



Australian Capital Territory

# **Court Procedures Rules 2006**

**SL2006-29**

(in 3 volumes)

**Volume 1**—rules 1-1920

Volume 2—rules 2000-4780

Volume 3—rules 5000-7011, schedules 1-6, dictionary and endnotes

Each volume has a table of contents for the rules

made under the

**Court Procedures Act 2004**

**Republication No 24**

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## About this republication

### The republished law

This is a republication of the *Court Procedures Rules 2006*, made under the *Court Procedures Act 2004* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 1 January 2011. It also includes any amendment, repeal or expiry affecting the republished law to 1 January 2011.

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

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### Penalties

At the republication date, the value of a penalty unit for an offence against this law is \$110 for an individual and \$550 for a corporation (see *Legislation Act 2001*, s 133).



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

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made under the

**Court Procedures Act 2004**

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## 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* and the *Domestic Violence and Protection Orders Act 2008*.

*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 2008* and also to proceedings in the Coroner's Court (see r 6520 (Application—div 6.8.10)).

- (2) 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)

- (3) Subrule (2) (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

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.

## 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 *Magistrates Court Act 1930*, s 287) 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 dismissed under rule 75 (When proceeding taken to be dismissed); or
  - (c) that the proceeding started by the originating process is reinstated under rule 76 (Reinstating dismissed 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 282 (2) (Person with legal disability—approval of settlement etc)
- 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 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) [AF2007-60](#)
- approved form 2.3 (Statement of claim—motor vehicle death or personal injury) [AF2008-63](#)
- approved form 2.4 (Statement of claim—employment death or personal injury) [AF2008-64](#)
- approved form 2.5 (Statement of claim—death or personal injury other than motor vehicle or employment-related) [AF2008-65](#)
- 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) [AF2008-63](#).

*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) [AF2008-64](#).

*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.

*Note* See also div 2.4.6 (Representation—trustees and personal representatives).

- (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 taken to be dismissed**

(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 dismissed 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 dismissed 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) For subrule (2), the filing in the court of a notice of intention to proceed in relation to a proceeding is taken to be a step in the proceeding.

*Note* See approved form 2.84 (Notice of intention to proceed) [AF2008-3](#).

- (4) A proceeding is taken to be dismissed 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 dismissed 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 dismissed 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 dismissed 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) A proceeding that has been dismissed under rule 75 (2) is reinstated if, before the end of 1 year after the day the proceeding is dismissed, a party to the proceeding files a document in the proceeding.
- (4) The party filing the document must serve a copy of the document on each other active party to the proceeding not later than 3 days after the day the document is filed.

*Note* **Active party**—see the dictionary.

- (5) 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 dismissed.

## **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) [AF2007-61](#)
- 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—
- (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 1* See approved form 2.8 (Notice of intention to respond) [AF2007-61](#).

*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) [AF2007-61](#)
- 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.

- (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.
- (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 bring the start of the proceeding within 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.

- (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 2.4.4A Representation in proceedings for personal injuries

#### 245 Separate representation of defendant for insurer's period on risk

- (1) A defendant in a proceeding in relation to a personal injury claim may be separately represented in the proceeding for each insurer on risk in relation to the claim.
- (2) These rules apply to the defendant as if, for each separate representation, the defendant were a separate party.
- (3) A notice of intention to respond or, if a notice is not filed, a defence, filed in relation to the separate representation must state the risk to which the notice or defence relates.

### 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—territory law otherwise providing**

The *Court Procedures Act 2004*, s 74E provides that in a proceeding in a court in relation to a child or young person, the child or young person may be represented by a lawyer or litigation guardian, 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*, s 7 (3) provides that a person's guardian may be given the power by the ACAT to bring or continue a proceeding for or in the name of the person.
- 2 That Act, s 8 provides that the ACAT 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.

**282 Person with legal disability—approval of settlement etc**

(SCR o 26 r 13; MC(CJ)R s 80 (1) (e))

- (1) In a proceeding (or proposed proceeding) in which there is a claim for an amount (including an amount of damages) by or on behalf of a person with a legal disability, a settlement or compromise may only be entered into, and an amount paid into court may only be accepted, with the court's approval.
- (2) The application for the court's approval must be made by originating application, unless the application is made in a proceeding that has already been started.

*Note 1* Div 2.2.3 (Originating applications) contains provisions about the content of originating applications, the filing and service of originating applications, etc.

*Note 2* Pt 6.2 (Applications in proceedings) applies to an application for the court's approval in a proceeding that has already been started.

- (3) This rule applies whether the person is suing alone or with another party.

## **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) [AF2007-60](#)
- approved form 2.3 (Statement of claim—motor vehicle death or personal injury) [AF2008-63](#)
- approved form 2.4 (Statement of claim—employment death or personal injury) [AF2008-64](#)
- approved form 2.5 (Statement of claim—death or personal injury other than motor vehicle or employment-related) [AF2008-65](#)
- 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 party**

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

- (1) A party to a proceeding, other than a plaintiff, may file a notice claiming a contribution or indemnity (a ***notice claiming contribution or indemnity***) if the party wants to—
  - (a) claim against another party to the proceeding a contribution or indemnity; or
  - (b) claim against another party 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 party 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) [AF2009-283](#).

- (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 party who filed the notice were the defendant; and
- (c) the party against whom the claim in the notice is made 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 party until the party 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 party who is filing the notice claiming contribution or indemnity (the *prescribed period*);
- (ii) if the plaintiff and the defendant, if the defendant is not the party filing the notice, agree 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 party against whom the claim is made; and
  - (b) each other active party.
- (3) If the court gives leave under subrule (1) to the party to file a notice claiming contribution or indemnity, it may give directions about filing and serving the notice.
- (4) A party who files a notice claiming contribution or indemnity must serve stamped copies of the notice on the party against whom the claim is made and each other active party.
- (5) A party served with a notice claiming contribution or indemnity need not file a notice of intention to respond or defence to the notice if the party 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 party is a contribution under the *Civil Law (Wrongs) Act 2002*, section 21 (Right of contribution) against another party, the party 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 that is known to the party.
- (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 1* Pt 6.2 (Applications in proceedings) applies to an application for leave under this rule.
  - Note 2* The registrar may make an order amending the originating process if the parties affected by the order consent to it and the registrar considers it appropriate (see r 1611 (Orders—by consent)).
- (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 1* Pt 6.2 (Applications in proceedings) applies to an application for leave under this rule.

*Note 2* The registrar may make an order amending a pleading if the parties affected by the order consent to it and the registrar considers it appropriate (see r 1611 (Orders—by consent)).

**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 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 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)

- (1) This rule applies to the following costs:
- (a) costs of an amendment under this part;
  - (b) costs thrown away because of the amendment.
- (2) Unless the court otherwise orders, the costs are payable by the party making the amendment.

*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, unless another party to the proceeding asks for the document to be discovered; 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, created after the commencement of 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 in relation to the proceeding, created after the commencement of the proceeding (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.
- (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 discoverable by the party 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 may 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 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 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 interlocutory order or an interlocutory undertaking given to the court, means an undertaking to submit to any order the court considers just for paying compensation, to be assessed by the court or as directed by the court, to someone (whether or not a party to the proceeding) who is adversely affected by—

- (a) the operation of the interlocutory order or undertaking; or
- (b) any continuation of the order or undertaking (whether or not varied).

### **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—

- (a) the property is the subject of a proceeding or is property about which an issue may arise in a proceeding; or
- (b) inspection of the property is necessary for deciding an issue in a proceeding.

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

- (2) Subrule (1) applies whether or not the property is in the ownership, possession, custody or power of a party.
- (3) The court may make an order mentioned in subrule (1) at any stage of a proceeding.
- (4) Also, if the Supreme Court makes an order under division 2.8.6 (Preliminary discovery) in relation to a proceeding, the court may make an order mentioned in subrule (1) before the proceeding starts as if the proceeding had started.
- (5) Without limiting subrule (1), the order may authorise a person to do any of the following:
  - (a) enter a place or do something else to obtain access to the property;
  - (b) take samples of the property;
  - (c) make observations of the property;
  - (d) make a record of the property, including, for example, take photographs of the property;
  - (e) conduct an experiment on or with the property;
  - (f) observe a process;
  - (g) observe or read images or information contained in the property, including, for example, by playing or screening a tape, film or disk;

- (h) photograph or otherwise copy the property or information contained in the property;
  - (i) in a proceeding about a party's right to a fund—pay the fund into court or otherwise secure the fund.
- (6) Without limiting rule 6901 (Orders may be made on conditions), an order under this rule may be made on any of the following conditions:
  - (a) conditions about the payment of the costs of a person who is not a party and who must comply with the order;
  - (b) conditions about giving security for the costs of a person or party who must comply with the order;
  - (c) conditions about giving the usual undertaking as to damages.
- (7) The court must not make an order under this rule unless it is satisfied that sufficient relief is not available under the Commonwealth Evidence Act, section 169 (Failure or refusal to comply with requests).
- (8) A party applying for an order under this rule must, as far as practicable, serve an application in accordance with part 6.2 (Applications in proceedings) on everyone who would be affected by the order if made.

## **716 Disposal of property other than land**

(SCR o 52 r 2; NSW r 25.4 and r 25.9; Qld r 251)

- (1) This rule applies—
  - (a) to a proceeding about property (other than land) or in which an issue may arise about property (other than land); and
  - (b) if it appears to the court that—
    - (i) the property is perishable or is likely to deteriorate or otherwise decrease in value; or

(ii) the property should be sold or otherwise disposed of for another reason.

- (2) At any stage of the proceeding, the court may order the sale or other disposal of all or part of the property.

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

- (3) Without limiting rule 6901 (Orders may be made on conditions), an order may be made on conditions about giving the usual undertaking as to damages.

**717 Order for inspection, detention, custody or preservation affecting non-party**

(Qld r 252)

The court may make an order under rule 715 (Inspection, detention, custody and preservation of property—orders etc) or rule 716 (Disposal of property other than land) binding on, or otherwise affecting, someone who is not a party to the proceeding.

**718 Application for order for inspection, detention, custody or preservation**

(SCR o 52 r 6; Qld r 253)

- (1) An application in a proceeding for an order for the inspection, detention, custody or preservation of property may be made by a party to the proceeding.

*Note* An application may be made before a proceeding starts (see r 706 (Urgent orders before start of proceeding)).

- (2) The applicant must make all reasonable inquiries to find out who has, or claims to have, an interest in the property.

- (3) Unless the court otherwise orders, an order must not be made under rule 715 (Inspection, detention, custody and preservation of property—orders etc) or rule 716 (Disposal of property other than land) unless each person who has an interest in the property is served with the application.

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

**719 Division 2.9.3—other jurisdiction of court not affected**  
(Qld r 255)

This division does not affect the jurisdiction of the court (whether inherent, implied or statutory) to make orders for the inspection, detention, custody or preservation of property that is exercisable apart from this division (whether or not under these rules).

**Division 2.9.4 Injunctions and similar orders**

*Note to div 2.9.4*

The Magistrates Court may make an order under this division only in relation to a proceeding that the court has jurisdiction to hear and decide. For example, the court may not make an order under this division before a proceeding is started (see *Magistrates Court Act 1930*, s 257 (Personal actions at law—amount or value) and s 258 (Power of court to grant relief)).

**Subdivision 2.9.4.1 Injunctions and similar orders—generally**

**725 Meaning of *division 2.9.4 order***

In these rules:

***division 2.9.4 order*** means an injunction, freezing order or search order.

**726 Definitions—div 2.9.4**

(FCR o 25A r 1 and o 25B r 1)

In this division:

*ancillary order*—see rule 742.

*freezing order*—see rule 741.

*search order*—see rule 751.

**727 Division 2.9.4—other jurisdiction of court not affected**

(FCR o 25A r 6 and o 25B r 4)

This division does not affect the jurisdiction of the court (whether inherent, implied or statutory) to make a division 2.9.4 order or ancillary order that is exercisable apart from this division (whether or not under these rules).

**728 Division 2.9.4 order—procedure**

(SCR o 52 r 6; Qld r 258)

- (1) If the division 2.9.4 order is the principal relief claimed, the applicant must apply to the court by originating application and must comply with part 2.2 (Starting civil proceedings), except as far as this division otherwise provides or the court otherwise orders.

*Note* Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule otherwise ordering if the proceeding has been started.

- (2) However, if the division 2.9.4 order is not the principal relief claimed, or the order is sought in a proceeding that has been started or relates to a proceeding that has ended, the applicant must comply with part 6.2 (Applications in proceedings), except as far as this division otherwise provides or the court otherwise orders.
- (3) For the Supreme Court, this rule applies whether the application is made—
  - (a) before a proceeding is started; or

- (b) in a pending proceeding; or
- (c) after a proceeding has ended (including after judgment).

**729 Division 2.9.4 order without notice etc**

(SCR o 52 r 6; FCR o 25A r 2 (1) and r 3 and o 25B r 2; Qld r 259)

- (1) An application for a division 2.9.4 order or ancillary order 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.
- (2) Without limiting the court's discretion in the exercise of its equitable jurisdiction, on an application for a division 2.9.4 order, the court may, if it considers it appropriate—
  - (a) make the order for a limited period stated in the order; or
  - (b) make the order until the trial of the proceeding; or
  - (c) make an order for a limited time restraining a person from leaving Australia; or
  - (d) make another order, including, for example, an ancillary order.

*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* **Ancillary order** is defined in r 742.

*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).

- (3) Also, an application for an ancillary order may be made separately from the application for a freezing order.

*Note* Pt 6.2 (Applications in proceedings) applies to an application for an ancillary order made separately from the application for a freezing order.



**730 Division 2.9.4 order without trial**

(Qld r 262)

- (1) A plaintiff claiming relief by way of a division 2.9.4 order, with or without a declaration or other relief, may apply to the court for a judgment.
- (2) The plaintiff may make the application at any time after—
  - (a) the plaintiff is served with a notice of intention to respond or defence; or
  - (b) the end of the time set by rule 102 (Notice of intention to respond or defence—filing and service) for filing a notice of intention to respond or defence.
- (3) On the hearing of an application under subrule (1), the court may do 1 or more of the following:
  - (a) give judgment in relation to the division 2.9.4 order and declaration (if any) and, if other relief is claimed, give the directions it considers appropriate about how to dispose of the rest of the proceeding;
  - (b) make a division 2.9.4 order until the hearing or until a stated day;
  - (c) order the parties to file and serve pleadings;
  - (d) direct a trial of the proceeding.

**731 Division 2.9.4 order—expedited trial**

(Qld r 263)

On an application for a division 2.9.4 order, the court may order an expedited trial under rule 1311 (Expedited trial).

**732 Division 2.9.4 order—damages and undertaking as to damages**

(Qld r 264)

- (1) Unless there is a good reason, a division 2.9.4 order or ancillary order made until the trial or hearing or until a stated day must not be made without the usual undertaking as to damages having been given.
- (2) The usual undertaking as to damages for a division 2.9.4 order or ancillary order applies during an extension of the period of the order.
- (3) If the usual undertaking as to damages is contravened, the person in whose favour the undertaking is given may apply to the court for an order for assessment of damages.

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

- (4) If the court finds damages are sustained because of a division 2.9.4 order or ancillary order, it may, at trial or on application by a party, assess damages or give the directions it considers necessary for the assessment of damages.

**733 Division 2.9.4 order—other undertakings and security to perform undertaking**

(Qld r 265)

- (1) The court may require an undertaking from a person approved by the court other than the person applying for the division 2.9.4 order or ancillary order.
- (2) The court may require a person who gives an undertaking as to damages under rule 732 (Division 2.9.4 order—damages and undertaking as to damages) to make a payment into court or to give other security, including to the registrar's satisfaction, for the performance of the undertaking.

- (3) In deciding whether to make a requirement under this rule, the court may have regard to any of the matters to which it could have regard in deciding whether to make an order for security for costs and whether it is otherwise reasonable in all the circumstances of the matter to impose the requirement.

*Note* See r 1902 (Security for costs—discretionary factors).

### **Subdivision 2.9.4.2 Freezing orders**

#### **740 Definitions—sdiv 2.9.4.2**

(FCR o 25A r 1)

In this subdivision:

***another court*** means a court outside Australia or a court in Australia other than the court.

***applicant*** means a person who applies for a freezing order or ancillary order.

***respondent*** means a person against whom a freezing order or ancillary order is sought or made.

#### **741 Freezing orders—general**

(FCR o 25A r 2 and r 4)

- (1) The Supreme Court may make an order (a ***freezing order***) for the purpose of preventing the frustration or inhibition of the court's process by ensuring that an order or prospective order of the court is not made valueless or diminished in value.
- (2) The Magistrates Court may make an order (also called a ***freezing order***) in a proceeding for the purpose of preventing the frustration or inhibition of the court's process by ensuring that an order or prospective order of the court in relation to the proceeding is not made valueless or diminished in value.

- (3) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.
- (4) For the Supreme Court, a freezing order or ancillary order may be made whether or not the respondent is a party to an existing proceeding.
- (5) For the Magistrates Court, a freezing order or ancillary order may be made in a proceeding whether or not the respondent is a party to the proceeding.
- (6) The affidavits supporting an application for a freezing order or ancillary order must include the following information:
  - (a) information about—
    - (i) the order mentioned in rule 743 (1) (a) (Freezing orders—order against enforcement debtor or prospective enforcement debtor or third party); or
    - (ii) if no order mentioned in rule 743 (1) (a) has been obtained—the following information about the cause of action mentioned in rule 743 (1) (b) or (c):
      - (A) the basis of the claim for principal relief;
      - (B) the amount of the claim;
      - (C) if the application is made without being served on the respondent—any possible defence or other response to the claim;
  - (b) the nature and value of the respondent's assets, as far as they are known to the applicant, in and outside Australia;
  - (c) why the applicant believes—
    - (i) the respondent's assets may be removed from Australia; or
    - (ii) the dealing with the assets should be restrained by order;

- (d) why the applicant believes the order mentioned in rule 743 (1) (a) may go unsatisfied if the removal or dealing mentioned in paragraph (c) happens;
  - (e) the identity of anyone, other than the respondent, who the applicant knows may be affected by the order, and how the person may be affected.
- (7) The court may amend or set aside a freezing order or ancillary order.

#### **742 Ancillary orders**

(FCR o 25A r 3)

- (1) The court may make an order (an *ancillary order*) ancillary to a freezing order or prospective freezing order as the court considers appropriate.
- (2) Without limiting subrule (1), an ancillary order may be made for either or both of the following purposes:
  - (a) finding out information about assets relevant to the freezing order or prospective freezing order;
  - (b) deciding whether the freezing order should be made.
- (3) On an application mentioned in rule 729 (3) (Division 2.9.4 order without notice etc), the court may make an ancillary order if it considers it appropriate.

#### **743 Freezing orders—order against enforcement debtor or prospective enforcement debtor or third party**

(FCR o 25A r 5)

- (1) This rule applies if—
  - (a) an order has been given in favour of an applicant by—
    - (i) the court; or

- (ii) for an order to which subrule (2) applies—another court;  
or

*Note* **Order** is defined in the dictionary to include judgment (see also def *made*).

- (b) for the Supreme Court—an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in—

- (i) the court; or

- (ii) for a cause of action to which subrule (3) applies—another court; or

- (c) for the Magistrates Court—an applicant has started a proceeding in the court and the applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in—

- (i) the court; or

- (ii) for a cause of action to which subrule (3) applies—another court.

- (2) This subrule applies to an order if there is a sufficient prospect that the order will be registered in or enforced by the court.

- (3) This subrule applies to a cause of action if there is a sufficient prospect that—

- (a) the other court will make an order in favour of the applicant;  
and

- (b) the order will be registered in or enforced by the court.

- (4) The court may make a freezing order or ancillary order (or both) against an enforcement debtor or prospective enforcement debtor if satisfied, having regard to all the circumstances, that there is a danger that an order or prospective order will be completely or partly unsatisfied because any of the following might happen:
- (a) the enforcement debtor, prospective enforcement debtor or someone else absconds;
  - (b) the assets of the enforcement debtor, prospective enforcement debtor or someone else are—
    - (i) removed from Australia or from somewhere in or outside Australia; or
    - (ii) disposed of, dealt with or diminished in value.
- (5) The court may make a freezing order or ancillary order (or both) against someone other than an enforcement debtor or prospective enforcement debtor (a *third party*) if satisfied, having regard to all the circumstances, that—
- (a) there is a danger that an order or prospective order will be completely or partly unsatisfied because—
    - (i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the enforcement debtor or prospective enforcement debtor; or
    - (ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the enforcement debtor or prospective enforcement debtor; or
  - (b) a process in the court, is or may ultimately be, available to the applicant as a result of an order or prospective order, and, under the process, the third party may be obliged to disgorge assets or contribute toward satisfying the order or prospective order.

- (6) This rule does not affect the court's power to make a freezing order or ancillary order if the court considers it is in the interests of justice to do so.

**744 Freezing orders—service outside Australia of application for freezing order or ancillary order**

(FCR o 25A r 7)

An application for a freezing order or ancillary order may be served on someone who is outside Australia without the court's leave (whether or not the person is domiciled or resident in Australia) if any of the assets to which the order relates are in the ACT.

*Note* For cases in which an originating process may be served without the court's leave, see r 6501 (Service outside Australia—service of originating process without leave).

**745 Freezing orders—costs**

(FCR o 25A r 8)

- (1) The court may make any order about costs that it considers appropriate in relation to a freezing order or ancillary order.
- (2) Without limiting subrule (1), an order about costs includes an order about the costs of anyone affected by a freezing order or ancillary order.

**Subdivision 2.9.4.3 Search orders**

**750 Definitions—sdiv 2.9.4.3**

(FCR o 25B r 1)

In this subdivision:

*applicant* means a person who applies for a search order.

*described* includes described generally whether by reference to a class or otherwise.

*premises* includes a vehicle or vessel of any kind.



*respondent* means a person against whom a search order is sought or made.

## **751 Search orders—general**

(FCR o 25B r 2)

- (1) The Supreme Court may make an order (a *search order*) in any proceeding or in anticipation of any proceeding in the court for the purpose of securing or preserving evidence and requiring the respondent to allow people to enter premises for the purpose of securing the preservation of evidence that is or may be relevant to an issue in the proceeding or anticipated proceeding.
- (2) The Magistrates Court may make an order (also called a *search order*) in any proceeding in the court for the purpose of securing or preserving evidence and requiring the respondent to allow people to enter premises for the purpose of securing the preservation of evidence that is or may be relevant to an issue in the proceeding.
- (3) The affidavits supporting an application for a search order must include the following information:
  - (a) a description of the things, or the categories of things, in relation to which the order is sought;
  - (b) the address of the premises in relation to which the order is sought and whether they are private or business premises;
  - (c) why the order is sought, including why the applicant believes that the things to be searched for will probably be destroyed or otherwise made unavailable for the purpose of evidence before the court unless the order is made;
  - (d) the prejudice, loss or damage likely to be suffered by the applicant if the order is not made;
  - (e) the name, address, firm and commercial litigation experience of an independent solicitor, who agrees to being appointed to

serve the order, supervise its enforcement and do the other things the court directs;

- (f) if the premises to be searched are or include residential premises—whether or not the applicant believes that the only occupants of the premises are likely to be young children or an unaccompanied female, or both;
  - (g) if the application is made in the Supreme Court and the applicant claims that the applicant has an existing or prospective cause of action that is justiciable in Australia—
    - (i) the basis of the claim for principal relief; and
    - (ii) if the application is made without being served on the respondent—any possible defence or other response to the claim;
  - (h) if the application is made in the Magistrates Court, the applicant has started a proceeding in the court and the applicant claims that the applicant has a cause of action that is justiciable in Australia—
    - (i) the basis of the claim for principal relief; and
    - (ii) if the application is made without being served on the respondent—any possible defence or other response to the claim.
- (4) The court may amend or set aside the search order.

## **752 Search orders—requirements for making order**

(FCR o 25B r 3)

- (1) The Supreme Court may make a search order if satisfied that—
- (a) an applicant seeking the order has a strong prima facie case on an accrued cause of action; and
  - (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and

- (c) there is sufficient evidence in relation to a respondent that—
  - (i) the respondent possesses important evidentiary material;  
and
  - (ii) there is a real possibility that the respondent might destroy the material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.
- (2) The Magistrates Court may make a search order in relation to a proceeding if satisfied that—
  - (a) an applicant seeking the order has a strong prima facie case on an accrued cause of action in the proceeding; and
  - (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and
  - (c) there is sufficient evidence in relation to a respondent that—
    - (i) the respondent possesses important evidentiary material;  
and
    - (ii) there is a real possibility that the respondent might destroy the material or cause it to be unavailable for use in evidence in the proceeding.

## **753 Search orders—terms of order**

(FCR o 25B r 5)

- (1) A search order may direct everyone who is named or described in the order—
  - (a) to allow, or arrange to allow, the other people named or described in the order—
    - (i) to enter premises stated in the order; and
    - (ii) to take any steps that are in accordance with the terms of the order; and

- (b) to provide, or arrange to provide, the other people named or described in the order with any information, thing or service described in the order; and
  - (c) to allow the other people named or described in the order to take and keep in their custody anything described in the order; and
  - (d) not to disclose any information about the order, for up to 3 days after the day the order is served, except for obtaining legal advice or legal representation; and
  - (e) to do or not to do any act as the court considers appropriate.
- (2) Without limiting subrule (1) (a) (ii), the steps that may be taken in relation to a thing stated in a search order include—
- (a) searching for, inspecting or removing the thing; and
  - (b) making or obtaining a record of the thing or any information it may contain.
- (3) A search order may contain other provisions that the court considers appropriate.
- (4) In this rule:
- record** includes a copy, photograph, film or sample.

## **754 Search orders—independent solicitors**

(FCR o 25B r 6)

- (1) If the court makes a search order, the court must appoint 1 or more solicitors (an **independent solicitor**), each of whom is independent of the applicant's solicitors, to supervise the execution of the order, and to do the other things in relation to the order that the court considers appropriate.
- (2) The court may appoint an independent solicitor to supervise execution of the order at any 1 or more premises, and a different independent solicitor or solicitors to supervise execution of the order

at other premises, with each independent solicitor having power to do the other things in relation to the order that the court considers appropriate.

**755 Search orders—costs**

(FCR o 25B r 7)

- (1) The court may make any order about costs that it considers appropriate in relation to a search order.
- (2) Without limiting subrule (1), an order about costs includes an order about the costs of anyone affected by a search order.

**Division 2.9.5 Receivers**

**765 Application—div 2.9.5**

(NSW r 26.1; Qld r 266)

- (1) This division applies only in relation to the appointment of a receiver, and a receiver appointed, in a proceeding in the Supreme Court.
- (2) However, this division does not apply to situations controlled or regulated by the Corporations Act.

**766 Receiver—agreement to act as etc**

(Qld r 267)

- (1) A person must not be appointed as a receiver unless the person's written agreement to act as receiver is filed in the court.
- (2) The court may set aside a receiver's appointment at any time for an appropriate reason and make the orders it considers appropriate about the receivership and the receiver's remuneration.

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

**767 Receiver—application for order appointing etc**

(SCR o 52 r 17)

An application for an order appointing, or directing the appointment of, a receiver 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.

