Judicial Commission of New South Wales

CIVIL TRIALS BENCH BOOK

Update 48

June 2022

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

SUMMARY OF CONTENTS

Update 48

Update 48, June 2022

The following changes have been incorporated in this Update:

[1-0000] Disqualification for bias

At **[1-0020] Apprehended bias**, the case of *Feldman v Nationwide News Pty Ltd* [2020] 103 NSWLR 307 has been added. The Court of Appeal noted that the possibility a fair-minded lay observer might reasonably apprehend the judge might not bring an impartial mind to the resolution of the relevant question is not to be assessed with the benefit of hindsight, but at the time of the event or events said to give rise to that possibility in the first place.

McIver v R [2020] NSWCCA 343 has been added at **[1-0040] Circumstances arising outside the hearing calling for consideration**, where it was stated it was particularly important, in circumstances where it was a judge-alone trial and the verdict was to be based on the complainant's credibility, that there be no circumstance which might give rise to the possibility of pre-judgment, conscious or unconscious, as a result of a prior association.

[2-1600] Service of process outside NSW

Joshan v Pizza Pan Group Pty Ltd (2021) 106 NSWLR 104 has been added at **[2-1600] Service within the Commonwealth of Australia**, with respect to the standard of proof required for a stay application.

[2-5400] Parties to proceedings and representation

Fakhouri v The Secretary for the NSW Ministry of Health [2022] NSWSC 233 has been added at **[2-5500] Representative proceedings in the Supreme Court**. In that case, the court found that while an application "under" Pt 2 of Ch 7 of the *Industrial Relations Act* 1996 cannot be commenced or maintained on behalf of group members, proceedings under Pt 10 of the *Civil Procedure Act* can be commenced and maintained seeking relief in respect of any statutory debt that arises in favour of group members in respect of their award entitlements.

[2-5900] Security for costs

A discussion of *Zong v Wang* [2021] NSWCA 214 and the question of what constitutes special circumstances in relation to an order for security for costs in an appeal has been added at **[2-5965] Ordering security in appeals**.

[5-0200] Appeals except to the Court of Appeal, applications, reviews and mandatory orders

The general principles which govern an application for leave to appeal as set out in *Namoi Sustainable Energy Pty Ltd v Buhren* [2022] NSWSC 175 at [34]–[39] have been added at **[5-0240] Appeals from the Local Court.**

[6-1000] The legal framework for the compensation of person injury in NSW

This workers compensation section of this chapter has been substantially reviewed and updated by the Personal Injury Commission of NSW.

[9-0700] Enforcement of foreign judgments

It is noted at **[9-0740] Procedure** that for the registration of a foreign judgment against a foreign State, or a separate entity of a foreign State, see the *Foreign States Immunities Act* 1985 and *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31.

[10-0300] Contempt generally

Sentencing principles summarised by the court in *Commissioner for Fair Trading v Rixon (No 5)* [2022] NSWSC 146 at [22]–[28] have been added at **[10-0305] Sentencing principles for contempt.**

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FILING INSTRUCTIONS

Update 48

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Disqualification for bias

[1-0000] Introduction

Bias may involve actual or apprehended bias.

[1-0010] Actual bias

A judge affected by actual bias would be unable to comply with the Judicial Oath, and would be disqualified from sitting. In such a case, the question for determination is whether there is bias in fact. See *Collier v Country Women's Association of NSW* [2018] NSWCA 36 at [27]–[46] for a summary of the relevant principles.

[1-0020] Apprehended bias

The test for determining whether a judge should disqualify himself or herself by reason of apprehended bias is objective: "whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide": *Johnson v Johnson* (2000) 201 CLR 488 at [11], affirmed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; applied in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 and *Charisteas v Charisteas* [2021] HCA 29; distinguished in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; see also *Slavin v Owners Corporation Strata Plan 16857* [2006] NSWCA 71; *Barakat v Goritsas (No 2)* [2012] NSWCA 36 and *Isbester v Knox City Council* (2015) 255 CLR 135. The resolution of the relevant question is not to be assessed with the benefit of hindsight, but at the time of the event or events said to give rise to that possibility in the first place: *Feldman v Nationwide News Pty Ltd* [2020] 103 NSWLR 307 at [41]–[43] (citing *Ebner* at [7]–[9], [33]).

The application of the test requires two steps: first, "it requires the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits"; and, second, there must be articulated a "logical connection" between that matter and the feared departure from the judge deciding the case on its merits: *Ebner* at [8]. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed: *Ebner* at [8]; *Charisteas* at [11].

See also *Chamoun v District Court of NSW* [2018] NSWCA 187 per Gleeson JA at [39] (citing *Tarrant v R* [2018] NSWCCA 21) for discussion as to the four discrete elements required for the "double might" test.

An intermediate appellate court dealing with allegations of apprehended bias should address the issue of bias first as the necessary result, if bias is established, is a retrial: *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [2]–[3]; [117].

As to the former association of the judge with legal representatives and litigants, see *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43. As to an example of where a fair-minded observer would likely be concerned about a current close personal relationship between judge and a prosecutor connected with the proceedings, see *Gleeson v DPP (NSW)* [2021] NSWCA 63 at [29]. As to the relevance of non-disclosure to issues of apprehended bias, see *Whalebone v Auto Panel Beaters & Radiators Pty Ltd (in liq)* [2011] NSWCA 176. As to a party being a member of the trial court, see *Rouvinetis v Knoll* [2013] NSWCA 24.

As to inappropriate contact or communication between the judge and a party's barrister during proceedings and while judgment was reserved which might reasonably be considered to compromise judicial impartiality, see *Charisteas v Charisteas* at [12], [15], [21]–[22].

[1-0030] Procedure

Present authority supports the proposition that an application for disqualification can be made without the filing of a formal motion (*Barton v Walker* [1979] 2 NSWLR 740; *Bainton v Rajski* (1992) 29 NSWLR 539), although there have been instances where a motion has been presented.

Such authority also supports the view that such an application should be determined by the judge whose disqualification is sought, and should not involve a contest on the facts: *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 at 436; and *Wentworth v Graham* [2003] NSWCA 240.

As to the approach to be adopted where there are disputed issues of fact, see *CUR24 v DPP* (2012) 83 NSWLR 385. In that case, it was held that where there is plausible evidence as to an out of court statement or other conduct of a judicial officer, the relevant principles do not require a court exercising appellate or supervisory jurisdiction to first resolve, by making findings of fact, any dispute about what was said or done before applying the fair-minded bystander test. Rather, the objective assessment called for by the test should take account of the dispute and whether the evidence, if accepted, is sufficient to give rise to a reasonable apprehension of bias: at [41], [52]. A judge asked to disqualify himself or herself may need to apply the fair-minded observer test in respect of the evidence, in other words, unless the hypothetical observer would reject the evidence as entirely implausible the judge should consider whether, if accepted, it had the relevant quality to raise a reasonable apprehension of bias: [22], [38], [44]. The denial of a judge alleged to have made a relevant statement cannot settle the question which depends upon the view of a fair-minded observer: [22].

A refusal by a judge to accede to an application for disqualification can be relied upon as a ground of appeal in relation to the substantive judgment. However, the conventional view has formerly been that no appeal lies from the rejection of a refusal application as such although a litigant could usually find an interlocutory order upon which to base an appeal: *Barton v Walker* and *Barakat v Goritsas* [2012] NSWCA 8 at [10].

Following strongly expressed obiter dicta in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [74]–[86] and the decision of the Court of Appeal in *Barakat v Goritsas (No 2)* [2012] NSWCA 36 that is no longer the position. Further, "it will frequently be appropriate to grant leave to appeal, assuming the challenge is not patently untenable and where a long and costly trial would be avoided if the decision below were incorrect": *Barakat v Goritsas (No 2)* at [64].

Failure to seek such leave may found an issue of waiver: *Michael Wilson & Partners Ltd v Nicholls* at [74]–[86].

In respect of refusal by judicial officers of the District Court and Local Court the discretionary remedy of an order in the nature of prohibition may be available.

Generally an application should be made as soon as reasonably practicable after the party seeking disqualification becomes aware of the relevant facts. Otherwise the right to do so may be waived: *Vakauta v Kelly* (1989) 167 CLR 568; *Cassegrain v Commonwealth Development Bank of Australia Ltd* [2003] NSWCA 260 and *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 per Basten JA at [23]–[34].

Where there are matters that might properly arise for consideration, which are known to the judge, it is desirable that they be drawn to the attention of the parties, even if it is believed that they are aware of them: *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 and *Dovade Pty Ltd v Westpac Banking Corporation* (1999) 46 NSWLR 168 at [105]–[107].

In *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, the High Court recognised that there are exceptions for necessity, or where there are special circumstances, or where there is consent. For a discussion on the exceptions, see *Australian National Industries Limited v Spedley Securities Ltd (in liq)*, above.

An indication by a party that it wishes a judge to disqualify himself or herself is not of itself a proper ground for the judge to recuse: *Fitzgerald v Director of Public Prosecutions* (1991) 24 NSWLR 45.

Judges are required to discharge their professional duties unless disqualified by law. They should not accede too readily to applications for disqualification, otherwise litigants may succeed in effectively influencing the choice of judge in their own cause: see *Re JRL; Ex p CJL* (1986) 161 CLR 342 at 352; *Attorney General of New South Wales v Lucy Klewer* [2003] NSWCA 295; *Ebner v Official Trustee*, above, at [19]–[23]; and *Raybos Australia Pty Limited v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272.

Where a legal representative does object to the conduct of a judge, or contends actual or apprehended bias on the part of the judge, there is an obligation to endeavour to have those objections and contentions noted and recorded.

Inter alia, this may assist in a correction of an attitude which has possibly gone too far; at the least it will make the complaint easier for resolution if the matter goes to appeal: *Goktas v GIO of NSW* (1993) 31 NSWLR 684.

[1-0040] Circumstances arising outside the hearing calling for consideration

(a) The fact that a judge was a customer of a bank which is a party to litigation is normally not a ground for disqualification unless the judge has some special connection with the bank or is in a position of obligation toward, or animus against, the bank: *Dovade Pty Ltd v Westpac Banking Corporation*, above.

(b) The fact that the judge, or a close family member, holds shares in a litigant party is normally not a ground for disqualification, unless the value or income stream of the shares could be affected by the outcome of the litigation: *Dovade Pty Ltd v Westpac Banking Corporation* and see *Ebner v Official Trustee*, above.

(c) The fact that the judge has a direct pecuniary interest in the proceedings will however lead to automatic disqualification: *Dimes v Proprietors of Grand Junction Canal Pty* (1852) 10 ER 301 and *Dovade Pty Ltd v Westpac Banking Corporation*.

(d) The fact that the trial judge has expressed views in previous decisions, or in extra-judicial publications in relation to the kind of litigation before the court, which may have questioned an existing line of authority is not normally a reason for disqualification unless those views were expressed with such trenchancy, or in such unqualified terms, as to suggest that the judge could not hear the case with an "open mind": *Timmins v Gormley* [2000] 1 All ER 65, *Newcastle City Council v Lindsay* [2004] NSWCA 198 and *Gaudie v Local Court of New South Wales* [2013] NSWSC 1425 at [175] ff.

(e) The fact that the judge has made findings in related proceedings which are critical of the recollection, credit and behaviour of those who are also parties to a case in which the same issues of fact and credit would arise for determination, will normally be a ground for disqualification: *Australian National Industries Ltd v Spedley Securities Ltd (in liq)*, above, and *Livesey v NSW Bar Association* (1983) 151 CLR 288. Express acknowledgment by a judge who is asked to try an issue that he or she has previously determined that different evidence may be led at the later trial may be insufficient to remove the impression that the judge's previous views might influence the determination of the same issue in the later trial: see *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 where a judge was disqualified after making relevantly unqualified findings of serious fraud against a party. For a case where a series of undisclosed ex parte hearings did not support a finding of apprehended bias, see *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427.

(f) The fact that the judge is related to a party, or to one of the party's legal representatives, at least where that legal representative is actually involved in the litigation, will normally be a ground

for disqualification. However, where association with somebody with an interest in the litigation is relied upon there must be shown to be a logical connection between the matter complained of and the feared deviation from impartial decision making: *Smits v Roach* (2006) 227 CLR 423.

(g) The fact that a prior complaint has been made to the Independent Commission Against Corruption, or to some other body such as the Judicial Commission or the Bar Association, in relation to the judge, has also arisen for consideration: *Briscoe-Hough v AVS Australian Venue Security Services Pty Ltd* [2005] NSWCA 51; see also *Attorney General of NSW v Klewer*, above.

(h) The fact that the judge knows a party or witness may be a ground for disqualification, depending upon the degree and the circumstances of the acquaintanceship and association. See *McIver v R* [2020] NSWCCA 343 at [74] where the NSWCCA stated that "it was particularly important that there be no circumstance which might give rise to the possibility of pre-judgment, conscious or unconscious, as a result of a prior association. The position would be the same if the case was a civil case…".

(i) The fact that the judge has acted in a professional capacity in another matter or matters for a party will not normally be a ground for disqualification: *Re Polites; Ex p Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 and *Australian National Industries v Spedley Securities Ltd (in liq)*, above.

(j) The statement of findings at an interlocutory stage in terms of finality, for example, in relation to the admissibility of evidence where those findings are related to the ultimate issue in the case, will normally give rise to disqualification: *Kwan v Kang* [2003] NSWCA 336.

(k) An association may give rise to a reasonable apprehension of bias without there being a connection between the association and one of the issues in dispute: *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council* [2009] NSWCA 300.

(l) For an example of a claim of a reasonable apprehension of bias founded upon remarks made by a judge in a social setting, see *CUR24 v DPP* (2012) 83 NSWLR 385.

[1-0050] Circumstances arising during the hearing

The conduct of the trial judge involving adverse observations, in relation to one party's case, or in relation to witnesses called by that party, especially where adverse findings are also made against that party or witnesses without proper substantiation, may lead to disqualification, see *Mistral International Pty Ltd v Polstead Pty Ltd* [2002] NSWCA 321 and *Damjanovic v Sharpe Hume & Co* [2001] NSWCA 407, see also *Vakauta v Kelly*, above, where remarks made by the trial judge critical of evidence given by the defendant's medical witnesses, in previous cases, which were effectively revived by what was said in the reserved judgment, arose for consideration.

It does not, however, follow that trial judges must sit in stony silence, without exposing their views, at risk of being accused of bias. Genuine engagement and debate about critical issues is permissible: *Re Keely; Ex p Ansett Transport Industries (Operations) Pty Ltd* (1990) 64 ALJR 495 and *Barbosa v Di Meglio* [1999] NSWCA 307. However, undue interference by a judge, for example, in questioning parties or witnesses, or in taking up the arguments of one party, may cross the line, as can expressions of opinion as to the likely outcome of the case prior to the conclusion of the evidence and submissions. For guidelines concerning the extent to which judicial intervention is or is not permissible, see *Galea v Galea* (1990) 19 NSWLR 263 at 281–282 and *Royal Guardian Mortgage Management Pty Ltd v Nguyen*, above.

The fact that the judge has had communication with a party, a witness or a legal representative, at or about the time of the hearing, in the absence of, and without the consent or approval of the other party, can also lead to disqualification: *Re JRL Ex p CJL*, above. See also *Royal Guardian Mortgage Management Pty Ltd v Nguyen*.

An increasingly common potential source of difficulty is the use of email to communicate with a judge's chambers. A useful set of guidelines was given in *Ken Tugrul v Tarrants Financial Consultants Pty Ltd (In liq) (No 2)* [2013] NSWSC 1971:

[21] There should be no communication (written or oral) with a judge's chambers in connection with any proceedings before that judge without the prior knowledge and consent of all active parties to those proceedings. Particularly in relation to written communications, given the ubiquity and speed of emails, the precise terms of any proposed communication with a judge's chambers should be provided to the other parties for their consent.

There are four exceptions to this:

1. trivial matters of practice, procedure or administration (eg the start time or location of a matter, or whether the judge is robing)
2. ex parte matters
3. where the communication responds to one from the judge's chambers or is authorised by an existing order or direction (eg for the filing of material physically or electronically with a judge's associate), and
4. exceptional circumstances.

[22] There are three other matters. First, any communication with a judge's chambers which falls into any of the categories set out in sub-paragraphs [21] (2), (3) and (4) above should expressly bring to the addressee associate's or tipstaff's attention the reason for the communication being sent without another parties' knowledge or consent. Second, where consent has been obtained, that fact should also be referred to in the communication. Third, all written communications with a judge's chambers in relation to proceedings should always be copied to the other parties.

It is desirable for judges to have developed a clear policy with their own staff as to when emails or any other written communications received from or on behalf of litigants are shown to the judge. It is not appropriate for that decision to be left to staff without guidance from the judge: *Stanizzo v Bardane* [2014] NSWSC 689 at [73]–[80]. See also M Groves, "Emailing judges and their staff" (2013) 37 *Aust Bar Rev* 69.

The fact that a judge has decided an issue in a particular way and is likely to decide it in the same way when it arises again, does not necessarily give rise to apprehended bias: *Fitzgerald v Director of Public Prosecutions*, above, but see also *Kwan v Kang*, above.

Complained of conduct should be considered in the context of the trial as a whole and the possibility of the dissipation of effect or express withdrawal of material taken into account: *Jae Kyung Lee v Bob Chae-Sang Cha*, above, at [32]. *Jae Kyung Lee v Bob Chae-Sang Cha* contains a useful discussion of disqualification for apprehended bias.

[1-0060] Immunity from suit

No action lies against a judge for damages in consequence of bias, in respect of acts done in the performance of judicial duties: *Gallo v Dawson* (1988) 63 ALJR 121 and *Yeldham v Rajski* (1989) 18 NSWLR 48. The Registrar has the same protection and immunity by reason of s 44C of the *Judicial Officers Act* 1986 (NSW).

Further references

- B Cairns, "Bias and procedural fairness at trial" (2021) 9 *Journal of Civil Litigation and Practice* 182
- J Sackar, "Disqualification of judges for bias", at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Sackar_20180116.pdf, accessed 16 May 2018.

[The next page is 151]

Service of process outside New South Wales

[2-1600] Service within the Commonwealth of Australia

In the Supreme Court, service of originating process may be effected in accordance with either UCPR r 10.3 or the *Service and Execution of Process Act* 1992 (Cth), ss 13–16. In other courts, service can only be effected in accordance with the *Service and Execution of Process Act* 1992. For an exception see [2-1620].

