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (2) The court may make any order under this rule it considers appropriate, including, for example, an order about the future conduct of the proceeding.

Note 1 Rule 6901 (Orders may be made on conditions) provides that the court may make an order under these rules on any conditions it considers appropriate.

Note 2 An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) Unless the court otherwise orders, the making of an application under this rule does not extend the time for pleading.

- (4) Particulars required under an order under this rule must repeat the relevant part of the order so the particulars are self-explanatory.

Note Div 6.10.3 (Exchange of correspondence before making application in proceeding) applies to an application under this rule. See esp r 6745 (Div 6.10.3 application—making application).

435 Pleadings—failure to comply with better particulars order

(Qld r 163)

If a party does not comply with an order made under rule 434 (Pleadings—application for better particulars), the court may make the order, including give the judgment, it considers appropriate.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Division 2.6.5 Answering pleadings

Note to div 2.6.5

For rules about when a defence must be filed etc, see r 102 (Notice of intention to respond and defence—filing and service). For an answer to a counterclaim, see r 466 (Counterclaim—answer to).

440 Pleadings—answering

(MC(CJ)R s 111 (2); NSW r 14.26 (2); Qld r 165 (1))

- (1) In response to a pleading, a party may plead a denial, non-admission or admission.
- (2) A plea of non-admission operates as a denial.

441 Pleadings—denials and non-admissions

(SCR o 23 r 17 and r 19 and o 25 r 4; MC(CJ)R s 111 (2) and (3); NSW r 14.26 (2) and (3))

- (1) It is not enough for a party to deny generally the grounds alleged in a pleading.
- (2) Instead, a party must deal specifically with each allegation of fact.
- (3) However, a pleading in response to a pleading that alleges damage or damages is taken not to admit the allegation unless it specifically admits the allegation.
- (4) A party in a pleading must not deny an allegation of fact in the previous pleading of an opposite party in an evasive way.
- (5) Instead, a party must answer the point of substance.

Example

A plaintiff alleges that a defendant received an amount of money. It is not enough for the defendant to deny that the defendant received that amount. Instead, the defendant must deny that the defendant received that amount or any part of it, or set out how much the defendant received.

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (6) If an allegation is made with various circumstances, it is not enough to deny it along with the circumstances.

442 Pleadings—defence to debt and liquidated demand claims

(SCR o 25 r 1)

- (1) In a defence to a claim for debt or a liquidated demand, it is not enough for the defendant simply to deny the debt.
- (2) Instead, the defendant must deny the matters of fact from which the defendant's liability is alleged to arise that are disputed.

443 Pleadings—defence to motor vehicle and employment personal injuries claims

(SCR o 25 r 1A)

- (1) This rule applies to a defence to an originating claim if rule 52 (Originating claim—statement of claim for motor vehicle death and personal injury claims) or rule 53 (Originating claim—statement of claim for employment death and personal injury claims) applies to the statement of claim for the originating claim.
- (2) The defendant must, in the defence, specifically admit or deny every material allegation of fact in the originating claim and statement of claim, including any allegation by way of particulars.
- (3) The allegation is taken to be admitted if the defendant does not comply with subrule (2) in relation to it.
- (4) A statement in the defence that the defendant does not know and therefore cannot admit a fact alleged in the originating claim or statement is taken to be a denial.
- (5) If the defendant wishes to prove a version of facts different from that alleged in the originating claim or statement of claim, the defendant must plead that version in the defence.

- (6) The defendant must plead every ground of defence to be relied on, together with the facts necessary to establish each ground.

444 Pleadings—defence to proceeding on bill of exchange etc

(SCR o 25 r 2)

- (1) This rule applies to a proceeding on a bill of exchange, cheque or promissory note
- (2) The defendant must deny some matter of fact in a defence in denial.

Examples

the drawing, making, endorsing, accepting, presenting, or notice of dishonour of the bill, cheque or note

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

445 Pleadings—denial of representative capacity or partnership constitution

(SCR o 25 r 5)

- (1) This rule applies if a party wants to deny—
- (a) another party's right to claim as a representative (including a personal representative or trustee) of someone else; or
- (b) the alleged constitution of a partnership.
- (2) The party must deny it specifically.

446 Pleadings—denial of contract

(SCR o 23 r 20)

- (1) This rule applies if a contract is alleged by a party in a pleading.
- (2) A bare denial of the contract by the opposite party is taken only as a denial in fact of the express contract alleged or of the matters of fact from which the contract may be implied by law, and not as a denial of the legality or sufficiency in law of the contract.

- (3) In this rule:

contract includes promise and agreement.

447 Pleadings—allegations admitted unless denied etc

(SCR o 23 r 13; MC(CJ)R s 111 (1); NSW r 14.26 (1) and (2); Qld r 166 (1) and (2))

- (1) An allegation of fact made by a party in a pleading is taken to be admitted by any opposite party required to plead in response unless, either expressly or by necessary implication—
- (a) it is denied in the pleading of the opposite party; or
 - (b) it is stated to be not admitted in the pleading of the opposite party; or
 - (c) a joinder of issue under rule 482 (Pleadings—joinder of issue) operates as a denial of the allegation.

Note Rule 441 (3) (Pleadings—denials and non-admissions) provides that a pleading in response to a pleading that alleges damage or damages is taken to deny the allegation unless it specifically admits the allegation.

- (2) However, there is no admission under subrule (1) because of a failure to plead by a party who is, or was at the time of the failure to plead, a person with a legal disability.

448 Pleadings—unreasonable denials and non-admissions

(SCR o 25 r 9; Qld r 167)

If the court considers that an allegation of fact denied or not admitted should have been admitted, it may order the party who denied or did not admit the allegation to pay the additional costs caused by the denial or non-admission.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

449 Pleadings—confession of defence

(SCR o 28 r 3; Qld r 170)

- (1) If a defendant alleges a defence that arose after the proceeding was started, the plaintiff may file and serve a confession of defence.

Note See approved form 2.15 (Confession of defence) [AF2006-260](#).

- (2) On filing and serving a confession of defence, the plaintiff may obtain a judgment for costs to be assessed up to the day the defence was served on the plaintiff, unless the court otherwise orders.
- (3) In this rule:

defendant includes a defendant to a counterclaim.

Division 2.6.6 Special defences

455 Pleadings—defence of tender

(SCR o 26 r 1 (6); MC(CJ)R s 46; NSW r 14.25 (1); Qld r 172)

A defendant cannot plead a defence of tender before the proceeding was started unless the defendant has—

- (a) paid the amount tendered into court under rule 1000 (Payment into court—amount); or
- (b) filed a bond for payment of the amount to the registrar under rule 1002 (Payment into court—bond); or
- (c) filed a security accepted by the registrar securing payment of the amount to the registrar under rule 1003 (Payment into court—security).

456 Pleadings—defence of set-off

(SCR o 23 r 3 (1) and o 25 r 17; MC(CJ)R s 47; NSW s 21; Qld r 173)

- (1) A defendant may rely on set-off (whether or not of an ascertained amount) as a defence to all or part of a claim made by the plaintiff, whether or not it is also included as a counterclaim.

- (2) If the amount of a set-off is more than the amount of the claim against which it is set off, then, whether or not the set-off is pleaded as a counterclaim—
- (a) the set-off may be treated as a counterclaim; and
 - (b) the court may give judgment for the amount of the difference or give the defendant other relief to which it considers the defendant is entitled.

Examples of other relief

injunction, or stay, if within the court's jurisdiction

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) Despite subrules (1) and (2)—
- (a) if the court considers that dealing with a set-off in a proceeding would unfairly prejudice a party, embarrass or delay the hearing of the proceeding or be otherwise inconvenient, it may, by order, set aside a defence or counterclaim in the proceeding by way of set-off and may order that the set-off be dealt with in a separate hearing; or
 - (b) if the court considers a set-off should not be allowed, it may, by order, set aside a defence or counterclaim by way of set-off.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Division 2.6.7 Counterclaims

460 Counterclaim—cause of action arising after start of proceeding

(Qld r 176)

A counterclaim may be made in relation to a cause of action that arose after the proceeding started.

461 Counterclaim—against plaintiff

(SCR o 23 r 3 (1) and o 25 r 10; MC(CJ)R s 48 (1); NSW s 22; Qld r 177)

- (1) In a proceeding, a defendant may make a counterclaim against a plaintiff, instead of bringing a separate proceeding.

Note See r 464 (Counterclaim—pleading) and approved form 2.9 (Defence and counterclaim) [AF2006-254](#).

- (2) The defendant must state specifically that the defendant is making a counterclaim.
- (3) For the Magistrates Court, the amount claimed by the counterclaim must not be more than the maximum amount for which the court has jurisdiction.

Note 1 The *Magistrates Court Act 1930*, pt 4.2 (Civil jurisdiction) deals with the civil jurisdiction of the Magistrates Court under that Act. See also r 463 (Counterclaim—abandonment of excess in Magistrates Court).

Note 2 See r 219 (Counterclaim or set-off when co-plaintiff wrongly included).

462 Counterclaim—against additional party

(SCR o 25 rr 11-13; NSW s 22 (3) (b); NSW r 9.7; Qld r 178)

- (1) A defendant to a proceeding may make a counterclaim against a person other than a plaintiff (whether or not the person is already a party to the proceeding) if—

- (a) the plaintiff is also made a party to the counterclaim; and
(b) either—

- (i) the defendant alleges that the other person is liable with the plaintiff for the subject matter of the counterclaim; or
(ii) the defendant claims against the other person relief relating to or connected with the original subject matter of the proceeding.