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

*Note 2* An application may be made before a proceeding starts (see r 706 (Urgent orders before start of proceeding)).

**768 Receiver—address for service**

(SCR o 52 r 18; NSW r 26.2)

- (1) Not later than 7 days after the day a receiver is appointed, the receiver must file a notice that states the receiver's address for service.

- (2) In this rule:

*address for service* means—

- (a) if the receiver has a home or place of business in the ACT—the receiver's home or business address; or  
(b) in any other case—the address of a place in the ACT.

**769 Receiver—security**

(SCR o 52 r 19; NSW r 26.3; Qld r 268)

- (1) If the court appoints a receiver, the receiver must file a security, unless the court otherwise orders.

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

- (2) The receiver's appointment does not start until the receiver files the security.

- (3) If the court directs the appointment of a receiver, a person must not be appointed under the direction until the person has filed a security, unless the court otherwise orders.
- (4) A security must—
  - (a) be approved by the court; and
  - (b) state that the receiver will account for what is received as receiver, and will deal with what is received as the court directs.

*Note* See approved form 2.28 (Receiver's security) [AF2006-273](#).

- (5) The court may, at any time, order the amendment or setting aside of a security filed under this rule.

#### **770 Receiver—remuneration**

(SCR o 52 r 21; NSW r 26.4; Qld r 269)

A receiver is allowed the remuneration (if any) the court decides.

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

#### **771 Receiver—accounts**

(SCR o 52 r 22; NSW r 26.5; Qld r 270)

- (1) A receiver must submit accounts to the parties at the intervals or on the dates the court directs.

*Note* Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.
- (2) On giving reasonable notice to the receiver, a party is entitled to inspect, either personally or by an agent, the documents and things on which the accounts are based.
- (3) If a party objects to the receiver's accounts, the party may serve notice on the receiver—
  - (a) stating the items objected to; and

- (b) requiring the receiver to file a copy of the accounts within a stated period of not less than 14 days after the day the notice is served.
- (4) The party must file a copy of the notice served.
- (5) If a notice is served on the receiver under subrule (3), the receiver must file a copy of the accounts, verified by affidavit, within the time required by the notice.

*Note* See approved form 2.29 (Receiver's affidavit and account) [AF2006-274](#).

- (6) The court may examine the items objected to.
- (7) The court must, by order, declare the result of the examination and may make an order for the costs and expenses of a party or the receiver.

## **772 Receiver—default**

(SCR o 52 r 23; NSW r 26.6; Qld r 271)

- (1) The court may make any orders it considers appropriate if a receiver does not, in accordance with these rules or an order of the court—
  - (a) file an account or other document that is required to be filed; or
  - (b) do something that is required to be done.

### **Examples of orders**

- 1 discharge the receiver
- 2 appoint another receiver
- 3 make an order about costs
- 4 order the repayment of remuneration already paid to the receiver

*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 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 a receiver fails to comply with a requirement of these rules or an order of the court to pay into court an amount shown by the



receiver's accounts to be owed by the receiver, the court may direct that the receiver pay interest on the amount at the following rate until the amount is paid into court:

- (a) the rate of interest applying, from time to time, under schedule 2, part 2.2 (Interest after judgment);
  - (b) if the court considers that another rate is appropriate—that rate.
- (3) This rule does not limit the court's powers to enforce its orders or to punish contempt of court.

**773 Receiver—powers**

(SCR o 52 r 20; NSW r 26.7; Qld r 272)

- (1) A receiver has the powers of a receiver and manager, unless the court otherwise orders.

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

- (2) The court may authorise a receiver to do anything a party might do.
- (3) The court may authorise the receiver to do the thing—
- (a) either in the receiver's name or the party's name; and
  - (b) either generally or in a particular case; and
  - (c) whether or not the party is a person with a legal disability.
- (4) If the party is a person with a legal disability, the authorisation has effect as if the party were not a person with a legal disability.
- (5) This rule does not limit the court's powers to authorise a receiver to do anything.

**774 Receiver—duty in relation to property**

(SCA s 73)

- (1) This rule applies if a receiver is in possession of property.

- (2) The receiver must manage and deal with the property according to the requirements of the laws of the State or Territory where the property is situated, in the same way in which the owner or possessor would be bound to do if in possession.

**775 Receiver—liability**

(SCA s 74)

A receiver of any property may, without the court's leave, be sued in relation to an act done or omission made in exercising any of the receiver's powers in relation to the property.

**776 Receiver—death of**

(SCR o 52 r 24; NSW r 26.8; Qld r 273)

- (1) If a receiver dies, the court may, on the application of a party, make any orders it considers appropriate about—
- (a) the filing and passing of accounts by—
    - (i) the receiver's personal representative; or
    - (ii) anyone else who has, or has had, possession or control of property the subject of the receivership; and
  - (b) the payment into court of any amount shown to be owing; and
  - (c) the delivery of property the subject of the receivership.

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

- (2) The court must not make an order under subrule (1) unless the application for the order has been served on the receiver's personal representative or anyone else affected by the order.

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## **Division 2.9.6      Sales of land by court order**

### **780      Meaning of *land*—div 2.9.6**

(Qld r 275)

In this division:

*land* includes an interest in land.

### **781      Application—div 2.9.6**

(NSW r 27.1; Qld r 276)

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

### **782      Sale of land—order**

(SCR 53 r 1; NSW r 27.1; Qld r 277)

The court may order—

- (a) that all or part of the land be sold before the proceeding is decided; and
- (b) that any party in receipt of the rents or profits of all or part of the land, or otherwise in possession of all or part of the land, give possession to the person that the court directs.

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

### **783      Sale of land—conduct of sale**

(SCR o 53 r 2 and rr 4-6; NSW r 27.2; Qld r 278)

- (1) The court may appoint a party or someone else to have the conduct of the sale if the court—
  - (a) makes an order under rule 782 that land be sold; or
  - (b) by a judgment, orders the sale of land.

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

- (2) The court may direct a party to join in the sale and conveyance or transfer or in another matter relating to the sale.
- (3) The court may permit the person having the conduct of the sale to sell the land in a way the person considers appropriate or give directions about conducting the sale.
- (4) Directions given under subrule (3) may include the following:
  - (a) stating the kind of sale, including, for example, sale by contract conditional on the court's approval, private treaty or tender;  
*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).
  - (b) setting a minimum or reserve price;
  - (c) requiring payment of the purchase money into court or to a trustee or someone else;
  - (d) for settling the particulars and conditions of sale;
  - (e) for obtaining evidence of value;
  - (f) stating the remuneration to be allowed to a real estate agent or someone else.

**784 Sale of land—certificate of sale result**

(SCR o 53 r 7; NSW r 27.3; Qld r 279)

- (1) Unless the court otherwise orders, the result of a sale of land by an order of the court must be certified—
  - (a) for a public auction—by the real estate agent who conducted the sale; or
  - (b) otherwise—by the person having the conduct of the sale or by the person's solicitor.

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

- (2) The court may require that the certificate be verified by affidavit of the person certifying.
- (3) The person required to give the certificate under subrule (1) must file the certificate and affidavit (if any) not later than 7 days after the day of settlement of the sale.

## **785 Mortgage, exchange or partition**

(SCR o 53 r 2 (1); NSW r 27.4)

If the court makes an order for the mortgage, exchange or partition of land, rule 783 (Sale of land—conduct of sale) and rule 784 (Sale of land—certificate of sale result) apply to the mortgage, exchange or partition, with necessary changes, in the same way as they apply to the sale of land under this division.

## Part 2.10 Payment into court

### 1000 Payment into court—amount

(SCR o 26 r 1; MC(CJ)R s 71 and s 72 (1), s 73 and s 74)

- (1) In a proceeding (other than a proceeding brought under the *Civil Law (Wrongs) Act 2002*, part 3.1 (Wrongful act or omission causing death)), a defendant may, when filing, or at any time after filing, a notice of intention to respond or defence—
  - (a) pay an amount into court in satisfaction of—
    - (i) the claim for relief; or
    - (ii) if there are 2 or more causes of action included in a single proceeding—1 or more of the claims for relief; or
  - (b) in a proceeding for defamation—pay an amount into court by way of compensation, satisfaction and amends.

*Note* If a defendant pleads a defence of tender before the proceeding, the defendant must pay the amount tendered into court before, or at the time, the defence is filed (see r 455 (Pleadings—defence of tender)).
- (2) If there are 2 or more causes of action included in a single proceeding, and an amount is paid into court in satisfaction of 1 or more of the claims for relief, the notice must state—
  - (a) the claim or each claim for which payment is made; and
  - (b) the part of the amount paid in satisfaction of each claim.
- (3) If a proceeding is brought under the *Civil Law (Wrongs) Act 2002*, part 3.1, a defendant may, when filing, or at any time after filing, a notice of intention to respond or defence, pay an amount into court as compensation for the benefit of the people for whose benefit the proceeding is brought, and who are entitled to compensation under the part, without stating the shares into which the amount is to be divided by the court.

- (4) If the defendant makes a payment into court under this part, the defendant must serve a notice of payment into court—
- (a) on the plaintiff; and
  - (b) if there are 2 or more defendants—on each of the other defendants.

*Note* See approved form 2.30 (Notice of payment into court) [AF2006-275](#).

- (5) The notice must state whether liability is admitted or denied.
- (6) A defendant who has paid an amount into court in accordance with this rule may make further payments increasing the amount without the court's leave.

#### **1001 Payment into court—costs**

- (1) If a party in a proceeding is liable to pay the costs of another party in the proceeding, the party may, at any time after the party becomes liable to pay the costs, pay an amount into court in satisfaction of the costs.
- (2) This part applies, with necessary changes, in relation to costs as if—
- (a) the party entitled to the costs is a plaintiff; and
  - (b) the party liable to pay the costs is a defendant; and
  - (c) the party's entitlement to costs is a claim for relief.

#### **1002 Payment into court—bond**

(SCR o 26 r 2; MC(CJ)R s 71 and s 85 (1) to (5))

- (1) When paying an amount into court under rule 1000 or rule 1001, a party may lodge a bond for the amount with the registrar instead of actually paying the amount into court.
- (2) The bond must be given by—

- (a) any of the following people (an **approved person**):
- (i) an authorised insurer, or the DI fund manager, under the *Road Transport (General) Act 1999*;
  - (ii) an approved insurer, or the nominal insurer, under the *Workers Compensation Act 1951*;
  - (iii) a corporation approved by the registrar;
  - (iv) the Territory, the Commonwealth, a State or another Territory; or
- (b) a person who is authorised, in writing, to give the bond for an approved person (an **authorised person**).

*Note* See

- approved form 2.31 (Bond for payment into court) [AF2006-276](#)
- approved form 2.32 (Authority to give bond for payment into court) [AF2006-277](#).

- (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.
- (5) An authority given by or for an approved person that has been filed binds the approved person until notice of its revocation is filed.
- (6) If a bond is lodged by a party in accordance with this rule, this part (including rule 1000 (4) and (5)) applies as if the party had paid the amount of the bond into court under rule 1000.



**1003 Payment into court—security**

(SCR o 26 r 3)

- (1) When paying an amount into court under rule 1000 (Payment into court—amount) or rule 1001 (Payment into court—costs), a party may lodge a security for payment of the amount with the registrar instead of actually paying the amount into court or lodging a bond under rule 1002 (Payment into court—bond).
- (2) The security may be accepted by the registrar.
- (3) If the registrar accepts the security, this part (including rule 1000 (4) and (5)) applies as if the party had paid the amount of the security into court under rule 1000.

**1004 Payment into court—interest up to date of payment**

(SCR o 26 r 4; MC(CJ)R s 72 (2))

For this part, the plaintiff's claim for relief or cause of action for a debt, liquidated demand or damages is taken to include a claim or cause of action for the interest that might be included in the judgment under rule 1616 (Interest up to judgment) or otherwise if judgment were given at the date of the payment into court.

**1005 Payment into court—defendant who has counterclaimed**

(SCR o 26 r 5; MC(CJ)R s 75)

- (1) This rule applies if—
  - (a) a defendant makes by counterclaim a claim for relief (the *defendant's claim*), or 2 or more claims (the *defendant's claims*), against the plaintiff for a debt, liquidated demand or damages; and
  - (b) the defendant pays an amount into court under rule 1000; and
  - (c) in making the payment the defendant has taken into account and intends to dispose of—
    - (i) the defendant's claim; or

- (ii) if there are 2 or more claims made by the counterclaim—  
1 or more of the defendant's claims.
- (2) The notice of payment into court must state the relevant matters mentioned in subrule (1) (c).

**1006 Payment into court—acceptance by plaintiff**

(SCR o 26 r 6; MC(CJ)R s 77 (1) and (2), s 78 (1) (a))

- (1) This rule does not apply in relation to a proceeding in which there is a claim for an amount (including an amount of damages) by or on behalf of a person with a legal disability.

*Note* See r 1015 (Payment into court—amount recovered by person with legal disability).

- (2) If an amount is paid into court under this part by a respondent, the applicant may accept the amount in satisfaction of—
  - (a) the claim for relief; or
  - (b) if there are 2 or more causes of action included in a single action—the claim or each claim for which the payment is made.
- (3) The plaintiff may accept the amount by serving a notice of acceptance on the defendant (or, if the payment was made by 1 of 2 or more defendants, each defendant)—
  - (a) not later than 14 days after the day notice of payment into court is served on the plaintiff; or
  - (b) if 2 or more payments into court have been made—not later than 14 days after the day notice of the last payment into court is served on the plaintiff.

*Note* See approved form 2.33 (Notice of acceptance of amount paid into Court) [AF2006-278](#).

- (4) If the defendant paid the amount into court by bond or other security, the defendant must pay into court the amount of the bond

or security not later than 14 days after the day the notice of acceptance is served on the defendant.

- (5) If the defendant does not comply with subrule (4), the defendant is not entitled to any advantage under the rules for the payment into court, and the plaintiff may—
- (a) withdraw the plaintiff's acceptance by notice; or
  - (b) ask the registrar to assign the bond or security to the plaintiff so the plaintiff can enforce it.
- (6) If the amount was paid into court under rule 1000 (3), the amount may be paid out only—
- (a) if a beneficiary is not a person with a legal disability—with the agreement of the parties to the proceeding; or
  - (b) under an order of the court.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for an order or leave under this rule.
- (7) If the amount was paid into court by 1 of 2 or more defendants, the amount may be paid out only—
- (a) with the agreement of the parties to the proceeding; or
  - (b) under an order of the court dealing with all of the costs of the proceeding or cause of action.
- (8) Unless the court otherwise orders, payment must be made to—
- (a) the plaintiff; or
  - (b) if the plaintiff has given written authority for payment to be made to the plaintiff's solicitor—the plaintiff's solicitor.
- (9) If payment out of court is made in accordance with this rule, the claim for relief or stated claim is permanently stayed.

- (10) If the proceeding is for defamation, and the plaintiff accepts the amount paid into court, the plaintiff may apply to the court for leave to make a statement in open court.
- (11) On application under subrule (10), the court may give leave for the plaintiff to make a statement in open court in the terms approved by the court.
- (12) This rule does not apply to a proceeding or cause of action to which a defence of tender before proceeding is pleaded.
- (13) In this rule:

*beneficiary* means a person for whose benefit a proceeding under the *Civil Law (Wrongs) Act 2002*, part 3.1 (Wrongful act or omission causing death) is brought, and who is entitled to compensation under the part.

## **1007 Payment into court—costs on acceptance by plaintiff**

(SCR o 26 r 7; MC(CJ)R s 83 (2))

- (1) This rule applies if—
  - (a) for a proceeding in which there is only 1 cause of action—the plaintiff accepts in accordance with rule 1006 an amount paid into court in satisfaction of the claim for relief; or
  - (b) for a proceeding in which there are 2 or more causes of action included in a single proceeding—the plaintiff accepts in accordance with rule 1006 an amount paid into court in satisfaction of all the claims for relief or stated claims and states in the notice of acceptance that the other claims are abandoned.
- (2) The plaintiff may file a bill of costs for assessment not earlier than 7 days after the day the amount is paid out of court.
- (3) The costs claimed in the bill of costs may include—
  - (a) the costs incurred to the day of payment into court; and

- (b) the costs reasonably incurred in accepting the payment; and
- (c) the costs incurred in preparing the bill of costs.

**1008 Payment into court—effect on counterclaim of acceptance by plaintiff**

(SCR o 26 r 8; MC(CJ)R s 78 (1) (d))

- (1) This rule applies if an amount is paid into court by a defendant who—
  - (a) made a counterclaim; and
  - (b) stated in the notice of payment into court that in making the payment the defendant had taken into account and intended to dispose of all the claims for relief, or stated claims, for which the defendant counterclaimed.
- (2) If the plaintiff accepts the amount, the claims for relief, or stated claims, are permanently stayed against the plaintiff.

**1009 Payment into court—payment out of remaining amount**

(SCR o 26 r 9)

- (1) If an amount paid into court is not taken out in accordance with rule 1006 (Payment into court—acceptance by plaintiff), the amount may be paid out only—
  - (a) with the agreement of all parties to the proceeding; or
  - (b) under an order of the court.
- (2) The order may be made at any time before, during or after the trial of the proceeding.

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

**1010 Payment into court—defendant to counterclaim**

(SCR o 26 r 10)

The plaintiff or other person made defendant to a counterclaim may pay an amount into court in accordance with this part, and this part applies with any necessary changes.

**1011 Payment into court—nondisclosure**

(SCR o 26 r 11; MC(CJ)R s 82)

- (1) This rule does not apply in a proceeding—
  - (a) to which a defence of tender before proceeding is pleaded; or
  - (b) to which rule 1012 (Payment into court—in discharge of lien) applies.
- (2) Until all issues relating to liability (including, for example, the amount of debt or damages) have been decided in the proceeding, the pleadings must not include a statement that an amount has been paid into court under this part.

*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) Until judgment has been given, the judicial officer at the trial of the proceeding must not be told about any payment into court.
- (4) When exercising a discretion about costs of the proceeding (other than an application for which a separate costs order is to be made), the judicial officer must take into account—
  - (a) the fact that an amount has been paid into court; and
  - (b) the date the payment was made; and
  - (c) the amount of the payment.
- (5) Subrule (4) does not limit the matters that the judicial officer may take into account.

**1012 Payment into court—in discharge of lien**

(SCR o 52 r 8)

- (1) This rule applies—
  - (a) if a plaintiff (a *recovering party*) brings a proceeding to recover, or a defendant (also a *recovering party*) in a counterclaim seeks to recover, property other than land; and
  - (b) the party (the *holding party*) from whom the recovery is sought does not dispute the recovering party's right to the property, but claims to be entitled to retain the property because of a lien or as other security for an amount.
- (2) The court may order that the recovering party pay the amount, and an amount (if any) for interest or costs, into court.

*Note* Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.
- (3) The court may make the order at any time after the claim mentioned in subrule (1) (b) is made—
  - (a) in the pleadings; or
  - (b) if there are no pleadings—by affidavit or otherwise to the court's satisfaction.
- (4) On the payment into court being made, the holding party must give the property to the recovering party.

**1013 Payment into court—payment of amount paid into court under order**

(SCR o 26 r 12)

An amount paid into court under an order of the court may be paid out of court only under an order of the court.

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

*Note 2* An order of the court includes a consent order (see r 1611 (Orders—by consent)).

**1014 Payment into court—amount paid into court under order under div 2.11.5**

- (1) If an amount is paid into court by a defendant under an order under division 2.11.5 (Summary judgment), the defendant may, by the defendant's pleading or notice, appropriate all or part of the amount, and any additional payment if necessary, to all or a stated part of the plaintiff's claim.
- (2) The amount appropriated is taken to be an amount paid into court under this part.

**1015 Payment into court—amount recovered by person with legal disability**

(SCR o 26 r 14)

- (1) An amount (including an amount of damages) recovered, awarded or agreed to be paid in a proceeding in relation to the claim for relief of a person with a legal disability must be paid into court.
- (2) The amount may be paid out of court only under an order of the court.

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

- (3) In this rule:

*order of the court* does not include a consent order.

**1017 Person with legal disability—orders about recovered amounts etc**

(SCR o 26 r 15; MC(CJ)R s 97)

- (1) The court may make an order directing how an amount recovered, awarded or agreed to be paid in a proceeding in relation to the claim



for relief of a person with a legal disability (the ***claimant***) must be dealt with.

*Note 1* An amount ordered to be paid to a person with a legal disability must be paid into court and, unless the court otherwise directs, be paid out to the public trustee (see *Public Trustee Act 1985*, s 25).

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

- (2) Without limiting subrule (1), the court may, by order, direct—
- (a) the payment of all or part of the amount to—
    - (i) the claimant or the claimant’s litigation guardian for—
      - (A) expenses incurred by or paid for the claimant; or
      - (B) the maintenance or benefit of the claimant; or
    - (ii) the claimant’s solicitor for costs; or
  - (b) the investment of all or part of the amount for the claimant in the way stated in the order; or
  - (c) the investment of all or part of the interest received from an investment under this rule for the claimant in the way stated in the order; or
  - (d) the changing of an investment made for the claimant under this rule; or
  - (e) the sale of securities in which an amount is invested for the claimant under this rule at the time, and on the conditions, stated in the order; or
  - (f) the payment of all or part of the amount, or the transfer of a security or investment under this rule (including an account with an authorised deposit-taking institution), for the claimant.
- (3) In this rule:
- amount*** includes an amount of damages.

## Part 2.11 Resolving proceedings early

### Division 2.11.1 Uncontested debts and liquidated demands

#### 1100 Meaning of *prescribed costs amount*—div 2.11.1

In this division:

*prescribed costs amount* means the amount applying under schedule 3, part 3.1 (Claim for debt or liquidated amount).

#### 1101 Application—div 2.11.1

This division applies to a proceeding that—

- (a) is for a debt or liquidated demand only; and
- (b) is 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).

#### 1102 Stay of debt etc proceeding on payment of amount sought

(SCR o 3 r 1, form 1.3)

- (1) The proceeding is stayed if, within the time allowed for filing any notice of intention to respond or defence, the defendant pays the plaintiff—
  - (a) the amount claimed; and
  - (b) any amounts claimed for interest; and

- (c) the prescribed costs amount plus any filing and service fees actually paid.

*Note* Rule 102 deals with filing and service of a notice of intention to respond or defence.

- (2) If the proceeding is in the Supreme Court, and could properly have been brought in the Magistrates Court, the prescribed costs amount payable by the defendant under subrule (1) (c) is the prescribed costs amount for the Magistrates Court.
- (3) This rule does not apply to the assessment or enforcement of costs.

**1103 Assessment of costs for stayed debt etc proceeding**

(SCR o 3 r 2)

- (1) This rule applies if a proceeding is stayed under rule 1102 (1).
- (2) The plaintiff may have the plaintiff's costs assessed if—
  - (a) the plaintiff claims for costs and disbursements (other than any filing and service fees actually paid) more than the prescribed costs amount; or
  - (b) the plaintiff claims assessed costs.
- (3) If the proceeding is in the Supreme Court, and could properly have been brought in the Magistrates Court, the prescribed costs amount mentioned in subrule (2) (a) is the prescribed costs amount for the Magistrates Court.

**1104 Judgment on acknowledgment of debt or liquidated demand**

(MC(CJ)R s 44; NSW r 20.34)

- (1) The defendant may file a statement acknowledging—
  - (a) the amount claimed; and

(b) if interest is claimed—interest.

*Note* See approved form 2.34 (Acknowledgement of debt or liquidated demand) [AF2006-279](#).

- (2) Subrule (1) does not apply if the defendant has filed a defence or the plaintiff has filed an application for default judgment in accordance with these rules.
- (3) On the filing of a statement under subrule (1), the court may enter judgment for the plaintiff for—
  - (a) the amount claimed; and
  - (b) if interest is claimed—
    - (i) interest worked out in accordance with the rate stated in the claim for relief to the date of judgment; or
    - (ii) if no rate of interest is stated in the claim for relief—interest to the date of judgment, or a lump sum instead of that interest, decided by the court; and
  - (c) if costs are claimed—
    - (i) if the plaintiff has claimed costs and disbursements not more than the prescribed costs amount (plus any filing and service fees actually paid)—the amount claimed for costs and disbursements; or
    - (ii) in any other case—costs to be agreed or assessed.
- (4) The court may enter judgment for the plaintiff without a hearing.
- (5) In deciding interest or a lump sum for subrule (3) (b), the court may have regard to the rate of interest applying, from time to time, under schedule 2, part 2.1 (Interest up to judgment).
- (6) If the period for which interest is to be awarded is not stated in the claim for relief, interest is recoverable only from the date of the issue of the originating claim.

- (7) If the proceeding is in the Supreme Court, and could properly have been brought in the Magistrates Court, the prescribed costs amount mentioned in subrule (3) (c) (i) is the prescribed costs amount for the Magistrates Court.
- (8) Judgment entered under subrule (3) fully discharges all the plaintiff's claims in the proceeding.
- (9) If default judgment against the defendant has been set aside under rule 1128, the defendant must not file a statement acknowledging the amount claimed without the court's leave.

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

## **Division 2.11.2 Default by plaintiff**

### **1110 Default by plaintiff—dismissal of proceeding**

(SCR o 31 r 1 and o 33A r 1; FCR o 35A r 2 (1); Qld r 280)

- (1) A defendant in a proceeding may apply to the court for an order dismissing the proceeding for want of prosecution if the plaintiff—
    - (a) is required to take a step in the proceeding required by these rules, or to comply with an order of the court, not later than the end of a particular time; and
    - (b) does not do what is required before the end of that time.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.
- (2) The court may dismiss the proceeding or make any other order it considers appropriate.
  - (3) An order dismissing the proceeding for want of prosecution may be set aside only on appeal or if the parties agree to it being set aside.

- (4) However, the court may amend or set aside an order dismissing the proceeding for want of prosecution made in the absence of the plaintiff without the need for an appeal.

*Note* 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.

## Division 2.11.3 Default by defendant

### 1115 Definitions—div 2.11.3

In this division:

*affidavit in support*—see rule 1119 (Default judgment—relevant affidavits).

*in default*—see rule 1117 (When is a defendant *in default*—generally).

*qualified person* means any of the following:

- (a) the plaintiff's solicitor;
- (b) if the plaintiff is a person with a legal disability—the person's litigation guardian;
- (c) if the person is a corporation—a member or officer of the corporation with knowledge of the facts as far as they are known to the corporation;
- (d) if the plaintiff is a corporation for which a receiver or a receiver and manager has been appointed—the receiver or the receiver and manager;
- (e) if the plaintiff is a corporation for which a liquidator, provisional liquidator or administrator has been appointed—the liquidator, provisional liquidator or administrator;

- (f) if the plaintiff is an incorporated body that can sue and be sued—a member or officer of the body with knowledge of the facts as far as they are known to the body;
- (g) if the plaintiff is the Commonwealth, a State or a Territory—an officer or employee of the Commonwealth, State or Territory with knowledge of the facts as far as they are known to the Commonwealth, State or Territory;
- (h) in any other case—an officer, employee or agent of the plaintiff having knowledge of the facts as far as they are known to the plaintiff.

#### **1116 Application—div 2.11.3**

(MC(CJ)R s 41 (1); NSW r 16.1; Qld r 281)

This division applies to—

- (a) a proceeding started by originating claim; and
- (b) a counterclaim, or third-party notice, made in a proceeding started by originating claim.