In the case of Supreme Court proceedings, if a person joined as a party wishes to have the proceedings transferred to the Federal Court, Family Court or the Supreme Court of another State or Territory, application may be made under the *Jurisdiction of Courts (Cross Vesting) Act* 1987 to have the proceedings transferred.

In respect of proceedings in other courts, the *Service and Execution of Process Act* 1992, s 20 (which does not apply to proceedings in a Supreme Court: s 20(1)) provides that a person served with an originating process under the Act may apply to the court which issued the process for an order staying the proceedings (s 20(2)) on the ground that a court of another State has jurisdiction to determine all the matters in issue between the parties and is the appropriate court to determine those matters: s 20(3). The applicant bears the onus on the balance of probabilities of demonstrating that the alternative court is the appropriate court. Language such as a "clear and compelling basis" operate as an unwarranted gloss on the statute and impose a higher hurdle on applicants seeking a stay of proceedings: *Joshan v Pan Pizza Group Pty Ltd* [2021] NSWCA 219 at [72]–[77].

In determining such an application, the court is to take into account the matters set out in s 20(4), namely:

- the places of residence of the parties and of the witnesses likely to be called in the proceedings,
- the place where the subject matter of the proceedings is situated,
- the financial circumstances of the parties so far as the court is aware of them,
- any agreement between the parties about the court or place in which the proceedings should be instituted,
- the law that would be most appropriate to apply in the proceedings, and
- whether a related or similar proceeding has been commenced against the person served or another person,

but the court is not to take into account the fact that the proceedings were commenced in the place of issue.

See also the observations of Bell P in *Joshan v Pizza Pan Group Pty Ltd* at [50]–[68] regarding s 20 of the Act.

The application may be determined without a hearing unless the applicant or a party objects (s 20(6)), or the court may hold a hearing by video link or telephone: s 20(7). An order may be made subject to such conditions as the court considers just and appropriate in order to facilitate determination of the matter in dispute without delay or undue expense: s 20(5).

A court of a State or Territory other than the place of issue must not restrain a party to the proceedings from taking a step in such proceedings on the ground that the place of issue is not the appropriate forum for the proceedings: s 21.

[2-1620] Service pursuant to UCPR r 10.6

In any proceedings, any document (including originating process) may be served by one party or another (whether in New South Wales or elsewhere) in accordance with any agreement, acknowledgement or undertaking by which the party to be served is bound: r 10.6(1).

In relation to the service of an originating process in proceedings on a claim for possession of land, the agreement, acknowledgment or undertaking must be made after the originating process is filed but before it is served: r 10.6(1A).

Such service is taken for all purposes (including for the purposes of any rule requiring personal service) to constitute sufficient service: r 10.6(2).

[2-1630] Service outside Australia pursuant to UCPR Pts 11 and 11A

General

Service of originating process outside Australia is permitted by UCPR Pt 11 and assisted by Pt 11A. Part 11 only applies to the Supreme Court: r 11.1. In the circumstances referred to in Sch 6, leave is not required: r 11.4(1). This rule extends to an originating process to be served outside Australia in accordance with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (the Hague Convention): r 11.4(2). In any proceedings when service is not allowed under Sch 6, such service may be effected with the leave of the court: r 11.5(1).

Part 11A deals with the operation of the Hague Convention, which is a set of uniform rules concerning the service of Australian judicial documents in civil and commercial matters to countries (other than Australia) that are parties to the Convention.

The Convention, which came into force in Australia on 1 November 2010, offers an alternative method of service of judicial documents outside Australia but it is not mandatory.

As to special provisions for service in New Zealand, see r 11.3 and "Trans-Tasman proceedings" at [5-3500]–[5-3510].

Part 11 does not require the leave of the court for any service or other thing that may be effected or done under any law of the Commonwealth or Pt 11A: r 11.2. Division 2 of Pt 11 does not apply to any documents that are intended to be served on a person outside Australia in accordance with the Convention: r 11.8A.

Application for leave to serve

The application must be on notice to every party other than the person intended to be served: r 11.5(2). A sealed copy of the relevant order must be served with the document to which it relates: r 11.5(3). The application must be supported by an affidavit stating the facts and matters referred to in r 11.5(4).

The court may grant an application for leave if satisfied that the claim has real and substantial connection with Australia (r 11.5(5)(a)), that Australia is an appropriate forum for the trial (r 11.5(5)(b)) and that in all circumstances the court should assume jurisdiction: r 11.5(5)(c). See *Michael Wilson & Partners Ltd v Emmott* [2019] NSWSC 218 where it was held Australia (NSW) was not the appropriate forum to determine the dispute as, inter alia, the citizenship of the parties was not regarded as a connecting factor at common law and no reason was advanced to justify an exception in this case. Further the fact one of the parties had given evidence in Australia did not mean of itself that there was a connection between the current claim and Australia: at [63].

On application by a person relevantly served, the court may dismiss or stay the proceeding or set aside service of the originating process: r 11.6(1).

Without limiting that provision, the court may make such an order if satisfied that service of the originating process is not authorised by the rules (r 11.6(2)(a)), or that the court is an inappropriate

forum for the trial of the proceeding (r 11.6(2)(b)) or that the claim has insufficient prospects of success to warrant putting the person served to the time, expense and trouble of defending the claim: r 11.6(2)(c).

Rule 11.7 provides that the person so served must also be served with a notice setting out the matters referred to in that rule.

Rule 11.8 provides that unless the court otherwise orders, an appearance must be filed within 42 days of the date of service.

Application by person served

Although not specifically referred to in r 11.6, it seems that the appropriate course is for a defendant served with an originating process outside the jurisdiction to apply for an order setting aside the originating process or service thereof, declaring the court has no jurisdiction in the matter or declining to exercise jurisdiction under r 12.11 on the ground that the service of the originating process is not authorised by the rules, on the ground that the court is an inappropriate forum for the trial of the proceedings, or that the claim has insufficient prospects of success to warrant putting the person served outside Australia to the time, expense and trouble of defending the claim: r 11.6. For an example of an application of this general kind, see *In the matter of Mustang Marine Australia Services Pty Ltd (In Liq)* [2013] NSWSC 360.

Such an application must be made by notice of motion filed within the time limited for entering an appearance, stating the applicant's address for service, but may be made without entering an appearance and does not constitute submission to the jurisdiction of the court: r 12.11(2), (3), (4).

See further *Michael Wilson & Partners Ltd v Emmott* [2020] NSWCA 139.

Leave to proceed

Where no appearance is entered, the party serving the originating process may not proceed except by leave of the court: r 11.8AA(1). An application for such leave may be made without serving notice on the person served with the originating process: r 11.8AA(2).

In an application for leave to proceed under r 11.8AA, the plaintiff must prove proper service on the defendant (*Castagna v Conceria Pell Mec SpA* (unrep, 15/3/1996, NSWCA)). Leave by the court for service outside of Australia or that proceedings come within Sch 6 and therefore r 11.4.

In deciding whether r 11.4 applies, attention is to be directed to the way in which the claims are framed. The focus is upon the nature of the claim which is made, that is the claim in which the plaintiff alleges a cause of action which, according to the allegations, falls within the schedule: *Agar v Hyde* (2000) 201 CLR 552 at [50].

The inquiry is not concerned with an assessment of the strength (in the sense of the likelihood of success) of the plaintiff's claim. The application of the schedule depends on the nature of the allegations which the plaintiff makes, not on whether these allegations will be made good at trial. "Once a claim is seen to be of the requisite kind, the proceeding falls within the relevant paragraph … service outside Australia is permitted, and prima facie the plaintiff should have leave to proceed": *Agar v Hyde*, above, at [51].

Similarly, it would seem that where leave to serve has been granted by the court and there is no opposition to a grant of leave to proceed, prima facie, the plaintiff should have such leave.

Other matters

Any documents other than an originating process may be served outside Australia with the leave of the court: r 11.8AB.

A document to be served outside Australia need not be personally served so long as it is served in accordance with the law of the country in which service is effected: r 11.8AC. This is so even though personal service would be required if the document was served in Australia: *BP Exploration Co (Libya) Ltd v Hunt* [1980] 1 NSWLR 496 at 501–502.

For a consideration of issues arising under r 11 and as to service generally, see *Hiralal v Hiralal* [2013] NSWSC 984 and *Agar v Hyde*.

Service pursuant to Pt 11A: the Hague Convention

Part 11A deals with the service of documents in Convention countries and with default judgements after such service. The majority of countries are party to the Hague Convention, including United Kingdom and Northern Ireland, United States, China and India. Some of the non-Convention countries include Kuwait and Pakistan. The Commonwealth Attorney-General's department maintains a list of Convention and non-Convention countries, and other relevant information.

The provisions in Pt 11A prevail to the extent of any inconsistency between those provisions and any other UCPR provisions: r 11A.2.

A person may apply to the Registrar for a request for service of an Australian judicial document in a Convention country. The documentation that must accompany the application is set out in r 11A.4 and includes:

- the signed request for service abroad
- the document to be served
- a summary of the document to be served, and
- where applicable, a translation (including a certificate from the translator) of the documentation.

The draft request for service may request a certificate of service: r 11A.4(4)(d). A certificate of service is sufficient proof that service of the document was effected by the method specified in the certificate on that date: r 11A.8. Concerning default judgment following service abroad of the initiating process, r 11A.10 applies if a certificate of service has been filed in the proceedings and the defendant has not appeared or filed a notice of address for service: r 11A.10(1).

A default judgment may not be given against the defendant, pursuant to r 11A.10(2), unless the court is satisfied that the initiating process was served in:

- accordance with the law of the Convention country
- sufficient time to enable the defendant to enter an appearance in the proceedings.

As to submission to the jurisdiction, see *Bagg v Angus Carnegie Gordon as liquidator of Salfa Pty Limited (in liq)* [2014] NSWCA 420.

Rule 11A.10(3) provides that "sufficient time" is 42 days from the date on which service of the process was effected or a lesser time that is thought to be appropriate by the court.

Where no certificate of service has been filed or if no service could be effected and the defendant has not appeared or filed a notice of address for service, the court may give a default judgment, pursuant to r 11A.11, if it is satisfied that:

- the initiating process was forwarded to the Convention country
- a period of not less than 6 months has elapsed since the date on which the initiating process was forwarded
- every reasonable effort was made to obtain a certificate of service or to effect service.

An application to have a judgment set aside may be made within a 12 month period after the date on which the judgment was given or within such time after the defendant acquires knowledge of the judgment as the court considers reasonable. An order to set aside a judgment on this basis may be made if the court is satisfied that the defendant did not have knowledge of the initiating process in sufficient time to defend the proceedings and a prima facie defence can be made to the proceedings on the merits: r 11A.12.

Legislation

- CPA s 67.
- *Service and Execution of Process Act* 1992 (Cth), ss 13–16, 20–21.
- UCPR rr 10.3, 10.6, Pts 11; 11A; 12; rr 11.1–12.11; Sch 6.

Further reading

- A Bell, "Private international law in practice across the divisions: some recent developments and caselaw" (2020) 14 *TJR* 1.

International Convention

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (the Hague Convention).

(The Convention and a list of parties to the Convention can be found at http://www.hcch.net.)

[The next page is 975]

Parties to proceedings and representation

[2-5400] Application

Part 7 of the UCPR applies to all courts except that Div 2, dealing with representative actions, and Div 6, dealing with relators, does not apply to the Small Claims Division of the Local Court.

Part 10 of the CPA concerning representative proceedings in the Supreme Court commenced operation on 4 March 2011.

[2-5410] By whom proceedings may be commenced and carried on

A natural person may commence and carry on proceedings in any court, either by a solicitor acting on his or her behalf or in person: r 7.1. Where proceedings are commenced by a natural person on behalf of another person pursuant to a power of attorney, the court may order that the proceedings be carried on, on behalf of that other person, by a solicitor: r 7.1(1A). A solicitor on the record must hold an unrestricted practising certificate: r 7.1(6).

As to a litigant in person see "Unrepresented litigants and lay advisers" at [1-0800].

A company within the meaning of the *Corporations Act* 2001 (Cth) may commence and carry on proceedings in any court by a solicitor or by a director of the company and may commence and, unless the court orders otherwise, carry on proceedings in a Local Court by a duly authorised officer or employee of the company: r 7.2.

Rule 7.2 is qualified by the provision in r 7.3 that, in the case of the Supreme Court, commencement by a director is only authorised if the director is also a plaintiff in the proceedings.

A corporation, other than a company within the meaning of the *Corporations Act* 2001 (Cth), may commence and carry on proceedings in any court by a solicitor. In any court, other than a Local Court, by a duly authorised officer of the corporation; and may commence and, unless the court orders otherwise, carry on proceedings in a Local Court by a duly authorised officer or employee of the corporation: r 7.1(4).

See r 7.1(5) as to provisions applicable in the Local Court permitting specified proceedings to be commenced, and unless the court otherwise orders, carried on by specified persons.

[2-5420] Affidavit as to authority to commence and carry on proceedings in the Supreme Court or District Court

A person who commences or carries on proceedings in the Supreme Court or District Court as the director of a company within the meaning of the *Corporations Act* 2001 (Cth) or as the authorised officer of a corporation not being such a company, must file with the originating process, notice of appearance or defence, an affidavit of his or her authority to act in that capacity, together with a copy of the instrument evidencing that authority: r 7.2(1).

The requirements of the respective affidavits are set out in r 7.2(1) and (3). A significant feature of those requirements is that the director or officer acknowledge that he or she may be liable to pay some or all of the costs of the proceedings: r 7.2(2)(iv), (3)(iv).

[2-5430] Issue of subpoena

A subpoena may not be issued, except by leave of the court, unless the party at whose request the subpoena is issued is represented by a solicitor in the proceedings: r 7.3(1). Leave may be given

generally or in relation to a particular subpoena or subpoenas: r 7.3(2). A subpoena may not be issued in relation to proceedings in the Small Claims Division of the Local Court except by the leave of the court: r 7.3(3).

[2-5500] Representative proceedings in the Supreme Court

General

Following amendments to the CPA in 2011, a new regime which echoed the provisions of Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) was enacted. (See Supreme Court Practice Note, No SC Gen 17, concerning representative proceedings, commencing 31 July 2017). Part 58 of the UCPR was inserted to make provision for opt out notice requirements together with Form 115, which may be downloaded from the Supreme Court website.

Part 10 permits the commencement of proceedings by a representative party and does not provide for the appointment of a representative party for defendants or respondents. However, the Supreme Court has jurisdiction to make such representative orders: *Ahmed v Choudbury* [2012] NSWSC 1452 and *Burwood Council v Ralan Burwood Pty Ltd (No 2)* [2014] NSWCA 179.

Claims under industrial awards

While an application "under" Pt 2 of Ch 7 of the *Industrial Relations Act* 1996 cannot be commenced or maintained on behalf of group members, proceedings under Pt 10 of the CPA can be commenced and maintained seeking relief in respect of any statutory debt that arises in favour of group members in respect of their award entitlements: *Fakhouri v The Secretary for the NSW Ministry of Health* [2022] NSWSC 233 at [1], [51].

Case management of representative proceedings

The representative proceedings are case managed by a Judge or Associate Justice of the Division in which they are commenced. (See [2-0000] ff as to case management.) The management of representative proceedings is discussed in *Merck Sharp and Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26 at [4]-[10] and *Bright v Femcare Ltd* (2002) 195 ALR 574 at [160].

Finklestein J, in *Bright v Femcare*, above, observed at [160]:

> By giving appropriate directions the court can ensure that the parties get on with the litigation and do not become bogged down in what are often academic or sterile arguments about pleadings, particulars, practices and procedures … it is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful.

See also *Giles v Commonwealth of Australia* [2014] NSWSC 83 and *Wigmans v AMP Ltd* [2021] HCA 7 at [116].

Commencement of representative proceedings

Proceedings can be commenced in the Supreme Court by seven or more people who have claims against the same person or persons. The claims must arise out of the same, similar or related circumstances and the claims must give rise to a substantial common question or law or fact: s 157(1). The person who commences the proceedings, known as the representative party, must have standing to commence representative proceedings on behalf of other persons. It is sufficient if the representative party has standing to commence proceedings on his or her own behalf: s 158(1).

A person may commence proceedings against more than one defendant. This can occur irrespective of whether or not the group have a claim against every defendant in the proceedings: s 158(2). This provision overcomes a contrary view expressed in *Philip Morris (Australia) Ltd v Nixon* [2000] 170 ALR 487, in relation to Pt IVA.

Consent of a person to be a group member is not required unless he or she is a Minister or an officer of the Commonwealth, a State or a Territory. An incorporated company or association does not require to give consent, however, consent is required if the proposed group member is the Commonwealth, a State, Territory or a body corporate established for a public purpose by a Commonwealth, State or Territory law: s 159.

The originating process must describe or otherwise identify the group members, specify the nature of the claims and the relief claimed, and the question of law or facts common to the claims. It is not necessary to name or specify the number of the group members: s 161.

It is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals: s 166(2). As to the framing of group definitions, see *Petrusevski v Bulldogs Rugby League Ltd* [2003] FCA 61, per Sackville J at [19]-[23].

Specification of common questions is important. The court may make orders for a hearing of common questions; these are referred to as *Merck* orders after *Merck Sharp and Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26. These common questions provide the backbone of the proceedings and "careful compliance" is "of the greatest importance", per Lindgren J in *Bright v Femcare Ltd* (2002) 195 ALR 574 at [14]. See also *Merck Sharp and Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26, at [6]; *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896 at [66] and *Richmond Valley Council v JLT Risk Solutions Pty Ltd* [2021] NSWSC 383.

Group members are given the option to opt out of representative proceedings in the Court: s 162. Part 58 of the UCPR provides that the opt out notice must be filed and served on the representative party in the approved form (see Form 115). The form specifies that the potential group member understands that he or she forgoes the right to share in any relief obtained by the representative party in the representative proceedings and will not be entitled to receive any further notification about the conduct or disposition of the proceedings, and, to the extent he or she has a claim against the defendant/s, any limitation period suspended by the commencement of the representative proceedings has recommenced to run.

Within 14 days after the opt out date, that is the date fixed by the court before which a group member may opt out, the representative party must provide to the other parties a list of the persons who have opted out: UCPR r 58.2(2).

If, at any stage of the proceedings, it appears likely to the court that there are fewer than seven group members, the court may, on such conditions as it thinks fit, order that the proceedings continue under Pt 10 or order that they no longer do so: s 164.

The court may, on application by the defendant or of its own motion, order that proceedings no longer continue under Pt 10 if it is satisfied that it is in the interests of justice to do so upon one or more of the grounds set out in the section: s 166(1). As to the ground of "inappropriateness", see *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 244 ALR 600: s 166(2).