Note See r 464 (Counterclaim—pleading) and approved form 2.9 (Defence and counterclaim) [AF2006-254](#).

- (2) If a defendant to a proceeding counterclaims against a person who is not a party to the original proceeding, the defendant must—
- (a) make the counterclaim; and
 - (b) serve the following on the person within the time allowed for service on a plaintiff:
 - (i) the defence (including the counterclaim);
 - (ii) a sealed copy of any directions about filing and serving the defence (including the counterclaim);
 - (iii) a copy of a sealed copy of any other relevant order made in relation to the proceeding;
 - (iv) a copy of a sealed copy of the originating claim and its statement of claim;
 - (v) a copy of a stamped copy of all other pleadings filed in the proceeding;
 - (vi) a copy of a stamped copy of all applications in the proceeding not finally disposed of;
- Note* **Application** in a proceeding is defined in r 6006.
- (vii) a copy of all affidavits filed in the proceeding, other than affidavits that are not relevant to the issues arising on the counterclaim;
 - (viii) a copy of all other documents that have been served by the plaintiff on the defendant, or by the defendant on the plaintiff, and are intended to be relied on;
 - (ix) a copy of all amendments of any document mentioned in subparagraphs (iv) to (viii) or details of the amendments.
- (3) A person not a party to the original proceeding who is included as a defendant to a counterclaim becomes a party to the proceeding on being served with the defence (including the counterclaim).

- (4) If a defendant makes a counterclaim against a person not a party to the original proceeding, the relevant provisions (see subrule (5)) apply, with necessary changes, as if—
- (a) the counterclaim were a proceeding started by originating claim; and
 - (b) the party making the counterclaim were a plaintiff; and
 - (c) each party against whom the counterclaim is made were a defendant.
- (5) In subrule (4):
- relevant provisions* means the following provisions:
- part 2.2 (Starting civil proceedings)
 - part 2.3 (Notice of intention to respond and defence)
 - division 2.11.2 (Default by plaintiff)
 - division 2.11.3 (Default by defendant)
 - division 2.11.4 (Default by defendant—partial defence)
 - division 2.11.5 (Summary judgment).

463 Counterclaim—abandonment of excess in Magistrates Court

(MC(CJ)R s 49)

- (1) This rule applies to a defendant in a proceeding in the Magistrates Court if the defendant has a cause of action against a plaintiff for an amount that is more than the maximum amount for which the court has jurisdiction (the *maximum amount*).
- (2) The defendant may make a counterclaim in relation to the cause of action if the defendant abandons the amount over the maximum amount in the counterclaim.
- (3) In the counterclaim proceeding—

- (a) the defendant may not recover an amount that is more than the maximum amount; and
- (b) final judgment in the proceeding operates in full discharge of all claims in relation to the cause of action.

464 Counterclaim—pleading

(SCR o 25 r 11; MC(CJ)R s 48 (1); NSW r 9.1 (2); Qld r 179)

A counterclaim must be included in the same document as the defence.

465 Counterclaim—plaintiff may rely on previous pleadings

(NSW r 9.3)

A plaintiff to a counterclaim may, in the counterclaim, plead all or any of the facts on which the plaintiff relies by referring to the previous pleadings in the proceeding in which the counterclaim is made.

466 Counterclaim—answer to

(SCR o 25 r 14 and o 27 r 2 (1) and r 3 (3); MC(CJ)R s 55; Qld r 164 (1) and r 180)

- (1) A defendant to a counterclaim may plead to the counterclaim by filing and serving an answer to the counterclaim.

Note See approved form 2.16 (Answer to counterclaim) [AF2006-261](#).

- (2) If a plaintiff in a proceeding is the defendant to a counterclaim and is filing and serving a reply, any answer to the counterclaim must be included in the reply.
- (3) Any answer to a counterclaim must be filed and served not later than—
 - (a) 14 days after the day the counterclaim is served; or
 - (b) if the defendant to the counterclaim is not a party to the original proceeding—28 days after the day the counterclaim is served.

467 Counterclaim—defence arising after answer

(SCR o 28 r 2)

- (1) This rule applies if a ground of defence to a counterclaim arises after—
 - (a) the defendant to the counterclaim files an answer to the counterclaim; or
 - (b) the time limited by rule 466 (Counterclaim—answer to) for the defendant to the counterclaim to file an answer to the counterclaim ends.

- (2) The defendant to the counterclaim may file a further answer to the counterclaim not later than 7 days after the day the ground of defence arises or at a later time with the court's leave.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave.

- (3) The registrar must seal the original and filed copies of the further answer to the counterclaim.

Note The registrar may reject a further answer to a counterclaim that is filed (see r 6140 (Rejecting documents—noncompliance with rules etc)).

- (4) The defendant to the counterclaim must serve a sealed copy of the further answer to the counterclaim on the plaintiff to the counterclaim at the plaintiff's address for service on the day it is filed.

Note Rule 449 (Pleadings—confession of defence) applies to a defendant to a counterclaim.

468 Counterclaim—effect of no answer

(SCR o 27 r 3 (2))

If no answer to a counterclaim is filed and served, the facts stated in the counterclaim are taken to have been admitted.

469 Counterclaim—response to answer

(SCR o 27 r 1; Qld r 164 (2))

- (1) A plaintiff to a counterclaim may file a response to an answer to the counterclaim.

Note See approved form 2.17 (Response to answer to counterclaim) [AF2006-262](#).

- (2) It is not necessary for a party to file a response only for the purpose of denying the allegations in the answer to the counterclaim (that is, to join issue on the answer).
- (3) The response must be filed not later than 14 days after the day the answer to the counterclaim is served on the plaintiff to the counterclaim.

Note Rule 6351 (Time—extending and shortening by court order) provides for the extending of time by the court.

- (4) The plaintiff to the counterclaim must serve a sealed copy of the response on the defendant to the counterclaim at the defendant's address for service on the day it is filed.

470 Counterclaim—conduct and pleading

(SCR o 27 r 2 (3); MC(CJ)R s 50 (1) and (2); NSW r 9.1 (3), r 9.2 and r 9.9; Qld r 181)

- (1) These rules apply, with necessary changes, to the conduct and pleading of a counterclaim as if—
- (a) the plaintiff on the counterclaim were the plaintiff in an original proceeding; and
 - (b) the defendant to the counterclaim were the defendant to the original proceeding; and
 - (c) the counterclaim were an originating process.

- (2) However, if a party against whom a counterclaim is made has filed and served a notice of intention to respond or defence in accordance with part 2.3 (Notice of intention to respond and defence), the party is not required to file and serve a notice of intention to respond in relation to the counterclaim.
- (3) Subject to rule 471 (Counterclaim—order for separate hearing), a counterclaim must be heard at the hearing of the plaintiff's claim.

471 Counterclaim—order for separate hearing

(SCR o 25 r 15; MC(CJ)R s 51; NSW r 9.8; Qld r 182)

- (1) The court may, at any time, order that a counterclaim be heard separately from the hearing for the proceeding in which the counterclaim is made if it considers that hearing them together would—
 - (a) unfairly prejudice a party; or
 - (b) embarrass or delay the hearing of the proceeding; or
 - (c) be otherwise inconvenient.
- (2) The court may order that a counterclaim be heard separately—
 - (a) on application by a party before the party files and serves an answer to the counterclaim; or
 - (b) on its own initiative.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.
- (3) The court may make the orders it considers appropriate about the conduct of the separate hearing.

472 Counterclaim—after judgment etc in original proceeding

(SCR o 25 r 16; MC(CJ)R s 50 (3); NSW r 9.10 (1); Qld r 183)

A counterclaim may proceed after judgment is given in the original proceeding or after the original proceeding is stayed, dismissed or discontinued.

473 Counterclaim—judgment for balance

(SCR o 25 r 17; Qld r 184)

If a defendant establishes a counterclaim against the plaintiff and there is a balance in favour of 1 of the parties, the court may give judgment for the balance.

474 Counterclaim—stay of claim

(Qld r 185)

If the defendant does not plead a defence but makes a counterclaim, the court may stay the enforcement of a judgment given against the defendant until the counterclaim is decided.

Note Pt 6.2 (Applications in proceedings) applies to an application for a stay.

Division 2.6.8 Progress of pleading

480 Pleadings—reply to defence

(SCR o 27 r 1; MC(CJ)R s 52; NSW r 14.4; Qld r 164 (2))

- (1) A plaintiff may file a reply to a defence.

Note See approved form 2.18 (Reply to defence) [AF2006-263](#).

- (2) It is not necessary for a party to file a reply only for the purpose of denying the allegations in the defence (that is, to join issue on the defence).

- (3) The reply must be filed not later than 14 days after the day the defence is served on the plaintiff.

Note Rule 6351 (Time—extending and shortening by court order) provides for the extending of time by the court.

- (4) The plaintiff must serve a sealed copy of the reply on the defendant at the defendant's address for service on the day it is filed.

Note 1 Rule 469 deals with the response to an answer to a counterclaim.

Note 2 *Address for service* is defined in the dictionary.

481 Pleadings—after reply

(SCR o 28 r 2; NSW r 14.5)

- (1) A party to a proceeding must not file a pleading after a reply (the *further pleading*) without the court's leave.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave.

- (2) A party may apply for leave to file the further pleading not later than 14 days after the day the party is served with the pleading to which the further pleading responds.