*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* This division applies to a counterclaim against a person not a party to the original proceeding as if it were a proceeding started by originating claim (see r 462 (4) (a) and (5)).

*Note 3* This division applies to a notice including a subsequent party as if the notice were a third-party notice (see r 322 (Third-party notice—fourth and subsequent parties)).

#### **1117 When is a defendant *in default*—generally**

(SCR o 14 and o 31 r 1; MC(CJ)R s 41 (1) (c); NSW r 16.2; Qld r 281)

- (1) For this division, a defendant is *in default* in relation to a plaintiff's claim for relief if—

*Note* *Plaintiff* and *defendant* are defined in r 20.

- (a) for a proceeding started by originating claim—
- (i) the defendant does not file a notice of intention to respond or defence within the time required by rule 102 (Notice of intention to respond or defence—filing and service) or any further period agreed between the relevant parties or allowed by the court; or
  - (ii) the defendant files a notice of intention to respond within the time required by rule 102 or any further period agreed by the parties or allowed by the court, but does not file a defence within the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court; or
  - (iii) the defendant files a conditional notice of intention to respond that becomes an unconditional notice of intention to respond but does not file a defence within the time required by rule 111 (Conditional notice of intention to respond) or any further period agreed between the relevant parties or allowed by the court; or
  - (iv) the defendant files a defence but the court orders the defence to be struck out; and

*Note* Subrule (1) (a) applies to a person not a party to the original proceeding who is included as a party by a counterclaim (see r 462 (4) (a) and (5)).

- (b) for a counterclaim—
- (i) the defendant to the counterclaim does not file an answer to the counterclaim within the time required by rule 466 (3) (Counterclaim—answer to) or any further period agreed between the relevant parties or allowed by the court; or
  - (ii) the defendant to the counterclaim files an answer to the counterclaim but the court orders the answer to be struck out; and



(c) for a third-party notice—

- (i) the third party does not file a notice of intention to respond or defence within the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court; or
- (ii) the third party files a notice of intention to respond within the time required by rule 102 or any further period agreed by the parties or allowed by the court, but does not file a defence within the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court; or
- (iii) the third party files a conditional notice of intention to respond that becomes an unconditional notice of intention to respond but does not file a defence within the time required by rule 111 or any further period agreed between the relevant parties or allowed by the court; or
- (iv) the third party files a defence but the court orders the defence to be struck out.

*Note 1* Pt 2.3 (Notice of intention to respond and defence) applies to a third-party notice (see r 311 (Third-party notice—notice of intention to respond and defence)).

*Note 2* Rule 425 (Pleadings—striking out) deals with striking out of defences and answers.

*Note 3* Rule 6351 (Time—extending and shortening by court order) provides for the extending of time by the court.

(2) However, the defendant is not ***in default*** in relation to the plaintiff's claim for relief if—

(a) for a proceeding started by originating claim—

- (i) the proceeding is stayed under rule 1102 (Stay of debt etc proceeding on payment of amount sought); or

- (ii) the defendant files a statement under rule 1104 (Judgment on acknowledgment of debt or liquidated demand); or
- (iii) the defendant files a defence after the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court, but before a default judgment is entered against the defendant; or
- (b) for a counterclaim—the defendant to the counterclaim files an answer to the counterclaim after the time required by rule 466 (3) or any further period agreed between the relevant parties or allowed by the court, but before a default judgment is entered against the defendant to the counterclaim; or
- (c) for a third-party notice—the third party files a defence after the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court, but before a default judgment is entered against the third party.

## **1118 Default judgment—generally**

(NSW r 16.3 (1))

- (1) If a defendant is in default in relation to a plaintiff's claim for relief, the plaintiff—
  - (a) may apply to the court for judgment to be entered under this division against the defendant; and
  - (b) may carry on the proceeding against any other party to the proceeding.
- (2) If rule 1126 (Default judgment—other claims) applies in relation to the application, the application must be accompanied by the relevant affidavits.

*Note 1* Pt 6.2 (Applications in proceedings) applies to the application.

*Note 2* For the meaning of **relevant affidavits**, see r 1119.

- (3) If rule 1126 does not apply to the application, the application is made by filing a draft judgment accompanied by the relevant affidavits.

*Note* See approved form 2.35 (Default judgment) [AF2007-131](#).

- (4) Part 6.2 (Applications in proceedings) does not apply to an application under subrule (3).
- (5) The draft judgment and relevant affidavits mentioned in subrule (3) need not be served on anyone unless the court otherwise orders on its own initiative.
- (6) The court may enter judgment under this division (other than rule 1126) in favour of the plaintiff without a hearing.

### **1119 Default judgment—relevant affidavits**

(SCR o 14 r 2; MC(CJ)R s 41 (1) (b); NSW r 16.3 (2); Qld r 282)

- (1) For an application under rule 1118, the *relevant affidavits* are—
- (a) for a proceeding started by originating claim—an affidavit of service of the originating claim; and

*Note* This division applies to a counterclaim against a person not a party to the original proceeding as if it were a proceeding started by originating claim (see r 462 (4) (a) and (5)).

- (b) an affidavit in support of the application (the *affidavit in support*) sworn by—
- (i) the plaintiff or, if there are 2 or more plaintiffs, any plaintiff; or
- (ii) a qualified person.

*Note* See approved form 2.36 (Affidavit in support of application for default judgment for debt or liquidated demand) [AF2006-281](#).

- (2) The plaintiff's solicitor may swear an affidavit in support only if the source of the knowledge of the facts deposed is—
- (a) the plaintiff; or

- (b) if there are 2 or more plaintiffs—any plaintiff; or
  - (c) another qualified person.
- (3) An affidavit in support must be sworn not earlier than 14 days before the day the affidavit is filed in the court.

*Note* For what must be included in an affidavit of support, see the following rules dealing with default judgment for particular kinds of claims:

- r 1120 (Default judgment—debt or liquidated demand)
- r 1122 (Default judgment—unliquidated damages)
- r 1123 (Default judgment—detention of goods)
- r 1124 (Default judgment—recovery of possession of land)
- r 1125 (Default judgment—mixed claims)
- r 1126 (Default judgment—other claims).

## **1120 Default judgment—debt or liquidated demand**

(SCR o 14 r 4, o 31 r 2 and r 9A; MC(CJ)R s 43; NSW r 16.6; Qld r 283)

- (1) This rule applies if a plaintiff's claim for relief against a defendant in default is for a debt, liquidated demand or claim for unliquidated damages mentioned in rule 418 (2) (Pleadings—amount of unliquidated damages), with or without interest.
- (2) On application by the plaintiff under rule 1118 (Default judgment—generally), the court may enter judgment for the plaintiff for an amount not more than the amount claimed, together with—
  - (a) if interest is claimed—interest; and
  - (b) the following costs:
    - (i) costs for issuing the originating claim;
    - (ii) costs for obtaining judgment;
    - (iii) any other fees and payments, to the extent they have been reasonably incurred and paid.
- (3) The affidavit in support mentioned in rule 1119 must—

- (a) state the amount owing to the plaintiff, in relation to the claim for relief, at the time the originating claim was filed; and
  - (b) give particulars of any reduction of the amount owing, and costs, because of any payments made, or credits accrued, since the originating claim was filed; and
  - (c) state the amount claimed for interest, and how the amount is worked out; and
  - (d) state the costs claimed.
- (4) If interest is claimed, the court may award—
- (a) interest worked out in accordance with the rate stated in the claim for relief to the date of judgment; or
  - (b) if no rate of interest is stated in the claim for relief—interest to the date of judgment, or a lump sum instead of that interest, decided by the court.
- (5) In deciding an amount for subrule (4) (b), the court may have regard to the rate of interest applying, from time to time, under schedule 2, part 2.1 (Interest up to judgment).
- (6) If the period for which interest is to be awarded is not stated in the claim for relief, interest is recoverable only from the date of the issue of the originating claim.

**1121 Default judgment for debt or liquidated demand—  
assessment of costs**

(SCR o 3 r 3)

- (1) This rule applies if—
- (a) a plaintiff's claim for relief against a defendant in default is only for a debt or liquidated demand, with or without interest; and
  - (b) the court enters judgment for the plaintiff under rule 1120.

- (2) The plaintiff's costs and disbursements (plus any filing and service fees actually paid) must be allowed without assessment if the costs and disbursements claimed (other than any filing and service fees actually paid) are not more than the costs amount applying, from time to time, under schedule 3, part 3.2 (Default judgment).
- (3) Subrule (2) is subject to rule 1725 (Solicitors' costs and determined fees—Supreme Court judgment within Magistrates Court jurisdiction).
- (4) The plaintiff's costs and disbursements must be agreed or assessed if the costs and disbursements claimed (other than any filing and service fees actually paid) are more than the costs amount applying under schedule 3, part 3.2 (Default judgment).

*Note* See r 1702 (Costs—agreement about costs).

## **1122 Default judgment—unliquidated damages**

(SCR o 14 r 5 (1), o 31 r 4; MC(CJ)R s 41 (1); NSW r 16.7; Qld r 284)

- (1) This rule applies if a plaintiff's claim for relief against a defendant in default is for unliquidated damages, with or without another claim.
- (2) On application by the plaintiff under rule 1118 (Default judgment—generally), the court may enter judgment for the plaintiff against the defendant for damages to be assessed.
- (3) The affidavit in support mentioned in rule 1119 (Default judgment—relevant affidavits) must state—
  - (a) that the proceeding has not been settled with the defendant; and
  - (b) any amounts paid in relation to the damages.
- (4) For an application in the Magistrates Court—
  - (a) the plaintiff may file with the application under rule 1118 a completed and signed certificate of readiness; and

- (b) if the plaintiff files an certificate of readiness under this rule—the court may decide the claim without listing the matter for hearing.

### **1123 Default judgment—detention of goods**

(SCR o 14 r 5 (1), o 31 r 4; MC(CJ)R s 41 (1); NSW r 16.5; NSW s 93 (2)-(4); Qld r 285)

- (1) This rule applies if a plaintiff's claim for relief against a defendant in default is for the detention of goods only.
- (2) On application by the plaintiff under rule 1118, the court may enter judgment for the plaintiff against the defendant, in accordance with the plaintiff's claim for relief, for either—
  - (a) the return of the goods to the plaintiff, or payment to the plaintiff of the value of the goods and costs; or
  - (b) payment to the plaintiff of the value of the goods and costs.
- (3) The affidavit in support mentioned in rule 1119 must—
  - (a) state which goods have, and which have not, been delivered to the plaintiff since the originating claim or counterclaim was filed; and
  - (b) give particulars of any payments the defendant has made to the plaintiff for the goods, or state that no payments have been made, since the originating claim or counterclaim was filed; and
  - (c) state the costs claimed.
- (4) If the court enters judgment under subrule (2) (a), and the plaintiff subsequently applies for an order under this subrule, the court may make an order for the return of the goods to the plaintiff without the option of the defendant paying the value of the goods.

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

- (5) If the court enters judgment under this rule for the return of goods, it may state a date before which the return must take place.
- (6) If the court enters judgment for the return of goods, but the goods are subsequently damaged, destroyed or otherwise made unavailable for return, the court may, on the plaintiff's application, order the defendant to pay the value of the goods to the plaintiff.
- (7) In this rule:  
*value*, of the goods, means the value as assessed by, or in accordance with the directions of, the court.

#### **1124 Default judgment—recovery of possession of land**

(SCR o 14 r 8, o 31 r 7; NSW r 16.4; Qld r 286)

- (1) This rule applies if a plaintiff's claim for relief against a defendant in default is for the recovery of possession of land only.
- (2) On application by the plaintiff under rule 1118 (Default judgment—generally), the court may enter judgment for the plaintiff for—
  - (a) recovery of possession of the land as against the defendant; and
  - (b) the following costs:
    - (i) costs for issuing the originating claim or counterclaim;
    - (ii) costs for obtaining judgment;
    - (iii) any other fees and payments, to the extent they have been reasonably incurred and paid.
- (3) If, before judgment is entered, a person files an application under division 2.4.2 (Including and substituting parties) for the person to be included as a defendant, the court must not enter judgment under this rule until it disposes of the application.
- (4) The affidavit in support mentioned in rule 1119 (Default judgment—relevant affidavits) must—



- (a) identify anyone (other than the parties to the proceeding) who is in possession of the land or any part of it—
  - (i) at the time the originating claim was filed; or
  - (ii) if the claim for possession arises from an amendment to the originating claim—at the time the amendment was made; and

*Note* This division applies to a counterclaim against a person not a party to the original proceeding as if it were a proceeding started by originating claim (see r 462 (4) (a) and (5)).

- (b) for each person mentioned in paragraph (a), state—
  - (i) that the person's possession of the land is not to be disturbed; or
  - (ii) that the person no longer possesses any part of the land; or
  - (iii) that the person has been served with the originating claim and that the person—
    - (A) has not applied for leave to file a notice of intention to respond or defence under rule 151 (Proceeding for possession of land—leave to file defence etc); or
    - (B) has been given leave to file a notice of intention to respond or defence but has not filed the notice or defence in accordance with rule 152 (Proceeding for possession of land—filing defence etc); and
- (c) if the claim for possession of the land arises from a failure to pay the amount—give particulars of the failure; and
- (d) state the costs claimed.

## **1125 Default judgment—mixed claims**

(NSW r 16.8; Qld r 287)

- (1) This rule applies if a plaintiff's claims for relief against a defendant in default include 2 or more of the claims mentioned in the following rules and no other claim:
  - rule 1120 (Default judgment—debt or liquidated demand)
  - rule 1122 (Default judgment—unliquidated damages)
  - rule 1123 (Default judgment—detention of goods)
  - rule 1124 (Default judgment—recovery of possession of land).
- (2) On application by the plaintiff under rule 1118 (Default judgment—generally), the plaintiff is entitled to have judgment entered for the plaintiff against the defendant on all or any of the claims that the plaintiff could obtain under those rules as if that were the plaintiff's only claim against the defendant.
- (3) For an application under this rule, the affidavit in support mentioned in rule 1119 (Default judgment—relevant affidavits) must comply with the requirements of this division in relation to each claim.

## **1126 Default judgment—other claims**

(SCR o 14 r 11, o 31 r 11; NSW r 16.10; Qld r 288)

- (1) This rule applies if a defendant is in default and the plaintiff is not entitled to apply for judgment under any of the following rules:
  - rule 1120 (Default judgment—debt or liquidated demand)
  - rule 1122 (Default judgment—unliquidated damages)
  - rule 1123 (Default judgment—detention of goods)
  - rule 1124 (Default judgment—recovery of possession of land).
- (2) On application by the plaintiff under rule 1118 (Default judgment—generally), the court may enter the judgment it considers is justified on the plaintiff's claim for relief even if the judgment was not claimed.

- (3) The affidavit in support mentioned in rule 1119 (Default judgment—relevant affidavits) must state—
- (a) that the proceeding has not been settled with the defendant; and
  - (b) the costs claimed.

**1127 Default judgment—costs only**

(NSW r 16.9; Qld r 289)

- (1) The court may enter judgment for a plaintiff against a defendant in default for costs alone if, under this division—
- (a) the plaintiff is entitled to judgment against the defendant for any relief and for costs; and
  - (b) the defendant satisfies the plaintiff's claim for relief; and
  - (c) because the defendant has satisfied the plaintiff's claim for relief, it is unnecessary for the plaintiff to continue the proceeding against the defendant.
- (2) On application by the plaintiff under rule 1118 (Default judgment—generally), the court may enter judgment for the plaintiff against a defendant in default for costs alone if, whatever the plaintiff's claim for relief against the defendant—
- (a) the defendant satisfies the plaintiff's claim for relief or complies with the plaintiff's demands; or
  - (b) it otherwise becomes unnecessary for the plaintiff to continue the proceeding against the defendant.

**1128 Default judgment—setting aside etc**

(SCR o 14 r 10, o 31 r 14; MC(CJ)R s 41 (3) (a); NSW r 36.16 (2) (a); Qld r 290)

- (1) The court may, by order, amend or set aside a judgment entered under this division, and any enforcement of it.

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

- (2) Without limiting rule 6901 (Orders may be made on conditions), an order may be made on any of the following conditions:

- (a) conditions about costs;
- (b) conditions about giving security.

## **Division 2.11.4 Default by defendant—partial defence**

### **1135 Definitions—div 2.11.4**

In this division:

*in default*—see rule 1137 (When is a defendant *in default*—partial defence).

*undefended part of the claim*—see rule 1137.

### **1136 Application—div 2.11.4**

This division applies to—

- (a) a proceeding started by originating claim; and
- (b) a counterclaim, or third-party notice, made in a proceeding started by originating claim.

*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* This division applies to a counterclaim against a person not a party to the original proceeding as if it were a proceeding started by originating claim (see r 462 (4) (a) and (5)).

*Note 3* This division applies to a notice including a subsequent party as if the notice were a third-party notice (see r 322 (Third-party notice—fourth and subsequent parties))

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**1137 When is a defendant *in default*—partial defence**

(SCR o 31 r 9)

- (1) A defendant is *in default* in relation to a part of a plaintiff's claim for relief (the *undefended part of the claim*) if—
- (a) the defendant files a defence but not to the undefended part of the claim; and
  - (b) the undefended part of the claim is a separate cause of action or is severable from the rest of the claim; and
  - (c) the court gives leave to the plaintiff to enter judgment against the defendant for the undefended part of the claim.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for leave.
- (2) However, a defendant is not *in default* in relation to an undefended part of the claim if—
- (a) for a proceeding started by originating claim—
    - (i) the proceeding, or the undefended part of the claim, is stayed under rule 1102 (Stay of debt etc proceeding on payment of amount sought); or
    - (ii) the defendant files a statement under rule 1104 (Judgment on acknowledgment of debt or liquidated demand) in relation to the undefended part of the claim; or
    - (iii) the defendant files a defence to the undefended part of the claim after the time required by rule 102 (Notice of intention to respond or defence—filing and service) or any further period agreed between the relevant parties or allowed by the court, but before a default judgment is entered against the defendant in relation to the undefended part of the claim; or
  - (b) for a counterclaim—the defendant to the counterclaim files an answer to the undefended part of the counterclaim after the time required by rule 466 (3) (Counterclaim—answer to) or

any further period agreed between the relevant parties or allowed by the court, but before a default judgment is entered against the defendant to the counterclaim in relation to the undefended part of the claim; or

- (c) for a third-party notice—the third party files a defence after the time required by rule 102 or any further period agreed between the relevant parties or allowed by the court, but before a default judgment is entered against the third party in relation to the undefended part of the claim.

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

## **1138 Default judgment—partial defence**

(SCR o 31 r 9)

- (1) If a defendant is in default in relation to the undefended part of the claim, the plaintiff may—
- (a) apply to the court for judgment to be entered under this division against the defendant in relation to the undefended part of the claim; and
- (b) carry on the proceeding against—
- (i) the defendant in relation to the rest of the proceeding; and
- (ii) any other party to the proceeding.
- (2) If rule 1126 (Default judgment—other claims) applies in relation to the application, the application must be accompanied by the relevant affidavits.

*Note 1* Rule 1126 may be applied to the undefended part of the claim by r 1139.

*Note 2* Pt 6.2 (Applications in proceedings) applies to the application.

*Note 3* For the meaning of **relevant affidavits**, see r 1119 (as applied by r 1139).

- (3) If rule 1126 does not apply in relation to the application, the application is made by filing a draft judgment accompanied by the relevant affidavits.
- (4) Part 6.2 (Applications in proceedings) does not apply to an application under subrule (3).
- (5) The draft judgment and relevant affidavits mentioned in subrule (3) need not be served on anyone unless the court otherwise orders on its own initiative.
- (6) The court may enter judgment under this division in favour of the plaintiff in relation to the undefended part of the claim without a hearing.
- (7) Subrule (2) does not apply to the undefended part of the claim if rule 1126 would apply to the undefended part of the claim if it were a separate claim for relief.

### **1139 Default judgment—application of div 2.11.3**

- (1) Division 2.11.3 (other than a non-applied rule) applies to the undefended part of the claim as if it were a separate claim for relief.
- (2) In this rule:  
*non-applied rule* means any of the following rules:
  - rule 1116 (Application—div 2.11.3)
  - rule 1117 (When is a defendant *in default*—generally)
  - rule 1118 (Default judgment—generally)
  - rule 1121 (Default judgment for debt or liquidated demand—assessment of costs)
  - rule 1127 (Default judgment—costs only).
- (3) If the court enters judgment for the plaintiff against a defendant under this division, it must not make an order for costs in relation to the undefended part of the claim until judgment is entered on the defended part of the claim.

## Division 2.11.5 Summary judgment

### 1145 Application—div 2.11.5

(SCR o 15 r 1A and r 1 (1) and (5), o 16 r 1A and o 17 r 1 (1); MC(CJ)R s 138; NSW r 13.1; Qld r 291)

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

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

### 1146 Summary judgment—for plaintiff

(SCR o 15 r 1A, r 1, r 4 and r 6, o 16; MC(CJ)R s 138; NSW r 13.1; Qld r 292)

- (1) The plaintiff may, at any time after a defendant files a notice of intention to respond or defence, apply to the court for summary judgment against the defendant.

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

- (2) The court may give judgment for the plaintiff against the defendant for all or a part of the plaintiff's claim for relief, unless satisfied that—
  - (a) the defendant has a good defence to the claim for relief on the merits; or
  - (b) sufficient facts are disclosed to entitle the defendant to defend the claim for relief generally.



- (3) Without limiting subrule (2), the court may give judgment for the plaintiff for damages to be assessed.
- (4) The court may make any other order it considers appropriate.

**Examples**

- 1 The court may give the defendant leave to defend on conditions.
- 2 The court may order the defendant to pay an amount into court.

*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) If the plaintiff's claim is for the return of a particular goods (whether or not the claim includes a claim for hire or damages for detention), the court may make an order for the return of the goods to the plaintiff without giving the defendant the option of keeping the goods and paying the value of the goods.

*Note* For the enforcement of the order, see r 2441 (Enforcement—orders for return of goods etc).

- (6) In this rule:

*damages* includes the value of goods.

**1147 Summary judgment—for defendant**

(SCR o 17 r 1; MC(CJ)R s 139; NSW r 13.4; Qld r 293)

- (1) A defendant may apply to the court for summary judgment against a plaintiff at any time after filing a notice of intention to respond or defence.

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

- (2) The court may give judgment for the defendant against the plaintiff for the plaintiff's claim for relief (or part of it) if satisfied—
  - (a) that the claim (or part of it) is frivolous or vexatious; or
  - (b) that there is a good defence to the claim (or part of it) on the merits; or

(c) that the proceeding should be finally disposed of summarily or without pleadings.

(3) The court may make any other order it considers appropriate.

**Example**

stay 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).

**1148 Claims not disposed of by summary disposal**

(SCR o 15 r 5; MC(CJ)R s 140; NSW r 13.3 and r 13.5; Qld r 294)

- (1) If the giving of judgment or the making of orders under this division does not dispose of all claims for relief in issue in a proceeding, the giving of judgment or making of the orders does not prevent the continuation of any part of the proceeding not disposed of.
- (2) A second or later application under this division may be made with the court's leave.

**1149 Evidence in summary judgment proceedings**

(SCR o 15 r 1 (2) and (3); MC(CJ)R s 138 (1) and s 139 (1); NSW r 13.1 (1) (a) and (b); Qld r 295)

- (1) Evidence must be given by affidavit in support of an application under this division unless the court gives leave.

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

- (2) An affidavit may contain statements of information and belief if the person making the affidavit states the sources of the information and the reasons for the belief.

- (3) A party to an application under this division who intends to rely on a document must—
  - (a) annex or exhibit the document to an affidavit; or
  - (b) identify in an affidavit the provisions relied on to the extent the party is able to identify them.
- (4) A person who makes an affidavit to be read in an application under this division may not be cross-examined without the court's leave.

### **1150 Summary judgment applications—filing and service**

(SCR o 15 r 2; Qld r 296)

- (1) A party applying for judgment under this division against another party must file and serve the other party with the following documents at least 8 days before the return date for the application:
  - (a) the application;
  - (b) a stamped copy of each affidavit on which the party intends to rely.

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

- (2) At least 4 days before the return date, the other party must file and serve on the party a stamped copy of any affidavit on which the other party intends to rely.
- (3) At least 2 days before the return date, the party must file and serve on the other party a stamped copy of any affidavit in reply to the other party's affidavit on which the party intends to rely.
- (4) This rule applies despite anything in rule 6008 (Application in proceeding—filing and service).

**1151 Summary judgment applications—directions etc**

(SCR o 15 r 9, o 16 r 6 and o 17 r 3; Qld r 298)

- (1) This rule applies if—
  - (a) the court dismisses an application for judgment under this division; or
  - (b) a judgment under this division does not dispose of all claims for relief in a proceeding.
- (2) The court may give directions about the future conduct of the proceeding.

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

*Note 2* The court has a general power to make directions about the conduct of a proceeding (see r 1401 (Directions generally)).

**1152 Summary judgment applications—costs**

(Qld r 299)

- (1) If it appears to the court that a party who applied for judgment under this division was or ought reasonably to have been aware that a respondent to the application relied on a point that would entitle that party to have the application dismissed, the court may dismiss the application and order costs to be paid on an indemnity basis.

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

- (2) This rule does not limit the court's powers in relation to costs.

**1153 Summary judgment—stay of enforcement**

(NSW r 13.2; Qld r 300)

The court may order a stay of the enforcement of a judgment given under this division for the time it considers appropriate.

*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.

**1154 Summary judgment—relief from forfeiture**

(SCR o 15 r 11; Qld r 301)

A tenant has the same right to relief against forfeiture for nonpayment of rent after judgment for possession of land is given under this division as if the judgment had been given after a trial.

**1155 Summary judgment—setting aside**

(Qld r 302)

The court may amend or set aside a judgment given on an application under this division against a party who did not appear at the hearing of the application.

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

**Division 2.11.6 Discontinuance and withdrawal**

**1160 Discontinuance or withdrawal by plaintiff**

(SCR o 30 r 1 and r 2; MC(CJ)R s 67 and s 68; NSW r 12.1 (1) and r 12.2; Qld r 304)

- (1) A plaintiff may discontinue a proceeding, or withdraw part of it, at any time before—
  - (a) if a certificate of readiness for the proceeding is required to be filed—

- (i) the certificate of readiness is filed; or
  - (ii) the court directs that the proceeding be given a listing hearing even though a certificate of readiness has not been filed; or
- (b) in any other case—the court sets a hearing date for the proceeding.
- (2) A plaintiff may discontinue a proceeding, or withdraw part of it, at any other time only with the court's leave or the agreement of the other active parties.

*Note* Pt 6.2 (Applications in proceedings) applies to an application for leave under this rule.
- (3) Also, if there is more than 1 plaintiff, or a counterclaim against a plaintiff, a plaintiff may only discontinue or withdraw with the court's leave or the agreement of the other active parties.
- (4) A plaintiff may discontinue against 1 or more defendants without discontinuing against other defendants.
- (5) Each party who agrees to a proceeding being discontinued, or part of it being withdrawn, must agree in writing.