If the court orders proceedings not to continue under Pt 10, they may continue as proceedings by a representative party on its own behalf. The court may order that a group member be joined as an applicant in those proceedings: s 167(1).

Where it appears to the court that determination of the question or questions common to all group members will not finally determine the claims of a group member, the court may give direction in relation to the determination of the remaining questions: s 168(1). A sub-group may be established and a sub-group representative party appointed: s 168(2). The court may permit an individual group member to appear in the proceedings for the purpose of determining a question that relates only to that member's claims: s 169(1).

Representative proceedings may not be settled or discontinued without leave of the court: s 173(1). The court may make orders as to the distribution of settlement moneys: s 173(2). As to settlement offers to group members, see *Courtney v Medtel Pty Ltd* [2002] FCA 957, per

Sackville J at [64]. For a detailed discussion concerning the fairness and reasonableness of an overall settlement sum, see *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche (No 2)* (2006) 236 ALR 322 at [42]–[64].

With the leave of the court, a representative party may settle their own claim at any stage of the representative proceedings: s 174(1). They may, with leave, withdraw as a representative party: s 174(2). By order, another group can be established: s 174(3). Before granting leave to withdraw as a representative party, the court must be satisfied that notice has been given to group members, that the notice was given in sufficient time for them to apply for another person to be substituted, and that any application for substitution has been determined: s 174(4).

Parallel representative proceedings in relation to the same controversy

There is no provision in Pt 10, CPA that expressly or impliedly prevents the filing of a second representative proceeding against a defendant in relation to a controversy. Where seven or more persons have claims against the same person, and the conditions in s 157(1)(b) and (c) are met, s 157 permits "one or more" of those persons to commence proceedings representing some or all of them. Provisions in Pt 10, such as ss 171 and 162, do not detract from the Supreme Court's power under s 67 to stay competing representative proceedings or impose any limitations: *Wigmans v AMP Ltd* [2021] HCA 7 at [78].

The Supreme Court's power to grant a stay under s 67 CPA of competing representative proceedings is not confined by a rule or presumption that the proceeding filed first in time is to be preferred. There is no "one size fits all" approach. In matters involving competing open class representative proceedings with several firms of solicitors and different funding models, where the interests of the defendant are not differentially affected, it is necessary for the court to determine which proceeding going ahead would be in the best interests of group members. The factors that might be relevant cannot be exhaustively listed and will vary from case to case: *Wigmans v AMP Ltd* [2021] HCA 7 at [52].

Notices

Part 10, Div 3 concerns notices. Section 175 provides for notices that must be given in representative proceedings. Generally, the court has a wide power to order that notice of any matter be given to the group or individual members: s 175(5). The court must be clear who is to give the notice and the way in which the notice is to be given: s 176(2). Any conditions and compliance periods must also be clearly specified in the order. Pursuant to s 175(6), notices must be given as soon as practicable after the happening of the event to which it relates.

Specifically, notices must be given for the following:

- commencement of the proceedings and the right of group members to opt out
- dismissal of the proceedings for want of prosecution
- withdrawal of a representative party.

The court has the power to dispense with compliance if the relief sought in the proceedings does not include any claim for damages (s 175(2)) or it may order that the notice includes a direction to a party to provide information relevant to the giving of the notice and relating to the costs of giving notice: s 176(3).

The court may also order that notice be given in the media, for example by means of press advertisement, radio or television broadcast: s 176(4). This may be particularly useful if the court is "not confident all the group members were known by name, and so could be notified by letter": *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 156 ALR 257 at 260, per Wilcox J. The court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practical and not unduly expensive, to do so: s 176(5).

Powers of the Court

In determining a matter in representative proceedings, pursuant to s 177(1), the court has the power to:

- determine a question of law
- determine a question of fact
- make a declaration of liability
- grant any equitable relief
- make an award of damages for group members, sub-group members or individual group members being specified amounts or amounts worked out in such a manner as the court specifies
- make an award of an aggregate amount of damages.

In making an award of damages, the court must make provision for the payment or distribution of the money to the group members entitled: s 177(2).

The court may provide for the constitution and administration of a fund: s 178. The court may give directions as it thinks just in relation to the manner in which a member's entitlement to damages is established and how to determine any disputes concerning that member's entitlement: s 177(4).

If a group member does not make a claim within the set timeframe, the court may allow his or her claim, taking into account such factors as whether it is just to do so or if the fund has not already been fully distributed: s 178(4). The defendant may apply to the court for an order to receive any money remaining in the fund: s 178(5).

The court may, of its own motion or on application by a party or a group member, make any order that the court thinks appropriate or necessary to ensure that justice is done in the proceedings: s 183. However, s 183 is not a plenary power "at large" and is not a power conferred on the Supreme Court simply to make such orders "as the court thinks fit" or which are "in the interests of justice" or which will promote or facilitate settlement: *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWCA 66 at [4]. Section 183 (and the identical s 33ZF of the *Federal Court of Australia Act* 1976) cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme. To do so would be to use ss 183 and 33ZF as a vehicle for rewriting the scheme of the legislation: *BMW Australia Ltd v Brewster* [2019] HCA 45 at [70].

A majority of the High Court in *BMW Australia Ltd v Brewster* held that s 183, properly construed, does not empower a court to make a common fund order. Sections 183 and 33ZF empower the making of orders as to how an action should proceed in order to do justice; they are not concerned with the radically different question as to whether an action can proceed at all: at [3]. It is one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that court: at [47], [49].

In related litigation in *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia*, a five-judge bench of the Court of Appeal held that an order for "class closure" which in effect destroyed a person's cause of action within the limitation period, without a hearing and with no guarantee that the person would necessarily know of the outcome or consequence of their failure to register, was not an order that was "necessary to ensure that justice is done in the proceedings" or "appropriate … to ensure that justice is done in the proceedings": at [12] The court held that he scheme of Pt 10 of the CPA is inconsistent with an interpretation of s 183 which empowered the Supreme Court to make an order effecting "class closure". In so finding, the Court of Appeal

analysed and followed the construction of Pt 10 of the *Civil Liability Act* preferred by the majority of the High Court in *BMW Australia Ltd v Brewster*: at [99]. See also *Wigmans v AMP* (2020) 102 NSWLR 199.

If the court makes an award of damages, the representative party may apply for reimbursement of the representative party's costs: s 184. The court must be satisfied that the costs, reasonably incurred in relation to the representative proceedings, are likely to exceed the costs recoverable from the defendant. In this case, the court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded. The court may also make any other order that it thinks just.

Pursuant to s 179, a judgment given in representative proceedings must describe or otherwise identify the group members who will be affected by it and bind them, other than those who have chosen to opt out of the proceedings.

Appeals

Under Pt 10, Div 5, appeals can be brought before the Court of Appeal by the group or sub-group's representative in respect of the judgment to the extent that it relates to questions common to the group or sub-group's claims: s 180(1). The parties to an appeal which relates only to the claim of any individual group member are that group member and the defendant: s 180(2). If the representative party does not bring an appeal within the time provided for instituting appeals, another group member may bring an appeal within 21 days: s 180(3). The court may direct to whom and how a notice of appeal should be given: s 180(4). The notice instituting an appeal must describe or identify the members of the group or sub-group but not necessarily the number or the names of those members: s 180(5).

[2-5530] Representation in cases concerning administration of estates, trust property or statutory interpretation

Where a person or class of persons is, or may be interested in, or affected by proceedings, the court may appoint one or more of those persons to represent any one or more of them, provided that those proceedings concern the administration of a deceased person's estate, property subject to a trust or the construction of an Act, instrument or other document: r 7.6(1).

A person cannot be so appointed unless the court is satisfied that the person or a class, or a member of a class cannot, or cannot readily, be ascertained or, if ascertained, cannot be found or, if ascertained and found, it is expedient for the purpose of saving expense for a representative to be appointed to represent any one or more of them: r 7.6(2).

A person may be treated as having an interest or liability for the purpose of this rule even if it is a contingent or future interest or liability or if the person is an unborn child: r 7.6(3).

A judgment or order made in proceedings in which an appointment has been made under r 7.6, binds the persons or members of the class represented as if they had been a party: r 7.7.

The court may give the conduct of the whole or any part of any proceedings to such persons as it sees fit: r 7.8 and see *Ritchie's* at [7.8.5].

[2-5540] Judgments and orders bind beneficiaries

It is not necessary, in proceedings against a trustee, executor or administrator, to join as a party any of the persons having a beneficial interest under the trust or in the estate concerned: r 7.9(1), (2).

Any judgment or order is as binding on the beneficiary as it is on the trustee, executor or administrator: r 7.9(3).

However, if the court is satisfied that the representative, trustee, executor or administrator did not in fact represent a beneficiary, the court may order that the judgment or order not bind that beneficiary: r 7.9(4).

This rule does not limit the power of the court to order that a party be joined under r 6.24: r 7.9(5).

[2-5550] Interests of deceased persons

Where it appears to the court that a deceased person's estate is not represented in proceedings or that the executors or administrators of the estate have an interest that is adverse to the interests of the estate, it may order that the proceedings continue in the absence of a representative of the estate or appoint a representative for the purpose of the proceedings but only with the consent of the person to be appointed: r 7.10(1), (2). For an example of the appointment of such a representative, see *RL v NSW Trustee and Guardian (No 2)* [2012] NSWCA 78.

A judgment or order then binds the deceased person's estate to the same extent as the estate would have been bound had a personal representative of the deceased been a party: r 7.10(3).

Before making an order under the rule the court may order that notice of the application be given to such persons having an interest in the estate as it sees fit: r 7.10(4).

Sample orders

I order that the plaintiff X be appointed to represent the estate of the plaintiff Y, deceased for the purposes of this suit.

For further examples and appropriate title amendment, see *Re Hart; Smith v Clarke* [1963] NSWR 627 at 631.

[2-5560] Order to continue

An examples of a situation where the court orders the proceedings to continue is where another party has the same interest or the relevant interest is small: *Porters v Cessnock City Council* [2005] NSWSC 1275. See also *Borough of Drummoyne v Hogarth* (1906) 23 WN (NSW) 243.

[2-5570] Executors, administrators and trustees

In proceedings relating to an estate, all executors or administrators must be parties unless one or more of them has represented the other pursuant to r 7.4 : r 7.11(1).

In proceedings relating to a trust, all the trustees must be parties: r 7.11(2).

In proceedings commenced by executors, administrators or trustees, any executor, administrator or trustee who does not consent to being joined as a plaintiff must be made a defendant: r 7.11(3).

[2-5580] Beneficiaries and claimants

In proceedings relating to an estate, all persons having a beneficial interest in a claim against the estate need not be parties, but the plaintiff may make parties of such of these persons as he or she thinks fit: r 7.12(1).

In proceedings relating to a trust, all persons having a beneficial interest under the trust need not be parties, but the plaintiff may make parties of such of those persons as he or she thinks fit: r 7.12(2).

Rule 7.12 has effect despite r 6.20. See "Joinder of causes of actions and parties" at [2-3400].

[2-5590] Joinder and costs

As to the appropriateness of joining beneficiaries and claimants and costs, see *Ritchie's* at [7.12.5]–[7.12.10], *Thomson Reuters* at [r 7.12.40].

[2-5600] Persons under legal incapacity

See "Persons under legal incapacity" at [2-4600].

[2-5610] Business names

Rules 7.19 and 7.20 provide that persons are to sue and be sued in their own name and not under any business name, except where the proceedings are in respect of anything done or omitted to be done in the course of, or in relation to, a business carried on under an unregistered name. In such a course the proceedings may be commenced against the defendant under the unregistered business name.

The unregistered name is taken to be a sufficient description of the person sued (r 7.20(2)) and any judgment or order in the proceedings may be enforced against the person carrying on the unregistered business: r 7.20(3).

[2-5620] Defendant's duty

If sued under a business name, a defendant must not enter an appearance or file a defence otherwise than under his or her own name: r 7.21(1). With the appearance or defence the defendant must file a statement of the names and residential addresses of all persons who were carrying on the business when the proceedings were commenced: r 7.21(2). Unless this is done, the court may order that the appearance or defence be struck out: r 7.21(3).

[2-5630] Plaintiff's duty

Where the defendant is sued under a business name, the plaintiff must take such steps as are reasonably practical to ascertain the name and residential address of the defendant and to amend such documents as will enable the proceedings to be continued against the defendant in his or her own name: r 7.22(1).

The plaintiff may not, except with the leave of the court, take any step in the proceedings other than the filing and serving of originating process and steps to ascertain the name and residential address of the defendant until the documents have been amended as above: r 7.22(2).

[2-5640] Relators

As to relator proceedings, see *Ritchie's* at [7.23.5]–[7.23.15] and *Thomson Reuters* at [r 7.23.40].

A relator must act by a solicitor: r 7.23(1). A solicitor may not act for a relator unless he is authorised to do so by the relator (r 7.23(2)(b)), and a copy of the instrument authorising the solicitor to so act has been filed: r 7.23(2)(b).

The consent of the Attorney General is needed for the commencement of relator proceedings, for they are brought in his or her name. However, if an action is commenced without the Attorney General as plaintiff, an amendment may be made with the permission of the Attorney General: *Farley and Lewers Ltd v The Attorney-General* [1963] NSWR 1624 at 1631.

[2-5650] Appointment and removal of solicitors

Subject to the content or subject matter otherwise indicating, every act or thing which, by or under the CPA or the UCPR or otherwise by law, is required or allowed to be done by a party, may be done by his or her solicitor: r 7.24.

As to the conduct of proceedings without retaining a solicitor, see "Unrepresented litigants and lay advisers" at [1-0800] and *Ritchie's* at [7.1.5], [7.24.5].

As to challenging the retainer of a solicitor see *Doulaveras v Daher* [2009] NSWCA 58 at [76]–[161].

[2-5660] Adverse parties

A solicitor or a partner of a solicitor who is a party to any proceedings, or acts as a solicitor for a party to any proceedings, may not act for any other party in the proceedings, not in the same interest, except by leave of the court.

Leave is commonly granted for a solicitor to appear for defendants in different interests in will-contention cases, unless there is likely to be an evidentiary dispute. Usually separate counsel are briefed for each interest.

[2-5670] Change of solicitor or agent

A party may change solicitors (r 7.26(1)) and a solicitor may change agents: r 7.26(2). The party or solicitor must file notice of the change: r 7.26(3). A copy of the notice filed must be served on all other active parties and, if practicable, on the former solicitor or agent: r 7.26(4).

An "active party" is defined in the dictionary to the UCPR as:

> a party who has an address for service in the proceedings, other than:
>
> (a) a party against whom judgment has been entered in the proceedings, or
>
> (b) a party in respect of whom the proceedings have been dismissed, withdrawn or discontinued,
>
> being, in either case, a party against whom no further claim in the proceedings subsists.

[2-5680] Removal of solicitor

A party who terminates the authority of a solicitor to act must file notice of the termination and serve a copy on all other parties and, if practicable, on the former solicitor: r 7.27(1), (2). The filing of the notice and its service may be effected by the former solicitor: r 7.27(3). Rule 7.27 does not apply to a change of solicitor referred to in r 7.26.

[2-5690] Appointment of solicitor by unrepresented party

A party who acts for himself may afterwards appoint a solicitor to act in the proceedings on the party's behalf: r 7.28(1). Notice of the appointment must be filed and served: r 7.28(2).

[2-5700] Withdrawal of solicitor

A solicitor who ceases to act may file the notice of change and serve the notice on the parties: r 7.29(1).

Except by leave of the court, a solicitor may not file or serve notice of the change unless he or she has filed and served on the client a notice of intention to file and serve the notice of change:

(a) in the case of proceedings for which a date for trial has been fixed, at least 28 days before doing so, or

(b) in any other case, at least seven days before doing so: r 7.29(2).

Unless the notice of change is filed with the leave of the court, the solicitor must include in the notice a statement of the date on which service of the notice of intention was effected: r 7.27(3).

Leave may be effected by post to the former client at the residential or business address last known to the solicitor: r 7.27(4).

As to a solicitor ceasing to act, see *Ritchie's* at [7.29.5] and *Thomson Reuters* at [r 7.29.40].

As to suggested form of notices, see *Thomson Reuters* at [r 7.29.60].

[2-5710] Effect of change

A notice of change of solicitor which is required or permitted to be given does not take effect as regards the court until the notice is filed (r 7.30(a)) and, as regards any person on whom it is required or permitted to be served, until a copy of the notice is served on that person: r 7.22(b).

Thus, service upon a solicitor who is still upon the record, but who is no longer retained, is good service: *Turpin v Simper* (1898) 15 WN (NSW) 117c.

[2-5720] Actions by a solicitor corporation

In the case of a solicitor corporation, any act, matter or thing authorised or required to be done which, in the circumstances of the case, can only be done by a natural person may be done by a solicitor who is a director, officer or employee of the corporation: r 7.31.

Legislation

- *Civil Procedure Act* 2005 Pt 10, Sch 6
- *Corporations Act* 2001 (Cth)
- *Federal Court of Australia Act* 1976 (Cth) Pt IVA
- *Industrial Relations Act* 1996 Ch 7, Pt 2

Rules

- UCPR Pt 7, Div 2, 6, rr 6.20, 6.24, 7.1-7.3, 7.6-7.12, 7.19–7.24, 7.26–7.31, Pt 58

Practice Note

- Supreme Court, General List: Practice Note SC Gen 17

[The next page is 1951]

Security for costs

Acknowledgement: the following material was originally prepared by Her Honour Judge J Gibson of the District Court and updated by Judicial Commission staff.

Portions of this chapter are adapted from NSW Civil Practice and Procedure, Thomson Reuters, Australia.

[2-5900] The general rule

The purpose of an order for security for costs is to ensure justice between the parties, and in particular to ensure that unsuccessful proceedings do not disadvantage defendants. However, as the NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012 notes at [1.5] and [2.4]–[2.6], the court has a wide discretion both at common law and pursuant to the *Civil Procedure Act* 2005 and UCPR. That discretion means that an order need not be made merely because grounds can be established: *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2012] NSWSC 1026 at [85]–[86]. "The basic rule that a natural person who sues will not be ordered to give security for costs, however poor, is ancient and well established": *Pearson v Naydler* [1977] 1 WLR 899 at 902. The general principle that poverty "is no bar to a litigant": *Cowell v Taylor* (1885) 31 Ch D 34 at 38; *Oshlack v Richmond River Council* (1998) 193 CLR 72 is now set out in r 42.21(1B).