- (3) However, if a ground of defence to a set-off arises after a plaintiff files a reply, or the time limited by rule 480 (Pleadings—reply to defence) for a plaintiff to file a reply ends, the plaintiff may file a further reply not later than 7 days after the day the ground of defence arises or at a later time with the court's leave.

- (4) The registrar must seal the original and filed copies of the further reply.

Note The registrar may reject a further defence that is filed (see r 6140 (Rejecting documents—noncompliance with rules etc)).

- (5) The plaintiff must serve a sealed copy of the further reply on each active party at the party's address for service on the day it is filed.

Note *Address for service* is defined in the dictionary.

482 Pleadings—joinder of issue

(SCR o 27 r 3 (1); MC(CJ)R s 111 (1) and s 112; NSW r 14.27)

- (1) A pleading may expressly join issue on a previous pleading.

Example

an express denial

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) An express joinder of issue on a pleading operates as a denial of every allegation of fact made in the pleading other than an allegation that is expressly admitted.
- (3) If there is no reply by a plaintiff to a defence, there is an implied joinder of issue on the defence.
- (4) If there is no answer by the opposite party to a reply or subsequent pleading, there is an implied joinder of issue on the reply or subsequent pleading.
- (5) An implied joinder of issue on a pleading operates as a denial of every allegation of fact made in the pleading.

483 Pleadings—close

(SCR o 27 r 3 (1); Qld r 169)

- (1) The pleadings in a proceeding close—
- (a) if a pleading is served after the defence, or answer to a counterclaim—on service of the pleading; or
- (b) in any other case—7 days after the day the defence, or answer to a counterclaim, is served.

- (2) If a third-party notice, or subsequent notice, is served in a proceeding, the pleadings in the proceeding on that notice close—
- (a) if a pleading is served after the defence, or answer to a counterclaim, to the notice—on service of the pleading; or
 - (b) in any other case—7 days after the day the defence, or answer to a counterclaim, to the notice is served.

Division 2.6.9 Admissions

490 Admissions—voluntary admission

(SCR o 35 r 1; MC(CJ)R s 156 (1) and (2); NSW r 17.2 (1); Qld r 187)

- (1) A party to a proceeding may, in a pleading or notice served on another party, admit, in favour of the other party, the facts stated in the pleading or notice.
- (2) An admission made under subrule (1) has effect only for the proceeding.

491 Admissions—notice to admit facts or documents

(SCR o 35 r 2 and r 3; MC(CJ)R s 157 and 161 (1); NSW r 17.3 and r 17.4; Qld r 189)

- (1) A party to a proceeding (the *first party*) may, by notice served on another party, ask the other party to admit, for the proceeding only, the facts or documents stated in the notice.

Note See

- approved form 2.19 (Notice to admit facts) [AF2006-264](#)
- approved form 2.20 (Notice to admit authenticity of documents) [AF2006-265](#).

- (2) The other party is taken to admit, for the proceeding only, each of the facts, or the authenticity of each of the documents, stated in the notice if, at the end of 14 days after the day the notice is served on the party, the party has not served a notice on the first party disputing the fact or authenticity of the document.

Note See

- approved form 2.21 (Notice disputing facts) [AF2006-266](#)
- approved form 2.22 (Notice disputing authenticity of documents) [AF2006-267](#).

- (3) If the other party serves a notice under subrule (2) disputing a fact or authenticity of a document and afterwards the fact or authenticity of the document is proved in the proceeding, the party must pay the costs of the proof, unless the court otherwise orders.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

492 Admissions—withdrawal

(MC(CJ)R s 156 (3); NSW r 17.2 (2); Qld r 188)

- (1) A party may withdraw an admission made under rule 490 (Admissions—voluntary admission) or taken to have been made under rule 491 (2) (Admissions—notice to admit facts or documents) only with the court's leave.
- (2) The court may order the withdrawal of the admission.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

Note 2 Rule 6901 (Orders may be made on conditions) provides that the court may make an order under these rules on any conditions it considers appropriate.

493 Admissions—orders on

(SCR o 35 r 6; MC(CJ)R s 159; NSW r 17.7; Qld r 190)

- (1) If an admission is made by a party, whether in a pleading or otherwise, after the start of the proceeding, the court may, on another party's application, make an order to which the party applying is entitled on the admission.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave or an order under this rule.

- (2) The court may give judgment or make another order even though other issues in the proceeding have not been decided.
- (3) If an application under this rule is made by a plaintiff, the court may, instead of assessing damages, enter judgment for the plaintiff against the defendant for damages to be assessed.

Part 2.7 **Amendment**

500 **Application—pt 2.7**

This part applies in relation to documents (other than affidavits) that have been filed in a proceeding.

Note See r 6107 (Documents—alterations) about alterations to documents before filing.

501 **Amendment—when must be made**

(SCR o 32 r 1 (2))

All necessary amendments of a document must be made for the purpose of—

- (a) deciding the real issues in the proceeding; or
- (b) correcting any defect or error in the proceeding; or
- (c) avoiding multiple proceedings.

502 **Amendment—of documents**

(SCR o 32 r 1 (1), (3) and (8); MC(CJ)R s 126 (1) and (3); Qld r 375)

- (1) At any stage of a proceeding, the court may give leave for a party to amend, or direct a party to amend, an originating process, anything written on an originating process, a pleading, an application or any other document filed in the court in a proceeding in the way it considers appropriate.

- (2) The court may give leave, or give a direction, on application by the party or on its own initiative.

Note 1 Pt 6.2 (Applications in proceedings) applies to an application for leave or a direction under this rule.

Note 2 Rule 6902 (Leave may be given on conditions) provides that, if the court gives leave under these rules, it may give the leave on the conditions it considers appropriate.

- (3) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started.

- (4) If there is a mistake in the name or identity of a party, the court must give leave for, or direct the making of, amendments necessary to correct the mistake, even if the effect of the amendments is to substitute another person as a party.

- (5) This rule does not apply in relation to an amendment of an order.

Note See r 6906 (Mistakes in orders or court certificates) for amendment of orders.

- (6) This rule is subject to rule 503 (Amendment—after limitation period).

503 Amendment—after limitation period

(SCR o 32 r 1 (3), (5) (6) and (7); Qld r 376)

- (1) This rule applies in relation to an application for leave in a proceeding to make an amendment mentioned in this rule if a relevant period of limitation, current at the date the proceeding was started, has ended.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave under this rule.

- (2) The court may give leave to make an amendment correcting a mistake in the name or identity of a party, even if the effect of the amendment is to substitute a new party, only if—
- (a) the court considers it appropriate; and
 - (b) the court is satisfied that the mistake sought to be corrected—
 - (i) was a genuine mistake; and
 - (ii) was not misleading or likely to cause any reasonable doubt about the identity of the person intending to sue or intended to be sued.
- (3) The court may give leave to make an amendment changing the capacity in which a party sues, whether as plaintiff or counter-claiming defendant, only if—
- (a) the court considers it appropriate; and
 - (b) the changed capacity in which the party would then sue is a capacity in which the party might have sued on the day the proceeding was started by the party.
- (4) The court may give leave to make an amendment to include a new cause of action only if—
- (a) the court considers it appropriate; and
 - (b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.

504 Amendment—of originating process

(NSW r 19.1; Qld r 377)

- (1) An originating process may be amended only with the court's leave.
Note Pt 6.2 (Applications in proceedings) applies to an application for leave under this rule.
- (2) This rule does not apply to a pleading or particular included in an originating process.

505 Amendment—of pleadings before close of pleadings

(SCR o 32 r 2; MC(CJ)R s 127; Qld r 378)

- (1) A party may, without the court's leave, amend the party's pleadings—
 - (a) once before the close of pleadings; and
 - (b) as often as necessary before the close of pleadings, with the agreement of all other parties to the proceeding.
- (2) This rule does not apply to an amendment for which the court's leave is required.

506 Amendment—of pleadings disallowed

(SCR o 32 r 7; MC(CJ)R s 129; NSW r 19.4 (1) and (2); Qld r 379)

- (1) If a party makes an amendment without the court's leave before the close of pleadings, another party may, not later than 14 days after the day the amendment is served on the party, apply to the court to disallow all or part of the amendment.
Note Pt 6.2 (Applications in proceedings) applies to an application under this rule.
- (2) On the application, the court may make any order it considers appropriate.

- (3) However, the court must disallow all or part of the amendment if satisfied that, had an application for leave to make the amendment or part been made, it would not have given leave to make the amendment or part.

507 Amendment—of pleadings after close of pleadings

(Qld r 380)

A party may amend the party's pleadings after the close of pleadings only with the court's leave.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave under this rule.

508 Amendment—when leave to amend ceases to have effect

(MC(CJ)R s 130; NSW r 19.3; Qld r 381)

An order giving a party leave to amend a document ceases to have effect if the party has not amended the document in accordance with the order—

- (a) at the end of the time stated in the order for making the amendment; or
- (b) if no time is stated in the order—at the end of 14 days after the day the order was made.