**1161 Discontinuance or withdrawal of counterclaim by defendant**

(Qld r 305)

A defendant may discontinue a counterclaim, or withdraw part of it—

- (a) before being served with the plaintiff's answer to the counterclaim; or

- (b) after being served with the plaintiff's answer to the counterclaim—only with the court's leave or the agreement of the other active parties.

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

## **1162 Withdrawal of notice of intention to respond**

(NSW r 12.5; Qld r 306)

A party may withdraw the party's notice of intention to respond at any time with the court's leave or the agreement of the other parties.

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

## **1163 Costs of discontinuance or withdrawal**

(SCR o 30 r 3; MC(CJ)R s 69; Qld r 307)

- (1) A party who discontinues or withdraws is liable to pay—
- (a) the costs of the party to whom the discontinuance or withdrawal relates up to when the notice of discontinuance or withdrawal is served on the party; and
  - (b) the costs of another party or parties caused by the discontinuance or withdrawal up to when the notice of discontinuance or withdrawal is served on the party.
- (2) If a party discontinues or withdraws with the court's leave, the court may make the order for costs it considers appropriate.

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

## **1164 Withdrawal of defence or further pleading**

(SCR o 30 r 1A; MC(CJ)R s 68 (1) and (2); NSW r 12.6; Qld r 308)

- (1) A party may withdraw all or part of the answer to a counterclaim.
- (2) A defendant may withdraw all or part of the defence.

- (3) For a proceeding started by originating application, a defendant may withdraw all or part of an affidavit.
- (4) However, this rule does not allow a party to withdraw an admission or another matter operating for the benefit of another active party without the other party's agreement or the court's leave.

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

### **1165 Notice of discontinuance or withdrawal**

(Qld r 309)

- (1) A discontinuance or withdrawal for which the court's leave is not required may be made by filing a notice of discontinuance or withdrawal and serving a stamped copy of the notice on the other active parties to the proceeding.

*Note 1* See approved form 2.37 (Notice of discontinuance or withdrawal) [AF2006-282](#).

*Note 2* A party may withdraw an admission made in a pleading only with the court's leave (see r 492 (Admissions—withdrawal)).

- (2) A discontinuance or withdrawal for which the court's leave is required is made by the order giving leave and a notice of discontinuance or withdrawal is not required.

### **1166 Discontinuance or withdrawal by party representing someone else etc**

(NSW r 12.1 (2) (a); Qld r 303)

- (1) If a party represents someone else in a proceeding, the party may discontinue the proceeding, or withdraw part of it, only with the court's leave.

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

- (2) If a party does not represent someone else in a proceeding, and the party discontinues or withdraws, the party (or the party's solicitor) must certify in the notice of discontinuance or withdrawal that the party does not represent someone else in the proceeding.



**1167 Discontinuance or withdrawal—subsequent proceeding**

(SCR o 30 r 1 (2); MC(CJ)R s 70 (1); NSW r 12.3; Qld r 310 (1))

- (1) A discontinuance or withdrawal under this division is not a defence to another proceeding on the same or substantially the same ground.
- (2) Subrule (1) is subject to the conditions of any agreement to the discontinuance or withdrawal or any leave to discontinue or withdraw.
- (3) A party who is served with another party's notice of withdrawal may continue with the proceeding as if the other party's notice of intention to respond or defence had not been filed.

**1168 Consolidated proceedings and counterclaims**

(Qld r 311)

The plaintiff's discontinuance of a proceeding does not prejudice a proceeding consolidated with it or a counterclaim made by the defendant.

**1169 Stay pending payment of costs**

(SCR o 30 r 4; MC(CJ)R s 70 (2); NSW r 12.4; Qld r 312)

- (1) This rule applies if, because of a discontinuance or withdrawal under this division, a party is liable to pay the costs of another party, and the party, before paying the costs, starts another proceeding on the same or substantially the same grounds.
- (2) The court may order a stay of the subsequent proceeding until the costs are paid.

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

## Division 2.11.7 Mediation and neutral evaluation

### 1175 Purpose—div 2.11.7

(CL(W)A s 191)

This division does not prevent the parties to a proceeding from agreeing to, and arranging for, mediation or neutral evaluation of any matter otherwise than under this division.

### 1176 Definitions—div 2.11.7

(CL(W)A s 192)

- (1) For this division, **mediation** is a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.
- (2) For this division, **mediation session** means a meeting arranged for the mediation of a matter under this division.
- (3) For this division, **neutral evaluation** is a process of evaluation of a dispute in which the evaluator seeks to identify and reduce the issues of fact and law that are in dispute.
- (4) The evaluator's role includes assessing the relative strengths and weaknesses of each party's case and offering an opinion about the likely outcome of the proceeding, including any likely findings of liability or the award of damages.
- (5) For this division, **neutral evaluation session** means a meeting arranged for the neutral evaluation of a matter under this division.

### 1177 Mediation—appointment of mediator

(CL(W)A s 193)

- (1) A person can be a mediator if the person—
  - (a) is a registered mediator under the *Mediation Act 1997*; and
  - (b) is appointed by the court as a mediator.

- (2) The Legislation Act, part 19.3 (Appointments) does not apply to the appointment of a mediator under this rule.

**1178 Neutral evaluation—appointment of evaluator**

(CL(W)A s 194)

- (1) The following people can be an evaluator:
- (a) the registrar of the court;
  - (b) someone else that the court considers has the skills and qualifications to be an evaluator and appoints as an evaluator.
- (2) The Legislation Act, part 19.3 (Appointments) does not apply to the appointment of an evaluator under this rule.

**1179 Mediation or neutral evaluation—referral by court**

(CL(W)A s 195)

- (1) The court may, by order, refer a proceeding, or any part of a proceeding, for mediation or neutral evaluation.
- (2) The court may make an order on application by a party 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.

- (3) If the court makes an order under subrule (1) for mediation, the mediation must be undertaken only by a mediator appointed by the court.
- (4) If the court makes an order under subrule (1) for neutral evaluation, the neutral evaluation must be undertaken only by an evaluator appointed by the court.

**1180 Mediation or neutral evaluation—duty of parties to take part**

(CL(W)A s 196)

Each party to a proceeding, or part of a proceeding, referred for mediation or neutral evaluation under rule 1179 has a duty to take part, genuinely and constructively, in the mediation or neutral evaluation.

**1181 Mediation or neutral evaluation—costs**

(CL(W)A s 197)

The costs of a mediation or neutral evaluation are payable—

- (a) by the parties to the proceeding, in the proportions they agree among themselves; or
- (b) if the court makes an order about the payment of the costs—by 1 or more of the parties, in the way stated in the order.

**1182 Mediation or neutral evaluation—agreements and arrangements arising from sessions**

(CL(W)A s 198)

- (1) The court may make orders to give effect to an agreement or arrangement between the parties arising out of a mediation session or neutral evaluation.
- (2) This division does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session or neutral evaluation, in relation to the matters that are the subject of the mediation session or neutral evaluation.

*Note* For provisions about privilege, secrecy and protection in relation to mediators, see the *Mediation Act 1997*.

**1183 Neutral evaluation—privilege**

(CL(W)A s 199)

- (1) The same privilege in relation to defamation that exists for a proceeding in the court, and a document in a proceeding, exists for—
  - (a) a neutral evaluation session; or
  - (b) a document or thing sent to or produced to an evaluator; or
  - (c) a document or thing sent to, or produced at, the court to enable a neutral evaluation session to be arranged.
- (2) However, the privilege under subrule (1) only extends to a publication made—
  - (a) at a neutral evaluation session; or
  - (b) as provided by subrule (1) (b) or (c); or
  - (c) as provided in rule 1184.
- (3) In this rule:

*neutral evaluation session* includes any steps taken while making arrangements for the session or during the follow-up of a session.

**1184 Evaluators—secrecy**

(CL(W)A s 200)

An evaluator may disclose information obtained in relation to the administration or enforcement of this division only in the following circumstances:

- (a) with the consent of the person who provided the information;
- (b) for the administration or enforcement of this division;
- (c) if there are reasonable grounds to believe the disclosure is necessary to prevent or reduce the danger of death or injury to anyone or damage to any property;

- (d) if the disclosure—
  - (i) is reasonably required for the referral to an entity of any party to a neutral evaluation session; and
  - (ii) is made to assist the resolution of a dispute between the parties, or assist the parties in any other way; and
  - (iii) is made with the consent of the parties to the neutral evaluation session;
- (e) in accordance with a requirement imposed under a territory law or a law of the Commonwealth (other than a requirement imposed by a subpoena or other compulsory process).

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

## **1185 Evaluators—protection from liability**

(CL(W)A s 201)

An evaluator is not personally liable for anything done or omitted to be done honestly for a neutral evaluation session under this division.

## Part 2.12 Expert evidence

*Note to pt 2.12*

Pt 6.10 contains provisions about evidence generally.

### Division 2.12.1 Expert evidence generally

#### 1200 Meaning of *code of conduct*—pt 2.12

In this part:

*code of conduct* means the expert witness code of conduct in schedule 1.

#### 1201 Meaning of *expert*, *expert witness* and *expert report*

(SCR o 39 r 1A; NSW r 31.17; Qld r 425)

(1) In these rules:

*expert*, in relation to a proceeding, means a person who—

- (a) has specialised knowledge about matters relevant to an issue arising in the proceeding based on the person's training, study or experience; and
- (b) would, if called as a witness at the trial of the proceeding, be qualified to give opinion evidence as an expert witness in relation to the issue.

*expert witness*, in relation to a proceeding, means an expert appointed or engaged to do either or both of the following:

- (a) to provide a report about the expert's opinion for use as evidence in the proceeding;
- (b) to give opinion evidence in the proceeding.

(2) In these rules, an *expert report*, in relation to a proceeding, is a written statement by an expert (whether or not an expert witness in

the proceeding), if the statement complies with the following requirements:

- (a) the statement sets out the expert's opinion and the facts on which the opinion is formed;
  - (b) the statement includes the substance of the expert's evidence that the party serving the statement intends to adduce in evidence in chief at the trial of the proceeding.
- (3) However, if the expert provides 2 or more written statements for a party for the proceeding, each of the statements is an expert report if the statements, taken together, comply with subrule (2) (a) and (b).

**1202 Expert witnesses to agree to be bound by code of conduct**

(SCR o 39 r 49B (2); PD 2/04; NSW r 31.23)

- (1) If a party to a proceeding engages an expert witness, the party must give the expert witness a copy of the code of conduct.
- (2) An expert witness must not give oral evidence unless—
  - (a) the expert witness has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceeding, that the expert witness has read the code of conduct and agrees to be bound by it; and
  - (b) a copy of the acknowledgment has been served on all active parties affected by the evidence.
- (3) If an expert report does not contain an acknowledgment by the expert witness who prepared the report that the expert witness has read the code of conduct and agrees to be bound by it, service of the expert report by the party who engaged the expert witness is not valid service.
- (4) This rule does not apply to a doctor who has treated the plaintiff.



**1203 Expert witness—immunity**

(Qld r 429C)

An expert witness has the same protection and immunity for the contents of an expert report prepared by the expert witness that is dealt with as required by these rules as the expert witness could claim if the contents of the report were given orally at the trial of the proceeding for which the report is prepared.

**Division 2.12.2 Multiple expert witnesses for same issue**

**1210 Application—div 2.12.2**

(SCR o 39 r 49F; NSW r 31.26)

This division applies if 2 or more parties to a civil proceeding call, or intend to call, expert witnesses to give opinion evidence about the same, or a similar, issue at the trial of the proceeding.

**1211 Court may direct experts to meet etc**

(SCR o 39 r 49G; NSW r 31.25 and r 31.26; Qld r 429B)

- (1) The court may, on its own initiative or on a party's application, give 1 or more of the following directions:
  - (a) a direction that the expert witnesses meet—
    - (i) to identify the matters on which they agree; and
    - (ii) to identify the matters on which they disagree and the reasons why; and
    - (iii) to try to resolve any disagreement;
  - (b) a direction that the expert witnesses produce for the court's use a document identifying—
    - (i) the matters on which they agree; and
    - (ii) the matters on which they disagree; and

- (iii) the reasons for any failure to reach agreement on any matter;
- (c) a direction that—
  - (i) the expert witnesses give evidence at the trial after all or certain factual evidence relevant to an issue has been given; and
  - (ii) each party intending to call 1 or more expert witnesses close the party's case in relation to an issue, subject only to presenting the evidence of the expert witnesses later in the trial;
- (d) a direction that, after all or certain factual evidence has been given, a party who called an expert witness file and serve on each other active party an affidavit or statement by the expert witness stating—
  - (i) whether the expert witness adheres to any opinion given earlier; or
  - (ii) whether, in light of factual evidence given at the trial, the expert witness wishes to modify any opinion given earlier;
- (e) a direction that—
  - (i) each expert witness be sworn one immediately after another; and
  - (ii) when giving evidence, an expert witness occupy a position in the courtroom (not necessarily in the witness box) that is appropriate to the giving of evidence;
- (f) a direction that each expert witness give an oral explanation of his or her opinion, or opinions, on a question;
- (g) a direction that each expert witness give his or her opinion about the opinion, or opinions, given by another expert witness;

- (h) a direction that the expert witnesses be cross-examined, or re-examined, in a certain way or sequence, including, for example, by putting to each expert witness, in turn, each question relevant to one subject or issue at a time, until the cross-examination, or re-examination, of all the witnesses is finished;

*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).

- (i) a direction that any expert witness giving evidence in accordance with a direction under paragraph (e) be allowed to ask questions of any other expert witness who is also giving evidence in accordance with a direction under that paragraph;
- (j) any other directions about giving evidence in accordance with a direction under paragraph (e) that the court considers appropriate.

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

- (2) This rule does not limit the directions that the court may give on its own initiative or on a party's application.
- (3) If the court directs expert witnesses to meet under subrule (1) (a), it may—
- (a) set the agenda; and
  - (b) state the matters the expert witnesses must discuss; and
  - (c) direct whether or not legal representatives may be present; and
  - (d) give directions about the form of any report to be produced to give effect to a direction under subrule (1) (b); and
  - (e) give any other directions it considers appropriate.
- (4) If expert witnesses have met and produced a document identifying the matters on which they agree, a party affected must not adduce

expert evidence inconsistent with a matter agreed unless the court gives leave for the evidence to be adduced.

### Division 2.12.3 Appointment of medical expert for Civil Law (Wrongs) Act

#### 1220 Definitions—div 2.12.3

(SCR o 39 r 43)

In this division:

*accompanying affidavit*—see rule 1222 (Accompanying affidavit for appointment of expert—Wrongs Act, s 86 application).

*appointed expert*—see the Wrongs Act, section 84.

*expert*, in relation to an issue—see the Wrongs Act, section 82.

*expert medical evidence*—see the Wrongs Act, section 82.

*Wrongs Act* means the *Civil Law (Wrongs) Act 2002*.

#### 1221 Application for appointment of expert—Wrongs Act, s 86

(SCR o 39 r 44)

- (1) An application to the court by a party to a proceeding for the appointment of a person to give expert medical evidence in the proceeding may seek any of the following orders:
  - (a) an order for the appointment of a person, an additional person, or 2 or more people, to give expert medical evidence;
  - (b) an order about payment of costs and expenses of a person proposed to be appointed.

*Note* Pt 6.2 (Applications in proceedings) applies to the application.

- (2) The court may make the orders sought.

**1222 Accompanying affidavit for appointment of expert—  
Wrongs Act, s 86 application**

(SCR o 39 r 45)

An application under the Wrongs Act, section 86 (including an application that seeks orders mentioned in rule 1221) must be supported by an affidavit (the *accompanying affidavit*) setting out—

- (a) the attempts made by the parties to agree on the appointment of a person to give expert medical evidence in the proceeding; and
- (b) the issues on which expert medical evidence is proposed to be given in the proceeding; and
- (c) if the application is for the appointment of an additional expert to give expert medical evidence in the proceeding—the issues for which the appointment is proposed to be made and why the appointment should be made; and
- (d) if the application is for the appointment of 2 or more experts to give expert medical evidence on a particular issue—the issue for which the appointment is proposed to be made and why more than 1 expert should be appointed to give expert medical evidence on the issue; and
- (e) for each appointment for which application is made—a list of appropriately qualified people who are available and willing to be appointed; and
- (f) for each person on a list mentioned in paragraph (e)—the following information:
  - (i) why the person is an expert in relation to the issue for which the appointment is proposed to be made;
  - (ii) the hourly rate of the fees the person proposes to charge and, if possible, an estimate of the total amount likely to be charged for the person’s expert medical evidence; and

- (g) if an order is sought about the payment of the costs and expenses of a person proposed to be appointed—why the order should be made; and
- (h) any matters relevant to whether the party or parties should be heard on the application.

**1223 Response by other parties—Wrongs Act, s 86 application**  
(SCR o 39 r 47)

- (1) A party on whom a copy of an application under the Wrongs Act, section 86 (the ***section 86 application***) and accompanying affidavit is served may, within the required time, do either or both of the following:
  - (a) apply to the court for any of the orders mentioned in rule 1221;
  - (b) file, and serve on each other active party, an affidavit responding to anything mentioned in the section 86 application or its accompanying affidavit.

*Note* Pt 6.2 (Applications in proceedings) applies to an application under par (a).

- (2) For subrule (1), the ***required time*** for a party is not later than 14 days after the day the party receives the section 86 application and its accompanying affidavit or, if the court allows a longer time, that time.

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

- (3) Rule 1222 (Accompanying affidavit for appointment of expert—Wrongs Act, s 86 application) applies in relation to an application under subrule (1) (a) as if it were an application under the Wrongs Act, section 86.

**1224 Selection of expert etc by court—Wrongs Act, s 86 application**

(SCR o 39 r 48)

- (1) This rule applies to the making of the following decisions by the court:
  - (a) a decision whether to appoint an expert;
  - (b) a decision about the person to be appointed as an expert;
  - (c) a decision whether to make an order under the Wrongs Act, section 90 about payment of the costs and expenses of an appointed expert.
- (2) The court—
  - (a) must make a decision by considering the applications and affidavits filed by the parties; and
  - (b) need not hear the parties unless satisfied that the interests of justice require the parties to be heard.
- (3) A person appointed as an expert in relation to an issue by the court may (but need not) be a person mentioned in a list of appropriately qualified people in relation to the issue set out in an affidavit filed by a party.
- (4) If the court proposes to make a decision to which this rule applies, it must give each of the active parties notice of the proposed decision.
- (5) Not later than 7 days after the day a party is given notice of the proposed decision, the party may apply to the court for an order in relation to the proposed decision.

*Note* Pt 6.2 (Applications in proceedings) applies to the application.

- (6) If an application is not made under subrule (5) in relation to the proposed decision, the court must, not later than 7 days after the 7-day period mentioned in that subrule ends, make the decision and give each of the active parties notice of the making of the decision.

- (7) The Legislation Act, part 19.3 (Appointments) does not apply to the appointment of an expert by the court.

**1225 Appointed experts to be briefed etc**

(SCR o 39 r 49)

- (1) Not later than 14 days after the day a party is given notice of the appointment of an expert by the court, the party must—
- (a) give the expert a statement of the issues on which the expert is to give expert medical evidence; and
  - (b) comply with the Wrongs Act, section 88 (Documents etc to be given to expert).
- (2) Not later than 14 days after the day the expert files the expert's report under rule 1227 (Appointed expert to report), each party must pay any amount payable by the party to the expert.

**1226 Request by appointed expert for directions**

(SCR o 39 r 49A)

- (1) An appointed expert may write to the registrar seeking directions in relation to the expert medical evidence the expert is to give.

**Example**

letter requesting directions about whether the plaintiff should be physically examined

*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 registrar must give a copy of the letter seeking directions to each active party at least 7 days before the day the letter is placed before a judicial officer of the court.
- (3) A party to the proceeding may file written submissions about the directions sought not later than 7 days after the day the party is given a copy of the letter.



- (4) The court—
  - (a) may set a date for a directions hearing to consider the directions sought by the appointed expert; but
  - (b) if the parties cannot agree on the directions to be given to the expert—must set a date for a directions hearing to consider the directions sought by the appointed expert.
- (5) The registrar must tell the active parties any date set for a directions hearing.
- (6) After considering any submissions made by the parties, the court may give the appointed expert directions it considers appropriate.

#### **1227 Appointed expert to report**

(SCR o 39 r 49B)

- (1) As soon as practicable after an expert is appointed by the parties or the court, the expert must prepare and file a written report on the issues on which the expert is to give expert medical evidence.
- (2) In preparing the report, the expert must comply with the code of conduct.

*Note* The code of conduct is in sch 1.

- (3) The expert must give a copy of the report to each of the active parties within 7 days after the day the expert files the report.

#### **1228 Expert report to be admitted in evidence**

(SCR o 39 r 49D)

Unless the court otherwise orders, an expert's report filed under rule 1227 (Appointed expert to report) must be admitted in evidence at the beginning of the trial of the proceeding if that rule is complied with in relation to the report.

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

## **1229 Attendance of appointed expert**

(SCR o 39 r 49E)

- (1) An expert must, on reasonable notice by the registrar or a party, attend the hearing of the proceeding for which the expert has filed a report under rule 1227 (Appointed expert to report).
- (2) A party may cross-examine the expert on the report.

## **Division 2.12.4 Expert reports**

### **1240 Application—div 2.12.4**

(SCR o 39 r 38; MC(CJ)R s 199 (1) and (2); NSW r 31.18 (1))

This division applies to—

- (a) a proceeding in the court in which a claim for damages for death or personal injury is made; and
- (b) any other proceeding to which the court directs, on application or its own initiative, that this division applies.

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

### **1241 Service of expert reports**

(SCR o 39 r 39; MC(CJ)R s 199 (3); NSW r 31.18))

- (1) At least 28 days before a certificate of readiness is filed in a proceeding, the plaintiff must serve on each other active party a copy of each expert report obtained by the plaintiff.
- (2) Not later than 14 days after being served with a copy of a report under subrule (1), the defendant must serve on each other active party a copy of each expert report obtained by the defendant.
- (3) If—
  - (a) a party obtains an expert report after serving reports under subrule (1) or (2); and

(b) either—

(i) the report is only responding to another report served under this rule; or

(ii) the report updates another report served under this rule;

the party must serve a copy of the report on each other active party not later than 3 days after the day the party obtains the report.

(4) An expert report must not be tendered, and is not admissible, in the proceeding unless it has been served in accordance with this rule, except with—

(a) the court's leave; or

(b) the agreement of all active parties to the proceeding.

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

(5) The court must not give leave under subrule (4) (a) unless satisfied that—

(a) there are exceptional circumstances that justify giving leave; or

(b) the expert report only updates an earlier version of an expert report that has been served in accordance with this rule.

(6) This rule applies subject to any order of the court.

## **1242 Supplementary expert reports**

(NSW r 31.24; Qld r 429A)

(1) If an expert witness changes in a material way an opinion in an expert report that has been served, the expert witness must provide a supplementary expert report (a *supplementary report*) to the party who engaged the expert witness (the *engaging party*) stating the change and the reason for it.

(2) The expert witness may provide the engaging party with other supplementary reports (also a *supplementary report*).

- (3) If an expert witness provides a supplementary report under this rule, the engaging party, and any other party having the same interest as the engaging party, must not use an earlier expert report (including an earlier supplementary report) on an issue to which the earlier report relates unless the engaging party has served a copy of the supplementary report on all active parties on whom the engaging party served the earlier report.

**1243 Expert evidence to be covered by expert report**

(SCR o 39 r 40; MC(CJ)R s 199 (3); NSW r 31.18 (3))

Except with the court's leave or as otherwise agreed by all the active parties to a proceeding, the oral evidence in chief of an expert is not admissible unless an expert report served in accordance with rule 1241 (Service of expert reports) contains the substance of the matters sought to be adduced in evidence.

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

**1244 Expert reports admissible as evidence of opinion etc**

(SCR o 39 r 41; MC(CJ)R s 199 (4); NSW r 31.18A (1))

An expert report served under rule 1241 (Service of expert reports) is admissible as evidence of—

- (a) the author's opinion; and
- (b) if the author's direct oral evidence of a fact on which the opinion was formed would be admissible as evidence of that fact without further evidence (whether oral or otherwise)—that fact.

**1245 Requiring attendance of expert for cross-examination etc**

(SCR o 39 r 42 (1) (a); MC(CJ)R s 199 (5)-(7); NSW r 31.18A and r 31.19; Qld r 427 (5))

- (1) This rule applies if an expert report is served under rule 1241 (Service of expert reports) by a party to a proceeding.

- (2) Another party to the proceeding may, by notice served on the party who served the expert report, require the expert who prepared the report to attend the trial of the proceeding to be cross-examined on the report.
- (3) The notice must be served at the listing hearing or no later than 49 days before the date set for the trial (whichever is the earlier).

**1246 Tender of expert report**

(SCR o 39 r 42; MC(CJ)R s 199 (7); NSW r 31.18A (5) and r 31.19 (5))

- (1) A party to a proceeding who is served with an expert report under rule 1241 (Service of expert reports) may tender the report.
- (2) If the expert who prepared the report is required under rule 1245 (Requiring attendance of expert for cross-examination etc) to attend the trial of the proceeding, the report may not be tendered or otherwise used in the proceeding by any party unless—
  - (a) the expert attends as required to be cross-examined on the report; or
  - (b) the expert has died; or
  - (c) the court gives leave.

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

- (3) If the expert is cross-examined on the report, the party using the report may re-examine the expert.

## Part 2.13 Pre-trial procedures

### 1300 Definitions—pt 2.13

In this part:

*category A proceeding*—see rule 1302.

*category B proceeding*—see rule 1302.

*category C proceeding*—see rule 1302.

*category D proceeding*—see rule 1302.

### 1301 Application—pt 2.13

This part applies to a proceeding 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).

### 1302 Pre-trial procedures—classification of proceeding

(NP 11.06.93)

- (1) The plaintiff must, in the originating claim, assign the proceeding to 1 of the following categories:
  - (a) personal injury claim (a *category A proceeding*)—
    - (i) including a claim for damages for death or personal injury; but
    - (ii) not including a claim for damages for death or personal injury arising out of medical negligence;
  - (b) debt or liquidated demand (a *category B proceeding*);

- (c) a complex claim that needs case management directions (a *category C proceeding*), including a claim for defamation, a commercial dispute, a building or technical dispute, and a claim for damages for death or personal injury arising out of medical negligence;
  - (d) any other claim (a *category D proceeding*).
- (2) Despite subrule (1), the court may, at any time before the trial and on application by a party or on its own initiative, change the category to which the proceeding is assigned under this rule.
- Note* Pt 6.2 (Applications in proceedings) applies to an application under this subrule.
- (3) If the court changes the category to which the proceeding is assigned on its own initiative, the registrar must tell the parties of the change.

### **1303 Directions hearing—category C proceedings**

(NP 11.06.93)

- (1) If a defendant files a notice of intention to respond or defence in a category C proceeding, the court must set a date for a directions hearing for the proceeding (a *category C directions hearing*).
- Note* Directions hearings for other categories of proceedings are dealt with in r 1308 (Directions hearing—category A, category B and Category D proceedings).
- (2) The date for the category C directions hearing must be not later than 28 days after the day the notice or defence is filed, unless the court otherwise orders.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.
- (3) If the court sets a date for the category C directions hearing, the registrar must tell the parties the date set.