This general rule is not, however, absolute: *Melville v Craig Nowlan & Associates Pty Ltd* (2001) 54 NSWLR 82 at 108; *Morris v Hanley* [2000] NSWSC 957 at [11]–[21]. The exercise of the power to order security for costs is a balancing process, requiring the doing of justice between the parties. The court must have a concern to achieve a balance between ensuring that adequate and fair protection is provided to the defendant, and avoiding injustice to an impecunious plaintiff by unnecessarily shutting it out or prejudicing it in the conduct of the proceedings: *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 at [47].

Rule 42.21 provides direction in achieving that balance by adding a non-exhaustive list of matters to which the court may have regard: r 42.21(1A). Further, provisions enable a court to order security where there are grounds for believing that a plaintiff has divested assets with the intention of avoiding the consequences of the proceedings (r 42.21(1)(e)) or changed their place of residence without reasonable notification of the change: r 7.3A. In addition, r 42.21(1B) provides that if the plaintiff is a natural person, an order for security for costs cannot be made "merely" on account of impecuniosity. See further at [2-5930] and [2-5940].

[2-5910] The power to order security for costs

The sources of the court's power to order a party to provide security or pay money into court are "many and varied": *JKB Holdings Pty Ltd v de la Vega* [2013] NSWSC 501 at [11] per Lindsay J, listing (at [11]–[13]) not only the Supreme Court's inherent and statutory powers, but examples where money may be paid into court where no order for security for costs has been made: see also *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [34].

The Supreme Court has inherent jurisdiction to make orders for security for costs (*Bhagat v Murphy* [2000] NSWSC 892), but the District Court and Local Court do not: *Philips Electronics Australia Pty Ltd v Matthews* (2002) 54 NSWLR 598 at [50]–[53]. While it has been held that the District Court has an implied power under *District Court Act* 1973 s 156 to order security for costs (*Phillips Electronics Australia Pty Ltd v Matthews*, above, at [45]), the provisions of the *Civil Procedure Act* 2005 and UCPR render this unnecessary. Additionally, where an order for security for costs is sought against a corporate plaintiff, *Corporations Act* 2001 (Cth) s 1335 gives power.

[2-5920] Exercising the discretion to order security

The power to order security for costs is discretionary and the order will not be automatic: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [20], [56]–[57] and [60]–[62]. The discretion is to be exercised judicially, and not "arbitrarily, capriciously or so as to frustrate the legislative intent":

Oshlack v Richmond River Council, above, at [22]. Exercise of the power requires consideration of the particular facts of the case: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502. Although r 42.21(1A) now provides a list of factors, these are not exhaustive; the factors that may be taken into account are unrestricted, provided they are relevant: *Morris v Hanley*, above; *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* (1985) 1 NSWLR 114. The weight to be given to any circumstance depends upon its own intrinsic persuasiveness and its impact on other circumstances which have to be weighed: *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 236 ALR 143 at [12].

[2-5930] General principles relevant to the exercise of the discretion

The relevant factors have been summarised and discussed in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189; *Tradestock Pty Ltd v TNT (Management) Pty Ltd* (1977) 14 ALR 52, most recently by the NSW Court of Appeal in *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 at [26]–[35]. The NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012 led to amendment to the rules: Uniform Civil Procedure Rules (Amendment No 61) 2013 (NSW).

These factors are set out below, in headings which mirror the provisions of rr 42.21(1A) and (1B):

(a) The prospects of success or merits of the proceedings: r 42.21(1A)(a)

A consideration of the plaintiff's prospects of success is an important element of balancing justice between the parties. However, care needs to be exercised when assessing the proportionate strength of the cases of the parties at an early stage of proceedings: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [39].

As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, then, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success: *KP Cable Investments Pty Ltd v Meltglow Pty Ltd*, above, at 197; *Staff Development & Training Centre Pty Ltd v Commonwealth of Australia* [2005] FCA 1643 at [12]–[13].

(b) The genuineness of the proceedings: r 42.21(1A)(b)

Whether the claim is bona fide or a sham is a relevant consideration, and the court will take into account the motivation of a plaintiff in bringing the proceedings: *Bhagat v Murphy*, above, at [20]–[21]. Examples include an unsatisfactory pleading, or a vexatious claim (*Bhagat* at [26]), particularly where the plaintiff is self-represented with "abundant time" to pursue incessant and numerous applications: *Lall v 53–55 Hall Street Pty Ltd* [1978] 1 NSWLR 310 at 313–314.

(c) The impecuniosity of the plaintiff: r 42.21(1A)(c)

The court must first consider the threshold question of whether there is credible testimony to establish that the plaintiff will be unable to pay the defendant's costs if the defendant is ultimately successful: *Idoport Pty Ltd v National Australia Bank Ltd* at [2], [35] and [60]. However, once the defendant has led credible evidence of impecuniosity, an evidentiary onus falls on the plaintiff to satisfy the court that, taking into account all relevant factors, the court's discretion should be exercised by either refusing to order security or by ordering security in a lesser amount than that sought by the defendant: *Idoport Pty Ltd v National Australia Bank Ltd* at [62] and [65]. In other words, proof of the unsatisfactory financial position of the plaintiff "triggers" the court's discretion: *Fiduciary Ltd v Morningstar Research Pty Ltd*, above, at [35]–[36]; *Thalanga Copper Mines Pty Ltd v Brandrill Ltd* [2004] NSWSC 349 at [12]–[13]; *Acohs Pty Ltd v Ucorp Pty Ltd*, above, at [10]; *Ballard v Brookfield Australia Investments Ltd* [2012] NSWCA 434 at [29]–[41].

While "mere impecuniosity" does not justify an order for security for costs in itself, impecuniosity when combined with other factors led to an order for security for costs in *Levy v*

Bablis [2011] NSWCA 411 at [9], although payment was adjusted to be made in two tranches (at [11], [13] ff). Particular note should be taken of UCPR r 42.21(1B). Where the plaintiff is a natural person, an order cannot be made because of mere impecuniosity.

(d) Whether the plaintiff's impecuniosity is attributable to the defendant: r 42.21(1A)(d)

Where the plaintiff's lack of funds has been caused or contributed to by the defendant, the court will take this consideration into account. This has been described as the "causation" factor: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [85]–[101]. It is a relevant consideration that an order would effectively shut a party out of relief in circumstances where that party's impecuniosity is itself a matter which the litigation may help to cure: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd*, above, at [26.4(g)]. However, a plaintiff cannot rely on the poverty rule where he or she has so organised their affairs so as to shelter assets: *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443 at 452. See also UCPR r 42.21(1)(f).

In *Dae Boong International Co Pty Ltd v Gray* [2009] NSWCA 11 at [34] the court noted that, in determining the causation factor, it is not inappropriate to have regard to the apparent strength of the case.

(e) Whether the plaintiff is effectively in the position of a defendant: r 42.21(1A)(e)

It is appropriate to examine whether the impecunious plaintiff is, in reality, the defender in the proceedings, and not the attacker: *Amalgamated Mining Services Pty Ltd v Warman International Ltd* (1988) 88 ALR 63 at 67–8.Where a plaintiff has been obliged to commence proceedings, and is effectively in the position of a defendant, security may not be ordered: *Hyland v Burbidge* (unrep, 23/10/92, NSWSC). Each case will turn on its facts. In *Hyland v Burbidge*, the claim that an overseas plaintiff was effectively in the position of a defendant and should not be ordered to provide security was dismissed. However, in *Dee-Tech Pty Ltd v Neddam Holdings Pty Ltd* [2009] NSWSC 1095 at [13]–[15] the court held that the plaintiff's principal claim was a defence to the defendant's claims of forfeiture of a lease and the retaking of possession. The plaintiff was effectively in the position of a defendant, and the application for security dismissed.

(f) The "stultification" factor: r 42.21(1A)(f)

Where the effect of an order for security would be to stifle the plaintiff's claim, this is an important consideration to be weighed, particularly in light of the poverty rule: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [72]; *Staff Development & Training Centre Pty Ltd v Commonwealth of Australia*, above, at [39]. It may also be appropriate to look behind the actual litigant to examine the means of others who stand to benefit from the litigation: *Acohs Pty Ltd v Ucorp Pty Ltd* at [49]; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 5)* [2006] FCA 1672 at [38.8]. In *Pioneer Park Pty Ltd (In Liq) v ANZ Banking Group Ltd* [2007] NSWCA 344 at [56], Basten J noted that it might be seen as oppressive to allow a large corporate defendant to obtain an order for security for costs likely to stifle the litigation, in circumstances where the claim had potential merit and the security sought, although a relatively insignificant amount, was beyond the capacity of the corporate plaintiff to pay. However, in *Odyssey Financial Management Pty Ltd v QBE Insurance (Australia) Ltd* [2012] NSWCA 113, McColl JA held that to demonstrate that there was such oppression, it would be necessary for those who stood behind the corporate plaintiff to demonstrate that they were also without the means to provide an order for security in the relatively modest amount sought by the corporate defendant: at [17].

(g) Whether the proceedings involve a matter of public importance: r 42.21(1A)(g)

If the proceedings raise matters of general public importance, this may be a factor relevant to the discretion. This may be the case where the area of law involved requires clarification for the

benefit of a wider group than the particular plaintiff: *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd* at [31]; *Soh v Commonwealth of Australia* (2006) 231 ALR 425 at [26].

(h) Whether there has been an admission or a payment into court: r 42.21(1A)(h)

The circumstances in which parties may pay money into court are outlined in *JKB Holdings Pty Ltd v de la Vega*, above, at [11]–[13]. Where there has been an existing order made, and a further order sought, this may be a factor to take into account: *Welzel v Francis (No 3)* [2011] NSWSC 858.

(i) Whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant: r 42.21(1A)(i)

In addition to bringing the application for security promptly, the conduct of the litigation may be taken into account, including delay in the commencement of the proceedings, where there is evidence that the defendant is prejudiced by that delay.

(j) The costs of the proceedings: r 42.21(1A)(j)

The party seeking the order generally tenders evidence of costs estimates for preparation for hearing and hearing costs and, if overseas enforcement is required, information about the likely costs and difficulties. In *Western Export Services Inc v Jireh International Pty Limited* [2008] NSWSC 601 at [82] Jagot AJ took into account that the defendant would incur "substantial legal costs" in defending the proceedings.

(k) Proportionality of the security sought to the importance and complexity of the issues: r 42.21(1A)(k)

The court may have regard to the proportionality of the costs to the activity or undertaking the subject of the claim. An example would be where the amount sought is so minuscule as to impose an undue hardship on an already vulnerable plaintiff, see *Shackles & Daru Fish Supplies Pty Ltd v Broken Hill Proprietary Co Ltd* [1996] 2 VR 427 at 432. The court may also take into account the relative disparity of resources of the parties (*P M Sulcs v Daihatsu Australia Pty Ltd (No 2)* [2000] NSWSC 826 at [82]) and the modesty of the sum sought in comparison to the importance of the issue: *Maritime Services Board of NSW v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107.

(l) The timing of the application for security: r 42.21(1A)(l)

Applications for security should be brought promptly. Delay by a defendant is a relevant factor in the exercise of the discretion: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [68]. A corporate plaintiff is expected to know its position "at the outset", before it embarks to any real extent on its litigation: *Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301 at 309.

The passage of time is only one item in the list of factors to be taken into account in the balancing exercise: *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 1 NSWLR 114 at 123 ff; *Thalanga Copper Mines Pty Ltd v Brandrill Ltd* [2004] NSWSC 349 at [25]–[26]; *P M Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd (No 2)* [2000] NSWSC 826. The delay must be weighed not only in terms of prejudice, but also in terms of the factors that have led to the delay: *Acohs Pty Ltd v Ucorp Pty Ltd* (2006) 236 ALR 143 at [61] ff; *Re GAP Constructions Pty Ltd* [2013] NSWSC 822 at [14]–[15] (order for security made notwithstanding the delay).

(m) Whether an order for costs is enforceable in Australia: r 42.21(1A)(m)

The Law Reform Commission report, above, identifies the problem of recoverable costs in terms of overseas enforcement. This provision should be read in conjunction with r 42.21(1A)(n).

(n) Ease and convenience (or otherwise) of overseas enforcement: r 42.21(1A)(n)

A defendant is not expected to bear the uncertainty of enforcement in a foreign country: *Cheng Xi Shipyard v The Ship "Falcon Trident"* [2006] FCA 759 at [9], *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 992 at [29]. It has been stated that this principle is not absolute and must be weighed against other discretionary considerations: *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245. However, the difficulty in enforcing an order for costs overseas against a non-resident plaintiff will usually be sufficient to ground an order: *Shackles & Daru Fish Supplies Pty Ltd v Broken Hill Proprietary Co Ltd* [1996] 2 VR 427, especially where there is no reciprocal right of enforcement in the relevant foreign jurisdiction or legislation which may make recovery difficult: *Dense Medium Separation Powders Pty Ltd v Gondwana Chemicals Pty Ltd (in liq)* [2011] NSWCA 84.

A list foreign jurisdictions where there is a reciprocal right of enforcement is set out in the *Foreign Judgments Act* 1991 (Cth); Sch 2 to the *Foreign Judgments Regulations* 1992 (Cth).

The residence of an appellant outside Australia is a powerful factor in favour of ordering security, even where enforcement may not be an issue. Security for costs was ordered where the appellant resided in Papua New Guinea in *Batterham v Makeig (No 2)* [2009] NSWCA 314 at [8] (see [2-5940] below) and in *Mothership Music v Flo Rida (aka Tramar Dillard)* [2012] NSWCA 344, where the appellant resided in the United States.

The non-exhaustive nature of the list

This list is non exhaustive. The court will always take into account factors peculiar to the circumstances of the proceedings: *Equity Access Ltd v Westpac Banking Corp* [1989] ATPR ¶40-972. Other relevant factors considered by the courts include: that the parties or some of them are legally aided, see *Webster v Lampard* (1993) 177 CLR 598; that the likely order as to costs, even if successful, may not be in favour of the winning defendant, see *Singer v Berghouse* (1993) 67 ALJR 708 at 709.

Security may be ordered in any cause of action. Although it has been suggested that security for costs will not be ordered against a plaintiff in personal injury or similar tortious proceedings (*De Groot (an infant by his tutor Van Oosten) v Nominal Defendant* [2004] NSWCA 88 at [29]–[30] per Handley JA), such orders have been made where the plaintiff resides overseas: *Li v NSW* [2013] NSWCA 165 (appeal from order for security for costs dismissed); *Chen v Keddie* [2009] NSWSC 762; *Jennings-Kelly v Gosford City Council* [2012] NSWDC 84.

[2-5935] The impoverished or nominal plaintiff: r 42.21(1B)

UCPR r 42.21(1B) provides that if the plaintiff is a natural person, an order for security for costs cannot be made "merely" on account of his or her impecuniosity. Prior to this rule coming into force, security against a person was ordered where a plaintiff brings repeated applications *Mohareb v Jankulovski* [2013] NSWSC 850 (security of $5,000 ordered), and where the claim was hopelessly framed: *Nanitsos v Pantzouris* [2013] NSWSC 862 (security of $5,000 ordered). In both cases the plaintiffs were litigants in person.

The court will also take into account, in balancing the interests of a defendant, that the plaintiff is suing for the benefit of other persons who are immune from the burden of an adverse costs order: *Idoport Pty Ltd v National Australia Bank Ltd*, above, at [31] ff. This factor has received increased attention in modern litigation with the advent of commercial litigation funding and insurance. The relevant principles are discussed more fully below in "Nominal plaintiffs" at [2-5950]. Representative plaintiffs are to be distinguished from nominal plaintiffs who have no personal interest and merely act in a representative capacity (such as executors, and trustees).

[2-5940] Issues specific to the grounds in r 42.21(1)

Additional factors are set out in r 42.21(1):

(a) The plaintiff is ordinarily resident outside Australia: r 42.21(1)(a)

The question of what the term "ordinarily resident" means is discussed in *Corby v Channel Seven Sydney Pty Ltd* [2008] NSWSC 245.

UCPR r 42.21(1)(a) was amended to replace "New South Wales" with "Australia" by Uniform Civil Procedure Rules (Amendment No 61) 2013. This provision is designed to be read in conjunction with r 42.21(1A)(m) and (n), as to which see [2-5930], above.

(b) Misstatement of address: r 42.21(1)(b)

It was previously the case that the defendant must prove a plaintiff has failed to state an address, or has misstated an address, with the intention to deceive, or has changed address with a view to avoiding the consequences of an adverse costs order: *Knight v Ponsonby* [1925] 1 KB 545 at 522. The requirement for compliance with this rule will lighten the evidentiary burden.

(c) Change of address after proceedings are commenced: r 42.21(1)(c)

This is a rarely used provision. In *Ghiassi v Ghiassi* (unrep, 19/12/2007, NSWSC), Levine J rejected an application made after the plaintiff left to travel overseas, on the basis that it was unsupported by evidence. In *Kealy v SHDS Services Pty Ltd as Trustee of the SHDS Unit Trust* [2011] NSWSC 709 the defendant complained that the plaintiff returned to Ireland without notice, although he later disclosed his new address in an affidavit of documents. Johnson J considered that the basis of the application was essentially that the plaintiff resided outside the jurisdiction, and made an order for security for costs in the sum of $40,000.

(d) The plaintiff is a corporation: r 42.21(1)(d)

It is not sufficient to prove simply that the plaintiff is a corporation. There must be some credible testimony that the corporation is likely to be unable to pay the defendant's costs, if unsuccessful. The test for the application of r 42.21(1)(d) is substantially similar to that for s 1335 of the *Corporations Act* 2001 (Cth) (*Fitzpatrick v Waterstreet* (1995) 18 ACSR 694), and this topic is therefore considered together with the section below on "Corporations" at [2-5960].

(e) The plaintiff is suing for the benefit of some other person: r 42.21(1)(e)

See *Riot Nominees Pty Ltd v Suzuki Australian Pty Ltd* (1981) 34 ALR 653. This ground overlaps the inherent jurisdiction and is discussed more fully below in the section on "Nominal plaintiffs". The discretion is more likely to be exercised where the nominal plaintiff has insufficient assets within the jurisdiction: *Bellgrove v Marine & General Insurance Services Pty Ltd* (1996) 5 Tas R 409. See [2-5950] below, "Nominal plaintiffs".