509 Amendment—procedure

(SCR o 32 r 9, r 10 and r 11; MC(CJ)R s 131, s 132 and s 133; NSW r 19.5 and r 19.6 (a); Qld r 382)

- (1) An amendment of a document made under this part must be distinguished so that the changes are identifiable.
- (2) A party amending a document must file—
 - (a) a copy of the document that contains the amendments written on it; and

- (b) a notice stating the amendments and the following:
- (i) the date of the amendment;
 - (ii) either—
 - (A) if the amendment was made with the court's leave—a statement to that effect and the date leave was given; or
 - (B) if the amendment was made without the court's leave—the number of the rule under which it was made.
- (3) The notice must be on or attached to the copy of the document mentioned in subrule (2) (a).
- Note* The copy of the document and notice must be served on each other active party (see r 511).
- (4) However, if an amendment on a copy of the document is inconvenient or makes the document difficult to read, the party making the amendment must file—
- (a) a revised document incorporating and distinguishing the amendments; and
 - (b) a notice stating the amendments and the matters mentioned in subrule (2) (b) (i) and (ii).
- (5) The notice must be on or attached to the revised document mentioned in subrule (4) (a).
- Note* The copy of the document and notice must be served on each other active party (see r 511).
- (6) Subject to rule 241 (Included or substituted defendant—filing and service of amended originating process), if an originating process is amended and the amendment is made on a copy of the originating process, the registrar must stamp the court's seal on the revised originating process near the amendment.

- (7) If a revised originating process is filed under subrule (4), the registrar must seal the revised originating process.
- (8) The court may direct how an amendment of a document is to be made.

Note Pt 6.2 (Applications in proceedings) applies to an application for a direction under this subrule.

510 Amendment—person required to make

(Qld r 383)

If the court orders an amendment be made to a document, it may order a party, the registrar or other appropriate person to make the amendment.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

511 Amendment—service of amended or revised document etc

(SCR o 32 r 12; MC(CJ)R s 134; Qld r 384)

If a document has been served and is later amended, the party making the amendment must serve on each other active party—

- (a) if the amendment is made on the document under rule 509 (2)—a copy of the document as amended and the notice mentioned in rule 509 (2) (b); or
- (b) if a revised document is filed under rule 509 (4)—a copy of the revised document and the notice mentioned in rule 509 (4) (b).

Note **Active party** is defined in the dictionary.

512 Amendment—pleading to

(SCR o 32 r 3, r 4 and r 5; MC(CJ)R s 128; Qld r 385)

- (1) If a party amends a pleading, an opposite party may plead to the amended pleading or amend the opposite party's own pleading.
- (2) The pleading or amendment must be served not later than the later of the following:
 - (a) the end of the time the opposite party then has to plead;
 - (b) 14 days after the day the amendment is served on the opposite party.

Note Rule 6351 (Time—extending and shortening by court order) provides for the extending of time by the court.

- (3) If an opposite party has pleaded before being served with the amendment and does not plead again within the time allowed under subrule (2), the opposite party is taken to rely on the original pleading as an answer to the amended pleading.

513 Amendment—costs

(SCR o 32 r 13; MC(CJ)R s 137; Qld r 386)

The costs of and resulting from an amendment made under this part are to be paid by the party making the amendment unless the court otherwise orders.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

514 Amendment—taking effect

(Qld r 387)

- (1) If a document is amended under this part, the amendment takes effect on and from the date of the document.

- (2) However, an amendment including or substituting a cause of action arising after the proceeding started takes effect on the day the order giving leave was made.
- (3) Despite subrule (2), if an amendment mentioned in that rule is made, then, for a limitation period, the proceeding as amended is taken to have started when the original proceeding started.
- (4) This rule applies unless the court otherwise orders.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

Part 2.8 Disclosure

Division 2.8.1 Interpretation—pt 2.8

600 Definitions—pt 2.8

(SCR o 34 r 1 and o 34B r 1; NSW r 5.1)

In this part:

discoverable document means a document that is discoverable under rule 605 (Discoverable documents).

document—see the Commonwealth Evidence Act, dictionary, part 1, definition of *document* and part 2, clause 8.

Note *Document* is defined in the Commonwealth Evidence Act, dict, pt 1 as any record of information, and includes:

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

The Commonwealth Evidence Act, dict, pt 2, cl 8 extends the meaning of document as follows:

A reference in this Act to a document includes a reference to:

- (a) any part of the document; or
- (b) any copy, reproduction or duplicate of the document or of any part of the document; or
- (c) any part of such a copy, reproduction or duplicate.

government means—

- (a) the Commonwealth, a State or Territory; or
- (b) a Minister, department or agency of the Commonwealth, a State or Territory; or
- (c) the government of a foreign country.

list of documents means a list of documents under rule 608 (List of discoverable and privileged documents etc).

privileged from production—see rule 601.

respondent, in relation to a notice for non-party production, means the person to whom the notice is directed.

601 Meaning of *privileged from production*—pt 2.8

(SCR o 34 r 2)

For this part, a document is ***privileged from production*** only if—

- (a) it is a document of which evidence could not be adduced, or could not be adduced over the objection of a person, because of the Commonwealth Evidence Act, part 3.10 (Privileges), other than section 128 or section 130; or

Note Section 128 deals with privilege against selfincrimination and s 130 deals with exclusion of evidence of matters of state.

- (b) the party who would otherwise give discovery is an individual and the contents of the document may tend to prove that the party—
 - (i) has committed an offence against or arising under an Australian law, or a law of a foreign country, within the meaning of the Commonwealth Evidence Act; or
 - (ii) is liable to a civil penalty within the meaning of the Commonwealth Evidence Act; or

- (c) it is a document that relates to matters of state within the meaning of the Commonwealth Evidence Act, unless the court decides that the document has stopped being privileged from production.

Note 1 The Commonwealth Evidence Act, dict, pt 2, cl 9 deals with the meaning of references to laws, and dict, pt 1 defines *Australian law*.

Note 2 The Commonwealth Evidence Act, dict, pt 2, cl 3 provides that a person is taken to be liable to a *civil penalty* if, in an Australian or overseas proceeding (other than a criminal proceeding), the person would be liable to a penalty arising under an Australian law or a law of a foreign country.

Note 3 For the meaning of *matters of state*, see the Commonwealth Evidence Act, s 130 (4).

Division 2.8.2 Disclosure of documents

605 Discoverable documents

(SCR o 34 r 3)

- (1) A document that is, or has at any time been, in the possession of a party to a proceeding is discoverable by the party if it—
- (a) relates, directly or indirectly, to a matter in issue in the proceeding; or
 - (b) is mentioned, expressly or by necessary implication, in a pleading or notice filed in the proceeding.
- (2) However, a document is not discoverable by a party if it—
- (a) is filed in court in the proceeding; or
 - (b) relates only to 1 or more items of special damage; or
 - (c) is mentioned in a pleading or notice filed in the proceeding by another party, unless it is discoverable on another ground; or

- (d) is a written communication in relation to the proceeding between a solicitor for the party requiring disclosure and a solicitor for the disclosing party; or
 - (e) is the party's brief to the party's counsel; or
 - (f) is an advice to the party from the party's counsel.
- (3) Also, a document is not discoverable by a party to a proceeding if the document is—
- (a) a written confidential communication in relation to the proceeding between—
 - (i) the party and a legal practitioner for the party; or
 - (ii) 2 or more legal practitioners for the party; or
 - (b) a note of an oral confidential communication (made in person or by telephone) between—
 - (i) the party and a legal practitioner for the party; or
 - (ii) 2 or more legal practitioners for the party; or
 - (c) a confidential document (whether delivered or not) and a solicitor for the party certifies in writing to the effect that evidence of the contents of the document would not be admissible in the proceeding under the Commonwealth Evidence Act, part 3.10 (Privileges), division 1 (Client legal privilege) if the party were to object to the admission of the evidence.
- (4) This rule applies unless the court otherwise orders.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.
- (5) For this rule, a matter is *in issue* until it is—
- (a) admitted or taken to be admitted; or

(b) withdrawn, struck out or otherwise disposed of.

(6) In this rule:

confidential communication—see the Commonwealth Evidence Act, section 117.

confidential document—see the Commonwealth Evidence Act, section 117.

606 Orders about disclosure

(SCR o 34 r 5; MC(CJ)R s 165 and s 167; NSW 21.2)

(1) The court may make the following orders:

- (a) an order that limits a party's duty of disclosure;
- (b) an order for a party to disclose discoverable documents;
- (c) if the court considers that a party has not, or may not have, adequately disclosed discoverable documents—an order for a party to make further disclosure;
- (d) an order for the lists of documents of the parties, or the list of documents of a party, to be served in a stated electronic form;
- (e) an order for disclosure of discoverable documents by the parties, or a party, to be made in stages or in a stated way;
- (f) an order for disclosure, or nondisclosure, by a party of any discoverable document in the party's possession;
- (g) any other order about disclosure, or nondisclosure, of documents that the court considers appropriate.

Example for par (e) and par (g)

The court may make an order permitting disclosure by bundle.

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) The court may make an order under subrule (1) on the application of a party or on its own initiative.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (3) Before making an order under subrule (1), the court must have regard to the following matters:

- (a) the principle that disclosure of documents in a proceeding should be limited to disclosure that is reasonably necessary for fairly disposing of the proceeding, or part of the proceeding, or for saving costs;
- (b) the likely relevance and significance, in relation to the proceeding, of the documents, or particular documents, that may be discovered;
- (c) the likely time, cost and inconvenience of disclosing documents or particular documents.

- (4) Subrule (3) does not limit the matters to which the court may have regard.

- (5) The court may inspect any document in a party's possession to decide whether it ought to be disclosed by the party.

- (6) An affidavit must not be used for an application for an order under this rule unless the court otherwise orders.