- (4) At a category C directions hearing, the court may—
- (a) give the directions that it considers appropriate for the proper conduct of the proceeding until a certificate of readiness is filed; or
  - (b) direct that a proceeding be given a listing hearing even though a certificate of readiness has not been filed; or
  - (c) make an order for costs for or against a party; or
  - (d) adjourn the directions hearing.
- (5) Without limiting subrule (4), the court may consider, and give directions in relation to, the following matters at a category C directions hearing:
- (a) requests for particulars;
  - (b) filing further pleadings;
  - (c) amending pleadings;
  - (d) challenges to any pleading;
  - (e) discovery, either in full or limited to particular issues;
  - (f) interrogatories;
  - (g) alternative dispute resolution, including mediation;
  - (h) statements of agreed facts;
  - (i) evidence by affidavit;
  - (j) service or exchange of expert reports.

*Note* The court has a general power to make directions about the conduct of a proceeding (see r 1401 (Directions generally)).

- (6) The court may at any time amend or revoke a direction made under this rule on application by a party or on its own initiative.

*Note* Pt 6.2 (Applications in proceedings) applies to an application to amend or revoke a direction.



- (7) The powers of the court under this rule are additional to any other powers of the court under a territory law.

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

**1304 Statement of particulars before trial—personal injury claims**

(SCR o 36A; NSW r 15.12)

- (1) This rule applies to a proceeding in which a claim for damages for personal injury is made, other than a claim under the *Civil Law (Wrongs) Act 2002*, part 3.1 (Wrongful act or omission causing death).
- (2) Before, or at the time of, the filing of a certificate of readiness for the proceeding, the plaintiff must file, and serve on each other active party to the proceeding, a statement (a ***statement of particulars***) setting out the following particulars of the plaintiff's claim:
- (a) particulars of injuries received;
  - (b) particulars of disabilities suffered since the accident giving rise to the claim and any continuing disabilities,
  - (c) particulars of out-of-pocket expenses;
  - (d) if a claim is made for loss of earnings—
    - (i) the name and address of each employer of the plaintiff for the year before the accident giving rise to the claim, together with details of the periods of employment, capacity in which the plaintiff was employed, and the plaintiff's earnings during each period of employment; and
    - (ii) the name and address of each employer of the plaintiff since the accident giving rise to the claim, together with details of the periods of employment, capacity in which the plaintiff was employed, and the plaintiff's earnings during each period of employment; and

- (iii) the amount claimed for loss of earnings to the date of the statement of particulars worked out by comparing the plaintiff's earnings since the accident with the earnings the plaintiff claims the plaintiff would have earned had the accident not happened; and
    - (iv) if the plaintiff was self-employed at any time in the year before, or since, the accident—the plaintiff's earnings for the year before, and since, the accident, together with all additional particulars necessary to disclose the way the claim for loss of earning capacity is worked out;
  - (e) particulars of any claimed future loss of earning capacity and future economic loss;
  - (f) if a claim is made for domestic assistance or attendant care—particulars of the claim.
- (3) In working out for subrule (2) (d) (iii) the earnings the plaintiff claims the plaintiff would have earned had the accident not happened, the plaintiff must, if appropriate, set out—
- (a) particulars of—
    - (i) the earnings of employees engaged in employment similar to the employment that the plaintiff claims the plaintiff would have engaged in had the accident not happened; and
    - (ii) the identity of those employees; or
  - (b) particulars of—
    - (i) payments that the plaintiff would have received under an award or industrial agreement applying to the employment that the plaintiff claims the plaintiff would have engaged in had the accident not happened; and
    - (ii) the identity of the award or agreement.

- (4) The plaintiff must serve, with the statement of particulars, a copy of all documents available to the plaintiff in support of any claim for special damages or economic loss, including the following:
- (a) hospital, medical or similar accounts and receipts;
  - (b) letters from any workers compensation insurer stating amounts paid for the plaintiff for hospital, medical, ambulance or similar expenses;
  - (c) a letter from the plaintiff's employer or employers immediately before the accident, giving particulars of—
    - (i) the dates when the plaintiff was absent from work because of the accident; and
    - (ii) any earnings (including overtime) lost by the plaintiff for the absences from work; and
    - (iii) any change in the plaintiff's classification and duties, and any earnings after the accident; and
    - (iv) if the plaintiff's employment has been terminated—the date of termination and the reason for the termination;
  - (d) copies of the plaintiff's group certificates and income tax returns for the 2 financial years immediately before the financial year in which the accident happened, together with any income tax returns lodged by the plaintiff since the accident;
  - (e) if the plaintiff was self-employed at any time in the year before, or since, the accident—accountants' reports and other business records that the plaintiff intends to rely on to prove loss of earnings;
  - (f) reports, award rates and correspondence relied on to support any claim for domestic assistance or attendant care.
- (5) If any document, or part of a document, required to be served under subrule (4) cannot be served, the plaintiff must serve, with the

statement of particulars, a statement of the reasons why the document cannot be served.

- (6) In this rule:

*accident* includes incident.

*earnings* means gross earnings per week or another appropriate period and net earnings after taxation per week or another appropriate period.

**1305 Statement of particulars before trial—compensation to relatives in death claims**

(NSW r 15.13)

- (1) This rule applies to a proceeding in which a claim for damages for personal injury is made under the *Civil Law (Wrongs) Act 2002*, part 3.1 (Wrongful act or omission causing death).
- (2) Before, or at the time of, the filing of a certificate of readiness for the proceeding, the plaintiff must file, and serve on each other active party to the proceeding, in relation to each person for whose benefit the proceeding is brought, a statement (a *statement of particulars*) setting out the following particulars:
  - (a) the person's name, address, relationship to the deceased person the subject of the proceeding;
  - (b) if relevant, whether the person's dependency on the deceased person, or reliance on services provided by the deceased person, is claimed to have been total or partial, the circumstances in which the person received support or services from the deceased person, and the amount of the support or services for the year ending on the day the person died.
- (3) The plaintiff must serve with the statement of particulars, in relation to each person for whose benefit the proceeding is brought, a copy of the following documents:

- (a) if relevant, a copy or extract of the birth certificate of the person and, if the person has been married, a copy of the person's marriage certificate;
  - (b) a letter from the deceased person's employer immediately before the accident, giving details of the deceased person's earnings and prospects of promotion at the date of the person's death;
  - (c) copies of the deceased person's income tax returns for the 2 financial years immediately before the financial year in which the person died;
  - (d) copies of any bank statements, financial records or other documents on which the plaintiff intends to rely to prove the support or other benefits given to the person by the deceased person for a period of not less than 1 year ending on the day the person died;
  - (e) copies of all documents, including accounts and receipts, in support of any claim for funeral expenses, medical or hospital expenses or any other expenses relating to the person's death;
  - (f) copies of documents proving the net value of the deceased person's estate.
- (4) If any document, or part of a document, required to be served under subrule (3) cannot be served, the plaintiff must serve, with the statement of particulars, a statement of the reasons why the document cannot be served.

**1306 Certificate of readiness for trial—generally**

(PD 1/90; MC(CJ)R s 179; Qld r 467 and r 469)

- (1) If a party to a proceeding is ready for trial, the party must—
- (a) complete and sign a certificate of readiness for the party; and

- (b) serve a copy of the completed and signed certificate on each other active party to the proceeding for the certificate to be completed and signed by each other active party.

*Note* See approved form 2.38 (Certificate of readiness for trial) [AF2006-283](#).

- (2) Each party who is served with a certificate of readiness must—
  - (a) if the party is ready for trial—complete and sign the certificate for the party and return it to the party who served it; or
  - (b) if the party is not ready for trial—
    - (i) return the unsigned certificate to the party who served it; and
    - (ii) tell the party who served it in writing—
      - (A) the steps that, in the party’s opinion, need to be completed by the party before the proceeding is ready for trial; and
      - (B) an estimate of the time needed by the party to complete each step.

*Note* If a party fails to complete and sign a certificate of readiness, a party who is ready for trial may apply for a directions hearing (see r 1308 (Directions hearing—category A, category B and category D proceedings)).

- (3) A certificate of readiness for a proceeding may be filed only if—
  - (a) the certificate has been completed and signed by each active party to the proceeding; and
  - (b) if a statement of particulars is required to be filed under rule 1304 (Statement of particulars before trial—personal injury claims) or rule 1305 (Statement of particulars before trial—compensation to relatives in death claims)—the statement has been filed.

- (4) If a certificate of readiness is filed—
- (a) the court must set a date for a listing hearing; and
  - (b) the registrar must tell the parties the date set for the listing hearing.
- (5) Unless the court otherwise orders, the court must not set a date for a listing hearing unless a certificate of readiness for trial is filed.

*Note 1* The court may direct that a proceeding be given a listing hearing even though the certificate of readiness has not been filed (see r 1303 (4) (b) and r 1308 (6) (b) (ii)).

*Note 2* Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

### **1307 Certificate of readiness for trial—default judgment**

- (1) This rule applies if—
- (a) every defendant in the proceeding fails to file a notice of intention to respond or defence; and
  - (b) the court enters default judgment for the plaintiff against every defendant for damages to be assessed.
- (2) If the plaintiff is ready for trial, and a certificate of readiness has not been filed under rule 1122 (Default judgment—unliquidated damages), the plaintiff must complete and sign a certificate of readiness for the plaintiff.
- (3) A certificate of readiness for a proceeding may be filed only if—
- (a) the certificate has been completed and signed by the plaintiff; and
  - (b) if a statement of particulars is required to be filed under rule 1304 (Statement of particulars before trial—personal injury claims) or rule 1305 (Statement of particulars before trial—compensation to relatives in death claims)—the statement has been filed.

- (4) If a certificate of readiness is filed—
  - (a) the court must either—
    - (i) set a date for a listing hearing; or
    - (ii) set a date for the assessment of damages; and
  - (b) the registrar must tell the plaintiff the date set.
- (5) If the court sets a date under subrule (4), the plaintiff must, not later than 14 days after the day the plaintiff receives notice of the date set, and no later than 7 days before the day of the hearing, serve a copy of the notice on every active party (if any) in the proceeding.

**1308      Directions hearing—category A, category B and category D proceedings**

(PD 1/90 and PD 3/94)

- (1) This rule applies to—
  - (a) a category A proceeding; or
  - (b) a category B proceeding; or
  - (c) a category D proceeding.
- (2) A party to the proceeding may apply to the court for a directions hearing if—
  - (a) the party has served a certificate of readiness under rule 1306 (1); and
  - (b) another active party to the proceeding (the *defaulting party*) has failed to complete and sign the certificate, and return the completed and signed certificate to the first party, within 21 days after the day the certificate was served on the other party.

*Note*      See approved form 2.39 (Application for directions hearing under rule 1308) [AF2006-284](#).



- (3) The application must be served on each other active party to the proceeding.
  - (4) On the filing of the application—
    - (a) the court must set a date for a directions hearing; and
    - (b) the registrar must tell the parties the date set for the directions hearing.
  - (5) Not later than 7 days before the date set for the directions hearing, each defaulting party must file, and serve on each other active party, a list that sets out—
    - (a) the steps that, in the party's opinion, need to be completed by the party before the proceeding is ready for trial; and
    - (b) an estimate of the time needed by the party to complete each step.
- Note* See approved form 2.40 (List of outstanding steps) [AF2006-285](#).
- (6) At the directions hearing, the court—
    - (a) must decide whether the proceeding is ready for trial; and
    - (b) may—
      - (i) give the directions it considers appropriate to have the proceeding made ready for trial; or
      - (ii) direct that the proceeding be given a listing hearing even though a certificate of readiness has not been filed; or
      - (iii) make an order for costs for or against a party; or
      - (iv) adjourn the directions hearing.
  - (7) The court may at any time amend or revoke a direction made under this rule.

- (8) The court may amend or revoke a direction made under this rule on application by a party or on its own initiative.

*Note* Pt 6.2 (Applications in proceedings) applies to an application to amend or revoke a direction.

- (9) The powers of the court under this rule are additional to any other powers of the court under a territory law.

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

### **1309 Listing hearing**

(PD 1/90)

- (1) At a listing hearing for a proceeding, the court may consider the following:
- (a) simplifying the issues in dispute;
  - (b) limiting the number of witnesses or the issues to be covered by witness evidence;
  - (c) the filing and serving of expert reports;
  - (d) the filing and serving of affidavit evidence;
  - (e) the admission of facts or documents to avoid unnecessary proof;
  - (f) written submissions to the court on issues of law or issues of law and fact;
  - (g) the estimated length of the trial;
  - (h) the possibility of the proceeding being settled before the trial;
  - (i) anything else that may assist the early resolution of the proceeding.
- (2) The court must decide whether the proceeding is ready for trial.
- (3) If the court decides the proceeding is ready for trial, it—
- (a) must—

- (i) set a date for the trial; and
  - (ii) tell the parties the date for the trial; and
- (b) may make any other order it considers appropriate.
- (4) If the court decides the proceeding is not ready for trial, it may—
  - (a) give the directions it considers appropriate to have the proceeding made ready for trial; or
  - (b) set aside the certificate of readiness; or
  - (c) make an order for costs for or against a party; or
  - (d) refer the proceeding to another judicial officer for further directions; or
  - (e) adjourn the listing hearing.
- (5) The court may at any time amend or revoke a direction made under this rule.
- (6) The court may amend or revoke a direction made under this rule on application by a party or on its own initiative.

*Note* Pt 6.2 (Applications in proceedings) applies to an application to amend or revoke a direction.

- (7) The powers of the court under this rule are additional to any other powers of the court under a territory law.

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

## **1310 Special fixture**

- (1) At the listing hearing, a proceeding may be set down by the court for trial as a special fixture if—
  - (a) for a proceeding in the Supreme Court—a party to the proceeding or the court estimates the trial will be 5 days or longer; or

- (b) for a proceeding in the Magistrates Court—a party to the proceeding or the court estimates the trial will be 3 days or longer; or
  - (c) the court has already ordered that the trial be expedited or listed as a special fixture.
- (2) If a proceeding is set down for trial as a special fixture, the court may—
  - (a) allocate a judicial officer (the *trial judicial officer*) for the trial; and
  - (b) set a date for a directions hearing before—
    - (i) the trial judicial officer; or
    - (ii) if the trial judicial officer is a judge who is not a resident judge—a resident judge or the master (the *nominated judicial officer*).
- (3) If the court allocates a trial judicial officer for the trial, the trial judicial officer or nominated judicial officer must—
  - (a) hear any application in the proceeding or application for directions in the proceeding before the trial; and
  - (b) monitor compliance with any directions given in the proceeding.

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

## **1311     Expedited trial**

(MC(CJ)R s 180; Qld r 468)

- (1) A party to a proceeding may apply to the court for an expedited trial.

*Note*     Pt 6.2 (Applications in proceedings) applies to the application.

- (2) An application for an expedited trial must be supported by an affidavit stating the following:
  - (a) the grounds for expediting the trial;
  - (b) the issues in dispute;
  - (c) the number of witnesses to be called and the nature of each witness's evidence;
  - (d) the estimated length of the trial;
  - (e) whether senior counsel or junior counsel is briefed in the proceeding.
- (3) The affidavit may include anything else the applicant considers relevant to the application.
- (4) The court may order that the trial be expedited if it is in the interests of justice to expedite the trial.

### **1312 Court book**

(PD 1/90 and PD 5/03)

- (1) If the court has set a date for the trial of a proceeding, the plaintiff must, not later than 14 days before the trial date, file a copy of the following documents bound or stapled together (the *court book*):
  - (a) the originating process;
  - (b) each pleading in the proceeding;
  - (c) any request made for further particulars of a party's pleading, and any answer to the request;
  - (d) any third-party notice;

*Note* **Pleading** is defined in the dictionary.

*Note* **Third-party notice** includes a fourth-party notice and the notice including any other further person and so on successively (see r 322 (2) (c)).

- (e) any notice claiming contribution or indemnity;
  - (f) any order in the proceeding to include a party;
  - (g) any affidavit to be used at the trial;
  - (h) if a statement of particulars is required to be filed under rule 1304 (Statement of particulars before trial—personal injury claims) or rule 1305 (Statement of particulars before trial—compensation to relatives in death claims)—the statement of particulars.
- (2) If a document mentioned in subrule (1) has been amended, the plaintiff must include in the court book only the most recent amended version of the document.
- (3) The following documents must not be included in a court book unless all the active parties to the proceeding agree:
- (a) expert reports, including medical reports;
  - (b) answers to interrogatories.

**1313 Directions hearings and listing hearings—costs**

(PD 1/90)

Unless the court otherwise orders, costs incurred by a party to a proceeding in relation to a directions hearing or listing hearing are costs in the cause.

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

## **Part 2.14                      Court supervision**

### **Division 2.14.1              Directions**

#### **1400              Directions—application**

(SCR o 33 r 1 (1) and r 3; NSW r 2.1; Qld r 366)

- (1) A party to a proceeding may, at any time, apply to the court for directions about the conduct of the proceeding.

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

- (2) A party to a proceeding may apply for directions either on an application for directions or on an application for other relief.

*Note 1*      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).

*Note 2*      The court may receive affidavit evidence in relation to an application for directions only if the court directs (see r 6746 (Div 6.10.3 application—hearing)).

#### **1401              Directions generally**

(SCR o 33 r 1 (2), o 38 r 18 (1) and o 58 r 7; NSW r 2.3; Qld r 367)

- (1) The court may, at any stage of a proceeding, give any direction about the conduct of the proceeding it considers appropriate, even though the direction may be inconsistent with another provision of these rules.

- (2) The court may give a direction about the conduct of the proceeding on application by a party or on its own initiative.

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

- (3) In deciding whether to give a direction under this rule, the interests of justice are paramount.

- (4) Without limiting subrule (1), the court may, at any time, do any of the following in relation to a hearing of a proceeding:
- (a) require copies of pleadings for use by the court before the hearing;
  - (b) require the parties to define, in writing, the issues for decision by the court;
  - (c) set a timetable for the conduct of the hearing or any steps in the proceeding;
  - (d) limit the time to be taken by the hearing;
  - (e) limit the time to be taken by a party in presenting the party's case;
  - (f) require Scott schedules to be filed;
  - (g) require evidence to be given by affidavit, orally or in some other form;
  - (h) require the service or exchange of expert reports and the holding of conferences of experts;
  - (i) limit the number of witnesses (including expert witnesses) a party may call on a particular issue;
  - (j) limit the time to be taken in examining, cross-examining or re-examining a witness;
  - (k) require the use of telephone or video conference facilities, videotapes, film projection, computer and other equipment and technology;
  - (l) require submissions to be made in the way the court directs, for example, in writing, orally, or by a combination of written and oral submission;
  - (m) limit the time to be taken in making an oral submission;
  - (n) limit the length of a written submission or affidavit;



- (o) require the parties, before the hearing, to provide statements of witnesses the parties intend to call;
- (p) refer the proceeding to another judicial officer for further directions;
- (q) order that a counterclaim be heard separately from the hearing for the proceeding in which the counterclaim is made;
- (r) order that the issues between the defendant who included a third party and the third party be heard separately from the issues between the plaintiff and the defendant;
- (s) give directions about the order of evidence and addresses and the conduct of the trial generally;
- (t) give any other direction the court considers appropriate.

*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) In addition to the principle mentioned in subrule (3), in deciding whether to give a direction of a kind mentioned in subrule (4), the court may have regard to the following matters:
  - (a) that each party is entitled to a fair hearing;
  - (b) that the time allowed for taking a step in the proceeding or for the hearing must be reasonable;
  - (c) the complexity or simplicity of the case;
  - (d) the importance of the issues and the case as a whole;
  - (e) the volume and character of the evidence to be led;
  - (f) the time expected to be taken by the hearing;
  - (g) the number of witnesses to be called by the parties;
  - (h) that each party must be given a reasonable opportunity to lead evidence and cross-examine witnesses;

- (i) the state of the court lists;
  - (j) any other relevant matter.
- (6) If a direction under this rule is inconsistent with another provision of these rules, the direction prevails to the extent of the inconsistency.
- (7) The court may at any time amend or revoke a direction made under this rule.
- (8) The court may amend or revoke a direction made under this rule on application by a party or on its own initiative.

*Note* Pt 6.2 (Applications in proceedings) applies to an application to amend or revoke a direction.

- (9) The powers of the court under this rule are additional to any other powers of the court under a territory law.

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

## **1402 Proceeding already being managed by court**

(Qld r 368)

- (1) If, under these rules, a particular judicial officer has been allocated to manage a proceeding, the court may direct that all applications in relation to the proceeding, or the hearing of the proceeding, be heard and decided by the judicial officer.
- (2) The court may make a direction under this rule on application by a party or on its own initiative.

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

## **1403 Decision in proceeding**

(Qld r 369)

If the parties agree, the court may hear and decide a proceeding on an application for directions.

**1404 Failure to comply with direction etc**

(Qld r 370)

- (1) This rule applies if a party—
  - (a) after receiving notice of a directions or listing hearing, in a proceeding, does not attend the hearing; or
  - (b) fails to comply with a direction about the conduct of a proceeding.
- (2) The court may do any of the following:
  - (a) give the further directions it considers appropriate;
  - (b) dismiss the application or proceeding;
  - (c) make an order for costs for or against a party;
  - (d) make another order dealing with the proceeding it considers appropriate.
- (3) The court may act under this rule on application by a party or on its own initiative.

*Note* Pt 6.2 (Applications in proceedings) applies to an application under this rule.
- (4) In deciding whether to dismiss the application or proceeding, the court must have regard to the principle that the interests of justice are paramount.

## Division 2.14.1A Transfer of proceedings between courts

### 1430 Transfer of proceeding from Supreme Court to Magistrates Court—application

- (1) The Supreme Court may, on application by a party to a proceeding started in the Supreme Court or its own initiative, order that the proceeding be transferred to the Magistrates Court.

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

- (2) The Court may make an order under subsection (1) only if satisfied that—
  - (a) the amount claimed (whether initially or as reduced by payment, admitted set-off or otherwise) is not more than the amount for which the Magistrates Court has jurisdiction to decide; and
  - (b) the proceeding could properly have been started in the Magistrates Court; and
  - (c) the Court considers it just to do so.

### 1431 Transfer of proceeding from Supreme Court to Magistrates Court—procedure

- (1) This rule applies if the Supreme Court orders under rule 1430 that a proceeding be transferred to the Magistrates Court.
- (2) A party to the proceeding may file in the Magistrates Court a copy of—
  - (a) the order; and
  - (b) each of the pleadings in the proceeding; and
  - (c) any other relevant documents filed in the Supreme Court.

- (3) When the documents mentioned in subrule (2) are filed, the proceeding—
  - (a) stops being a proceeding in the Supreme Court; and
  - (b) becomes a proceeding in the Magistrates Court.
- (4) The proceeding is taken to have been started in the Magistrates Court on the day the proceeding was started in the Supreme Court.
- (5) Costs in the proceeding are to be allowed—
  - (a) for costs incurred before the order under rule 1430 is made (including the costs of getting the order) and the costs of getting the copies mentioned in subrule (2)—
    - (i) if the Court makes an order in relation to the costs—in accordance with the order; or
    - (ii) in any other case—at the prescribed scale of costs; and
  - (b) for costs incurred after the order is made (not including the costs of getting the copies mentioned in subrule (2))—in accordance with rule 1722 (Costs—solicitors’ costs generally) as if the proceeding were a proceeding in the Magistrates Court immediately after the order is made.

#### **1432 Transfer of proceeding from Magistrates Court to Supreme Court—application**

- (1) The Supreme Court may, on application by a party to a proceeding started in the Magistrates Court, order that the proceeding be transferred to the Supreme Court.

*Note* Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.
- (2) The Court may make an order under subsection (1) on the conditions about costs, security for the amount claimed for costs, or otherwise, that the Court considers just.

**1433 Transfer of proceeding from Magistrates Court to Supreme Court—stay of proceeding**

- (1) This rule applies to an application under rule 1432.
- (2) The Supreme Court may, on application by a party to the proceeding, order that the proceeding be stayed until the application is decided or the Court otherwise orders.

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

- (3) An order under this rule takes effect immediately on filing a copy of the order in the Magistrates Court.

**Division 2.14.2 Failure to comply with rules or order**

**1450 Effect of failure to comply with rules**

(SCR o 69 r1 and o 80 r 3; MC(CJ)R s 492; Qld r 371, r 372 and r 373)

- (1) A failure to comply with these rules in relation to a proceeding is an irregularity and does not make the proceeding, or a document, step taken or order made in the proceeding, void.
- (2) If there has been a failure to comply with these rules in relation to a proceeding, the court may—
  - (a) set aside all or part of the proceeding; or
  - (b) set aside a step taken or order made in the proceeding; or
  - (c) declare a document or step taken to be void; or
  - (d) declare a document or step taken to be valid; or
  - (e) make another order that could be made under these rules (including an order dealing with the proceeding generally); or

- (f) make any order dealing with the proceeding generally that it considers appropriate.

*Note 1* 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).

*Note 2* The court may receive affidavit evidence in relation to an application under this rule only if the court directs (see r 6746 (Div 6.10.3 application—hearing)).

- (3) 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.
- (4) The court may act under subrule (2) on application by a party or on its own initiative.

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

## **1451 Application because of failure to comply with rules**

(SCR o 69 r 2 and r 3 and o 80 r 3; MC(CJ)R s 492 (3); Qld r 372)

- (1) An application for an order under rule 1450 must be made—
- (a) within a reasonable time; and
  - (b) before the applicant has taken any fresh step in the proceeding after becoming aware of the failure to comply with these rules.
- (2) The application must set out details of the failure to comply with these rules.

## **1452 Failure to comply with order to take step**

(Qld r 374)

- (1) This rule applies if a party (the *defaulting party*) does not comply with an order to take a step in a proceeding in the court.
- (2) A party who is entitled to the benefit of the order may apply to the court for an order under this rule against the defaulting party.

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

- (3) The application—
  - (a) must set out the grounds on which it is based; and
  - (b) is evidence of the grounds stated in the application.
- (4) On the hearing of the application, the court may—
  - (a) give judgment against the defaulting party; or
  - (b) extend time to comply with the order that has not been complied with; or
  - (c) give directions; or
  - (d) make any other order.
- (5) The party who makes the application may reply to any material filed by the defaulting party.
- (6) The application may be withdrawn with the agreement of all parties concerned in the application or with the court's leave.
- (7) A judgment given under subrule (4) (a) may be set aside—
  - (a) if the application was made without being served on the defaulting party, or the court is satisfied the defaulting party was not present at the hearing of the application for good reason—on an application to set the judgment aside; or
  - (b) otherwise—only on appeal.



- (8) Despite subrule (7), if the court is satisfied an order dismissing the proceeding was made because of an accidental slip or omission, it may rectify the order.
- (9) The powers of the court under this rule are additional to any other powers of the court under a territory law.

*Note* A **territory law** includes these rules (see Legislation Act, s 98).
- (10) This rule does not limit the powers of the court to punish for contempt of court.

## Part 2.15 Trial

### Division 2.15.1 Interpretation—pt 2.15

#### 1500 Meaning of *question*—pt 2.15

(SCR o 37 r 1A and o 89 r 1; NSW r 28.1; Qld r 482)

In this part:

*question* includes a question or issue in a proceeding, whether of fact or law or partly of fact and partly of law, and whether raised by pleadings, agreement of parties or otherwise.