(f) There is reason to believe the plaintiff has divested assets to avoid the consequences of the proceedings: r 42.21(1)(f)

This new provision was added on 9 August 2013. Applications have been brought on such a basis in other jurisdictions in Australia, as summarised in *Vizovitis v Ryan t/as Ryans Barristers & Solicitors* [2012] ACTSC 155 at [49]–[54] (the application in those proceedings failed due to lack of evidence). In *Evans v Cleveland Investment Global Pty Ltd* [2013] NSWCA 230, Leeming JA made an order for security for costs of $15,000 where the respondent alleged that a series of withdrawals contrary to Mareva orders.

[2-5950] Nominal plaintiffs

A nominal plaintiff is "nothing but a puppet for some third party, a mere shadow, in the sense that he has parted with any right he may have had in the subject matter": *Andrews v Caltex Oil (Aust) Pty Ltd* (1982) 40 ALR 305 at 309.

The poverty rule must be qualified in circumstances where the claim is put forward on behalf of others: *Grizonic v Suttor* [2006] NSWSC 1359 at [20]. See also *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [79].

The real plaintiff is not allowed to seek to enforce a right through a nominal plaintiff who is a person of straw: *Sykes v Sykes* (1869) LR 4 CP 645 at 648; *Riot Nominees Pty Ltd v Suzuki Australian Pty Ltd*, above.

The involvement of third-party funders with no pre-existing interest in the proceedings, who are in some instances resident out of Australia but who stand to benefit substantially from any recovery from the proceedings is a material consideration: *Idoport Pty Ltd v National Australia Bank Ltd* at [107]; *Chartspike Pty Ltd v Chahoud* [2001] NSWSC 585. It is fair for the courts to proceed on a basis which reflects the proposition that those who seek to benefit from litigation should bear the risks and burdens that the process entails: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [83]; *Chartspike Pty Ltd v Chahoud*, above, at [5]. This topic is discussed in the Law Reform Commission report, above, 3.3–3.40.

[2-5960] Corporations

The power to order security for costs against corporations is derived from UCPR r 42.21(1)(d) (and r 51.50 in the case of appeals) and from s 1335 of the *Corporations Act* 2001 (Cth). The Supreme Court also has inherent jurisdiction in order to regulate the court's procedures and processes and to prevent abuse of process: *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148 at [33]–[35].

Corporations are in a different category from natural person plaintiffs: *Pacific Acceptance Corp Ltd v Forsyth (No 2)* [1967] 2 NSWR 402 at 407; *Fiduciary Ltd v Morningstar Research Pty Ltd* at [53]; *Idoport Pty Ltd v National Australia Bank Ltd* at [53]–[59]; *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189; *Whyked Pty Ltd v Yahoo Australia and New Zealand Ltd* [2006] NSWSC 1236 at [25].

A corporation which seeks to rely on the stultification factor must also demonstrate that those standing behind it, likely to benefit from the litigation (such as shareholders and creditors) are also without means to satisfy an adverse costs order: *Re Staway Pty Ltd (in liq)(rec and mgrs appted)* [2013] NSWSC 819 at [57]–[60] (application for security deferred due to merits of corporation's claim). It is not for the party seeking security to raise such issues: *Thalanga Copper Mines Pty Ltd v Brandrill Ltd*, above, at [12]–[18]; *Acohs Pty Ltd v Ucorp Pty Ltd* at [42] ff. The same is the case where there is a third party funder: *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd*, above, at [51].

Undertakings or offers to pay the surety by directors or other persons may be accepted: *Harpur v Ariadne Australia Ltd (No 2)* [1984] 2 Qd R 523 at 532 (company principal agreeing to meet costs); *Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr* [2005] NSWCA 240 (shareholders agreeing to meet costs liability); *Jazabas Pty Ltd v Haddad* (2007) 65 ACSR 276 (security ordered as shareholders were not prepared to provide formal undertaking to meet costs).

Where a liquidator conducts the litigation on behalf of the company in liquidation, the court should not treat an application for security at large, but should have regard to guidelines as set out in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* at [45].

[2-5965] Ordering security in appeals

The differences in principle between security for costs at trial level and on appeal have been noted and explained in *Tait v Bindal People* [2002] FCA 332 at [3]; *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2007] NSWCA 247 at [18] and *Ballard v Brookfield Australia*

Investments Ltd [2012] NSWCA 434 at [13]–[28]. Under UCPR r 51.50(1), the court may, *in special circumstances*, order that such security as the court thinks fit be given for the costs of an appeal. Rule 51.50 (3) provides that r 51.50(1) does not affect the powers of the court under UCPR r 42.21. There are no fixed rules for determining what will amount to special circumstances: *Zong v Wang* [2021] NSWCA 214 at [45], and the question of what constitutes special circumstances should not be fettered by any general rule of practice. Impecuniosity, without more, is normally insufficient to satisfy the requirement for special circumstances: *Zong v Wang* at [17].

While security for costs is more likely to be awarded because the issues have been the subject of findings by a primary judge, security for costs was refused where an impecunious appellant had reasonable prospects of success on appeal: *Neale v Archer Mortlock & Woolley Pty Ltd* [2013] NSWCA 209. See also *Murray John Carter v Ian Mehmet t/as ATF Ian G Mehmet Testamentary Trust* [2021] NSWCA 32, where special circumstances justified the order for security for costs (security of $40,000). These included that the appellants had resolved to pursue an appeal which was more likely to fail than not (at [41]). Because of the appellants' impecuniosity, in the absence of any provision of security, the respondents faced the reality of incurring substantial further legal costs with no realistic prospect of recovering them if the appeal was unsuccessful. Similarly, in *Zong v Wang* , special circumstances justified the order for security for costs (security of $50,000) including that the respondent had obtained judgment against the appellant that was unlikely to be recovered and had incurred substantial costs in excess of $100,000 in obtaining that judgment, also unlikely to be recovered from the appellant. It was also relevant that the respondent would be put to the further cost of responding to the appellant's appeal, with no prospect of recovering his costs if the appeal is dismissed.

The security for costs procedure is intended to ensure that the beneficiary of a security for costs order is not left out of pocket in the event of success on appeal: *Evans v Cleveland Investment Global Pty Ltd* [2013] NSWCA 230 (security of $15,000 ordered); *Swift v McLeary* [2013] NSWCA 173 (security of $40,000 ordered where unexplained dissipation of assets was alleged).

In *Porter v Gordian Runoff Ltd* [2004] NSWCA 69 at [41], Hodgson JA considered a factor in favour of an order for security to be that the appellant's legal advisors were owed substantial amounts of money giving them a "large stake" in the success of the appeal. The relevance of that factor is that lawyers with such an interest may reasonably be expected to provide some financial support for the prosecution of the appeal. See also *Porter v Gordian Runoff Ltd* [2004] NSWCA 171 at [32] (application to discharge the order dismissed) and *Murray John Carter v Ian Mehmet t/as ATF Ian G Mehmet Testamentary Trust*, above, at [34]. In the latter case, in the unlikely event that the appeal succeeded, the appellants stood to recover their costs incurred at first instance and the beneficiaries of their doing so were their lawyers and others whose fees at first instance remain unpaid.

The court's role includes a re-exercise of the discretion to award security for costs: *Wollongong City Council v Legal Business Centre Pty Ltd* [2012] NSWCA 245 at [53]; *Wollongong City Council v Legal Business Centre Pty Ltd (No 2)* [2012] NSWCA 366.

In *Batterham v Makeig (No 2)* [2009] NSWCA 314, Macfarlan JA was of the view that the reference to "plaintiff" in r 42.21(1)(a) encompasses an appellant, even if the appellant was not a plaintiff in the court below: at [6]. In that case, the first appellant's residence outside Australia, his manifested preparedness to place what hurdles he could in the path of enforcement by the respondent of the judgment, and the limited financial resources available to the first appellant combined to require security to be ordered: at [10].

[2-5970] Amount and nature of security to be provided

The order should not provide a complete indemnity for costs: *Brundza v Robbie & Co (No 2)* (1952) 88 CLR 171 at 175. Fixing the amount to be provided by way of security is part of the exercise of the court's discretion: *Fiduciary Ltd v Morningstar Research Pty Ltd* at [132]. The court will therefore

require evidence by which it might estimate the defendant's probable recoverable costs: see, for example, the evidence adduced in such cases as *Fiduciary Ltd v Morningstar Research Pty Ltd*; *Idoport Pty Ltd v National Australia Bank Ltd*; and *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 1131; *Western Export Services Inc v Jireh International Pty Limited* [2008] NSWSC 601.

Evidence generally consists of an affidavit from a solicitor or costs assessor as to the amount of costs, although the court may accept a general estimate from a costs assessor or senior solicitor. Factual matters, such as proof of the plaintiff's residence overseas, or a corporation's financial circumstances, may be the subject of affidavit or tender.

The court may initially only order security for the costs of preparing the matter for hearing and make further orders at a later date, or order the sum to be paid in tranches (*KDL Building v Mount* [2006] NSWSC 474 at [36]; *Porter v Aalders Auctioneers and Valuers Pty Ltd* [2011] NSWDC 96 at [29]–[30]), or make such other order as may be appropriate to ensure that the party paying the security has adequate opportunity to do so. The security may take such form as the court considers will provide adequate protection to the defendant. In lieu of the more traditional payment into court, guarantees, charges or the provision of a bank bond: *Estates Property Investment Corp Ltd v Pooley* (1975) 3 ACLR 256. Other examples of how security may be provided are set out in the NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012, at [1.6]. The basic principle is that so long as the defendant can be adequately protected, the security should be given in the way that is least disadvantageous to the giver: G Dal Pont, *Law of Costs*, 4th edn, LexisNexis Butterworths, Sydney, 2018 at [29.96].

[2-5980] Practical considerations when applying for security

1. **Timing of an application**
   It is important to foreshadow any application in correspondence*: Crypta Fuels Pty Ltd v Svelte Corp Pty Ltd* (1995) 19 ACSR 68 at 71. The court will exercise care when assessing the proportionate strength of the cases of the parties at the early stages of proceedings: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 208 ALR 564 at [39].

2. **Multiple parties**
   Difficulties arise where there are two or more plaintiffs, including one or more individuals and one or more corporations, or where one or more of the plaintiffs resides overseas; or where the prospects of success vary as amongst the co-plaintiffs: *Fiduciary Ltd v Morningstar Research Pty Ltd*, above, at [54] ff. Similarly, when only one of several defendants applies for security: *Gujarat NRE Australia Pty Ltd v Williams* [2006] NSWSC 992.

3. **Ordering security against a defendant**
   An order for security will not ordinarily be made against parties defending themselves and thus forced to litigate: *Weily's Quarries v Devine Shipping Pty Ltd* (1994) 14 ACSR 186 at 189. Where, however, the defendant is in fact pursuing a claim as, in substance, the claiming party, the position is reversed: *Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA* (1994) 12 ACLC 334; *Motakov Ltd v Commercial Hardware Suppliers Pty Ltd* (1952) 70 WN (NSW) 64. Where a corporation, which is a defendant, brings a cross-claim, an application for security for costs in relation to the cross-claim may be made.

[2-5990] Dismissal of proceedings for failure to provide security

The court has power to dismiss proceedings where the plaintiff fails to comply with an order to give security: r 42.21(3): *Porter v Gordian Runoff Ltd (No 3)* [2005] NSWCA 377 at [36]. Relevant circumstances to be taken into account are discussed in *Idoport v National Australia Bank Ltd* [2002] NSWCA 271 at [24] ff and [69] ff and in *Lawrence Waterhouse Pty Ltd v Port Stephens Council* [2008] NSWCA 235. UCPR r 50.8 has been amended to enable a court to which Pt 50 applies to

dismiss an appeal or cross-appeal for failure to provide security for costs. UCPR r 51.50 has similarly been amended to enable the NSW Court of Appeal to dismiss appeals or cross-appeals for failure to comply with security for costs orders.

A party unable to provide security within the time frame ordered may seek an extension: *Wollongong City Council v Legal Business Centre Pty Ltd (No 2)* [2012] NSWCA 366 (application for extension dismissed).

An order for security for costs should not be used as an alternative way of striking out an appeal. Nor should it be used to push an appellant towards discontinuing an appeal. Rather, it is a process available to secure, in advance, the costs of a respondent to an appeal where the circumstances justify reversing the sequence which usually applies: namely that costs orders are made, if at all, after a proceeding has been heard and determined: *Nyoni v Shire of Kellerberrinin (No 9)* [2016] FCA 472.

[2-5995] Extensions of security for costs applications

Applications for further security may be brought at any time: *Welzel v Francis* [2011] NSWSC 477; *Welzel v Francis (No 2)* [2011] NSWSC 648; *Welzel v Francis (No 3)* [2011] NSWSC 858.

Applications to vary or extinguish the terms may be made during the proceedings before the primary court or on appeal: *Nicholls v Michael Wilson & Partners (No 2)* [2013] NSWCA 141 (application for release of security).

[2-6000] Sample orders

Although judgments may refer to payment of money into court under these provisions, parties generally prefer to provide security by way of a bank bond or a deposit of funds, placed in an interest bearing account in the joint names of solicitors on either side of proceedings: *JKB Holdings v de la Vega* [2013] NSWSC 501 at [12].

The following sample orders contemplate payment into court, but may be varied to suit the parties' convenience:

1. The plaintiff is to provide security for the defendant's costs by paying into court the sum of $35,000 or by otherwise providing security for that amount in a manner satisfactory to the defendant. Until that security is provided, there will be a stay of the proceedings. The security is to be provided before 23 June 2007, on which date the matter is to be listed before the court for consequential orders, or, in the event that the security has not been provided, an order for the dismissal of the proceedings under r 42.21(3).
2. All orders currently in place for the case management of the proceedings are presently stayed until the motion seeking security for costs is determined.
3. The first defendant is to provide security on or before 22 June 2007, for the costs of the first defendant and the second defendant up to the end of the first day of the trial, in the amount of $150 000, by way of unconditional bank guarantee, or otherwise to the satisfaction of those defendants.
4. The parties have liberty to apply for additional security for costs at any stage of the proceedings.

Legislation

- *Corporations Act* 2001 (Cth), s 1335
- *Foreign Judgments Act* 1991 (Cth)
- *Foreign Judgments Regulations* 1992 (Cth)

Rules

- UCPR Pt 7 r 7.3A, Pt 42, r 42.21, Pt 50, Pt 51 r 51.50

Further references

- G Dal Pont, *Law of Costs*, 4th edn, LexisNexis Butterworths, Sydney, 2018
- NSW Law Reform Commission, *Security for costs and associated costs orders*, Report 137, 2012, <www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r137.pdf>, accessed 15 August 2013
- P Blazey and P Gillies, "Recognition and Enforcement of Foreign Judgments in China", *International Journal of Private Law*, Macquarie University, 2008, (cited in *Chen v Keddie* [2009] NSWSC 762 at [18]).

[The next page is 2011]

Appeals except to the Court of Appeal, applications, reviews and mandatory orders

Appeals from judges of the Supreme Court and the District Court and from certain decisions of the Civil and Administrative Tribunal lie to the Court of Appeal and are not covered by this review.

[5-0200] Appeal from an associate judge of the Supreme Court to a judge of that court

An appeal lies from an associate judge of the Supreme Court to a judge of that court except where an appeal lies to the Court of Appeal: r 49.4.

Section 75A, Appeal, of the SCA applies: s 75A(1). The section includes the following provisions:

- Where the decision under appeal follows a hearing, the appeal is by way of rehearing: s 75A(5). That is a rehearing on the record, as delineated in *Warren v Coombes* (1979) 142 CLR 531 at 553. See also *Do Carmo v Ford Excavations Pty Ltd* [1981] 1 NSWLR 409 at 420 per Cross J and *Morrison v Judd* (unrep, 10/10/95, NSWCA). For a fuller discussion of the nature of such an appeal, see *Ritchie's* [SCA s 75A.10]–[SCA s 75A.40] and *Thomson Reuters* [SCA 75A.60]
- The court has the powers and duties of the court, body or person from whom the appeal is brought: s 75A(6)
- The court may receive further evidence (s 75A(7)), but only on special grounds if the appeal is from a judgment following a trial or hearing on the merits unless the evidence concerns matters occurring after the trial or hearing: s 75A(8) and (9). What constitutes "special grounds" depends on the circumstances of the case. For a fuller discussion, see *Ritchie's* [SCA s 75A.45]–[SCA s 75A.52]; *Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd* (2019) 99 NSWLR 447 at [68]–[70], [83]. Also see *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 and *Levy v Bablis* [2013] NSWCA 28,
- The court may make any finding, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires: s 75A(10).

Part 49 of the UCPR, Reviews and Appeals within the court, applies insofar as it relates to appeals. The Part includes the following provisions:

- an appeal is instituted by notice of motion: r 49.8(1)
- time for appeal: r 49.8(2)–(5)
- contents of notice of motion: r 49.9
- institution of an appeal has no effect on the judgment, order or decision under appeal unless otherwise directed: r 49.10
- cross appeal: r 49.11
- no further evidence on appeal unless by leave, and the form of any such further evidence: r 49.12,
- notice of contention: r 49.13.

It appears that the requirement for leave under r 49.12 is intended to restrict the reception of further evidence pursuant to s 75A(7) of the SCA.

The practice is for the appeal to be listed for directions before a registrar and not to be listed for hearing before a judge until the papers are in order and the appeal is ready to be heard.

[5-0210] Sample orders

Appeal allowed / dismissed

(If allowed) Orders as on a hearing at first instance.

Costs

[5-0220] Appeals to the Supreme Court and to the District Court

Such appeals are constituted by the legislation relating to the court or tribunal from which the appeal lies.

Whether the appeal is as of right or only by leave depends on the legislation constituting the appeal. The nature of the appeal may be specified or may have to be inferred from the legislation: *Builder Licensing Board v Sperway Construction (Sydney) Pty Ltd* (1976) 135 CLR 616.

As to appeals from the Civil and Administrative Tribunal, see R Wright, "The NSW Civil and Administrative Tribunal", Judicial Commission of NSW, Supreme Court of NSW Seminar, 16 March 2016, Sydney. Also at R Wright, "The work of the NSW Civil and Administrative Tribunal" (2014) 26 *JOB* 87.

Most appeals to the Supreme Court, other than to the Court of Appeal, are assigned to the Common Law Division: see r 45.8 and Sch 8.

In the case of appeals to the Supreme Court, s 75A of the SCA applies. (See [5-0200], above, for a summary of the section.) Section 75A is subject to any other Act: s 75A(4). The statutes constituting appeals often include provisions (relating, for example, to the nature of the appeal or time for appeal) which then take priority.