607 Notice to disclose discoverable documents

(SCR o 34 r 4; MC(CJ)R s 163 and s 164)

- (1) A party to a proceeding may serve on another party a notice requiring the other party to disclose discoverable documents for the proceeding.

Note For disclosure in relation to third parties, see r 315 (Third parties—disclosure).

(2) Unless the court gives leave, the party must not serve a notice—

- (a) before the close of pleadings; or
- (b) after filing a certificate of readiness.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave.

(3) The party who is served with the notice must—

- (a) file the following documents not later than 28 days after the day the party receives the notice:
 - (i) the party's list of documents;
 - (ii) an affidavit verifying the list;
 - (iii) if the party is represented by a solicitor—the solicitor's certificate of advice in relation to the list; and

Note 1 Rule 608 (List of discoverable and privileged documents etc) sets out requirements for the list, affidavit and certificate.

Note 2 Rule 6351 (Time—extending and shortening by court order) provides for the extending of time by the court.

- (b) serve a copy of each of the documents on each other active party.

608 List of discoverable and privileged documents etc

(SCR o 34 r 6; MC(CJ)R s 168; NSW r 21.3 and r 21.4)

(1) A party's list of documents must—

- (a) set out, in a convenient order—
 - (i) each document discoverable by the party; and
 - (ii) each document that the party claims to be privileged from production; and
- (b) describe clearly and briefly—
 - (i) each document set out in the list; and

- (ii) if the party claims the document is privileged from production—the nature of the claim for privilege; and
- (c) for each document not in the party's possession, state—
 - (i) when and how it stopped being in the party's possession; and
 - (ii) to the best of the party's knowledge, information and belief, who now has possession of the document or, failing that, what has become of the document.

Note See approved form 2.23 (List of documents) [AF2006-268](#).

- (2) For subrule (1), if any documents come within a group of documents of the same kind, the list of documents must deal with the documents as a group.
- (3) The affidavit verifying the party's list of documents must state that the person making the affidavit—
 - (a) has made reasonable inquiries about the party's discoverable documents; and
 - (b) believes that there are no discoverable documents, other than those mentioned in the list of documents in accordance with subrule (1) (a) (i), that are, or have been, in the party's possession; and
 - (c) believes that the documents mentioned in the list of documents (other than the documents mentioned in subrule (1) (c)) are in the party's possession; and
 - (d) believes that the documents mentioned in subrule (1) (c) are in the possession of the people (if any) respectively stated in the list of documents in accordance with subrule (1) (c) (ii); and
 - (e) for any document mentioned in subrule (1) (c) for which no person is stated—has no belief about who has possession of the document.

Note See approved form 2.24 (Affidavit verifying list of documents) [AF2006-269](#).

- (4) The certificate of advice by the party's solicitor in relation to the party's list of documents must state that the solicitor—
- (a) has advised the party of the party's obligations in relation to—
 - (i) a notice requiring the party to disclose discoverable documents for the proceeding; or
 - (ii) an order for the party to disclose discoverable documents; and
 - (b) is not aware of any discoverable documents, other than those mentioned in the list of documents in accordance with subrule (1) (a) (i), that are, or have been, in the party's possession.

Note See approved form 2.25 (Solicitor's certificate of advice in relation to list of documents) [AF2006-270](#).

609 Claim for privilege—challenge etc

(SCR o 34 r 6 (1) (d) and r 8 (2); Qld r 213)

- (1) This rule applies if—
- (a) a party claims in the party's list of documents that a document is privileged from production; and
 - (b) another party challenges the claim by letter given to the party making the claim.
- (2) The party making the claim must file and serve on the other party an affidavit stating the claim not later than 7 days after the day the party making the claim receives the letter from the other party challenging the claim.
- (3) The affidavit must be made by an individual who knows the facts giving rise to the claim.

- (4) On application by the party making the claim or a party challenging the claim, the court may decide a dispute about whether a document is privileged.

Note 1 For privilege, see the Commonwealth Evidence Act, pt 3.10.

Note 2 Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule in relation to a dispute.

610 Claim for privilege—waiver

(SCR o 34 r 8 (1))

A claim for privilege from production for a document mentioned in a list of documents served by a party is taken to be waived by the party if—

- (a) the list of documents does not comply with rule 608 (1) (a) (ii) and (1) (b) (List of discoverable and privileged documents etc) in relation to the document; or
- (b) the party does not comply with rule 609 (2) (Claim for privilege—challenge etc) in relation to the document.

611 Continuing disclosure

(SCR o 34 r 7)

- (1) This rule applies to a discoverable document if, after disclosing documents under this part—
 - (a) a party to a proceeding becomes aware that the document was wrongly omitted from the party's list of documents; or
 - (b) the document comes into the party's possession.
- (2) However, this rule does not apply to a note of oral communications (whether made in person or by telephone) in relation to the proceeding between a solicitor for a party and a solicitor for another party to the proceeding.

- (3) The party must disclose the document to each party to whom the party has been required to give discovery—
 - (a) not later than 7 days after the day the party—
 - (i) becomes aware of the omission; or
 - (ii) receives possession of the document; or
 - (b) if the hearing of the proceeding is to start within the 7-day period, or has started—immediately.
- (4) However, this rule does not require the party to disclose a document if, apart from this rule, the party is not required to disclose it.

Division 2.8.3 Production and inspection

620 Production of documents for inspection

(SCR o 34 r 9)

- (1) This rule applies if a party to a proceeding (the *inspecting party*) gives notice to another party (the *producing party*) to produce for inspection a document mentioned in—
 - (a) the producing party's list of documents; or
 - (b) any originating process, pleading, particular or affidavit filed by the producing party in the proceeding.
- (2) The producing party must, in accordance with this rule, produce the document for inspection by the inspecting party.
- (3) However, the producing party does not have to produce—
 - (a) a document not required to be disclosed under this part; or
 - (b) a document for which the producing party has, in the party's list of documents, claimed privilege from production; or
 - (c) a document not required by the inspecting party to be produced; or

- (d) a document not in the producing party's possession; or
 - (e) a document relating only to a claim in the proceeding that does not affect the producing party.
- (4) Production of documents by the producing party must take place on the day, and at the time and place, stated by the producing party in a notice given to the inspecting party, unless the producing party and the inspecting party agree on alternative arrangements.
- (5) The notice must—
- (a) be given by the producing party to the inspecting party not later than 7 days after the day the producing party is given the notice under subrule (1); and
 - (b) state—
 - (i) a day that is a business day and is not earlier than 7 days, nor later than 21 days, after the day the notice under subsection (4) is given to the inspecting party; and
 - (ii) a time between 9 am and 3 pm; and
 - (c) state as the place for production—
 - (i) the address for service of the producing party; or
 - (ii) if it is not practicable to produce the documents at that address—some other reasonable place in the ACT.
- Note* **Address for service** is defined in the dictionary.
- (6) The inspecting party may copy a document produced for inspection and make notes of, or take extracts from, it.
- (7) If the producing party makes a copy of a document for, and at the request of, the inspecting party, the producing party is entitled to payment for the copy under schedule 4 (Scale of costs).
- (8) If the producing party discloses a document to the inspecting party after inspection by the inspecting party, the producing party must

allow the inspecting party to inspect the document as soon as practicable, either at the place where the inspection took place or another place agreed by the parties.

- (9) However, subrule (8) does not require the producing party to produce a document if, apart from the subrule, the party is not required to produce it.

621 Orders about production of documents for inspection

(SCR o 34 r 10)

- (1) This rule applies to the production of documents by a party to a proceeding for inspection by another party to the proceeding.
- (2) The court may do any of the following:
- (a) make an order for production of documents by 1 or more parties to be made in stages or in a stated way;
 - (b) inspect a document to decide whether it ought to be produced;
 - (c) make an order about whether a document has to be produced by a party (either generally, at a particular time or to a particular party);
 - (d) make an order for a document stored on a computer to be produced in a stated way or form;
 - (e) make any other order about production of documents that it considers appropriate.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (3) Before making an order under subrule (2), the court must have regard to the following matters:
- (a) the principle that production of documents in a proceeding should be limited to production that is reasonable and

necessary for fairly disposing of the proceeding, or part of the proceeding, or for saving costs;

- (b) the likely relevance and significance, in relation to the proceeding, of the documents, or particular documents, that may be produced;
 - (c) the likely time, cost and inconvenience of producing documents or particular documents.
- (4) Subrule (3) does not limit the matters to which the court may have regard.

622 Effect of inspection of documents disclosed by another party

(SCR o 34 r 11)

- (1) A party who inspects a document (the *inspecting party*) that was disclosed by another party (the *producing party*) is taken to admit—
- (a) if the document is described in the list of documents as an original document—that the document is an original document and was printed, written or signed as it purports to have been; and
 - (b) if the document is described in the list of documents as a copy—that the document is a true copy; and
 - (c) if the document is described in the list of documents as a copy of a document that was served—that the original was served as described.
- (2) However, subrule (1) does not apply if—
- (a) the document is not admissible in evidence; or
 - (b) the inspecting party has in the party's pleadings denied its authenticity or that the original was served as described; or

- (c) the inspecting party serves on the producing party, not later than 14 days after the day the inspecting party inspected the document, a notice stating that the inspecting party disputes its authenticity or that the original was served as described; or
- (d) the court orders that it does not apply.