### Division 2.15.2 Proceedings at trial

#### 1505 Trial—defendant or plaintiff not appearing

(SCR o 38 rr 10-12 and r 15; MC(CJ)R s 185 and s 186; NSW r 29.7 (1); Qld r 476)

- (1) If a defendant does not appear when the trial starts, the plaintiff may call evidence to establish an entitlement to judgment against the defendant in the way the court directs.

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

- (2) If the plaintiff does not appear when the trial starts, the court may dismiss the plaintiff's originating process and the defendant may call evidence to establish an entitlement to judgment under a counterclaim against the plaintiff, in the way the court directs.
- (3) Despite subrule (2), the defendant may submit to judgment if the plaintiff does not appear when the trial starts.
- (4) If neither the plaintiff nor the defendant appear when the trial starts, the court may, on its own initiative, order that the proceeding (including any counterclaim by the defendant) be dismissed and make no order for costs.

- (5) On application made not later than 7 days after the day judgment is entered because of this rule, the court may amend or set aside the judgment.

*Note* 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.

### **1506 Trial—adjournment etc**

(SCR o 38 r 16; MC(CJ)R s 191; Qld r 477)

On application by a party or on its own initiative, the court may adjourn or postpone a trial at or before the trial.

*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.

### **1507 Trial—third-party proceeding**

(Qld r 473 (1))

A third-party proceeding may be tried in the same way as the proceeding between the plaintiff and the defendant.

### **1508 Order of evidence and addresses**

(SCR o 38 r 18; MC(CJ)R s 183; NSW r 29.6)

- (1) This rule applies—

- (a) subject to any directions by the court about the order of evidence and addresses and the conduct of the trial generally; and
- (b) if there are more than 2 parties to the proceeding or a counterclaim in the proceeding—to the proceeding with necessary changes.

*Note* The court has a general power to make directions about the conduct of a proceeding (see r 1401 (Directions generally)).

- (2) If the plaintiff has the burden of proof on any issue, the plaintiff's case is presented first.
- (3) If the defendant has the burden of proof on every issue, the defendant's case is presented first.
- (4) The party whose case is presented first (the *first party*) may make an address opening the first party's case and may then present evidence in support of the case.
- (5) If, during the presentation of the first party's case, no document or thing is admitted in evidence or by tender by the other party, and the other party does not present any evidence in support of the other party's case, the first party may make a closing address and the other party may then make a closing address.
- (6) If, during the presentation of the first party's case, a document or thing is admitted in evidence or by tender by the other party, but the other party does not present any evidence in support of the other party's case, the other party may make a closing address and the first party may then make a closing address.
- (7) If the other party presents evidence—
  - (a) the other party may make an opening address and, after the other party's evidence is presented, may make a closing address; and
  - (b) after the other party has made a closing address, the first party may make a closing address.

## **1509 View by court**

(Qld r 478)

On application by a party or on its own initiative, the court may inspect a place, process or thing, and witness any demonstration about which an issue arises in the proceeding.

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

**1510 Associate etc to record hearing times**

(SCR o 38 r 22)

- (1) This rule applies only in relation to the Supreme Court.
- (2) The judicial officer's associate or other officer present at a hearing of a proceeding must, on each day of the hearing, record the times when the hearing starts and ends.
- (3) If the costs of a party to the proceeding are to be assessed, the recorded times must be provided to the registrar for the assessment.

**1511 Associate to enter findings etc**

(SCR o 38 r 23)

- (1) This rule applies only in relation to the Supreme Court.
- (2) The judicial officer's associate must, as directed by the judicial officer, record—
  - (a) the orders made by the judicial officer about judgment; and
  - (b) the certificates (if any) given by the judicial officer; and
  - (c) anything else directed by the judicial officer.

**Division 2.15.3 Separate decisions on questions**

**1520 Application—div 2.15.3**

- (1) This division applies to any question for decision of the court from a proceeding in the court.
- (2) However, this division does not apply to—
  - (a) a question for decision of the Supreme Court from a proceeding in another court or a tribunal; or

- (b) a case stated or question reserved by the Supreme Court to the Court of Appeal.

*Note 1* Div 5.7.1 (Questions referred—Supreme Court) deals with questions for decision of the Supreme Court from a proceeding in another court or a tribunal.

*Note 2* Div 5.7.2 (Questions referred—Court of Appeal) deals with a case stated or question reserved by the Supreme Court for decision by the Court of Appeal.

## **1521 Separate decisions on questions—order**

(SCR o 37 rr 1-3; NSW r 28.2; Qld r 483 and r 486)

- (1) The court may make an order for the decision by the court of a question separately from another question, whether before, at, or after the trial or continuation of the trial of the proceeding.
- (2) The court may make an order under subrule (1) on application by a party to a proceeding or on its own initiative.

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

- (3) Unless the court otherwise orders, a separate question or questions must—
- (a) set out the question or questions to be decided; and
  - (b) be divided into paragraphs numbered consecutively; and
  - (c) be prepared in draft by the initiating party for the proceeding after consultation with each other active party; and
  - (d) be settled by the registrar; and
  - (e) be filed.

- (4) In this rule:

***initiating party*** means—

- (a) if the order under subrule (1) was made on the application of a party—that party; or

- (b) if the order under subrule (1) was made by the court on its own initiative—the party nominated by the court.

**1522 Separate decisions on questions—directions**

(SCR o 37 r 6)

On the filing of the question—

- (a) the court must set a date for a directions hearing; and  
(b) the registrar must tell the parties the date set for the directions hearing.

**1523 Separate decisions on questions—decision**

(NSW r 28.3 and r 28.4; Qld r 484 and r 485)

- (1) If a question is decided under this division, the court may make the order, grant the relief and give the directions that the nature of the case requires.
- (2) The court may, in relation to a decision of a question under this division, as the nature of the case requires—
- (a) dismiss the proceeding or all or part of a claim for relief in the proceeding; or  
(b) give judgment, including a declaratory judgment; or  
(c) make another order.

**Division 2.15.4 Assessors and court-appointed referees**

**1530 Assessors**

(SCR o 38 r 25; Qld r 500)

- (1) The court may sit with 1 or more assessors.
- (2) A trial with assessors may be conducted as the court directs.

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

- (3) Assessors may be appointed as the court directs.
- (4) The Legislation Act, part 19.3 (Appointments) does not apply to an appointment under this rule.

**1531 Referee—referral of question etc**

(SCR o 89 r 2 (1) and r 4 (2); Qld r 501)

- (1) The court may, at any stage of a proceeding—
  - (a) refer a question to a referee for the referee to give an opinion on, or hear and decide, the question; or
  - (b) refer the proceeding to a referee for the referee to give an opinion on, or hear and decide, the proceeding.

- (2) The court may make an order on application by a party to the proceeding or on its own initiative.

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

- (3) If the court makes an order under subrule (1), it may give directions about the conduct of the reference.
- (4) Directions may be given in the reference or from time to time on application by a party or on the court's own initiative.

**1532 Referee—appointment**

(SCR o 89 r 2 (2))

- (1) The court may appoint a referee for a reference.

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

- (2) A referee may be—
  - (a) a judicial officer or other officer of the court; or
  - (b) anyone else—
    - (i) agreed by the parties; or



- (ii) named by the court; or
  - (iii) named by a person nominated by the court to select a suitable referee.
- (3) A judicial officer or other officer of the Supreme Court may only be appointed with the agreement of the Chief Justice.
- (4) A judicial officer or other officer of the Magistrates Court may only be appointed with the agreement of the Chief Magistrate.
- (5) The Legislation Act, part 19.3 (Appointments) does not apply to an appointment under this rule.

**1533 Referee—amendment of order referring question etc**

(SCR o 89 r 3)

- (1) The court may amend or set aside an order made under rule 1531 (Referee—referral of question etc).
- (2) The court may amend or set aside the order—
  - (a) on application by the referee or a party to the proceeding under the reference; or
  - (b) on its own initiative.

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

- (3) This rule does not affect any other power of the court to amend or set aside an order made under rule 1531.

**1534 Referee—conduct under reference**

(SCR o 89 r 4; Qld r 502)

- (1) A question or proceeding referred to a referee under rule 1531 must be conducted as if—
  - (a) the reference were an arbitration agreement under the *Commercial Arbitration Act 1986*; and

(b) the referee were an arbitrator under that Act.

*Note* The *Commercial Arbitration Act 1986*, s 19 deals with the taking of evidence.

- (2) However, each party to the proceeding must, within a time set by the referee but before the referee has finished hearing evidence, give the referee and each other active party a brief statement of the findings of fact and law that the party says the referee should make.
- (3) This rule is subject to—
- (a) any directions given by the court under rule 1531 for the reference; and
  - (b) rule 1535.

### **1535 Referee—submission of question to court**

(Qld r 503)

- (1) A referee may submit for the decision of the court a question that arises in the course of the question or proceeding referred to the referee under rule 1531.
- (2) The registrar must give a copy of the question to each active party at least 7 days before the day the question is considered by the court.
- (3) A party to the proceeding may file written submissions about the question not later than 7 days after the day the party is given a copy of the question.
- (4) The court must set a date for a hearing to consider the question.
- (5) The registrar must tell the active parties the date set for the hearing.
- (6) After considering any submissions made by the parties, the court must decide the question and may give the referee directions it considers appropriate.
- (7) The referee must comply with the decision of the court given on the question or proceeding.

**1536 Referee—report**

(SCR o 89 r 6; Qld r 504 (a))

- (1) Unless the court otherwise orders, a referee must file a written report on the question or proceeding referred to the referee.

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

- (2) The report must—
  - (a) give the referee’s opinion or decision on the question or proceeding referred; and
  - (b) give reasons for the opinion or decision; and
  - (c) have attached to it the statements given to the referee by the parties under rule 1534 (2).
- (3) The registrar must give a copy of the report to each active party.

**1537 Referee—proceeding on report**

(SCR o 89 r 7; Qld r 505 (1) (a))

- (1) This rule applies if a referee’s report has been filed in the court in a proceeding.
- (2) On application by a party, the court may, on a matter of fact or law or both—
  - (a) accept, amend or reject all or part of the report; or
  - (b) require the referee to give an explanation by further report; or
  - (c) on any ground, remit for further consideration and report by the referee all or part of the question or proceeding referred to the referee; or
  - (d) make an order in the proceeding on the evidence taken before the referee, with or without additional evidence.

*Note 1* **Order** is defined in the dictionary to include judgment (see also def *made*).

*Note 2* Pt 6.2 (Applications in proceedings) applies to an application under this subrule or for leave under this rule.

- (3) A party applying for an order under subrule (2) (d) must give at least 7 days notice of the party's intention to apply for the order to all other active parties.
- (4) Evidence additional to the evidence taken before the referee must not be given before the court on the question or proceeding referred to the referee unless the court gives leave.

### **1538 Assessor and referee—remuneration**

(SCR o 89 r 8; Qld r 506)

- (1) The court may decide, either in the first instance or finally—
  - (a) the remuneration of a referee or assessor; and
  - (b) by which party or parties, and in what proportion, the remuneration is to be paid.

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

- (2) The court may—
  - (a) order a party to give security for the remuneration of a referee or assessor; and
  - (b) order a stay of the proceeding until the security is given.

## **Division 2.15.5 Assessment of damages**

### **1545 Application—div 2.15.5**

This division applies subject to any order of the court.

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

**1546 Assessment of damages**

(NSW r 30.1; Qld r 509 (1))

- (1) An assessment of damages must be conducted as nearly as possible in the same way as a trial.
- (2) This rule is subject to rule 1547.

**1547 Assessment of damages—use of affidavit evidence**

(MC(CJ)R s 196 (3); NSW r 31.1 (5))

- (1) This rule applies to a proceeding in the Magistrates Court if judgment has been entered for the plaintiff against the defendant for damages to be assessed.
- (2) Evidence may be given by affidavit on the assessment of damages in relation to—
  - (a) the identity of a motor vehicle; or
  - (b) the damage sustained by a motor vehicle in a particular collision; or
  - (c) the reasonable cost of repairing the damage sustained by a motor vehicle in the particular collision; or
  - (d) anything else prescribed by practice note.

**1548 Partial judgment for damages to be assessed**

(NSW r 30.1 (3) and r 30.2; Qld r 508)

- (1) This rule applies if—
  - (a) a judgment (including a default judgment) is given for damages (including the value of goods) to be assessed; and
  - (b) the proceeding is carried on in relation to a claim for relief not decided by the judgment.
- (2) The court must assess the damages at the trial of the other claim for relief.

**1549 Damages to time of assessment**

(SCR o 38 r 29; MC(CJ)R s 216; NSW r 30.3; Qld r 512)

- (1) This rule applies if damages, including interest, may be assessed and—
  - (a) continuing damages are likely to happen; or
  - (b) there are—
    - (i) repeated breaches of recurring obligations; or
    - (ii) intermittent breaches of a continuing obligation.
- (2) The damages must be assessed for the period up to the time of assessment, including damages for breaches happening after the proceeding started.

## Part 2.16 Judgments and other orders

### 1600 Orders—required by nature of case

(SCR o 58 r 8; MC(CJ)R s 215 (1); NSW s 90 (1); NSW r 36.1; Qld r 658)

- (1) On the application of a party to a proceeding, the court may, at any stage of the proceeding, make any order that the nature of the case requires.

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

*Note 2* **Order** is defined in the dictionary to include judgment (see also def *made*).

- (2) The court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document.

### 1601 Judgment book

(SCR o 42 r 1)

- (1) The registrar of the Supreme Court must keep a judgment book.
- (2) The judgment book may be kept in electronic form.
- (3) The registrar must record in the judgment book—
  - (a) the distinguishing number or other unique identifier given to the proceeding for which a judgment is entered under rule 71 (Numbering etc of proceedings); and
  - (b) the judgment in the proceeding; and
  - (c) the date the judgment was entered; and
  - (d) the other information the court directs.
- (4) The registrar may record any other information in the judgment book.

**1602 Judgments—several claims**

(MC(CJ)R s 215 (2); NSW s 90 (2))

- (1) This rule applies if—
  - (a) there is a claim by a plaintiff in a proceeding and a counterclaim by a defendant in the proceeding; or
  - (b) there are several claims between the parties to a proceeding.
- (2) The court may give judgment—
  - (a) for the balance only of the amounts awarded on the respective claims between 2 or more parties; or
  - (b) in relation to each claim.

**1603 Orders—set off between enforceable money orders**

(MC(CJ)R s 229; NSW s 96)

- (1) This rule applies if, in relation to 2 or more money orders of the same court, the enforcement creditor and the enforcement debtor under 1 or more of the orders are the enforcement debtor and enforcement creditor, respectively, under the other orders.

*Note* **Enforceable money order, enforcement creditor** and **enforcement debtor** are defined in r 2000 (Definitions—pt 2.18).

- (2) The enforcement debtor under an enforceable money order made in a proceeding (the **first order**) may apply to the court for an order in the proceeding that the first order be set off against another enforceable money order of the same court (the **second order**) in which the enforcement debtor is the enforcement creditor.

*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 this rule—
  - (a) if the amount of the first order is less than the amount of the second order—the first order is taken to have been satisfied



and the amount of the second order is taken to have been reduced by the amount of the first order; or

- (b) if the amount of the first order is equal to the amount of the second order—both orders are taken to have been satisfied; or
- (c) if the amount of the first order is greater than the amount of the second order—the second order is taken to have been satisfied and the amount of the first order is taken to have been reduced by the amount of the second order.

**1604 Judgments—detention of goods**

(MC(CJ)R s 217; NSW s 93)

- (1) This rule applies to a proceeding in relation to the detention of goods.
- (2) The court may give judgment for the plaintiff against the defendant, in accordance with the plaintiff's claim for relief, for either—
  - (a) the return of the goods to the plaintiff, or the retention of the goods by the defendant and payment to the plaintiff of the value of the goods; or
  - (b) payment to the plaintiff of the value of the goods.
- (3) If the court gives judgment for the return of goods, it may state a date before which the return must take place.
- (4) If the court gives judgment for the return of goods, but the goods are subsequently damaged, destroyed or otherwise made unavailable for return, the court may, on the plaintiff's application, order the defendant to pay the value of the goods to the plaintiff.

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

- (5) If the court gives judgment under subrule (2) (a), and the plaintiff subsequently applies for an order under this subrule, the court may make an order for the return of the goods to the plaintiff without the option of the defendant retaining the goods and paying their value.

- (6) In this rule:

**value**, of the goods, means the value assessed by, or in accordance with the directions of, the court.

### 1605 Orders—making and effect

(SCR o 42 r 3, r 4, r 5 and r 6A (2); MC(CJ)R s 223; NSW r 36.11 (2); Qld r 660)

- (1) An order of the court is made by the order—
- (a) being pronounced in court by the judicial officer making the order; or
  - (b) being recorded, in accordance with the court's practice, as having been entered.

*Note* **Order** is defined in the dictionary to include judgment (see also def *made*).

- (2) An order takes effect on the day that the order is made.
- (3) However, the court may order that the order takes effect on an earlier or later date or at any earlier or later time.

*Note* Pt 6.2 (Applications in proceedings) applies to an application for an order under r (3).

### 1606 Orders—filing

(SCR o 38 r 24 and o 42 r 2 (1) to (3); MC(CJ)R s 225, s 226 and s 227; NSW r 36.11 (2); Qld r 661)

- (1) If a judicial officer or associate writes the date and terms of an order on a court file or document on a court file, then, unless the order is filed in the court, the writing is sufficient proof of the making of the order, its date and terms.
- (2) An order of the court is filed in the court if a document embodying the order, and the date the order was made, is drawn up, settled and signed by the registrar, and filed in the court.

- (3) The party in whose favour an order is made may, not later than 7 days after the day the order is made, file in the court a draft order for settling by the registrar.

*Note* See

- approved form 2.41 (General form of judgment—civil proceeding) [AF2006-472](#)
- approved form 2.42 (General form of order—civil proceeding) [AF2006-473](#).

- (4) If a draft order is not filed in accordance with subrule (3), another party to the proceeding may file in the court a draft order for settling by the registrar.
- (5) If a draft order is filed in the court under this rule, the registrar—
- (a) may approve the draft with or without amendment; and
  - (b) must enter the order on the filing of the final order in accordance with the approved draft.
- (6) An order must be filed in the court if—
- (a) the order is a judgment or other final order; or
  - (b) the court directs it to be filed; or
  - (c) a party asks for it to be filed.
- (7) Unless an order is filed in the court—
- (a) the order may not be enforced under part 2.18 (Enforcement) or by other process; and
  - (b) an appeal may not be brought against the order without the leave of the court to which the appeal would be made.

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

- (8) However—
- (a) an order appropriate on default of an earlier order may be made without the earlier order being filed in the court; and

- (b) costs payable under an order may be assessed without the order being filed in the court.

**1607 Orders—certified duplicate**

(SCR o 42 r 14; MC(CJ)R s 494; NSW r 36.12 (1); Qld r 662)

- (1) Unless the court otherwise orders on its own initiative, the registrar must, on request, give a person a sealed copy of an order entered in a proceeding.

*Note* A fee may be determined under the *Court Procedures Act 2004*, s 13 for this provision.

- (2) However, the registrar must not give a copy of the order to a person who is not a party to the proceeding unless the person appears to the registrar to have a sufficient interest in the order.
- (3) If a rule, order or practice of the court requires the production or service of a judgment or other order, it is sufficient to produce or serve the sealed copy of the order.

**1608 Orders—reasons**

(NSW r 36.2; Qld r 663)

- (1) If the court makes an order, and its reasons for the order are put in writing, the court may make the order orally without stating the reasons.
- (2) The reasons of the court for making any order in a proceeding may, if in writing, be published—
- (a) by the reasons being delivered in court to a judicial officer's associate or court officer for a copy to be given to each party; or
- (b) by a copy of the reasons signed by the judicial officer making the order being given to an appropriate officer of the court to deliver in court and a copy being given to each party.

*Note* **Order** is defined in the dictionary to include judgment (see also def *made*).

- (3) The reasons of a court for a proposed order may be published before the order is made.

**1609 Orders—reservation of decision**

(MC(CJ)R s 224; NSW r 36.3; Qld r 664)

- (1) At the end of a hearing in a proceeding, the judicial officer may reserve the decision on any question of fact or law, and may deliver the decision on another date or a date to be set.
- (2) If a judicial officer reserves a decision in a proceeding, the judicial officer may arrange for written reasons for the decision to be prepared setting out the proposed order, sign them and send them to another judicial officer for delivery.
- (3) The other judicial officer must, at a convenient time, publish in court the reasons for the decision.
- (4) The publication by the other judicial officer has the same effect as if, at the time of publication, the judicial officer who reserved the decision had been present in court and made the order proposed in the written reasons, and published the reasons in person.

**1610 Orders—time for compliance**

(SCR o 42 r 6; MC(CJ)R s 219; NSW r 36.5; Qld r 664)

- (1) An order in a proceeding requiring a person to perform an act must state the time within which the person is required to perform the act.
- (2) If an order in a proceeding requires a person to perform an act immediately or immediately on the happening of a stated event or to perform an act but does not state a time for the performance, the court may, by order, state a time within which the person must perform the act.

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

- (3) An order requiring a person to perform an act must have written on it or attached to it the following statement or a statement to the same effect:

‘If you, [state name of person required to perform act], do not obey this order within the time stated in it, a court proceeding may be taken to compel you to obey it.’

- (4) The court may amend a time stated in an order for the performance of an act.

## **1611 Orders—by consent**

(SCR o 42 r 11; Qld r 666)

- (1) The registrar may make an order in a proceeding if—

- (a) the parties affected by the order consent to the order; and
- (b) the registrar considers it appropriate.

*Note* **Order** is defined in the dictionary to include a judgment, direction or decision of the court (see also def *made*).

- (2) A party affected by the order may file a draft order for settling by the registrar.

*Note* See

- approved form 2.43 (General form of consent judgment) [AF2007-62](#)
- approved form 2.44 (General form of consent order) [AF2006-289](#).

- (3) The draft order must include a statement signed by the parties affected by the order that the parties consent to the order.

- (4) If a draft order is filed under this rule, the registrar—

- (a) may approve the draft with or without amendment; and
- (b) must enter the order on the filing of the final order in accordance with the approved draft.

- (5) An order made under this rule has effect as if it had been made by the court on the day it is entered under this rule.

**1612 Orders—by consent in proceeding**

(SCR o 42 r 10)

- (1) This rule applies to an order in a proceeding for judgment by consent.
- (2) If a party is represented by a legal practitioner in the proceeding, the party's consent to the order must be given by the party's practitioner.
- (3) If a party acts in person in the proceeding, the party's consent to the order must be given—
- (a) in person to the judicial officer hearing the proceeding; or
  - (b) in writing, witnessed by a legal practitioner.
- (4) However, a party who is a legal practitioner complies with subrule (3) (b) if the consent is in writing.

**1613 Orders—setting aside etc**

(MC(CJ)R s 221 (1) and s 222; NSW r 36.15 and r 35.16 (1) and (2); Qld r 667)

- (1) The court may amend or set aside an order before the filing of the order.

*Note 1* **Order** is defined in the dictionary to include judgment (see also def *made*).

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

- (2) The court may set aside an order at any time if—
- (a) the order was made in the absence of a party; or
  - (b) the order was obtained by fraud; or
  - (c) the order is for an injunction or the appointment of a receiver;  
or

- (d) the order does not reflect the court's intention at the time the order was made; or
  - (e) the party who has the benefit of the order consents; or
  - (f) for a judgment for specific performance, the court considers it appropriate for reasons that have arisen since the order was made.
- (3) If the court sets aside an order, it may also set aside any order made to enforce the order.
  - (4) If the court sets aside an order under subrule (3), the setting aside of the order does not affect the title to any property sold under the order before it is set aside.
  - (5) This rule does not apply to a default judgment.

*Note* See r 1128 (Default judgment—setting aside etc) in relation to setting aside a default judgment.

## **1614 Order dismissing proceeding—effect**

(NSWA s 91)

- (1) This rule applies to the dismissal of—
  - (a) a proceeding, either generally or in relation to any cause of action; or
  - (b) a claim, or any part of a claim, for relief in a proceeding.
- (2) Subject to the order for dismissal, the dismissal does not prevent the plaintiff in the proceeding from starting a fresh proceeding or claiming the same relief in a fresh proceeding.
- (3) However, if the dismissal follows a decision on the merits, the plaintiff must not claim any relief in relation to the same cause of action in any subsequent proceeding in a court.



**1615 Orders—joint liability**

(MC(CJ)R s 228; NSW s 95)

- (1) This rule applies if—
  - (a) 2 or more people are jointly liable in relation to a cause of action in a proceeding; and
  - (b) 1 or more, but not all, of the people jointly liable are served with the originating process.
- (2) The court may enter judgment in relation to the cause of action against any 1 or more of the people served with the originating process, and the judgment may be enforced against anyone against whom judgment is entered.
- (3) If judgment is entered in relation to the cause of action against 1 or more, but not all, of the people jointly liable in relation to the cause of action—
  - (a) the liability of the people jointly liable against whom judgment is not entered (the *other people*) is not discharged by the judgment or any enforcement of the judgment; and
  - (b) the people against whom judgment is entered (the *judgment parties*) and the other people are, as between the judgment parties on the one hand and the other people on the other hand, liable severally but not jointly; and
  - (c) if there are 2 or more other people—the other people are jointly liable as between themselves; and
  - (d) if the judgment is satisfied or partly satisfied—the liability of the other people is discharged to the extent to which the judgment is satisfied.
- (4) Subrule (3) does not affect a person's right to contribution or indemnity in relation to the person's satisfaction of all or part of a liability that the person has (whether jointly, severally or jointly and severally) with anyone else.

- (5) This rule does not apply to a proceeding to which the *Civil Law (Wrongs) Act 2002*, section 107F (Proportionate liability for apportionable claims) applies.

**1616 Interest up to judgment**

(SCR o 42A r 1; MC(CJ)R s 230; NSW s 100; QldSCA, s 47)

- (1) In a proceeding for the recovery of money, including a debt or damages or the value of goods, the court may—
- (a) order that interest be included in the amount for which judgment is given—
    - (i) at the rate it considers appropriate; and
    - (ii) on all or any part of the money; and
    - (iii) for all or any part of the period beginning on the day the cause of action arose and ending on the day before the day judgment is entered; or
  - (b) order that a lump sum be included in the amount for which judgment is given instead of interest under paragraph (a).
- (2) However, the court must not order that interest be included, or that an amount be included in a lump sum instead of interest, for—
- (a) compensation in relation to liabilities incurred that do not carry interest as against the person claiming interest or claiming a lump sum instead of interest; or
  - (b) compensation for loss or damage to be incurred or suffered after the day judgment is given; or
  - (c) exemplary or punitive damages.
- (3) Subrule (4) applies if—
- (a) a proceeding is started for a debt or liquidated demand; and

- (b) payment of all or part of the debt or liquidated demand is made during the proceeding and before or without judgment being entered in relation to the debt or liquidated demand.
- (4) On application by a party to the proceeding, the court may order that interest be paid—
  - (a) at the rate it considers appropriate on all or part of the amount paid; and
  - (b) for all or any part of the period between the day the cause of action arose and the day of the payment.