Part 50 of the UCPR, Appeals to the Court, applies to appeals to the Supreme Court (other than appeals to the Court of Appeal) and to appeals to the District Court: r 50.1. The Part operates subject to any provision in any Act to the contrary: see the note in the UCPR following r 50.1.

Part 50 includes provisions relating to the following matters:

- time for appeal: r 50.3
- the required content of the summons initiating the appeal and of the separate statement of grounds of appeal: r 50.4 and Form 74
- parties: r 50.5
- the appeal does not operate as a stay: r 50.7
- security for costs: r 50.8
- cross-appeals: r 50.10
- notice of contention: r 50.11
- procedure concerning leave to appeal (r 50.12), and cross-appeal: r 50.13
- preparation, filing and service of the reasons for decision of the court below, transcript, exhibits etc: r 50.14
- if the decision under appeal has been given after a hearing, the appeal is by way of rehearing: r 50.16. See [5-0200], above, in relation to SCA s 75A(5),
- obligation on a defendant who objects to the competency of an appeal to apply for an order dismissing the appeal as incompetent: r 50.16A.

As in the case of appeals from an associate judge to a judge of the Supreme Court, the practice in the Supreme Court is for the appeal to be listed for directions before a registrar and not to be listed for hearing before a judge until the papers are in order and the appeal is ready to be heard.

Special provisions relating to appeals from the Local Court are reviewed below.

[5-0230] Sample orders

Appeal allowed/ dismissed

(If allowed) Orders as on a hearing at first instance.

Costs

[5-0240] Appeals from the Local Court

As of right: An appeal lies to the Supreme Court against a judgment or order of the Local Court sitting in its General Division, but only on a question of law: LCA s 39(1).

An appeal lies to the District Court against a judgment or order of the Local Court sitting in its Small Claims Division but only on the ground of lack of jurisdiction or denial or denial of procedural fairness: LCA s 39(2).

By leave of the Supreme Court: An appeal lies to the Supreme Court against a judgment or order of the Local Court sitting in its General Division on a ground which involves a question of mixed law and fact (s 40(1)) or which is an interlocutory judgment or order, a consent judgment or order or an order for costs: s 40(2).

The Supreme Court may dispose an appeal under s 39(1) or s 40 by:

- varying the terms of the judgment or order
- setting aside the judgment or order
- setting aside the judgment or order and remitting the matter to the Local Court for determination in accordance with the Supreme Court directions,
- dismissing the appeal: s 41(1).

The general principles which govern an application for leave to appeal are set out in *Namoi Sustainable Energy Pty Ltd v Buhren* [2022] NSWSC 175 at [34]–[39] (which concerned an appeal from an interlocutory decision of a magistrate) and include:

1. The jurisdiction which the court exercises is a preliminary procedure which is recognised by the legislation as a means of enabling a court to control the volume of appellate work requiring its attention:*Coulter v The Queen* (1988) 164 CLR 350.
2. It is appropriate to grant leave only in those matters that involve issues of principle, questions of general public importance, or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable:*Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284; *McEvoy v Wagglens Pty Ltd* [2021] NSWCA 104 at [35].
3. It is necessary for the court to examine the merits of the arguments advanced in support of the appeal, and pay attention to whether any injustice had been occasioned to either party, such that the intervention of the court is required: *Sokolowski v Craine* [2019] NSWSC 1123 at [119].

4. The intention of the *Local Court Act 2007* is that the Supreme Court should have supervision over Local Courts in matters of law. Where small claims are involved, it is important that there be early finality in the determination of litigation: *Henamast Pty Ltd v Sewell* [2011] NSWCA 56 at [22].
5. There is a need for legal costs to be proportionate to the amount in issue. A relevant consideration in the exercise of the discretion to grant leave is the proportionality between the amount in issue and the legal costs which have been expended: *Crane v The Mission to Seafarers Newcastle Inc* [2018] NSWSC 429 at [28].

The District Court has similar powers in respect of appeals under s 39(2): s 41(2).

Appeal from the Local Court in its special jurisdiction: Section 70(1) LCA confers a right of appeal in respect of any order made in its special jurisdiction. Any appeal to the District Court is to be made in accordance with Pt 3 of the *Crimes (Appeal and Review) Act* 2001 (CARA Act) "in the same way as such an … appeal may be made in relation to a conviction arising from a court attendance notice" dealt with under Pt 2 of Ch 4 of the *Criminal Procedure Act 1986*: *Huang v Nazaran* [2021] NSWCA 243 at [22]–[24]. Section 70 is not to be construed as restricting or qualifying the subject matter of such an appeal so that it is limited to a conviction (or sentence) appeal: *Huang v Nazaran* at [21]. The right to appeal from any order is "by way of rehearing" in accordance with ss 18 and 19 of the CARA Act, the District Court relevantly having power in determining the appeal to exercise "any function that the original Local Court could have exercised in the original Local Court proceedings" (s 28(2)): *Huang* at [23]; see also *Lewis v Sergeant Riley* (2017) 96 NSWLR 274 at [12].

In *Huang*, the applicants were found to have a right of appeal to the District Court from an order of a magistrate dismissing their application for a noise abatement order, an order awarding costs and an order revoking a noise abatement order pursuant to s 268 of the *Protection of the Environment Operations Act* 1997.

[5-0250] Sample orders

Appeal allowed/ dismissed.

(If allowed) I vary the terms of the judgment/ order by deleting/ substituting/ adding …, or

I set aside the judgment/ order, or

I set aside the judgment/ order, or

I set aside the judgment/ order and remit the matter to the Local Court for determination in accordance with these reasons for judgment (or specifying directions as may be appropriate)…

Costs

[5-0255] Applications and appeals to the District Court and Local Court in federal proceedings

Federal proceedings are covered in Pt 3A of the *Civil and Administrative Tribunal Act* 2013. "Federal jurisdiction" (formerly referred to as "federal diversity jurisdiction") is defined in s 34A as "jurisdiction of a kind referred to in section 75 or 76 of the Commonwealth Constitution".

The *Justice Legislation Amendment Act* 2018 (commenced 1 December 2018) amended Pt 3A of the *Civil and Administrative Tribunal Act* 2013 to enable persons to commence proceedings in the District or Local Court for the determination of original applications and external appeals that the NSW Civil and Administrative Tribunal (the Tribunal) cannot determine because they involve the exercise of federal jurisdiction.

These amendments were made in response to a series of cases concerned with whether the Tribunal could exercise federal jurisdiction. In *Burns v Corbett* (2018) 265 CLR 304, the High Court held that the Tribunal could not exercise jurisdiction of the kind referred to in ss 75 or 76 of the Constitution (Cth). A State law purporting to confer such jurisdiction is inconsistent with Ch III and therefore invalid. The High Court affirmed, for different reasons, the NSW Court of Appeal's decision that the Tribunal had no jurisdiction to determine matters between residents of different States: *Burns v Corbett* (2017) 96 NSWLR 247. It was common ground between the parties that the Tribunal was not a court of the State, so the High Court was not required to decide this issue.

Following these decisions, an Appeal Panel of the Tribunal determined that, in making orders under the *Residential Tenancies Act* 2010 (NSW) commenced between residents of different States, the Tribunal was exercising federal jurisdiction. Further, the Tribunal determined that the Tribunal was a court of the State within the meaning of s 39(2) of the *Judiciary Act* 1903 and s 77(ii) of the Constitution: *Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45. The Court of Appeal, in a 5-judge decision, held that the Tribunal was not a court of the State for this purpose: *Attorney General for NSW v Gatsby* [2018] NSWCA 254.

A person with standing to make an original application or external appeal may, with the leave of an authorised court (the District Court or the Local Court), make the application or appeal to the court instead of the Tribunal: s 34B(1).

Leave may be granted only if the court is satisfied that the application or appeal was first made with the Tribunal (s 34B(2)(a)), that the Tribunal does not have jurisdiction to determine the matter because its determination involves the exercise of federal jurisdiction (s 34B(2)(b)), that the Tribunal would otherwise have jurisdiction to determine the matter (s 34B(2)(c)), and that substituted proceedings would be within the jurisdictional limit of the court: s 34B(2)(d).

The court may remit on application or appeal to the Tribunal if it is satisfied that the Tribunal has jurisdiction to determine it: s 34B(5).

The District Court may grant leave and then transfer proceedings to the Local Court in accordance with the provisions of Pt 9 Div 2 CPA.

For s 75(iv) of the Constitution to apply, the parties must have been residents of different States at the time of bringing the application: *Dahms v Brandsch* (1911) 13 CLR 336.

A company is not a resident for the purposes of s 75(iv): *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290; *Cox v Journeaux* (1934) 52 CLR 282.

The District Court or Local Court has, and may exercise, all of the jurisdiction and functions in relation to the substituted proceedings that the Tribunal would have had if it could exercise federal jurisdiction: s 34C(3).

Section 34C(4) makes a number of modifications as to functions of procedural matters in relation to the conduct of the proceedings.

[5-0260] Review of directions etc of registrars

Part 49 of the UCPR, Reviews and Appeals within the Court, includes provisions relating to the review of a registrar's directions, orders and acts.

These provisions do not apply to the judicial registrar of the District Court: r 49.14. Otherwise, they apply to registrars of the Supreme Court, District Court and Local Court.

A judge or magistrate of the Supreme Court, District Court or Local Court may, on application, review the direction, order or act of a registrar of the respective court, and may make such order by way of confirmation, variation, discharge or otherwise as is thought fit: r 49.19(1). However, decisions of the registrar of the court under cl 11(1) of the *Civil Procedure Regulation* 2017 are not reviewable by a court under Div 4, Pt 49 of the Rules: (r 49.19(2)).

Section 75A of the SCA, Appeal, does not apply to a review.

Prior to the amendment of r 49 on 7 September 2007, a line of authority had developed to the effect that a review was akin to an appeal of the kind provided for in the rules. Following the amendment it is clear that a review is not such an appeal: *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 (CA); *Liverpool City Council v Estephen* [2008] NSWCA 245 at [17].

In *Tomko v Palasty (No 2)*, above, at [52] Basten JA set out the correct approach to a review under r 49 as follows:

> (2) a review, unlike an appeal, does not require demonstration of error, nor is it restricted to a reconsideration of the material before the primary decision-maker;
>
> (3) authorities with respect to the conduct of appeals against the exercise of discretionary powers, such as *House v The King*, do not in terms apply to a review;
>
> (4) nevertheless, similar policy considerations may arise in relation to a review, including:
>
> (a) a court may be less inclined to intervene in relation to a decision concerned with the management of an on-going proceeding, as opposed to one which terminates the proceeding or prevents its commencement;
>
> (b) different factors may need to be addressed in relation to breach of time limits in relation to the commencement of proceedings, as compared with breach of time limits for steps to be taken in the course of proceedings properly commenced, and
>
> (c) a court may be more inclined to intervene on a review based on fresh evidence, changed circumstances or where error is demonstrated in the decision under review.

It should be noted that, whilst Hodgson and Ipp JJA agreed with this approach and that on such a review the court must exercise its own discretion, Ipp JA agreed with qualifications expressed by Hodgson JA at [7]–[9] which can be summarised as follows:

- A court's discretion extends to a discretion as to whether, and if so how, to intervene.
- There is an onus on a person seeking to have a court set aside or vary a registrar's decision to make a case that the court, in the interests of justice, should exercise its discretion to do so.
- In the case of a decision on practice or procedure, this will normally require at least demonstration of an error of law, or a *House v The King* (1936) 55 CLR 499 error, or a material change of circumstance or evidence satisfying the strict requirements of fresh evidence. Even then, the court may not think the interest of justice requires intervention. A court may be more willing to intervene in a decision which finally determines a party's rights or has a decisive impact upon them.

Following the amendment referred to above, Pt 49 now includes the following provisions:

- a review is instituted by notice of motion: r 49.20(1)
- time for review: r 49.20(2)–(5),
- exceptions to the foregoing subrules: r 49.20(6).

The amendment of r 49 repealed r 49.17 which provided that the institution of a review had no effect on the direction etc under review.

[5-0270] Sample orders

I order that the order/ direction/ act/ certificate of Registrar … made/ given/ done/ issued on … be confirmed/ varied by …/ discharged/ replaced with the following direction/ order/ act/ certificate, namely …

Costs

[5-0280] Mandatory order to a registrar or other officer

A judge or magistrate of the Supreme Court, District Court or Local Court, of his or her own motion or on application, may, by order, direct a registrar or other officer of the respective court to do or refrain from doing any act in any proceedings relating to the duties of his or her office: r 49.15.

The rule does not apply to the judicial registrar of the District Court: r 49.14.

[5-0290] Sample orders

I direct the Registrar (or other officer) to… / not to …

Legislation

- *Supreme Court Act* 1970, s 75A, Sch 8
- *Local Court Act* 2007, ss 39, 40, 41

Rules

- UCPR r 45.8, Pt 49, Pt 50

Further references

- *Ritchie's* [SCA s 75A.10]–[SCA s 75A.40], [SCA s 75A.45]–[SCA s 75A.52]
- *Thomson Reuters* [SCA 75A.60]
- R Wright, "The NSW Civil and Administrative Tribunal", Judicial Commission of NSW, Supreme Court of NSW Seminar, 16 March 2016, Sydney
- R Wright, "The work of the NSW Civil and Administrative Tribunal" (2014) 26 *JOB* 87

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The legal framework for the compensation of personal injury in NSW

Acknowledgement: the following material is based on an extract from the NSW Law Reform Commission, Report 131 Compensation to relatives, Sydney, 2011, updated by his Honour Judge Scotting of the District Court of NSW. The material is reproduced with permission. This chapter was updated by the Personal Injury Commission in 2022.

Note: The figures in this chapter are current as at 1 October 2021. Workers compensation amounts are reviewed on 1 April and 1 October each year: *Workers Compensation Act* 1987, Div 6–6B, Pt 3.

Note: The Personal Injury Commission was established on 1 March 2021 (s 6(1)). The legal instruments that govern the Commission's operations are now live on the Personal Injury Commission website.

[6-1000] Introduction

It is useful to note the framework that is in place in NSW for the compensation of those who acquire dust diseases, including asbestos related diseases. In this section we note the jurisdiction of the DDT and the broad heads of damages that may be awarded at common law, as well as the workers' compensation benefits that are available to dust diseases victims.

By way of comparison, we also note the substance of the legislative schemes that are in place in NSW that provide for the receipt of compensation, or for the recovery of common law damages, by non-dust disease claimants. An appreciation of these schemes is relevant to the equity implications of any reform that the terms of reference require us to take into account.

The discussion in this chapter is limited to liability under the laws of NSW. Consequently, it does not consider the availability of compensation, either statutory benefits or common law damages, to those who are subject to the laws of another jurisdiction. The main example of such a category of plaintiff would be workers who were injured while working in NSW, but who were employed by the Commonwealth. Commonwealth employees are provided for by a statutory compensation scheme established under the *Safety, Rehabilitation and Compensation Act* 1988 (Cth).[1]

Workers' compensation—no fault schemes

[6-1005] Workers' compensation—no fault schemes [introduction]

Where a person is injured or killed arising out of or in the course of his or her employment in NSW, that person and his or her dependants can claim compensation which will be funded though statutory contributions.[2]

In general, injured workers in NSW are entitled to workers' compensation benefits and modified common law damages under the *Workers Compensation Act* 1987.

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[1] *Safety, Rehabilitation and Compensation Act* 1988 (Cth) provides for statutory compensation benefits for Commonwealth employees (and in some cases their dependants) who are injured or killed in the course of their employment (see s 14). The Act restricts the recovery of common law damages from the Commonwealth or a Commonwealth authority where an employee is injured (s 44(1)), although if the employee has a right to recover damages for non-economic loss at common law, he or she can elect to pursue common law damages, rather than receiving statutory compensation for his or her non-economic loss (s 45). No restrictions are placed on dependency actions against the Commonwealth in regards to the death of a person who dies from an injury suffered in the course of his or her employment (s 44(3)).

[2] See for example, *Workers Compensation Act* 1987 (NSW) s 154D; *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 6.

Workers suffering certain dust diseases are covered under their own compensation scheme.[3] Certain volunteers (fire fighters, emergency and rescue workers) are covered under their own scheme.[4]

[6-1010] General workers

In 2012 and 2015 workers' compensation reforms modified weekly payments arrangements for all new and existing workers' compensation claims. The amendments introduced in the *Workers Compensation Legislation Amendment Act* 2012 do not apply to certain categories of workers, namely, police officers, paramedics, firefighters and coal miners. These workers are referred to as "exempt workers". Claims by exempt workers are mainly managed as though the 2012 amendments did not occur.

The current scheme provides for the following weekly payments:[5]

- for workers with no current work capacity
  - payments of up to 95% of their pre-injury average weekly earnings for the first 13 weeks (first entitlement period)
  - payments of up to 80% of their pre-injury average weekly earnings for weeks 14 to 130 (second entitlement period).
- for workers with current work capacity
  - payments of up to 95% of their pre-injury average weekly earnings less current weekly earnings for the first 13 weeks (first entitlement period)
  - payments of up to 95% of pre-injury average weekly earnings less current weekly earnings for weeks 14 to 130 (second entitlement period) provided the worker has returned to work for not less than 15 hours per week
  - those workers who are working less than 15 hours per week or have not returned to work are entitled to payments of up to 80% of their pre-injury average weekly earnings less current weekly earnings.
- after the second entitlement period (130 weeks) workers' entitlements to weekly benefits continue if they have no current work capacity or they have achieved an actual return to employment for at least 15 hours per week earning at least $202 per week.
- workers with current work capacity (other than a worker with high needs) must apply to the insurer for the payment of weekly benefits after 130 weeks.[6]
- benefits are limited to a maximum of five (5) years except for workers with high needs (defined as a worker with more than 20% permanent impairment), who are eligible to receive weekly payments until reaching Commonwealth retirement age, subject to ongoing work capacity assessments.
- workers with highest needs (more than 30% permanent impairment) are entitled to a minimum weekly payment of $871 per week. If the worker with highest needs is entitled to a lesser payment, the insurer is required to make payments up to the minimum amount. The amount is to be indexed in April and October of each year.
- weekly payments are capped at the maximum amount of $2282.90.[7]

The entitlement to weekly payments of exempt workers is determined by reference to the pre-2012 scheme.

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[3] *Workers' Compensation (Dust Diseases) Act* 1942.
[4] *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act* 1987.
[5] *Workers Compensation Act* 1987, Div 2 Pt 3.
[6] *Workers Compensation Act* 1987, s 38(3A).
[7] Workers Compensation Act 1987, s 34.