623 Production of documents at hearing of proceeding

(SCR o 34 r 12)

A document disclosed under this part must be produced at the hearing of the proceeding if—

- (a) notice to produce it has been given with reasonable particularity to a party by another party to the proceeding; and
- (b) its production is asked for by the other party at the hearing.

Division 2.8.4 Interrogatories

630 Service of interrogatories

(SCR o 34 r 13; MC (CJ)R s 162 (1), (2) and (4))

- (1) A party to a proceeding has the right to serve interrogatories on another party to the proceeding.
- (2) The interrogatories may be set out in a letter.
- (3) However, the court may order that interrogatories not be served in the proceeding, or not be served by or on a particular party to the proceeding, except to the extent (if any) stated in the order.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order or leave under this rule.

- (4) Also, unless the court gives leave, a party must not serve interrogatories in the proceeding on another party—
 - (a) before the close of pleadings; or

- (b) if the party has previously served interrogatories on the other party; or
 - (c) after the filing of a certificate of readiness.
- (5) A set of interrogatories that is to be answered by 2 or more people must contain a note stating which of the interrogatories each of them is required to answer.
- (6) A party who is served with interrogatories must, not later than 28 days after the day the party receives the interrogatories—
- (a) file an affidavit setting out and verifying (except to the extent that the party objects under rule 631 to answering) the party's answers to the interrogatories; and
 - (b) serve a stamped copy of the affidavit on the party serving the interrogatories.

631 Objections to answer interrogatories

(SCR o 34 r 14; MC(CJ)R s 162 (6))

- (1) An objection by a party to answer an interrogatory must be on 1 or more of the following grounds:
- (a) the interrogatory is unnecessary;
 - (b) the interrogatory is oppressive, scandalous, vexatious or otherwise improper;
 - (c) the interrogatory is unnecessarily long, wordy or uncertain;
 - (d) the interrogatory is irrelevant, is of a 'fishing' nature or inquires into a matter of evidence;
 - (e) the party is privileged under the Commonwealth Evidence Act, part 3.10 (Privileges) from answering the interrogatory;
 - (f) the answer would disclose (completely or partly) the contents of a document privileged from production by the party;

- (g) it is contrary to the public interest to disclose a matter that the answer would disclose;
 - (h) a ground arising under a provision of a territory law or a law of the Commonwealth, if the ground, the law and the provision are stated in the objection.
- (2) An objection to answer on the ground that the interrogatory is unnecessary operates as an objection that the interrogatory is not reasonable and necessary for fairly disposing of the proceeding, or part of the proceeding, or for saving costs.

632 Orders about interrogatories

(SCR o 34 r 15; MC(CJ)R s 162 (7), (8) and (9))

- (1) The court may—
- (a) set aside interrogatories, or any interrogatory, on a ground mentioned in rule 631 (1); or
 - (b) on a ground mentioned in rule 631 (1), set aside, order to be removed from the court file, or order to be removed from the court file and destroyed, any answers to interrogatories that have been filed; or
 - (c) order a party to answer, or to give a further answer to, an interrogatory that the party has—
 - (i) failed to answer (sufficiently or at all); or
 - (ii) made an objection to answering that the court disallows;
or

- (d) make any other order about the service or answering of interrogatories (including an order about costs) that it considers appropriate.
- (2) The court may make an order under this rule on the application of a party or on its own initiative.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.
- (3) Before making an order under subrule (1), the court must have regard to the following matters:
- (a) the principle that interrogatories in a proceeding should be limited to interrogatories that are reasonable and necessary for fairly disposing of the proceeding, or part of the proceeding, or for saving costs;
 - (b) the likely relevance and significance, in relation to the proceeding, of interrogatories, or particular interrogatories, and the answers;
 - (c) the likely time, cost and inconvenience of answering interrogatories or particular interrogatories.
- (4) Subrule (3) does not limit the matters to which the court may have regard.
- (5) An order under subrule (1) (c) may include, for a party who has failed to answer an interrogatory (sufficiently or at all), an order for the oral examination of—
- (a) if the party is an entity mentioned in rule 640 (1) (Answers by governments, corporations etc)—a person, or the holder of a position, stated by the court; or
 - (b) in any other case—the party.
- (6) The questions asked, and answers given, on an examination under subrule (5)—

- (a) must be taken down in writing and certified by an officer of the court; and
 - (b) as certified, are taken for this division to be interrogatories and answers to interrogatories.
- (7) An affidavit must not be used for an application for an order under this rule unless the court otherwise orders.

633 Answers to interrogatories

(SCR o 34 r 16)

- (1) A party who is served with interrogatories must answer an interrogatory that the party is required to answer under this division—
- (a) from the party's own knowledge of the fact or matter raised by the interrogatory; or
 - (b) if the party does not have the knowledge—from any belief the party has about the fact or matter.
- (2) This rule and rule 634 apply, with necessary changes, to a party that is a government, corporation or unincorporated body as if—
- (a) a reference to the party were a reference to the person who answers the interrogatories on behalf of the government, corporation or body; and
 - (b) a reference to an employee or agent of the party were a reference to an employee or agent of the government, corporation or body.

Note Rule 640 (Answers by governments, corporations etc) sets out who may swear an affidavit verifying answers to interrogatories.

634 Answers to interrogatories—belief

(SCR o 34 r 17)

- (1) This rule applies if a party mentioned in rule 633 does not have knowledge of the fact or matter raised by an interrogatory and must answer the interrogatory from any belief the party has about the fact or matter.
- (2) The party is taken not to have a belief about the fact or matter if the party—
 - (a) does not have information relating to the fact or matter on which to form a belief; or
 - (b) has the information, but the party has reasonable grounds for not believing that the information is true.
- (3) The party must answer from any belief the party has about the fact or matter irrespective of the source of the information on which the belief is formed.
- (4) However, the party is not required to answer from the party's belief about the fact or matter if the belief is formed on information that was given to the party in a communication or document that is privileged under the Commonwealth Evidence Act, part 3.10 (Privileges).
- (5) To help the party form a belief about the fact or matter, the party must make all reasonable inquiries to find out—
 - (a) whether a person who is or has been the party's employee or agent has knowledge of the fact or matter that was acquired by the person as the party's employee or agent; and
 - (b) if a person has the knowledge—what the knowledge is.

- (6) To remove any doubt, the party must make the inquiries mentioned in subrule (5) even if at the time the party is required to answer the interrogatory a person having the relevant knowledge has stopped being the party's employee or agent.

635 Answers to interrogatories to be verified

(SCR o 34 r 18; MC(CJ)R s 162 (4))

A party's answers to interrogatories must be verified by an affidavit.

Note See approved form 2.26 (Affidavit verifying answers to interrogatories) [AF2006-271](#).

636 Tendering of answers to interrogatories in evidence

(SCR o 34 r 19; MC(CJ)R s 162 (11) and (12))

- (1) A party to a proceeding who has served interrogatories on another party may tender the answers, or some of the answers, in evidence against the other party on the hearing of the proceeding.
- (2) However, the court must not allow an answer to be tendered in evidence without another answer if it considers that, in the interests of justice, the other answer should also be tendered in evidence.
- (3) For subrule (2), the court may inspect all of the answers to the interrogatories.
- (4) Subrule (1) does not make an answer admissible in evidence if, apart from the subrule, it is not admissible in evidence.

Division 2.8.5 Who may verify list of documents or answers to interrogatories?

640 Answers by governments, corporations etc

(SCR o 34 r 20)

- (1) This rule applies if any of the following is a party who has to verify a list of documents, or answer interrogatories:

- (a) a government;
- (b) a corporation;
- (c) the holder of a position (including, for example, the sheriff);
- (d) an unincorporated body;
- (e) a person represented by a litigation guardian.

Note An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) The affidavit verifying the party's list of documents, or answers to the interrogatories, must be sworn as follows:
 - (a) for a government—by a Minister, or an authorised officer, employee or agent, of the government;
 - (b) for a corporation—by a director, the secretary, or an authorised officer or employee, of the corporation;
 - (c) for the holder of a position—by the holder of the position or an authorised officer, employee or agent of the position holder;
 - (d) for an unincorporated body—by the members, or 1 or more authorised members, or an authorised employee or agent, of the body;
 - (e) for a person represented by a litigation guardian—by the litigation guardian.
- (3) However, the court may make an order for a party's list of documents or answers to interrogatories to be verified by the affidavit of a person not mentioned in subrule (2).

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

641 Party cannot swear affidavit personally

(SCR o 34 r 21)

If the court is satisfied that a party cannot, for adequate reason, swear an affidavit verifying the party's list of documents or answers to interrogatories, it may authorise a suitable person to swear the affidavit.

Note Pt 6.2 (Applications in proceedings) applies to an application for an authorisation under this rule.