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

- (5) For subrule (1) (a), the court may set the rate of interest—
  - (a) in accordance with the rate stated in the claim for relief; or
  - (b) having regard to the rate of interest applying, from time to time, under schedule 2, part 2.1 (Interest up to judgment).
- (6) This rule—
  - (a) does not authorise the giving of interest on interest awarded under this rule; and
  - (b) does not apply in relation to any debt on which interest is payable as of right, whether by agreement or otherwise; and
  - (c) does not affect damages recoverable for the dishonour of a bill of exchange.
- (7) In a proceeding for damages, the court must not order the payment of interest under this rule in relation to a period after the defendant offers (or first offers) an appropriate settlement amount to the plaintiff unless the special circumstances of the case justify the making of the order.
- (8) For subrule (7), if an amount is offered in settlement of the proceeding and the amount for which judgment is entered in the

proceeding (including interest until the day of the offer) does not exceed the amount offered in settlement by more than 10%, the amount offered is an *appropriate settlement amount*.

**1617 Interest after judgment**

(SCR o 42A r 2; MC(CJ)R s 234; NSW s 101; QldSCA s 48)

- (1) Unless the court otherwise orders, interest is payable on the amount of a judgment debt (other than costs) that is unpaid at any time at the rate of interest applying at that time under schedule 2, part 2.2 (Interest after judgment).

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

- (2) However, unless the court otherwise orders, interest is not payable on the amount of the judgment debt if the amount is paid in full not later than 28 days after the day the judgment takes effect.
- (3) Interest is payable on any amount awarded for costs, unless the court otherwise orders.
- (4) Unless the court otherwise orders, interest is payable on an amount awarded for costs that is unpaid at any time—
  - (a) at the rate of interest applying at that time under schedule 2, part 2.2 (Interest after judgment); and
  - (b) from the day the costs were assessed or another date decided by the court.
- (5) This rule does not authorise the giving of interest on interest payable under this rule.

**1618 Judgment for interest only**

(MC(CJ)R s 232)

- (1) This rule applies if—
  - (a) the defendant in a proceeding satisfies the plaintiff's claim after the proceeding is started; and

- (b) the plaintiff would be entitled to judgment on the claim if the defendant had not satisfied the claim.
- (2) The plaintiff is entitled to judgment for interest in relation to the amount claimed in accordance with rule 1616 (Interest up to judgment).

**1619 Interest after judgment—usual order as to interest**

- (1) This rule applies if the court order in relation to a judgment debt or costs awarded is expressed to be the usual order as to interest.
- (2) Subject to this rule, interest is payable on the amount of the judgment debt, and on any costs awarded, at the rate that applies from time to time under rule 1617.
- (3) Interest is not payable on the amount of the judgment debt if, not later than 28 days after the date of the judgment—
  - (a) the debt is paid; and
  - (b) the plaintiff gives the defendant notice from Medicare Australia confirming that no amount of the debt is payable to Medicare Australia; and
  - (c) the defendant has not been given a notice under—
    - (i) the *Social Security Act 1991* (Cwlth), section 1182 (Secretary may send preliminary notice to potential compensation payer or insurer) (a ***preliminary compensation recovery notice***); or
    - (ii) the *Social Security Act 1991* (Cwlth), section 1184 (Secretary may send recovery notice to compensation payer or insurer) (a ***compensation recovery notice***).
- (4) Interest is not payable on the amount of the judgment debt if, not later than 28 days after the date of the judgment, the defendant—
  - (a) pays to Medicare Australia—

- (i) the amount of any charge stated in a Medicare Australia notice of charge given to the defendant; or
    - (ii) if the defendant has not been given a Medicare Australia notice of charge—10% of the judgment debt; and
  - (b) pays to the plaintiff—the remainder of the judgment debt.
- (5) Interest is not payable on the amount of the judgment debt while a preliminary compensation recovery notice given to the defendant has effect.
- Note* For the effect of a notice, see the *Social Security Act 1991* (Cwlth), s 1184B (Preliminary notice or recovery notice suspends liability to pay compensation).
- (6) Interest is not payable on the amount of the judgment debt if—
- (a) the defendant is given a compensation recovery notice; and
  - (b) the defendant pays the amount of the judgment debt, less any amount owing to the Commonwealth under the notice, to the plaintiff not later than 28 days after the later of the following:
    - (i) the day the judgment takes effect;
    - (ii) the day the defendant receives the notice.
- (7) Interest is not payable on any amount awarded for costs if the amount is paid not later than 28 days after—
- (a) the day the parties agree on the amount; or
  - (b) if paragraph (a) does not apply, the day the costs are assessed.
- (8) In this rule:
- compensation recovery notice***—see subrule (3) (c) (ii).
- preliminary compensation recovery notice***—see subrule (3) (c) (i).

**1620      Change in interest rates up to and after judgment**

The advisory committee may recommend a change in the rates of interest set out in schedule 2 to take effect on 1 January of the year following the recommendation.

## Part 2.17 Costs

### Division 2.17.1 Costs generally

#### 1700 Definitions—pt 2.17

(SCR o 65 r 53A; Qld r 679)

In this part:

***costs of the proceeding***, for a proceeding, means costs of all the issues in the proceeding, and includes—

- (a) costs ordered to be costs of the proceeding; and
- (b) costs of complying with the necessary steps before starting the proceeding; and
- (c) costs otherwise incurred for the purpose and benefit of the proceeding before starting the proceeding; and
- (d) costs incurred before or after the start of the proceeding for successful or unsuccessful negotiations for settlement of the dispute.

*Note 1* The costs of the proceeding include the costs of an application in the proceeding, unless the court otherwise orders (see r 1721 (2) (Costs—general rule)).

*Note 2* This definition also applies outside this part.

***party*** includes a person not a party to a proceeding by or to whom assessed costs of the proceeding are payable.

***prescribed scale of costs*** means the scale of costs in schedule 4 (Scale of costs).

***trustee*** includes a personal representative of a deceased individual.



## **1701 Costs—general provisions**

(MC(CJ)R s 247; Qld r 680)

- (1) The costs that the court may award—
  - (a) may be awarded at any stage of a proceeding or after the proceeding ends; and
  - (b) must be assessed in accordance with this part.
- (2) If the court awards the costs of an application in a proceeding, it may order that the costs not be assessed until the proceeding ends.

*Note 1* **Application** in a proceeding is defined in r 6006.

*Note 2* The costs of the proceeding include the costs of an application in the proceeding, unless the court otherwise orders (see r 1721 (2) (Costs—general rule)).

*Note 3* Pt 6.2 (Applications in proceedings) applies to an application for an order under r (2).

## **1702 Costs—agreement about costs**

(MC(CJ)R s 249; Qld r 723)

- (1) If a party entitled to costs and a person liable for costs agree that the costs be set at a certain amount (the **agreed amount**), either party may file a written agreement to the costs being set at the agreed amount.
- (2) The agreement must be signed by the parties or their solicitors.
- (3) On the filing of the agreement, the agreed amount is taken to be the assessed costs between the parties.

## **1703 Costs—order against non-party**

(NSW r 42.3)

- (1) Unless these rules otherwise provide, the court must not make an order for costs in a proceeding against a person who is not a party to the proceeding except in accordance with subrule (2).

*Note* For provisions of these rules that otherwise provide, see r 745 (Freezing orders—costs) and r 755 (Search orders—costs).

- (2) The court may make an order—

- (a) for payment by a relator in a proceeding of all or part of the costs of a party to the proceeding; or

*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.

- (b) for payment by a person of all or part of the costs of a party to a proceeding that were caused by—

- (i) the person's contravention of an order made by the court in the proceeding that is binding on the person; or  
(ii) the person's breach of an undertaking given to the court by the person in the proceeding; or

- (c) for payment, by a person who has committed contempt of court or an abuse of the court's process, of all or part of the costs of a party to a proceeding that were caused by the contempt or abuse of process; or

- (d) for costs against a person who purports, without authority, to conduct a proceeding in the name of someone else; or

- (e) for costs against a person who starts or carries on a proceeding, or purports to do so, as an authorised director of a corporation; or

- (f) of the kind mentioned in rule 1704; or
- (g) for costs against a person in the exercise of its supervisory jurisdiction over its own proceedings and its own officers, including, for example, an order for costs against legal practitioners and court-appointed liquidators and receivers.

*Note 1* The court may order a legal practitioner to pay all or part of a party's costs if the costs are incurred because of the practitioner's conduct (see r 1753 (Costs—legal practitioner's delay etc)).

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

*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).

- (3) The court may make an order under subrule (2) (g) on its own initiative if justice requires it.

## **1704 Costs—failure to comply with subpoena etc**

(NSW r 42.27)

- (1) This rule applies if, in a proceeding—
  - (a) a person is ordered by the court, by subpoena or otherwise, to attend court—
    - (i) to give evidence; or
    - (ii) to produce a document or thing; or
    - (iii) to answer a charge of contempt; or
    - (iv) for any other purpose; or
  - (b) a person is required by a notice for non-party production to produce a document for inspection.

- (2) If the order is not complied with, the court may order the person to pay any costs of a party to the proceeding caused by the noncompliance.

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

- (3) This rule does not limit any power of the court to punish for contempt.

### **1705 Costs—for issue or part of proceeding**

(Qld r 682)

- (1) The court may make an order for costs in relation to a particular issue in, or a particular part of, a proceeding.

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

- (2) For subrule (1), the court may declare what percentage of the costs of the proceeding is attributable to the issue or part of the proceeding to which the order relates.

### **1706 Costs—if unnecessary to continue proceeding**

(MC(CJ)R s 218; Qld r 683)

- (1) If, for any reason, it becomes unnecessary to continue a proceeding other than for deciding who is to pay the costs of the proceeding, any party to the proceeding may apply to the court for an order for the costs.

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

- (2) The court may make the order it considers just.

### **1707 Costs—proceeding removed to another court**

(SCR o 65 r 2; Qld r 686)

- (1) This rule applies if a proceeding is removed to the court from another court or tribunal (the *first court*).

(2) For the proceeding—

- (a) if the first court has not made an order for costs—the court may make an order for the costs of the proceeding, including the costs before the removal; and
- (b) any order for costs made by the first court may be assessed and enforced as if it were an order of the court.

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

- (3) Unless the court otherwise orders, the costs up to the time of the removal must be assessed as if the proceeding had remained in the first court.

**1708 Costs—in account**

(SCR o 65 r 50; Qld r 687)

If the court orders that an account be taken and the account is partly for costs, the court may set costs or order that the registrar assess costs under this part.

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

**Division 2.17.2 Entitlement to costs**

**1720 Costs—entitlement to recover**

(SCR o 65 r 20; MC(CJ)R s 248; Qld r 685 and r 691)

- (1) A party to a proceeding cannot recover any costs of the proceeding from another party or anyone else otherwise than by agreement, under a territory law, or an order of the court under a territory law.

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

- (2) If, under a territory law or an order of the court, a party is entitled to costs, the costs are to be assessed costs.

*Note* The parties may agree that the costs be set at a certain amount (see r 1702 (Costs—agreement about costs)).

- (3) However, instead of assessed costs, the court may order a person liable for costs to pay to the party entitled to costs—
- (a) a stated part or percentage of assessed costs; or
  - (b) assessed costs to or from a stated stage of the proceeding; or
  - (c) an amount for costs decided by the court; or
  - (d) an amount for costs to be decided in a way the court directs.

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

### 1721 Costs—general rule

(SCR o 65 r 1; MC(CJ)R s 246; Qld r 689 and r 693)

- (1) The costs of a proceeding or of an application in a proceeding are in the discretion of the court.
- (2) The costs of the proceeding include the costs of an application in the proceeding, unless the court otherwise orders.

*Note 1* **Application** in a proceeding is defined in r 6006.

*Note 2* Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

### 1722 Costs—solicitors' costs generally

(SCR o 65 r 7; MC(CJ)R s 259 and s 260, dict, def **prescribed percentage**; Qld r 690 (1) and (7))

- (1) For assessing costs under this part, unless the court otherwise orders, a solicitor is entitled to charge, and be allowed, the costs under the prescribed scale of costs for work done for or in a proceeding in the court, multiplied by the prescribed percentage.

*Note* The *Civil Law (Wrongs) Act 2002*, s 181 (Maximum costs for claims of \$50 000 or less) limits costs in relation to a claim for personal injury damages if \$50 000 or less is recovered, if the cause of action arose after 1 January 2003 or the party and the party's solicitor had an agreement about costs before 1 January 2003 (see *Civil Law (Wrongs) Act 2002*, s 224 (expired)).

- (2) The costs under the prescribed scale of costs for work done are inclusive of any GST payable in relation to the work.
- (3) However, the costs payable to a party are reduced by the amount of any input tax credit for GST to which the party is entitled in relation to the party's costs.
- (4) In this rule:

***prescribed percentage*** means—

- (a) for a proceeding in the Supreme Court—100%; or
- (b) for a proceeding in the Magistrates Court—
  - (i) if the relevant amount is less than \$10 000—33%; or
  - (ii) if the relevant amount is not less than \$10 000 but less than \$25 000—67%; or
  - (iii) if the relevant amount is not less than \$25 000 but less than \$40 000—80%; or
  - (iv) if the relevant amount is not less than \$40 000—90%.

***relevant amount***—see rule 1723.

### **1723 Costs—*relevant amount* for Magistrates Court proceedings**

(MC(CJ)R s 259 and s 260)

- (1) For a proceeding in the Magistrates Court in which a counterclaim is not issued, the ***relevant amount*** for costs is—
  - (a) if judgment in the proceeding is given for the plaintiff and if the defendant pays any amount to the plaintiff after the proceeding starts—the amount for which judgment is given together with the total of the amounts paid to the plaintiff after the proceeding started; or
  - (b) if judgment in the proceeding is given for the plaintiff—the amount for which judgment is given; or

- (c) if judgment in the proceeding is given against the plaintiff, or the plaintiff is otherwise required to pay the costs of the proceeding—the amount for which the originating process in the proceeding was issued.
- (2) For a proceeding in the Magistrates Court in which a counterclaim is issued, the *relevant amount* for costs is—
- (a) if judgment in the proceeding and the counterclaim is given for the plaintiff in the proceeding—
    - (i) for costs incurred before service on the plaintiff of the counterclaim—the amount for which judgment is given; and
    - (ii) for costs incurred after service on the plaintiff of the counterclaim—the amount for which judgment is given or the amount for which the counterclaim was issued, whichever is the higher; or
  - (b) if judgment in the proceeding and the counterclaim is given for the defendant in the proceeding—the amount for which the originating process in the proceeding was issued or the amount for which judgment on the counterclaim was given, whichever is the higher; or
  - (c) if judgment in the proceeding is given for the plaintiff in the proceeding and in the counterclaim is given for the defendant in the proceeding—
    - (i) for costs payable to the plaintiff—the amount for which judgment on the originating process was given; and
    - (ii) for costs payable to the defendant—the amount for which judgment on the counterclaim was given; or
  - (d) if judgment in the proceeding is given against the plaintiff in the proceeding and in the counterclaim is given against the defendant in the proceeding—



- (i) for costs payable by the plaintiff—the amount for which the originating process in the proceeding was issued; and
  - (ii) for costs payable by the defendant—the amount for which the counterclaim was issued.
- (3) For a proceeding in the Magistrates Court in which an amount is not claimed, the court may set an amount for the proceeding (the *relevant amount*), having regard to the nature and complexity of the proceeding.

**1724 Solicitors' costs—separate judgments against defendants in Magistrates Court**

(MC(CJ)R s 262)

- (1) This rule applies to a proceeding in the Magistrates Court in which there are 2 or more defendants.
- (2) If judgment for or including costs in the proceeding is given separately against 2 or more defendants, the costs must be assessed once only against the defendants on the basis of the larger or largest judgment.
- (3) On the assessment of costs, costs incurred against any defendant must be allowed against all of the defendants.
- (4) The plaintiff may enforce a costs order under this rule against any 1 or more of the defendants against whom the order is made.
- (5) However, the defendants are liable as between themselves to contribute to the costs in proportion to the respective amounts for which judgment was given against each defendant in the proceeding.

**1725 Solicitors' costs and determined fees—Supreme Court judgment within Magistrates Court jurisdiction**

(SCR o 65 r 7A; Qld r 698)

- (1) This rule applies to a proceeding in the Supreme Court if—

- (a) the Magistrates Court—
    - (i) would have had jurisdiction and power to hear and decide the proceeding; or
    - (ii) would, apart from the amount claimed, have had jurisdiction and power to hear and decide the proceeding; and
  - (b) the plaintiff is entitled to the costs of the proceeding; and
  - (c) the plaintiff is awarded an amount (excluding costs) of not more than \$40 000.
- (2) The plaintiff is only entitled to—
- (a) the costs that the plaintiff would have been entitled to recover had the proceeding been started in the Magistrates Court; and
  - (b) the amount of any Magistrates Court determined fee that the plaintiff would have been entitled to recover had the proceeding been started in the Magistrates Court.
- (3) The costs (including any Magistrates Court determined fee) that the plaintiff is entitled to under subrule (2) must be reduced by—
- (a) the additional costs properly incurred by the defendant because the proceeding was started in the Supreme Court instead of the Magistrates Court; and
  - (b) the difference between the amount of any Supreme Court determined fee incurred by the defendant and the amount of the equivalent Magistrates Court determined fee.
- (4) However, the plaintiff is not required to pay the defendant any amount that the defendant's costs (including determined fees) exceed the costs (including determined fees) payable to the plaintiff.
- (5) This rule does not apply in relation to disbursements (other than determined fees).

- (6) Despite subrules (2) to (4), the court may order that the plaintiff is entitled to a different amount for the costs (including the amount of any Magistrates Court determined fee).

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

- (7) In this rule:

***Magistrates Court determined fee*** means the relevant determined fee under the *Court Procedures Act 2004*, part 3 (Court and tribunal fees) in relation to a proceeding in the Magistrates Court (and includes a fee determined under any other territory law that applied to a proceeding in that court before the commencement of that part).

***Supreme Court determined fee*** means the relevant determined fee under the *Court Procedures Act 2004*, part 3 (Court and tribunal fees) in relation to a proceeding in the Supreme Court (and includes a fee determined under any other territory law that applied to a proceeding in that court before the commencement of that part).

## **1726 Costs—amendment of documents**

(SCR o 65 r 55 and 56; Qld r 692)

- (1) This rule does not apply to a party who amends a document because of another party's amendment or default.
- (2) A party who amends a document must pay the costs of and caused by the amendment, unless the court otherwise orders.

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

**1727 Costs—party not interested in application**

(SCR o 65 r 46)

If a party appears on an application in a proceeding in which the party has no interest, or ought not to attend, the party must not be allowed the costs of the appearance, unless the court otherwise orders.

*Note 1* **Application** in a proceeding is defined in r 6006.

*Note 2* Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

**1728 Costs—for application reserved**

(FCR o 62 r 15; Qld r 699)

If the court reserves costs of an application in a proceeding, the costs reserved become costs in the cause, unless the court otherwise orders.

*Note 1* **Application** in a proceeding is defined in r 6006.

*Note 2* Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise ordering.

*Note 3* If a proceeding is removed to the court from another court or tribunal, the costs up to the time of the removal must be assessed as if the proceeding had remained in the court from which it was removed (see r 1707 (Costs—proceeding removed to another court)).

**1729 Costs—extending or shortening time**

(SCR o 65 r 47; FCR o 62 r 23; Qld r 695)

A party applying for the extension or shortening of a time set under these rules must pay the costs of the application or any order made on or because of the application, unless the court otherwise orders.

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

**1730 Costs—inquiry to find person entitled to property**

(SCR o 65 r 12; Qld r 697)

The costs of an inquiry to find out who is entitled to a legacy, money, share or other property must be paid out of the property, unless the court otherwise orders.

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

**1731 Costs—assessment of receiver’s costs**

(Qld r 700)

The costs of a receiver appointed in a proceeding may be assessed by the registrar on the application of the receiver or a party to the proceeding.

**1732 Costs—trustee**

(SCR o 65 r 1A and r 11; Qld r 701 and r 705)

- (1) This rule applies to a party who sues or is sued as trustee.
- (2) Unless the court otherwise orders—
  - (a) the party is entitled to have costs of the proceeding that are not paid by someone else paid out of the fund held by the trustee; and
  - (b) the costs must be assessed on a solicitor and client basis.

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

- (3) However, the costs caused by an unsuccessful claim or unsuccessful resistance to any claim to any property must not be paid out of the fund, unless the court otherwise orders.

**1733 Costs—solicitor appointed litigation guardian**

(SCR o 65 r 9)

- (1) This rule applies if a solicitor is appointed by the court as litigation guardian of a person with a legal disability.
  - (2) The court may direct that the solicitor's costs incurred in exercising the functions of litigation guardian must be paid—
    - (a) by all or any of the parties to the proceeding in which the appointment is made; or
    - (b) out of a fund in court (if any) in which the person is interested.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for directions under this rule.
- (3) The court may give directions for the payment of costs mentioned in subrule (2).

**1734 Costs—assessment costs**

(MC(CJ)R s 283 (1) and (2); Qld r 694)

- (1) The costs of a proceeding include the costs of preparing a bill of costs and attending the assessment of costs.
- (2) This rule is subject to rule 1809 (3) (a) (ii) (Costs—default assessment if no objection to bill of costs).

**1735 Costs—counsel's advice and settling documents**

(SCR o 65 r 37 and r 69; Qld r 728)

The costs of a proceeding may include costs incurred for—

- (a) the advice of counsel on pleadings, evidence or other matters in a proceeding; and
- (b) counsel drawing or settling any pleading or other document in a proceeding that is appropriate for counsel to draw or settle.

**1736 Costs—evidence**

(SCR o 65 r 31; MC(CJ)R s 269 and s 270; Qld r 729)

- (1) The costs of a proceeding may include costs incurred in procuring evidence, and the attendance of witnesses or the production of documents.
- (2) For this rule, the attendance of a witness includes an attendance at any necessary conference with counsel before the trial and, if the witness is an expert, qualifying to give evidence as an expert.

**Examples of costs incurred**

- 1 reasonable conduct money or witness expenses paid to a witness, whether or not the witness attended under subpoena
- 2 reasonable expenses of preparing and proving plans, drawings, models or photographs

*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).

**1737 Costs—solicitor advocate**

(SCR o 65 r 83; Qld r 730)

- (1) This rule applies if a solicitor appears on a trial alone or instructed by a partner or employee.
- (2) The registrar must not allow the solicitor or partner a fee for preparing a brief.
- (3) The registrar may allow a single fee for preparing for the trial.

**1738 Costs—retainer for counsel**

(SCR o 65 r 68; MC(CJ)R s 264; Qld r 732)

In assessing costs on a party and party basis, the registrar must not allow a fee paid to counsel as a retainer.

**1739 Costs—counsel’s fees for applications**

(NT r 63.72 (9))

- (1) If the court certifies the use of counsel on an application in a proceeding, the registrar must allow counsel’s fees for the application.

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

- (2) However, if the court does not certify the use of counsel on the application, the registrar must not draw any inference about allowing counsel’s fees.

**1740 Costs—fixed costs for winding-up application**

- (1) This rule applies to an application to wind up a company under schedule 6, part 6.5 (Winding-up proceedings (including oppression proceedings where winding-up is sought)) if—
  - (a) the court orders the company to be wound up; or
  - (b) the applicant discontinues the application on a condition that the company pay an amount to the applicant.
- (2) The applicant’s costs and disbursements (plus any filing and service fees actually paid) must be allowed without assessment if the costs and disbursements claimed (other than any filing and service fees actually paid) are not more than the costs amount applying, from time to time, under schedule 3, part 3.3 (Company winding-up).
- (3) The costs allowed under subrule (2) are inclusive of any GST payable in relation to the work.
- (4) However, the costs payable to a party are reduced by the amount of any input tax credit for GST to which the party is entitled in relation to the party’s costs.
- (5) The applicant’s costs and disbursements must be agreed or assessed if the costs and disbursements claimed (other than any filing and service fees actually paid) are more than the costs amount applying,



from time to time, under schedule 3, part 3.3 (Company winding-up).

*Note* See r 1702 (Costs—agreement about costs).

## **Division 2.17.3 Costs of party in proceeding**

### **1750 Application—div 2.17.3**

(Qld r 702)

This division applies to costs that, under a territory law or an order of the court, are to be paid to a party to the proceeding by another party, by a person who is not a party to the proceeding, or out of a fund.

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

### **1751 Costs—assessed on party and party basis**

(SCR o 65 r 53; Qld r 703)

- (1) Unless a territory law or an order of the court otherwise provides, the registrar must assess costs on a party and party basis.

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

*Note 2* Pt 6.2 (Applications in proceedings) applies to an application for an order otherwise providing.

- (2) In assessing costs on a party and party basis, the registrar must allow all costs that the registrar considers were fair and reasonable for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed.

### **1752 Costs—assessed on solicitor and client etc basis**

(Qld r 704)

- (1) The court may order costs to be assessed—
  - (a) on a solicitor and client basis; or
  - (b) on an indemnity basis; or

(c) on any other basis it considers appropriate.

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

- (2) Without limiting subrule (1), the court may order that costs be assessed on a solicitor and client basis if it orders payment of costs—
- (a) out of a fund; or
  - (b) to a party who sues or is sued as a trustee; or
  - (c) of an application in a proceeding brought for—
    - (i) noncompliance with an order of the court; or
    - (ii) breach of an undertaking given to the court.
- (3) In assessing costs on a solicitor and client basis, the registrar must allow all costs reasonably incurred and of a reasonable amount, having regard to—
- (a) the costs allowable under rule 1722 (Costs—solicitors’ costs generally); and
  - (b) charges ordinarily payable by a client to a solicitor for the work.
- (4) In assessing costs on an indemnity basis, the registrar—
- (a) must allow all costs other than costs unreasonably incurred (with the party paying the costs having the onus of proving that the costs were unreasonably incurred); and
  - (b) may have regard to any costs agreement between the party to whom the costs are payable and the party’s solicitor.

### **1753 Costs—legal practitioner’s delay etc**

(SCR o 65 r 3 and r 8; MC(CJ)R s 257; Qld r 708)

- (1) This rule applies to a legal practitioner acting for a party to a proceeding if—

- (a) the hearing of the proceeding, or an application in the proceeding, did not proceed, and a party to the proceeding incurred costs, because the practitioner—
    - (i) failed to attend the hearing either personally or by someone on his or her behalf; or
    - (ii) failed to file a document; or
    - (iii) failed to deliver a document or thing necessary for use in the hearing; or
    - (iv) failed to do anything else required to be done under these rules or in accordance with the practice of the court; or
  - (b) a party to the proceeding incurred costs because of the delay, misconduct or negligence of the practitioner.
- (2) The court may order the legal practitioner—
- (a) to repay to a party all or part of any costs ordered to be paid by the party to another party because of the practitioner's conduct; or
  - (b) to pay the costs incurred by any party because of the practitioner's conduct.
- Note* Pt 6.2 (Applications in proceedings) applies to an application for an order under this rule.
- (3) The court may, on its own initiative, order the legal practitioner not to charge the practitioner's client costs in relation to all or any part of the proceeding if justice requires it.