The pre-2012 scheme provides for:

- indexed maximum weekly payments where a worker is rendered unable to work as a result of a workplace injury at the rate of the worker's current weekly wage to a maximum of $2282.90 for the first 26 weeks,[8] and thereafter at the rate of up to 90% of the worker's current weekly wage per week to a maximum of $536.90, depending on the level of the worker's disability, as well as additions for a dependent spouse or child.[9]

The *Workers Compensation Act* 1987 provides the following further benefits for workers:

- the payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services[10]
- lump sum permanent impairment compensation dependent on the degree of the impairment[11]
- lump sum compensation for pain and suffering if the claimant has at least a 10% impairment, limited to a maximum award of $50,000 (exempt workers only)[12]
- any reasonably necessary domestic assistance[13]
- compensation, in some circumstances, for gratuitous domestic assistance provided to the worker, and[14]
- compensation for property damage.[15]

In situations where a worker dies as the result of an accident or disease associated with his or her employment, the Act also provides for a lump sum death benefit.[16] This is currently $849,300, and is to be apportioned between dependents,[17] or otherwise paid to the worker's legal personal representative.[18] Provision is also made for weekly payments for dependent children[19] and funeral expenses.[20]

This compensation scheme is regulated by State Insurance Regulatory Authority.[21] Insurance and Care NSW (icare)[22] acts on behalf of the Workers Compensation Nominal Insurer, the statutory insurer in NSW.[23]

The Personal Injury Commission resolves disputes in relation to workers compensation statutory entitlements, except for certain classes of injured person. The District Court of NSW has jurisdiction to resolve disputes about claims by coal miners, workers suffering dust diseases and volunteers.[24]

[6-1020] Dust disease workers

Separate provision is made for dust diseases victims, whose total or partial disablement for work was reasonably attributable to the exposure to dust, in the course of their work. The applicable no

[8] *Workers Compensation Act* 1987, s 35 prior to amendments made by Act 52 of 2012.
[9] *Workers Compensation Act* 1987, s 37 prior to amendments made by Act 52 of 2012.
[10] *Workers Compensation Act* 1987 (NSW) s 60.
[11] *Workers Compensation Act* 1987 (NSW) s 66.
[12] *Workers Compensation Act* 1987 (NSW) s 67.
[13] *Workers Compensation Act* 1987 (NSW) s 60AA.
[14] *Workers Compensation Act* 1987 (NSW) s 60AA(3).
[15] *Workers Compensation Act* 1987 (NSW) Div 5 Pt 3.
[16] See generally *Workers Compensation Act* 1987 (NSW) Pt 3 Div 1.
[17] *Workers Compensation Act* 1987 (NSW) s 25(1)(a).
[18] *Workers Compensation Act* 1987 (NSW) s 25(1).
[19] *Workers Compensation Act* 1987 (NSW) s 25(1)(b) which sets a sum of $66.60 subject to indexation in accordance with *Workers Compensation Act* 1987 (NSW) Pt 3 Div 6.
[20] *Workers Compensation Act* 1987 (NSW) s 26.
[21] *State Insurance and Care Governance Act* 2015, Pt 3.
[22] *State Insurance and Care Governance Act* 2015, Pt 2.
[23] *Workers Compensation Act* 1987 (NSW), Div 1A Pt 7.
[24] *District Court Act* 1973, Div 8A Pt 3.

fault statutory scheme is established under the *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) (the "1942 Act"), which is administered by the icare dust diseases care and also known as the Dust Diseases Authority ("DDA").[25]

Decisions by the DDA in relation to the award of compensation follow upon assessment, and the issue of a certificate,[26] by the Medical Assessment Panel, which is also established under the 1942 Act. Decisions of the Medical Assessment Panel and of the DDA are subject to appeal to the District Court.[27]

The benefits available under the dust diseases workers' compensation scheme similarly include:

- indexed weekly payments where a worker is rendered totally or partially disabled due to a dust disease, paid at the rate of the worker's current weekly wage for the first 26 weeks, and after 26 weeks, weekly payments up to a maximum payment of $536.90 per week, depending on the extent of the disability;[28]
- payment of medical and related treatment, hospital, occupational rehabilitation, ambulance and related services;[29]
- payment for the commercial provision of domestic assistance;[30] and
- compensation, in some circumstances, for gratuitous domestic assistance provided to the victim.[31]

Where a worker dies as a result of a dust disease that was reasonably attributable to exposure to dust in the course of his or her work, those who were wholly dependent on that worker are entitled to compensation as follows:

- an indexed lump sum payment which is presently $380,050; and
- an indexed weekly payment to a surviving dependent spouse, currently payable at $313.40 per week,[32] which continues until re-marriage or the commencement of a de facto relationship,[33] or until the death of the spouse; and a[34]
- weekly payment to each surviving dependent child, currently payable at $158.40 per week,[35] where the child is aged under 16, which continues for children who are engaged in full-time education until the age of 21.[36]

It is noted that, although the lump sum death benefit payable under the 1987 Act is greater than that payable under the 1942 Act, the surviving dependent spouse is entitled to weekly compensation benefits under the 1942 Act, but not under the 1987 Act.

Unlike the general workers' compensation scheme, there is no compensation payable under the dust diseases workers' compensation scheme for permanent impairment, nor for pain and suffering. Such damages must be recovered in dust diseases cases through a common law action brought in the Dust Diseases Tribunal of New South Wales ("DDT").

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[25] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 5.
[26] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) ss 7–8.
[27] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8I.
[28] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2).
[29] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d).
[30] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d).
[31] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2)(d). Damages for gratuitous provision of attendant care services are also recoverable via common law action: *Civil Liability Act* 2002 (NSW) s 15A.
[32] *Workers' Compensation (Dust Diseases) Act*1942 (NSW) s 8(2B)(b)(ii) which sets an amount of $137.30 per week subject to indexation in accordance withs 8(3)(d).
[33] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(bb).
[34] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(b)(ii).
[35] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(b)(iii) which sets an amount of $69.40 per week subject to indexation in accordance with s 8(3)(d).
[36] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8(2B)(ba) .

The 1942 Act provides the DDA with mechanisms for reducing payments made to an eligible claimant in certain circumstances. If a worker or a worker's spouse is qualified to receive a government pension, the board can adjust the weekly payments to ensure they will still be entitled to receive that pension.[37] Additionally, where the claimant is entitled to receive compensation from another source, the board can require a person to take all appropriate and reasonable steps to claim compensation from that other source and, if he or she fails to do so, it can reduce the dust disease compensation that would otherwise be payable.[38] It is an offence to fail to inform the DDA that a person is receiving compensation under another Act, ordinance, or law of the Commonwealth, or of another State or Territory or of another country.[39]

There are cases where a person who contracted a dust disease, including an asbestos-related disease, in the course of his or her work, will not receive workers' compensation benefits. Such people include employees whose employers did not make contributions to the NSW workers' compensation scheme (such as Commonwealth employees[40]) or independent contractors who were not covered by the workers' compensation scheme.[41] In such cases their dependants will similarly be unable to receive the statutory benefits that are available upon the victim's death.

Persons whose exposure to dust was not work-related are ineligible for compensation under the 1942 Act.

Common law damages—fault-based liability

[6-1030] Common law damages—fault-based liability [introduction]

In NSW, the recovery of common law damages for personal injury or death is subject to a different regime, depending on the circumstances in which the injury or death was caused. Separate provisions apply in relation to:

- injuries at work, workers have an entitlement to recover modified common law damages subject to the provisions of the 1987 Act;
- persons who have contracted a dust disease;
- personal injury or death occurring in a motor vehicle accident, or arising out of the use of a motor vehicle and whose claim for damages is subject to the *Motor Accidents Compensation Act* 1999 (NSW) or *Motor Accident Injuries Act* 2017; and
- those whose injuries or death arose as the result of a breach of the duty of care owed by health professionals, occupiers, and others and whose claim for damages is subject to the *Civil Liability Act* 2002 (NSW).

The application of these separate regimes can result in material differences in the outcome of damages claims for comparable levels of incapacity and loss.

Moreover there is a difference in the jurisdictions in which awards of "common law damages" are made. Claims subject to the *Motor Accidents Compensation Act* 1999 (NSW), *Motor Accident Injuries Act* 2017, the *Civil Liability Act* 2002 (NSW) and the modified provisions of the *Workers Compensation Act* 1987 (NSW), are brought in the District and Supreme Courts, from which appeal lies to the Court of Appeal. The jurisdiction to award "common law damages" in relation to dust diseases is vested in the DDT, from which appeal lies to the Court of Appeal.

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[37] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8A.
[38] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8AA(4).
[39] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8AA(3).
[40] *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61; *West v Workers Compensation (Dust Diseases) Board* (1999) 18 NSWCCR 60.
[41] Although, see *Workers Compensation Act* 1987 (NSW) s 20.

See further H Luntz and S Harder, *Assessment of damages for personal injury*, 5th edn, LexisNexis, 2021.

[6-1040] Claims subject to the Motor Accidents Compensation Act 1999

The recoverability of "common law damages", in respect of fault-based motor accident injuries is currently subject to the limitations arising from the *Motor Accidents Compensation Act* 1999 (NSW). That Act imposes:

- a ceiling on the calculation of damages for past and future economic loss by a requirement to disregard any amount by which the victim's net weekly earnings would have exceeded a sum currently fixed at $5461;[42]
- a threshold on the recoverability of damages for non-economic loss (that is compensation for the victim's pain and suffering, loss of bodily function, loss of enjoyment of life, loss of expectation of life, and disfigurement), dependent on the assessment of, or agreement that, there is permanent impairment of greater than 10%;[43]
- a ceiling on the maximum damages for non-economic loss currently fixed at $595,000;[44]
- limitations on the damages for the provision of attendant care services through the provision of a threshold and a cap;[45]
- an exclusion of the damages payable for the loss of the services of a person;[46]
- a restriction on the calculation of all future losses by requiring the assessment to be made by reference to the 5% actuarial discount tables,[47] in place of the 3% discount previously applicable at common law;
- an exclusion of the recovery of interest on damages awarded for non-economic loss and attendant care services, and a qualified right to interest in relation to other damages awards;[48] and
- an exclusion of the award of exemplary or punitive damages.[49]

The recovery of compensation under this Act is regulated by procedural requirements that impose duties on authorised insurers to attempt expeditious claim resolution,[50] and that provide for an assessment process as a precondition to commencement of court proceedings.[51]

Proceedings must be commenced within 3 years of the motor accident, except with leave of the court, which cannot be granted unless the claimant has provided a full and satisfactory explanation for the delay and the total damages awarded is likely to exceed 25% of the maximum amount that may be awarded for non-economic loss.[52]

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[42]*Motor Accidents Compensation Act* 1999 (NSW) s 125; Motor Accidents Compensation (Determination of Loss) Order 2009 (NSW) O 3.
[43]*Motor Accidents Compensation Act* 1999 (NSW) ss 131, 132.
[44]*Motor Accidents Compensation Act* 1999 (NSW) s 134; Motor Accidents Compensation (Determination of Loss) Order 2009 (NSW) O 4.
[45]*Motor Accidents Compensation Act* 1999 (NSW) s 128. No compensation is to be paid unless services were, or will be, provided for at least 6 hours per week, and for a period of at least 6 consecutive months, and the amount of compensation awarded for attendant care services must not exceed the average weekly total earnings in NSW.
[46]*Motor Accidents Compensation Act* 1999 (NSW) s 142.
[47]*Motor Accidents Compensation Act* 1999 (NSW) s 127(2).
[48]*Motor Accidents Compensation Act* 1999 (NSW) s 137. Interest is not payable unless the defendant has been given sufficient information to enable a proper assessment of the claim and the defendant has had a reasonable opportunity to make an offer of settlement, but has not done so, and in some other specific circumstances involving settlement offers.
[49]*Motor Accidents Compensation Act* 1999 (NSW) s 144.
[50]*Motor Accidents Compensation Act* 1999 (NSW) Pt 4.3.
[51]*Motor Accidents Compensation Act* 1999 (NSW) s 108. See Pt 4.4 for details of the claims assessment process.
[52]*Motor Accidents Compensation Act* 1999 (NSW) s 109.

Special provision is made in this Act, to allow the recovery of damages for a limited class of no fault claimants. This is confined, however, to those cases where the victims were either children, or where the injury or death arose as the result of a blameless accident.[53] In these cases the accident is deemed to have been caused by the fault of the owner or driver of the relevant vehicle, provided it was the subject of motor accident insurance cover.

In addition, the *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) has established a statutory compensation scheme that provides compensation for severe motor accident injury victims and that applies regardless of fault.[54] The injuries compensated include spinal cord injury, brain injury, multiple amputations, burns and permanent blindness.[55]

[6-1045] Claims subject to the Motor Accident Injuries Act 2017

Claims for damages arising from motor accidents occurring after 1 December 2017 are the subject of the 2017 Act.

The Act provides for the payment of no fault statutory benefits for persons injured in a motor accident as defined in s 1.4, however those benefits are restricted for persons at fault. The statutory benefits include weekly compensation and treatment and care costs for varying periods, depending on whether the person was at fault and the extent of the impairment suffered. Statutory benefits are not payable if compensation under the *Workers Compensation Act* 1987 is payable in respect of the injuries.[56] Statutory benefit payments are reduced after 26 weeks for contributory negligence, if applicable. A claim for statutory payments must be made within 3 months of the motor accident.

Damages are payable for persons who were not at fault and have more than minor injuries. "Minor injuries" are defined as soft tissue injury and minor psychological or psychiatric injury.[57] Damages are restricted to past and future economic loss unless the permanent impairment as a result of the injuries suffered is more than 10% and then non-economic loss damages to compensate pain and suffering and loss of amenities of life are available up to a maximum of $595,000.[58]

A claim for damages cannot be made until 20 months after the motor accident, unless the claim relates to a death or where the extent of permanent impairment is greater than 10% and all claims for damages must be made within 3 years of the motor accident. A claim for damages cannot be settled within 2 years of the motor accident unless the extent of permanent impairment is greater than 10%, and the claimant must be represented by an Australian legal practitioner or the settlement is approved by the Personal Injury Commission. If damages are payable the award will be reduced by the amount of the weekly payments received and there is no entitlement to future statutory payments.

If there is a dispute as to the extent of a person's permanent impairment a court or Member of the Personal Injury Commission may refer a claimant for assessment by a medical assessor. The certificate of a medical assessor is prima facie evidence of the extent of permanent impairment as a result of the injury and conclusive evidence of any other matter certified, including the extent of the person's permanent impairment.[59] A court can reject the contents of a certificate on the grounds of denial of procedural fairness but only if the admission of the certificate would cause substantial injustice.

When assessing damages consideration must be given to the steps taken by the claimant to mitigate their loss and any other reasonable steps that could have been taken, including by

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[53] *Motor Accidents Compensation Act* 1999 (NSW) Pt 1.2.
[54] *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) s 4.
[55] See *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) s 58; Lifetime Care and Support Guidelines 2018—Part 1: Eligibility Criteria for Participation in the Lifetime Care and Support Scheme, accessed 20 April 2022.
[56] Note that journey claims were removed by the 2012 workers' compensation amendments.
[57] *Motor Accidents Injuries Act* 2017 (NSW) s 1.6, "soft tissue injury" is separately defined.
[58] *Motor Accidents Injuries Act* 2017 (NSW) s 4.11.
[59] *Motor Accidents Injuries Act* 2017 (NSW) s 7.23.

undergoing treatment and undertaking rehabilitation.[60] Contributory negligence applies to the assessment of damages, which must be found where drugs, alcohol or the failure to wear a seatbelt or helmet have been a factor in the accident or injury.

A claimant is not entitled to commence court proceedings until the claim has been assessed by a Member of the Personal Injury Commission, or the Member has issued a certificate that the claim is exempt.[61] Proceedings must be commenced within 3 years of the motor accident, except with leave of the court, which cannot be granted unless the claimant has provided a full and satisfactory explanation for the delay and the total damages awarded is likely to exceed 25% of the maximum amount that may be awarded for non-economic loss.[62] An insurer may require a claimant to commence proceedings and the claimant must do so within 3 months of the notice, or the claim is deemed to have been withdrawn.[63] A court may grant leave to reinstate the claim if the claimant provides a full and satisfactory explanation for the delay in commencing the proceedings. If a claimant provides significantly new evidence in court proceedings, the claim must be referred back to the claims assessment process and the proceedings adjourned until it is complete.[64]

Legal costs are capped and costs are not recoverable for the claims assessment process unless they are included in the assessment.

[6-1050] Claims subject to the Civil Liability Act 2002

Claims under this Act for "common law damages" arising out of other forms of fault-based liability, are also subject to limitations. For example:

- damages for economic loss (past and future loss of earnings or of earning capacity) and loss of expectation of financial support are capped, with the maximum net weekly earnings that may be recovered currently being three times average weekly earnings;[65]
- damages for gratuitous attendant care services provided to the plaintiff are restricted with thresholds to be met, and a maximum allowable award specified;[66]
- damages for loss of capacity to provide attendant care services are restricted with thresholds to be met and with a maximum allowable award;[67]
- damages for loss of employer superannuation contributions are limited to the relevant percentage of the damages payable for the deprivation and impairment of the plaintiff's earning capacity on which the entitlement to those contributions is based;[68]
- damages for non-economic loss can only be awarded if the severity of the non-economic loss is at least 15% of the most extreme case; and where the non-economic loss is equal to or greater than 15% of a most extreme case, damages are to be awarded in accordance with a table to a maximum award of $693,500;[69]

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[60] *Motor Accidents Injuries Act* 2017 (NSW) ss 4.11 and 4.13.
[61] *Motor Accidents Injuries Act* 2017 (NSW) s 6.31.
[62] *Motor Accidents Injuries Act* 2017 (NSW) s 6.32.
[63] *Motor Accidents Injuries Act* 2017 (NSW) s 6.33.
[64] *Motor Accidents Injuries Act* 2017 (NSW) s 6.34.
[65] *Civil Liability Act* 2002 (NSW) s 12, (approximately $3,617).
[66] *Civil Liability Act* 2002 (NSW) s 15. No damages may be awarded unless the gratuitous attendant care services were, or will be, provided for at least 6 hours per week and for a period of at least 6 consecutive months: s 15(3). Further, awards are capped at a maximum rate of 1/40th of average weekly earnings in NSW per hour (approximately $30), up to a maximum of 40 hours per week: ss 15(4), 15(5).
[67] *Civil Liability Act* 2002 (NSW) s 15B. No damages for loss of a person's capacity to provide services unless there is a reasonable expectation that the claimant would have provided those services to his or her dependants for at least 6 hours per week, and for a period of at least 6 consecutive months: s 15B(2)(c). Further, awards are capped at a maximum rate of 1/40th of average weekly earnings in NSW per hour (approximately $30): s 15B(4).
[68] *Civil Liability Act* 2002 (NSW) s 15C.
[69] *Civil Liability Act* 2002 (NSW) s 16; Civil Liability (Non-economic Loss) Order 2010 (NSW) O 3.