Division 2.8.6 Preliminary discovery

650 Discovery to identify potential defendant

(SCR o 34A r 1, r 3, r 4, r 6 (1) and r 7; NSW r 5.1 and r 5.2; Vic r 32.03)

- (1) This rule applies if—
- (a) a person (the *applicant*) has, or is likely to have, a cause of action against someone (the *potential defendant*); and
 - (b) either—
 - (i) the applicant wants to start a proceeding in the court against the potential defendant for the cause of action; or
 - (ii) the following provisions apply:
 - (A) the applicant is a party to a proceeding in the court;
 - (B) the potential defendant is not a party to the proceeding;
 - (C) the applicant wants to make a claim for relief in the proceeding against the potential defendant for the cause of action;
 - (D) the claim for relief could properly have been made in the proceeding against the potential defendant if the potential defendant were a party; and

- (c) the applicant, after making reasonable inquiries, cannot ascertain the identity or whereabouts of the potential defendant sufficiently to start the proceeding, or make the claim for relief, against the potential defendant; and
 - (d) someone else (the *other person*) may have information, or may have or have had possession of a document or thing, that tends to assist in ascertaining the identity or whereabouts of the potential defendant.
- (2) If subrule (1) (b) (i) applies, the applicant may apply to the court by originating application for an order under this rule (and, if relevant, an order under rule 715 (Inspection, detention, custody and preservation of property—orders etc)) against the other person.
 - (3) If subrule (1) (b) (ii) applies, the applicant may apply to the court for an order under this rule (and, if relevant, an order under rule 715) against the other person.

Note Pt 6.2 (Applications in proceedings) applies to the application.

- (4) The application must be supported by an affidavit stating the facts on which the applicant relies, and stating the kinds of information, documents or things in relation to which the application is made.

Note 1 For an application mentioned in r (2), div 2.2.3 (Originating applications) contains provisions about the content of originating applications, the filing and service of originating applications, etc.

Note 2 For an application mentioned in r (3), r 6008 (Application in proceeding—filing and service) deals with service of the application and supporting affidavit.

- (5) The court may order the other person—
 - (a) to attend before the court to be examined in relation to the identity or whereabouts of the potential defendant; or
 - (b) to produce to the court any document or thing that is, or has been, in the other person's possession relating to the identity or whereabouts of the potential defendant; or

- (c) to make and serve on the applicant a list of the documents or things that are, or have been, in the other person's possession relating to the identity or whereabouts of the potential defendant; or
 - (d) to produce for inspection by the applicant any document or thing that is, or has been, in the other person's possession relating to the identity or whereabouts of the potential defendant.
- (6) If the court makes an order under subrule (5) (a) (an *order for attendance*), the court may—
- (a) order that the other person must produce to the court on the examination any document or thing that is in the other person's possession relating to the identity or whereabouts of the potential defendant; and
 - (b) direct that the examination by the court be held before the registrar.
- (7) An order under this rule in relation to any information, document or thing held by a corporation may be addressed to any appropriate officer or former officer of the corporation.
- (8) Rule 6606 (1) (Compliance with subpoena) and rule 6611 (Costs and expenses of compliance with subpoena) apply, with necessary changes, in relation to an order for attendance under this rule as if the order were a subpoena.
- (9) In this rule:
- identity or whereabouts*, of the potential defendant, includes—
- (a) whether the potential defendant is an individual or a corporation; and
 - (b) for an individual—the potential defendant's name, home address or other whereabouts, occupation and sex; and

- (c) for a corporation—the potential defendant’s registered office, business address or other whereabouts.

651 Discovery to identify right to claim relief

(SCR o 34A r 5, r 6 (2) and r 7; NSW r 5.3; Vic r 32.05)

- (1) This rule applies if—
- (a) a person (the *applicant*) has, or is likely to have, a cause of action against someone (the *potential defendant*); and
- (b) either—
- (i) the applicant, after making reasonable inquiries, cannot obtain sufficient information to decide whether to start a proceeding in the court against the potential defendant for the cause of action; or
- (ii) the following provisions apply:
- (A) the applicant is a party to a proceeding in the court;
- (B) the potential defendant is not a party to the proceeding;
- (C) the applicant, after making reasonable inquiries, cannot obtain sufficient information to decide whether to make a claim for relief in the proceeding against the potential defendant for the cause of action;
- (D) the claim for relief could properly have been made in the proceeding against the potential defendant if the potential defendant were a party; and
- (c) the applicant has reasonable grounds for believing that the potential defendant has or has had possession of a document or thing that can assist in deciding whether to start the proceeding, or make the claim for relief, against the potential defendant; and

(d) inspection of the document or thing by the applicant would help in making the decision.

- (2) If subrule (1) (b) (i) applies, the applicant may apply to the court by originating application for an order under this rule (and, if relevant, an order under rule 715 (Inspection, detention, custody and preservation of property—orders etc)) against the potential defendant.
- (3) If subrule (1) (b) (ii) applies, the applicant may apply to the court for an order under this rule (and, if relevant, an order under rule 715) against the potential defendant.

Note Pt 6.2 (Applications in proceedings) applies to the application.

- (4) The application must be supported by an affidavit stating the facts on which the applicant relies, and stating the kinds of documents or things in relation to which the application is made.

Note 1 For an application mentioned in r (2), div 2.2.3 (Originating applications) contains provisions about the content of originating applications, the filing and service of originating applications, etc.

Note 2 For an application mentioned in r (3), r 6008 (Application in proceeding—filing and service) deals with service of the application and supporting affidavit.

- (5) The court may order the potential defendant to produce the document or thing to the applicant.
- (6) An order under this rule in relation to any document or thing held by a corporation may be addressed to any appropriate officer or former officer of the corporation.

652 Order under div 2.8.6—privilege

(SCR o 34A r 2; NSW r 5.7)

An order under this division does not require the person against whom the order is made to produce any document that, on the ground of privilege, the person could not be required to produce if the applicant for the order—

- (a) had started a proceeding against the person; or
- (b) had made the person a party to the proceeding.

653 Order under div 2.8.6—costs

(FCR o 15A r 11; NSW r 5.8)

- (1) On application for an order under this division, the court may make an order in relation to the costs of the applicant, the person against whom the order is sought or made and any other party to the proceeding.
- (2) The costs for which an order may be made include—
 - (a) payment of conduct money; and
 - (b) payments made for any expense or loss in relation to the proceeding; and
 - (c) the costs of producing any documents for inspection under this division.

Division 2.8.7 Non-party production

660 Notice for non-party production—issue

(SCR o 34B r 2 and r 3; Qld r 242 (1) and (2))

- (1) At the request of a party to a proceeding, the registrar must, unless the court otherwise orders, issue a notice (a *notice for non-party production*) requiring a person who is not a party to the proceeding to produce for inspection a document—

- (a) relating to a matter in issue in the proceeding; and
- (b) in the person's possession; and
- (c) that the person could be required to produce at the trial of the proceeding.

Note 1 See approved form 2.27 (Notice for non-party production) [AF2006-272](#).

Note 2 See div 6.3.3 (Rejecting filed documents) for the registrar's powers to reject documents.

- (2) The applicant may not require production of a document if there is available to the applicant another reasonably simple and inexpensive way of proving the matter sought to be proved by the document.
- (3) For this rule, a matter is *in issue* until it is—
 - (a) admitted or taken to be admitted; or
 - (b) withdrawn, struck out or otherwise disposed of.

661 Notice for non-party production—service

(SCR o 34B r 4; Qld r 243 (1) (e) and (2))

- (1) A notice for non-party production must be served personally.
- (2) A notice for non-party production is taken to be served personally on a medical expert if, at a place where the expert's practice is carried on—
 - (a) it is given to a person apparently engaged (whether as employee or otherwise) in the practice and apparently at least 16 years old; or
 - (b) if a person mentioned in paragraph (a) does not accept the notice—the notice is put down in the person's presence and the person is told in general terms what it is.
- (3) A copy of the notice must be served on each other active party to the proceeding not later than 2 days after the day the notice is served on the respondent.

662 Notice for non-party production—inspection by other parties

(SCR o 34B r 5)

For the purpose of deciding whether to make a claim mentioned in rule 664 (1) (a) (which deals with claims of privilege), any party to a proceeding on whom a copy of a notice for non-party production is served is entitled to inspect a document stated in the notice (other than a document in relation to which any other party makes such a claim) immediately before the document is produced under the notice.

663 Notice for non-party production—application to set aside

(SCR o 34B r 6)

- (1) The respondent to a notice for non-party production in a proceeding or any other party to the proceeding may, not later than 14 days after the day the notice is served on the respondent, apply to the court to have the notice amended or set aside.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (2) On an application under this rule, the court may make the orders it considers appropriate.

664 Notice for non-party production—privilege or objection

(SCR o 34B r 7 (1) and (3); Qld r 245 and r 247 (1), (2) and (4))

- (1) This rule applies if—
 - (a) the respondent to a notice for non-party production in a proceeding or any other party to the proceeding—
 - (i) claims that a document mentioned in the notice is privileged from production; or
 - (ii) otherwise objects to its production; or

- (b) someone else who would be affected by the notice and who has not been served with the notice is given leave to object to the production of a document mentioned in the notice.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave or an order under this rule.

- (2) The person objecting must file an affidavit, and serve a stamped copy on the applicant to the notice, stating—
 - (a) the document that the person objects to being produced; and
 - (b) the reasons the person claims privilege or otherwise objects to the document being produced.
- (3) The reasons for objection may include, but are not limited to, the following:
 - (a) if the person objecting is the respondent—the expense and inconvenience likely to be incurred by the respondent in complying with the notice;
 - (b) the lack of relevance to the proceeding of the document;
 - (c) the lack of particularity with which the document is described;
 - (d) the confidential nature of the document or its contents;
 - (e) the effect disclosure would have on anyone;
 - (f) if the person objecting was not served with the notice—the fact that the person should have been served.
- (4) The respondent need not produce the document and the applicant for the notice, the respondent or the other party may apply to the court for orders in relation to the claim or objection.

- (5) On application under this rule, the court may make the orders it considers appropriate.