**1754 Costs—disallowance of costs for vexatious document etc**  
(SCR o 65 r 43)

- (1) The court may order that the costs of anything done, or any document prepared or used, in a proceeding be disallowed completely or partly if it considers—

- (a) for something done—any of the following:
  - (i) that doing the thing was, completely or partly, improper, vexatious or unreasonable;
  - (ii) that the thing was done because of misconduct or negligence;
  - (iii) that doing the thing caused unnecessary expense; or
- (b) for a document—any of the following:
  - (i) that the document was, completely or partly, improper, vexatious or unreasonable;
  - (ii) that the document was prepared or used because of misconduct or negligence;
  - (iii) that the document was unnecessarily lengthy;
  - (iv) if there is an approved form for a document—that the document substantially departs from the approved form.

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

- (2) The court may direct the registrar to consider anything done, or any document prepared or used, in a proceeding, and to disallow, completely or partly, the costs of the thing or document, or to assess costs as a lump sum, if the registrar considers—
  - (a) for something done—any of the following:
    - (i) that doing the thing was, completely or partly, improper, vexatious or unreasonable;
    - (ii) that the thing was done because of misconduct or negligence;
    - (iii) that doing the thing caused unnecessary expense; or

- (b) for a document—any of the following:
- (i) that the document was, completely or partly, improper, vexatious or unreasonable;
  - (ii) that the document was prepared or used because of misconduct or negligence;
  - (iii) that the document was unnecessarily lengthy;
  - (iv) if there is an approved form for a document—that the document substantially departs from the approved form.

*Note* Rule 6144 (Rejecting document—costs) provides that costs incurred by a party in relation to a document rejected under div 6.3.3 may be disallowed on assessment of the party's costs.

## **Division 2.17.4 Costs—registrar's powers and discretion**

### **1760 Costs—registrar's general powers**

(SCR o 65 r 48 and r 80; MC(CJ)R s 275; Qld r 706)

For assessing costs, the registrar may do any of the following:

- (a) if satisfied that a stamped copy of a bill of costs cannot be served within a reasonable time—dispense with service;
- (b) direct a party to subpoena someone to attend a hearing, or produce a document or thing, before the registrar;
- (c) if satisfied there is or may be a conflict of interest between a party's legal practitioner and the party—require the party to be represented by another legal practitioner;
- (d) unless the court otherwise orders, extend or shorten the time for taking any step in the assessment;
- (e) administer an oath or receive an affirmation;
- (f) examine witnesses;

- (g) direct or require a party to produce documents;
- (h) give directions about the conduct of the assessment;
- (i) assess the costs in the absence of a party to the proceeding if the party does not appear at the time set for the assessment;
- (j) anything else the court directs.

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

### **1761 Costs—registrar’s discretion in assessing**

(SCR o 65 r 61; Qld r 707)

In assessing costs, the registrar must consider the following:

- (a) any other fees and allowances payable to the solicitor or counsel for other items in the same proceeding;
- (b) the nature and importance of the proceeding;
- (c) the amount involved;
- (d) the principle involved;
- (e) the interest of the parties;
- (f) the fund, estate, or person who is to pay the costs;
- (g) the general conduct and cost of the proceeding;
- (h) any other relevant circumstances.

## **Division 2.17.5 Procedure for assessing costs**

### **1800 Costs—when bill of costs to be filed etc**

(SCR o 65 r 49 and r 58 (1), (2) and (3); MC(CJ)R s 273 and s 275; Qld r 684, r 710 (2) and r 711)

- (1) This rule applies if costs are to be paid to a party to a proceeding by another party, by a person who is not a party to the proceeding, or out of a fund—

- (a) under—
  - (i) a territory law; or
  - (ii) an order of the court; or
  - (iii) a filed written agreement; but
- (b) the party entitled to costs and the person liable for costs cannot agree on the amount of costs to be paid.

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

- (2) The costs must be assessed by the registrar.
- (3) The party entitled to costs must file a bill of costs.
- (4) On receipt of the bill of costs, the registrar must write on the bill, and a stamped copy of the bill, the day and time when the bill is to be assessed.
- (5) The party entitled to costs must serve a stamped copy of the bill on each party liable to pay the costs not later than 6 weeks before the day the costs are to be assessed.

#### **1801 Costs—if costs out of fund bill to be sent to clients**

(SCR o 65 r 79)

- (1) This rule applies if the costs of a proceeding are to be paid out of a fund or property.
- (2) The registrar may, before finishing the assessment, direct the solicitor whose costs are to be assessed to send to all or any of the solicitor's clients, free of charge—
  - (a) a copy of the bill of costs or any part of it; and
  - (b) any statement directed by the registrar; and
  - (c) a letter telling the clients—
    - (i) the bill of costs is to be assessed by the registrar; and

- (ii) the time set for the assessment.
- (3) If the registrar gives a direction under subrule (2), the registrar may suspend the assessment of the costs for the time the registrar considers reasonable.

### **1802 Costs—content of bill of costs**

(SCR o 65 r 18A and r 81; MC(CJ)R s 274; Qld r 709)

A bill of costs must contain—

- (a) the name and address for service of the solicitor whose costs are to be assessed; and

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

- (b) each item of work claimed, or disbursement made, numbered consecutively; and
- (c) the date each item of work was done; and
- (d) the number of the item in the prescribed scale of costs for each item of work claimed; and
- (e) a detailed statement of the work done by the solicitor, or the solicitor's employee or agent, for the party; and
- (f) a detailed statement of the disbursements made; and
- (g) the date each disbursement was made; and
- (h) the costs claimed for each item of work done or disbursement made.

*Note* See approved form 2.45 (Bill of costs) [AF2006-290](#).

### **1803 Costs—failure to file and serve bill of costs**

(SCR o 65 r 52; MC(CJ)R s 279; Qld r 712)

- (1) If a party entitled to costs delays filing and serving a bill of costs, a party liable to pay the costs may, by notice, require the party entitled to costs to file and serve a bill of costs.



- (2) If the party entitled to costs does not file and serve a bill of costs before the end of 30 days after the day the notice under subrule (1) is served, the registrar may direct the party entitled to costs to file and serve a bill of costs within a time set by the registrar, having regard to any representation made by the party not later than the end of the 30-day period.
- (3) If the party does not comply with the registrar's direction, the registrar may—
  - (a) either—
    - (i) disallow the costs; or
    - (ii) allow costs at a nominal or other amount; and
  - (b) order the party to pay to another party costs incurred because of the failure to comply with the direction.

**1804 Costs—payment of disbursements**

(SCR o 65 r 75; MC(CJ)R s 271; Qld r 713)

- (1) If a party's bill of costs includes an account that has not been paid, the party may claim the amount as a disbursement.
- (2) The registrar may allow the amount as a disbursement only if it is paid before the registrar issues a certificate of assessment under rule 1835 (Costs—registrar's certificate of assessment).
- (3) Subrule (2) does not apply to counsel's fees properly incurred by the party in the proceeding.

**1805 Costs—professional charges and disbursements**

(Qld r 714)

- (1) If a bill of costs includes a charge for work done by a solicitor practising in the ACT and acting as agent for a party's solicitor, the charge must be shown as a professional charge, not as a disbursement.

- (2) The registrar may assess and allow a charge mentioned in subrule (1) even though it is not paid before the assessment.
- (3) If a bill of costs includes a charge for work done by a solicitor or counsel practising outside the ACT, the charge must be shown as a disbursement.
- (4) If the registrar allows a charge mentioned in subrule (3) when assessing costs, the amount the registrar allows must, as far as practicable, be an amount appropriate in the place where the solicitor or counsel practices.

**1806 Costs—amendment and withdrawal of bill of costs**

(MC(CJ)R s 274 (6); Qld r 716)

- (1) The court may at any time, by order, allow a party to amend or withdraw a bill of costs or order that a party file another bill of costs.

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

- (2) Unless the court otherwise orders, the amendment or withdrawal and replacement of a bill of costs must be disregarded in deciding whether—

- (a) under rule 1834 (Costs—bill of costs reduced by 15% or more), the bill of costs has been reduced by 15% or more on assessment; or

*Note* If costs are payable out of a fund or estate, or out of the assets of a company in liquidation, and the bill of costs is reduced by 15% or more on assessment, the registrar must not allow the solicitor whose costs are assessed the costs of preparing the bill or attending the assessment, unless the registrar otherwise orders (see r 1834 (Costs—bill of costs reduced by 15%)).

- (b) the amount of the assessed costs in the bill of costs is more than, equal to or less than an offer mentioned in rule 1811 (Costs—offer to settle).

**1807 Costs—notice of objection to bill of costs**

(SCR o 65 r 58 (4), (5) and (6); Qld r 717)

- (1) A party on whom a bill of costs is served may, by notice, object to any item in the bill.
- (2) The notice of objection must—
  - (a) number each objection; and
  - (b) give the number of each item in the bill of costs to which the party objects; and
  - (c) for each objection—briefly state the reasons for the objection identifying any issue of law or fact that the objector considers the registrar must consider to make a decision in favour of the objector.
- (3) The reasons for objection may be in abbreviated note form but must be understandable without further explanation.
- (4) If the same objection applies to consecutive or near consecutive items in a bill of costs, the notice need not separately state the reasons for objecting to each of the items.
- (5) Also, if there are a number of associated items, the objection may be in the form of an objection to a common issue related to the associated items.
- (6) The party objecting must file the notice and serve a stamped copy on the party entitled to the costs not later than 14 days before the day the bill of costs is to be assessed.

**1808 Costs—assessment must be limited**

(Qld r 718)

The registrar must limit the assessment to the resolution of the matters raised in the notice of objection and otherwise assess the costs under rule 1809.

**1809 Costs—default assessment if no objection to bill of costs**

(SCR o 65 r 58 (6); Qld r 719)

- (1) This rule applies if the party liable for costs does not file a notice of objection to the bill of costs.
- (2) On proof that the bill of costs was served on the party liable for the costs, the registrar must—
  - (a) assess the costs without considering each item and by allowing the costs claimed in the bill of costs; and
  - (b) issue a certificate of assessment for the amount of the assessed costs.
- (3) However—
  - (a) despite subrule (2) (a)—
    - (i) the costs must be assessed subject to rule 1804 (Costs—payment of disbursements); and
    - (ii) the costs of attending the assessment of costs (other than attendances the registrar considers necessary) , and any other anticipated costs included in the bill, are not allowable; and
  - (b) subrule (2) (a) does not prevent the registrar correcting an obvious error in the bill of costs or assessing the costs differently in exceptional circumstances.

**1810 Costs—setting aside default assessment**

(Qld r 720)

- (1) On the application of the party liable for costs, the court may amend or set aside a certificate of assessment issued under rule 1809 (2) (b).

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

- (2) The application must be supported by—

- (a) an affidavit explaining—
  - (i) the party's failure to file a notice of objection to the bill of costs; and
  - (ii) any delay; and
- (b) a notice of objection under rule 1807, as an exhibit to the affidavit.
- (3) Rule 1808 (Costs—assessment must be limited) applies to any reassessment of costs on an application made under this rule.
- (4) The costs of an application under this rule are to be paid by the applicant unless the court otherwise orders.

**1811 Costs—offer to settle**

(SCR o 65 r 58 (9)-(13); Qld r 721)

- (1) A party liable to pay costs may serve on the party entitled to the costs a written offer to settle the costs.
- (2) An offer to settle costs—
  - (a) must state it is made under this rule; and
  - (b) must be clear and unconditional; and
  - (c) must be for all of the person's liability for costs (and any interest claimed on the costs) in the proceeding to the party to whom it is made; and
  - (d) may be served at any time after whichever of the following applies, but at least 2 days before the day the bill of costs is to be assessed:
    - (i) if costs are payable under an order—the day the order is made;
    - (ii) if costs are not payable under an order—the day liability for costs accrues.

- (3) An offer to settle costs—
- (a) cannot be withdrawn without the court's leave; and
  - (b) does not lapse because the party to whom it is made rejects or fails to accept it; and
  - (c) ends at the end of 14 days after the day it is made or when the assessment of the bill of costs to which it relates starts (whichever is the earlier).

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

- (4) Except for rule 1812, a party must not disclose to the registrar the amount of an offer to settle until the registrar has assessed all items in the bill of costs, and decided all issues, other than the cost of the assessment.

## **1812 Costs—acceptance of offer to settle**

(Qld r 721 (1) and (2))

- (1) An acceptance of an offer to settle must be in writing.
- (2) If a party gives the registrar a copy of the offer and the acceptance of the offer, the amount of the offer is taken to be assessed costs of the proceeding.

## **1813 Costs—rejection of offer to settle**

(Qld r 721 (3)-(5))

- (1) This rule applies if a party entitled to costs does not accept an offer to settle made under rule 1811 by a party liable to pay the costs.
- (2) If the amount of the bill of costs allowed by the registrar, before deciding the costs of the assessment, is equal to, or more than, the amount of the offer, the party liable to pay the costs must pay the costs of the assessment, unless the registrar otherwise orders.
- (3) If the amount of the bill of costs allowed by the registrar, before deciding the costs of the assessment, is less than the amount of the offer, the party entitled to the costs must not recover the costs of the

assessment, but must pay the costs of the assessment of the party liable for the costs, unless the registrar otherwise orders.

- (4) For this rule, the costs of the assessment of a party are the costs that have been, or will be, incurred by the party on and from the day the offer to settle was served, and includes any fee determined under the *Court Procedures Act 2004*, part 3 (Court and tribunal fees) for the assessment.

#### **1814 Costs—Calderbank offer to settle**

- (1) This rule applies if a party entitled to costs serves on the party liable to pay the costs—
- (a) a bill of costs; and
  - (b) not before the bill of costs is served—a written offer to settle the costs.
- (2) The offer to settle costs must state that, if the offer is not accepted and the amount of the bill of costs allowed by the registrar for costs up to the date of the offer is equal to, or more than, the amount of the offer, the party entitled to the costs may apply to the court for an order that the costs of the assessment be assessed on a basis other than a party and party basis.
- (3) A party must not disclose to the registrar the amount of an offer to settle until the registrar has assessed all items in the bill of costs, and decided all issues, other than the costs of the assessment.
- (4) If the amount of the bill of costs allowed by the registrar for costs up to the date of the offer is equal to, or more than, the amount of the offer, the party entitled to costs may apply to the court for an order in relation to the costs of the assessment.

*Note 1* The court may order that costs be assessed on a basis other than a party and party basis (see r 1752 (1) (b)).

*Note 2* The registrar may exercise the jurisdiction of the court under r 1752 (1) (b) (see r 6250 (2) (a) and r 6251 (2) (a), and sch 5, pt 5.1 and pt 5.4)

## Division 2.17.6 Procedure on costs assessment

### 1830 Costs—attendance of parties at assessment

(SCR o 65 r 51; MC(CJ)R s 285; Qld r 724)

- (1) The registrar may give directions about—
  - (a) who must be served with a bill of costs; and
  - (b) who should attend or be represented when the registrar is assessing costs.
- (2) If the registrar considers a person's attendance at an assessment is unnecessary, the registrar may disallow the costs of the person's attendance.
- (3) This rule does not prevent a person affected by an assessment attending the assessment.
- (4) If the registrar gives a direction under subrule (1) (a) and costs are payable by a fund, the party entitled to costs must also serve a notice—
  - (a) identifying the fund; and
  - (b) stating that the costs in the bill of costs are payable by the fund; and
  - (c) stating when the costs are to be assessed; and
  - (d) containing any other information the registrar requires to be included in the notice.

### 1831 Costs—notice of adjournment of assessment

(MC(CJ)R s 276; Qld r 725)

- (1) If an assessment is adjourned for any reason, the party with the carriage of the assessment must give notice of the adjournment to any solicitor or party served with the original bill of costs but not present when the assessment was adjourned.



- (2) This rule applies unless the registrar otherwise directs.

**1832 Costs—delay before registrar etc**

(SCR o 65 r 78; Qld r 726)

If, on an assessment before the registrar, a party or a legal practitioner acting for a party, puts another party to any unnecessary or improper expense or inconvenience because of neglect or delay, the registrar may—

- (a) order the first party to pay the costs, or part of the costs, of the proceeding before the registrar to any party; or
- (b) refuse to allow fees to which the practitioner would otherwise be entitled.

**1833 Costs—set off of costs**

(SCR o 65 r 10 and r 44; MC(CJ)R s 280; Qld r 734)

- (1) If a party entitled to be paid costs is also liable to pay costs, the registrar may—
  - (a) assess the costs the party is liable to pay, set off the amount assessed against the amount the party is entitled to be paid, and by order set the amount of the balance and by whom the balance is payable; or
  - (b) decline to make an order for costs the party is entitled to be paid until the party has paid the amount the party is liable to pay.
- (2) Costs may be set off under subrule (1) even though a solicitor for a party has a lien for costs of the proceeding.

**1834 Costs—bill of costs reduced by 15% or more**

(SCR o 65 r 63; Qld r 735)

- (1) This rule applies if on the assessment of costs payable out of a fund or estate, or out of the assets of a company in liquidation, the

amount of professional charges and disbursements is reduced by 15% or more.

- (2) The registrar must not allow the solicitor filing the bill of costs for assessment any costs for preparing the bill of costs or attending the assessment, unless the registrar otherwise orders.

### **1835 Costs—registrar’s certificate of assessment**

(SCR o 65 r 58 (8) (b); MC(CJ)R s 281; Qld r 736)

- (1) The registrar must issue a certificate of assessment for the amount at which a bill of costs has been assessed.

*Note* See approved form 2.46 (Certificate of costs assessment) [AF2006-291](#).

- (2) However, the registrar must not sign the certificate of assessment until the end of 14 days after the day the assessment is made, unless the parties to the assessment agree.

*Note* An application for reconsideration may be filed within the 14-day period (see r 1852 (Costs—procedure for reconsideration)).

- (3) Subrule (2) does not apply if—
- (a) costs are assessed under rule 1809 (Costs—default assessment if no objection to bill of costs); or
  - (b) an offer to settle is accepted under rule 1812 (Costs—acceptance of offer to settle).
- (4) If a notice is filed under rule 1852 in relation to the assessment, the registrar must not sign the certificate of assessment until after the reconsideration procedure ends.
- (5) However, if a notice is not filed under rule 1852 in relation to the assessment, the registrar must sign and file the certificate of assessment.
- (6) The certificate of assessment is final when it is signed, sealed and filed by the registrar, and operates as if the certificate were an order of the court.

**1836 Costs—interim certificates of assessment**

(SCR o 65 r 40)

The registrar may issue 1 or more interim certificates of assessment in an assessment for any part of the assessed costs, without waiting until a certificate of assessment can be issued for the full amount of the assessed costs.

**Division 2.17.7 Reconsideration and review of costs assessment**

**1850 Application—div 2.17.7**

(Qld r 737)

This division does not apply to—

- (a) an assessment under rule 1809 (Costs—default assessment if no objection to bill of costs); or
- (b) an interim assessment under rule 1836.

**1851 Costs—application for reconsideration**

(SCR o 65 r 64 (1); Qld r 738)

- (1) This rule applies if a party has objected under rule 1807 (Costs—notice of objection to bill of costs) or attends an assessment and objects to any decision of the registrar.
- (2) The party may apply to the registrar in accordance with rule 1852 for reconsideration of the decision.
- (3) For this rule, the registrar does not make a decision on an item in a bill of costs if no-one objected, or sought to object, to the item and the registrar allows the item.

## **1852 Costs—procedure for reconsideration**

(SCR o 65 r 64 (1); Qld r 739)

- (1) A party must apply for reconsideration of a decision of the registrar under this part by notice given to the registrar.

*Note* See approved form 2.47 (Notice for reconsideration of costs assessment) [AF2006-292](#).

- (2) The notice must be filed not later than 14 days after the day the assessment was made.
- (3) The applicant must file with, or include in, the notice a statement of objection.
- (4) The statement of objection must—
  - (a) give the number of each item in the bill of costs to which the decision objected to relates; and
  - (b) for each objection—briefly state the reasons for the objection identifying any issue of law or fact the applicant considers the registrar must consider to make a decision in favour of the applicant.
- (5) The applicant must, not later than 3 days after the day the notice and statement of objection are filed, serve a stamped copy of the notice and statement on any other party who attended the assessment.
- (6) If the applicant is the party liable to pay the costs, the applicant must not include in the statement of objection any objection not previously taken or sought to be taken.

## **1853 Costs—reply to objection on reconsideration**

(Qld r 740)

- (1) If a party to an assessment is served with a notice and statement of objection under rule 1852, the party may file a reply to the statement of objection.

*Note* See approved form 2.48 (Reply to statement of objection for costs assessment) [AF2006-293](#).

- (2) The reply must state specifically any issue of law or fact that the party filing the reply considers the registrar must consider to make a decision in favour of the party.
- (3) The party must serve a stamped copy of the reply on the party who applied for reconsideration.
- (4) The reply must be filed and served not later than 14 days after the day the statement of objection is served.

**1854 Costs—reconsideration of registrar’s assessment**

(SCR o 65 r 65; Qld r 741)

- (1) If a party files a notice and statement under rule 1852 (Costs—procedure for reconsideration), the registrar must—
  - (a) reconsider a decision objected to having regard to the statement of objection and any reply filed under rule 1853; and
  - (b) give reasons for the decision on reconsideration; and
  - (c) issue a certificate of assessment in accordance with the decision on reconsideration.
- (2) Subject to rule 1855, a certificate of assessment issued under subrule (1) (c) is final.

**1855 Costs—review by court**

(SCR o 65 r 66, r 67 and r 82; MC(CJ)R s 282; Qld r 742)

- (1) A party dissatisfied with the decision of the registrar on reconsideration under rule 1854 may apply to the court to review the decision.
- (2) The application must—
  - (a) give the number of each item in the bill of costs to which the decision objected to relates; and
  - (b) state briefly, but specifically, the grounds for objecting to the decision; and

- (c) state briefly the reasons for the grounds; and
  - (d) state the decision sought from the court in relation to each objection.
- (3) The party must file the application, and serve a stamped copy of it on all other parties to the assessment, not later than 14 days after the day the registrar made the decision on reconsideration under rule 1854.
- (4) Unless the court otherwise orders, on the review a party must not—
  - (a) present evidence; or
  - (b) raise any ground of objection not stated in a statement of objection or raised before the registrar.

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

- (5) On the review, the court may—
  - (a) exercise all the powers of the registrar in relation to the items of the bill of costs under objection; and
  - (b) amend or set aside the registrar's decision; and
  - (c) return any item in the bill of costs to the registrar for reconsideration, whether with or without directions to the registrar; and
  - (d) make any other order it considers appropriate.
- (6) Unless the court otherwise orders, the review does not operate as a stay of the registrar's decision.

## **Division 2.17.8      Security for costs**

### **1900      Security for costs—application and order**

(SCR o 33B r 2 and r 3 (2); MC(CJ)R s 286 (2); NSW r 42.21 (1); Qld r 670)

- (1) On application by a defendant, the court may order the plaintiff to give the security it considers appropriate for the defendant's costs of the proceeding.

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

- (2) An application must be supported by an affidavit setting out the facts relied on and the grounds on which the order is sought.

### **1901      Security for costs—when court may make order**

(SCR o 33B r 3 (1); MC(CJ)R s 286 (2) and (3); NSW r 42.21 (1); Qld r 671)

The court may order a plaintiff to give security for costs under rule 1900 only if satisfied—

- (a) the plaintiff is a corporation and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them; or
- (b) the plaintiff is suing for the benefit of someone else, rather than for the plaintiff's own benefit, and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them; or
- (c) the plaintiff's address is not stated, or is misstated, in the originating process, and there is reason to believe that the failure to state an address, or the misstatement of the address, was made with intention to deceive; or
- (d) the plaintiff has changed address since the start of the proceeding and there is reason to believe this was done to avoid the consequences of the proceeding; or
- (e) the plaintiff is ordinarily resident outside Australia; or

- (f) the plaintiff is, or is about to depart Australia to become, ordinarily resident outside Australia and there is reason to believe the plaintiff has insufficient fixed and permanent property in Australia available for enforcement to pay the defendant's costs if ordered to pay them; or
  - (g) a territory law authorises the order to be made; or
- Note* A **territory law** includes these rules (see Legislation Act, s 98).
- (h) the justice of the case requires the order to be made.

## **1902 Security for costs—discretionary factors**

(Qld r 672)

- (1) In deciding whether to make an order for security for costs under rule 1900, the court may have regard to any of the following matters:
  - (a) the means of the people standing behind the proceeding;
  - (b) the prospects of success or merits of the proceeding;
  - (c) the genuineness of the proceeding;
  - (d) for rule 1901 (a)—the corporation's lack of financial resources;
  - (e) whether the plaintiff's lack of financial resources is attributable to the defendant's conduct;
  - (f) whether the plaintiff is effectively in the position of a defendant;
  - (g) whether an order for security for costs would be oppressive;
  - (h) whether an order for security for costs would stop or limit the progress of the proceeding;
  - (i) whether the proceeding involves a matter of public importance;
  - (j) whether there has been an admission or payment into court;



- (k) whether delay by the plaintiff in starting the proceeding has unfairly prejudiced the defendant;
  - (l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;
  - (m) the estimated costs of the proceeding.
- (2) This rule does not limit the matters to which the court may have regard.

**1903 Security for costs—way security given**

(SCR o 33B r 4; MC(CJ)R s 286 (4); NSW r 42.21 (2); Qld r 673)

- (1) If the court orders the plaintiff to give security for costs, the security must be given for the amount, in the form, at the time the court directs.

*Note* 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) If the court does not state the form of security to be given—
- (a) the security must be given in a form satisfactory to the registrar; and
  - (b) the registrar's approval of the form of security must be written on the order before it is issued.
- (3) After giving the security, the plaintiff must serve on the defendant notice of the time when, and the way, the security was given.

**1904 Security for costs—effect of order**

(SCR o 64 r 4; MC(CJ)R s 286 (5); NSW r 42.21 (3); Qld r 674)

- (1) This rule applies if the court orders the plaintiff to give security for costs.

- (2) The time set by these rules or by an order of the court for another party to take a step in the proceeding does not run until security is given.
- (3) If security is not given under the order—
  - (a) the proceeding is stayed as far as it concerns steps to be taken by the plaintiff; and
  - (b) the court may, on the defendant's application, dismiss all or part of the proceeding.

**1905 Security for costs—setting aside or amending order**

(MC(CJ)R s 286 (6) and (7); Qld r 675)

The court may, in special circumstances, amend or set aside an order made under this division.

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

**1906 Security for costs—finalising security**

(Qld r 676)

- (1) This rule applies if, in a proceeding, security for costs has been given by a party under an order made under this division.
- (2) If judgment is given requiring the party to pay all or part of the costs of the proceeding or any application in the proceeding, the security may be applied in satisfaction of the costs.
- (3) However, the security must be discharged—
  - (a) if a judgment is given and the judgment does not require the party to pay all or part of the costs of the proceeding or any application in the proceeding; or
  - (b) if the court orders the discharge of the security; or
  - (c) if the party entitled to the benefit of the security agrees to its discharge; or

- (d) in relation to the balance after costs have been satisfied under subrule (2).

**Example**

A security given by a payment into court is discharged by payment of the security out of court to the party who made the payment.

*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).

## **Division 2.17.9      Miscellaneous—pt 2.17**

### **1920      Liquidator, guardian or manager—accounts**

(SCR o 52 r 25)

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