665 Notice for non-party production—failure to produce documents

(SCR o 34B r 7 (2) and (3))

- (1) This rule applies if the respondent to a notice for non-party production fails to produce a document stated in the notice in accordance with the notice.
- (2) The applicant for the notice may apply to the court for orders in relation to the failure.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (3) On application under this rule, the court may make the orders it considers appropriate.

666 Notice for non-party production—copying produced documents

(SCR o 34B r 8; Qld r 248)

- (1) The applicant for a notice for non-party production, or the applicant's solicitor, may copy at the applicant's expense any document produced under the notice unless the respondent to the notice objects.
- (2) If the respondent objects the applicant may apply to the court for orders in relation to the objection.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

- (3) On an application under this rule, the court may make the orders it considers appropriate.

667 Notice for non-party production—costs

(SCR o 34B r 9; Qld r 249)

- (1) The applicant for a notice for non-party production must pay any expenses reasonably incurred by the respondent to the notice in complying with the notice.
- (2) If the respondent has not been paid by the applicant for the notice an amount that the respondent considers adequate to cover the expenses reasonably incurred, or expected to be reasonably incurred, in complying with the notice, the respondent may apply to the court to decide the amount that the applicant is to pay the respondent.

Note Pt 6.2 (Applications in proceedings) applies to an application under this rule.

- (3) Before making an application to the court under subrule (2), the respondent must give the applicant for the notice not less than 7 days notice of the intention to make the application.
- (4) A decision of the court on an application under subrule (2) is taken to be a judgment of the court for the amount decided against the applicant for the notice and may be enforced accordingly.
- (5) Subrule (1) does not affect the discretion of the court to order that the costs of and incidental to an application for a notice for non-party production (including any amount paid to the respondent under that subrule) are to be paid by any other party to the proceeding.

Division 2.8.8 Discovery—other provisions

670 Contravention of pt 2.8 order—contempt of court

(SCR o 34 r 22)

- (1) If a person, without reasonable excuse, contravenes an order of the Supreme Court made under this part, the person may be dealt with for contempt of court.

- (2) This rule does not limit any other power of the Supreme Court or Magistrates Court in relation to the contravention.

Note 1 Failure to answer a question or give information in a legal proceeding may be an offence (see Criminal Code, s 722).

Note 2 See also r 671 (Contravention of pt 2.8 order—other action), r 2444 (Enforcement—failure of individual to comply with subpoena etc), r 2445 (Enforcement—failure of corporation to comply with subpoena etc).

671 Contravention of pt 2.8 order—other action

(SCR o 34 r 25)

- (1) If a party, without reasonable excuse, contravenes an order of the court made under this part, the court may—
- (a) if the party is a plaintiff or other claimant—order that all, or a stated part, of the party’s proceeding be struck out, dismissed or stayed; or
 - (b) if the party is a defendant or respondent—order that the party not be allowed to defend all, or a stated part, of the proceeding against the party.
- (2) This rule does not limit any other power of the court in relation to the contravention.

672 Solicitor to notify party of certain matters about pt 2.8

(SCR o 34 r 23)

- (1) This rule applies if a solicitor who acts for a party to a proceeding receives in relation to the proceeding—
- (a) a notice under rule 607 (1) (Notice to disclose discoverable documents) or 620 (1) (Production of documents for inspection); or
 - (b) interrogatories under rule 630 (1) (Service of interrogatories); or

- (c) an order of the court made under this part that imposes an obligation (however expressed) on the party.
- (2) The solicitor must, without unnecessary delay, take all reasonable steps to tell the party fully about the party's obligation in relation to the notice, interrogatories or order.
- (3) If the solicitor, without reasonable excuse, contravenes subrule (2), the solicitor may be dealt with for contempt of court.
- (4) Subrule (3) does not limit any other power of the court in relation to the failure.

673 Improper use of disclosed document

(SCR o 34 r 24)

- (1) This rule applies to someone if the person—
 - (a) receives a document produced to the person under this part or division 2.12.4 (Expert reports) in relation to a proceeding; or
 - (b) receives a document, directly or indirectly, from someone else and the document has, to the person's knowledge, been produced under this part or division 2.12.4 to the other person.
- (2) The person must not, without leave of the court or other lawful authority, make use of the document otherwise than for the proper purposes of the proceeding.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave.
- (3) If the person, without reasonable excuse, contravenes subrule (2), the person may be dealt with for contempt of court.
- (4) The fact that a document has been filed, received in evidence or read out in court does not affect the application of this rule to the document, but the court may take that fact into account in deciding what action (if any) to take about a contravention of subrule (2) in relation to the document.

- (5) Subrule (3) does not limit any other power of the court in relation to the contravention.

674 Failure to disclose document

(SCR o 34 r 26)

- (1) This rule applies if a party fails, without reasonable excuse, to disclose to another party a document that the party is required to disclose under this part, including under an order of the court made under this part.
- (2) The party must not tender the document in evidence against the other party on the hearing of the proceeding, or tender evidence of its contents, without the leave of the court.

Note Pt 6.2 (Applications in proceedings) applies to an application for leave.

- (3) In deciding whether to give leave under subrule (2), the court must act in accordance with the Commonwealth Evidence Act, part 3.11 (Discretions to exclude evidence).
- (4) The party must also pay any costs incurred by another party because of the failure.
- (5) This rule does not limit any other power of the court in relation to the failure.

675 Discovery by electronic means—practice notes

(SCR o 34 r 27)

- (1) A practice note may make provision in relation to the discovery of documents by electronic means.

Note **Practice note** is defined in the dictionary to mean a practice note under r 6907.

- (2) A practice note must be complied with despite anything in these rules.

Part 2.9 Preservation of rights and property

Division 2.9.1 Interpretation—pt 2.9

700 Meaning of *usual undertaking as to damages*—pt 2.9

(NSW r 25.8; Qld r 264 (5); PD 3/99)

In this part:

usual undertaking as to damages, in relation to an order, means an undertaking to pay to someone (whether or not a party to the proceeding) who is adversely affected by the order an amount the court considers is just as compensation for damages the person may suffer because of the order.

Division 2.9.2 Interim preservation, distribution and payment

705 Application—div 2.9.2

(NSW r 25.1)

- (1) This division applies only in relation to the Supreme Court.
- (2) To remove any doubt, division 2.4.9 (People with a legal disability) applies in relation to this division as if an application under this division were a proceeding.

706 Urgent orders before start of proceeding

(NSW r 25.2; Qld r 254)

- (1) This rule applies—
 - (a) in urgent circumstances; and

- (b) if the person applying for an order mentioned in subrule (2) intends to start a proceeding.
- (2) Before the proceeding starts, the court may do any of the following as if the proceeding had started:
- (a) make an order that the court might make in a proceeding on an application for a habeas corpus order;
- (b) make a division 2.9.4 order;
- Note* For the giving of the usual undertaking as to damages, see r 732 (Division 2.9.4 order—damages and undertaking as to damages).
- (c) make an order extending the operation of a caveat, including, for example, under the *Land Titles Act 1925*;
- Note* An example is part of these rules, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).
- (d) make an order appointing, or directing the appointment of, a receiver;
- (e) make an order under rule 715 (Inspection, detention, custody and preservation of property—orders etc) or rule 716 (Disposal of property other than land).
- Note* The court may impose a condition about giving the usual undertaking as to damages (see r 715 (5) and r 716 (2)).
- (3) Subrule (2) does not limit the orders the court may make before a proceeding starts.
- (4) An application for an order mentioned in subrule (2) must be made by originating application.
- Note* Div 2.2.3 (Originating applications) contains provisions about the content of originating applications, the filing and service of originating applications, etc.

- (5) An application for an order mentioned in subrule (2) should be served, but if the court is satisfied there is adequate reason for doing so, it may make the order without the application being served on anyone.
- (6) The person must give an undertaking to the court that the person will file originating process starting the proceeding not later than—
- (a) the end of the time ordered by the court; or
 - (b) if the court does not make an order mentioned in paragraph (a)—2 days after the day the order mentioned in subrule (2) is made.
- (7) In this rule:
habeas corpus order—see rule 3500 (Definitions—pt 3.9).

707 Interim distribution

(NSW r 25.5)

- (1) This rule applies—
- (a) to a proceeding about property; and
 - (b) if the court considers that the property is more than enough to answer the claims on the property for which provision ought to be made in the proceeding.
- (2) The court may make an order allowing any part of the property to be conveyed, transferred or delivered to anyone having an interest in the property.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

708 Interim income

(NSW r 25.6)

- (1) This rule applies—
 - (a) to a proceeding about property; and
 - (b) if the court considers that all or part of the income of the property is not required to answer the claims on the property or its income for which provision ought to be made in the proceeding.
- (2) The court may make an order allowing all or part of the income to be paid to everyone or anyone having an interest in the income for the period set by the court.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

709 Payment before finding out everyone interested

(SCR o 65 r 13; NSW r 25.7; SA r 101.07 (3))

- (1) This rule applies if 2 or more people are entitled to share in a fund.
- (2) The court may make an order allowing immediate payment to any of those people of the person's share without reserving any part of the share to meet the later costs of finding out any other of those people.

Note Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.

Division 2.9.3 Inspection, detention, custody and preservation of property

715 Inspection, detention, custody and preservation of property—orders etc

(SCR o 52 r 3; NSW r 23.8, r 25.3 and r 25.9; Qld r 250; PD 3/99)

- (1) The court may make an order for the inspection, detention, custody or preservation of property if—