- the prescribed actuarial discount rate to be applied to the assessment of lump sum awards for future economic loss of any kind is 5%;[70]
- interest cannot be awarded on damages for non-economic loss, gratuitous attendant care services or loss of capacity to provide gratuitous domestic services to the plaintiff's dependants;[71] and
- exemplary, punitive or aggravated damages cannot be awarded.[72]

Some limits are placed on the recovery of damages where the injury is solely related to mental or nervous shock.[73] Damages cannot be recovered for pure mental harm, arising from mental or nervous shock in connection with another person's death or injury, unless:

- the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril; or
- the plaintiff is a close member of the family of the victim.[74]

Additionally, the plaintiff needs to have developed a recognised psychiatric illness in order to recover damages for pure mental harm.[75]

There are no provisions comparable to those that were introduced in relation to the Motor Accidents Scheme, that allow recovery for blameless injuries or injuries occasioned to children.

[6-1060] Claims by injured workers—general

In addition to the entitlement for workers' compensation outlined above, an injured worker is also entitled to pursue common law damages, as modified by the 1987 Act against the party whose negligence or other wrongful act or omission led to the injury.[76]

No damages are recoverable unless the worker dies or has sustained a permanent impairment of at least 15%.[77]

The worker's claim for loss of economic capacity is confined to the recovery of past lost earnings and future loss due to the deprivation or impairment of the worker's earning capacity.[78]

Future losses are currently calculated according to the 5% actuarial discount rate.[79]

In awarding such damages, the court is required to disregard the amount (if any) by which the worker's net weekly earnings would have exceeded the amount that is the maximum amount of weekly statutory compensation payable in respect of total or partial incapacity, currently $2282.90.[80]

Common law damages are not available in respect of the victim's non-economic loss, the recovery of which is confined to the statutory no fault lump sum benefits that are available to the claimant for such losses.

Interest on damages is not payable unless certain conditions are satisfied.[81]

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[70] *Civil Liability Act* 2002 (NSW) s 14.
[71] *Civil Liability Act* 2002 (NSW) s 18. See also s 11A(3)—interest on damages cannot be awarded contrary to the provisions in Pt 2 of the Act, which includes s 18.
[72] *Civil Liability Act* 2002 (NSW) s 21.
[73] *Civil Liability Act* 2002 (NSW) s 29.
[74] *Civil Liability Act* 2002 (NSW) s 30.
[75] *Civil Liability Act* 2002 (NSW) s 31; and see also s 33 in relation to a similar requirement for the recovery of economic loss for consequential mental harm. The Act also provides that a defendant will only owe a duty of care to a plaintiff in regards to nervous shock if the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken: s 32.
[76] *Workers Compensation Act* 1987 (NSW) s 151E.
[77] *Workers Compensation Act* 1987 (NSW) s 151H.
[78] *Workers Compensation Act* 1987 (NSW) s 151G.
[79] *Workers Compensation Act* 1987 (NSW) s 151J.
[80] *Workers Compensation Act* 1987 (NSW) s 151I.
[81] *Workers Compensation Act* 1987 (NSW) s 151M.

If a worker sues an employer at common law, and receives damages, these will have an impact on the statutory compensation that he or she can receive. For example, an award of damages in a common law action will mean that:

- the worker ceases to be entitled to any further compensation under the 1987 Act in respect of the relevant injury including compensation that has not yet been paid;[82]
- any compensation that has already been paid in the form of weekly payments is deducted from the damages awarded, and is to be paid or credited to the person who paid the compensation;[83] and
- the worker ceases to be entitled to participate in any injury management program provided for by the workers' compensation scheme.[84]

[6-1070] Claims by dust disease workers and other dust disease victims

During his or her lifetime, a person who suffers a dust disease can sue a person, whose wrongful act or omission caused or contributed to that injury, to recover damages of the kind that were previously available under the common law. They include, accordingly:

1. Damages in respect of:
    - past and future medical, hospital, rehabilitation and related expenses;
    - any paid and gratuitous attendant care services that are received by the plaintiff consequent upon the injury;[85]
    - any inability of the plaintiff to provide the domestic services that he or she previously provided to others;[86]
    - any loss of the plaintiff's earnings to the date of trial; and
    - any loss of future earning capacity.
2. Damages for non-economic loss—including pain and suffering, loss of amenities and loss of expectation of life.
3. Interest—on past losses to the time of judgment or settlement.[87]

Successfully completing such an action, either by settlement or by judgment, during the plaintiff's lifetime, extinguishes the possibility of common law claims being brought after death, including claims by that person's estate, or by his or her dependants.[88] It does not, however, bar dust diseases victims or their dependants from claiming statutory dust diseases workers' compensation benefits, where the victim's disease was work related. In this respect, the 1942 Act does not contain a provision equivalent to that contained in the 1987 Act,[89] which has the effect of terminating any further entitlement to workers' compensation benefits, once common law damages are recovered.

As noted above, the DDT has exclusive jurisdiction in NSW in respect of all common law claims arising from injuries caused by exposure to dust, and non-exclusive jurisdiction in proceedings for

[82] *Workers Compensation Act* 1987 (NSW) s 151A(1)(a).
[83] *Workers Compensation Act* 1987 (NSW) s 151A(1)(b). The position in relation to estate actions and dependency actions is considered later: para 4.48–4.51 and para 4.57–4.58.
[84] *Workers Compensation Act* 1987 (NSW) s 151A(1)(c).
[85] *Civil Liability Act* 2002 (NSW) ss 3B(1)(b) and 15A. These are also known as *Griffiths v Kerkemeyer* damages.
[86] *Civil Liability Act* 2002 (NSW) s 15B. These are also known as *Sullivan v Gordon* damages.
[87] See *Borowy v ACI Operations Pty Ltd (No 2)* [2002] NSWDDT 21 [131]–[132].
[88] See, eg, *Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Company Ltd v Gentile* [1914] AC 1024, 1041.
[89] *Workers Compensation Act* 1987 (NSW) s 151A(1)(a). See above, para 1.54.

contribution between defendants, and questions arising under relevant policies of insurance.[90] It has jurisdiction over any injuries caused by a "dust-related condition", which is defined in the *Dust Disease Tribunal Act* 1989 (NSW) as meaning:

- a disease specified in Schedule 1, or
- any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.[91]

Schedule 1 to the *Dust Disease Tribunal Act* 1989 (NSW) now lists, for the purposes of that Act, 14 dust diseases:

- aluminosis;
- asbestosis;
- asbestos induced carcinoma;
- asbestos-related pleural diseases;
- bagassosis;
- berylliosis;
- byssinosis;
- coal dust pneumoconiosis;
- farmers' lung;
- hard metal pneumoconiosis;
- mesothelioma;
- silicosis;
- silico-tuberculosis; and
- talcosis.

Pneumoconiosis is any "disease of the lung caused by the inhalation of dust, especially mineral dusts that produce chronic induration and fibrosis".[92] The DDT's jurisdiction, therefore, includes diseases caused by asbestos dust, as well as a range of other diseases and conditions caused by exposure to industrial dusts.

In a number of respects differences exist in relation to the recoverability of "common law damages" in, and the procedures followed by, the DDT when compared with the recovery of such damages in accordance with the other schemes outlined above. They include, for example:

- the use, by leave, of historical and general medical evidence admitted in other cases;[93]
- the use, by leave, and with the consent of the party who originally obtained the material or other prescribed persons, of material obtained by discovery or interrogatories in one proceedings, in other proceedings, even if the proceedings are between different parties;[94]
- precluding, without leave, the re-litigation of issues of a general nature that were determined in other proceedings;[95]

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[90] *Dust Diseases Tribunal Act* 1989 (NSW) s 10.
[91] *Dust Diseases Tribunal Act* 1989 (NSW) s 3. For example occupational asthma caused by a dust capable of causing dust disease: *Manildra Flour Mills v Britt* [2007] NSWCA 23.
[92] A R Gennaro, A H Nora, J J Nora, R W Stander and L Weiss (ed), *Blakiston's Gould Medical Dictionary*, 4th edn, McGraw-Hill, 1979, p 1068.
[93] *Dust Diseases Tribunal Act* 1989 (NSW) s 25(3).
[94] *Dust Diseases Tribunal Act* 1989 (NSW) s 25A.
[95] *Dust Diseases Tribunal Act* 1989 (NSW) s 25B.

- the absence of any threshold dependent on a minimum specified degree of impairment, for recovery of damages, or of any caps on the maximum amount of damages that can be recovered;
- the ability to award interim damages;[96]
- the calculation of future losses by reference to a 3% actuarial discount table;[97]
- the exemption of the proceedings from the limitations periods that would otherwise apply;[98]
- some differences in the damages available for gratuitous domestic assistance and loss of domestic capacity;[99] and
- s 13(6) of the *Dust Diseases Tribunal Act* 1989 (NSW) which provides:

> Whenever appropriate, the Tribunal may reconsider any matter that it has previously dealt with, or rescind or amend any decision that the Tribunal has previously made.[100]

There are also two substantive law differences:

- general damages survive the death of the claimant and may be recovered by the person's legal personal representative; and[101]
- the ability to award provisional damages in relation to an established dust-related condition, reserving the right to claim, additional damages, if the claimant later develops another dust-related condition. This is an exception to the usual principle that damages are awarded on a "once and for all" basis.[102]

The recovery by a worker of compensation from one source may affect his or her ability to recover from another source. A recipient of benefits under the dust diseases workers' compensation scheme cannot be required to repay anything to the DDA if he or she also receives compensation benefits for the same injury from another source.[103] In this respect, the dust diseases workers' compensation scheme is unlike the general workers' compensation scheme where repayment can be required if, for example, the injured worker recovers common law damages for the same injury.[104] In addition, unlike the general workers' compensation scheme,[105] recovery of common law damages does not bring an end to a worker's statutory compensation entitlements under the dust diseases workers' compensation scheme.

However such payments are recoverable by the DDA from the wrongdoer who is, or who would have been, liable to the dust disease claimant if sued by that person.[106]

If a worker has received workers' compensation benefits prior to judgment in a common law action, any weekly benefits that have been received are to be taken into account and deducted from the common law damages for loss of earning capacity or economic loss recovered by the injured person or his or her estate.[107] In addition, where a worker has an entitlement to statutory workers'

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[96] *Dust Diseases Tribunal Act* 1989 (NSW) s 41.
[97] No discount rate is provided for in any relevant legislation, therefore the common law rate of 3% applies: *Todorovic v Waller* (1981) 150 CLR 402.
[98] *Dust Diseases Tribunal Act* 1989 (NSW) s 12A.
[99] See *Civil Liability Act* 2002 (NSW) ss 15A and 15B. Although damages for loss of capacity to provide domestic services are available in both dust diseases cases and actions under the *Civil Liability Act*, there are some restrictions imposed on recovery of such damages in motor accidents claims: ss 15B(8), (9). Additionally, while damages for gratuitous domestic assistance are limited to recovery for 40 hours per week of care (s 15(4)), there is no equivalent maximum number of hours in dust diseases cases (see s 15A(2)).
[100] *Dust Diseases Tribunal Act* 1989 (NSW) s 13(6). Although the occasion for its application will only arise in exceptional circumstances: *CSR Ltd v Bouwhuis* (1991) 7 NSWCCR 223 and *Browne v Cockatoo Dockyard Pty Ltd* (1999) 18 NSWCCR 618.
[101] *Dust Diseases Tribunal Act* 1989 s 12B
[102] *Dust Diseases Tribunal Act* 1989 (NSW) s 11A.
[103] See *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8AA(4).
[104] *Workers Compensation Act* 1987 (NSW) s 151A(1)(b).
[105] See *Workers Compensation Act* 1987 (NSW) s 151A(1)(a).
[106] *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) s 8E.
[107] *Commercial Minerals Ltd v Harris* [1999] NSWCA 94.

compensation benefits but has failed to claim them, the failure to claim the compensation available under the statutory scheme may be construed as a failure to mitigate the worker's loss. Where a worker has failed to mitigate his or her loss, the DDT may make a deduction from an award of common law damages for the statutory compensation entitlements which the worker has not, but could have, claimed.[108]

On the other hand, statutory compensation benefits paid to a worker are not to be deducted from damages awarded for non-economic loss.[109]

The relatives of dust diseases victims can bring claims for nervous shock in the DDT.[110] Such cases are likely to be determined according to the common law principles, unaffected by Pt 3 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), which has been repealed and only replaced for proceedings subject to the *Civil Liability Act* 2002 (NSW).[111]

Post-death claims

[6-1080] Estate actions

The legal personal representative of the estate of a deceased person who was injured as the result of the wrongful act of another, can bring an action to recover common law damages on behalf of the estate, or continue an action already commenced by the deceased, provided the deceased had a cause of action. Such an estate action is not, however, available if the deceased commenced and completed an action for the recovery of such damages before dying.

This type of action is based on the survival of causes of action legislation that was introduced in NSW by the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) (the "1944 Act").[112] Similar provisions exist in other common law jurisdictions. Prior to its introduction any cause of action that was vested in the deceased died with that person.[113]

In an estate action, the economic loss damages recoverable comprise:[114]

- medical and hospital expenses incurred before the death, as well as damages for gratuitous care services both received by,[115] and provided by, the deceased to other people, prior to death;[116]
- the loss of the deceased's earning capacity to the date of death; and
- funeral expenses.[117]

The damages recoverable by the estate, in an estate action, do not include any damages for the loss of the deceased's earning capacity past the date of his or her death, (that is, during the "lost years"),[118] nor do they include exemplary damages.[119]

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[108]See *Downes v Amaca Pty Ltd* (2010) 78 NSWLR 451.
[109]*Dust Diseases Tribunal Act* 1989 (NSW) s 12D.
[110]*Mangion v James Hardie and Co Pty Ltd* (1990) 20 NSWLR 100; *Seltsam Pty Ltd v Energy Australia* [1999] NSWCA 89.
[111]*Civil Liability Act* 2002 (NSW) Pt 3. It is also noted that, as a consequence of *Asbestos Injuries Compensation Fund Pty Ltd* [2011] NSWSC 97, such damages are not recoverable from the Asbestos Injuries Compensation Fund, which is established to fund the liabilities of former James Hardie subsidiaries (see para 2.106–2.107). This does not, however, preclude proceedings against employers or insurers or other co-defendants.
[112]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(1).
[113]The rule has been traced as far back as 1611: *Pinchon's Case* (1611) 9 Co Rep 86b, 87a; 77 ER 859, 860, although various statutory and common law exceptions were created in the intervening years. For the history of the common law with respect to fatal accidents and the survival of causes of action, see: P H Winfield, "Death as Affecting Liability in Tort" (1929) 29 *Columbia Law Review* 239. See also: England and Wales, Law Revision Committee, Interim Report (1934).
[114]See H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th edn, Butterworths, Sydney, 2002, p 480.
[115]*Civil Liability Act* 2002 (NSW) s 15A, also known as *Griffiths v Kerkemeyer* damages.
[116]*Civil Liability Act* 2002 (NSW) s 15A, also known as *Griffiths v Kerkemeyer* damages.
[117]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(c).
[118]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(a)(ii).
[119]*Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(2)(a)(i).

In non-dust disease cases, damages for non-economic loss cannot be recovered in an estate action.[120]

In dust diseases estate actions, damages for non-economic loss and interest thereon,[121] including damages for the loss of the deceased's expectation of life, can be awarded, but only if proceedings for damages had been commenced by the injured person during his or her lifetime.[122] There is no restriction on the award of interest on damages for past economic loss. The entitlement to interest in such cases differs from that applicable to claims under the other compensation schemes.[123]

[6-1090] Dependency actions

The legal personal representative of a deceased person can also bring an action under the 1897 Act, on behalf of specified family members,[124] for compensation for the loss of support that they sustain, consequent upon the death of a person who died as the result of the wrongful act of another.[125] Only one such dependency action can be brought.[126]

The damages recoverable in such an action, for the benefit of any eligible claimant, are limited to the loss of that dependant, that arose from the loss of the expectation of the deceased's financial support,[127] although they also include reasonable funeral or cremation expenses as well as the reasonable cost of erecting a headstone or tombstone.[128] Although the relevant provision does not explicitly limit the damages recoverable in this way,[129] this approach has been accepted in Australian law following decisions of the Privy Council. Where there is more than one dependant,[130] the amount recovered in the proceedings is apportioned between the dependants, according to their individual loss.[131]

The measure of damages available is the extent of the support that is lost by the dependant from the time of death, reduced by benefits obtained by the dependant as a consequence of the death, other than those benefits that are specifically excluded under s 3(3) of the 1897 Act.

Completion in the deceased's lifetime of an action, brought by the deceased, for damages arising out of the injury—either through settlement with the wrongdoer or through the judgment of a court—will mean that his or her dependants will no longer have a right of action under the 1897 Act. This is because a dependency action can only be brought, if the deceased would have been entitled to bring an action and to recover damages, as a result of the defendant's wrongful act or omission.[132] Completion of an action in the deceased plaintiff's lifetime extinguishes any such entitlement.[133]

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[120]The rationale for the non-survival of damages for non-economic loss in estate actions is that the estate, as an "impersonal body", ought not receive damages for the pain and suffering of the deceased: NSW, Legislative Assembly, *Parliamentary Debates*, 18 October 1944,p 523 (V Treatt).

[121]See, eg, *Novek v Amaca Pty Ltd* [2008] NSWDDT 12 [53], where such interest was awarded in an estate action. Interest on non-economic loss damage is not available in proceedings under the civil liability, motor accidents and non-dust workers' compensation schemes.

[122]*Dust Diseases Tribunal Act* 1989 (NSW) s 12B.

[123]*Motor Accidents Compensation Act* 1999 (NSW) s 137(4); *Workers Compensation Act* 1989 (NSW) s 151M(4); *Civil Procedure Act* 2005 (NSW) s 100(4).

[124]*Compensation to Relatives Act* 1897 (NSW) s 4.

[125]The rights conferred under the *Law Reform (Miscellaneous Provisions) Act* for the benefit of the estate of a deceased person operate in addition to, not in derogation of, any rights conferred under the *Compensation to Relatives Act* 1897 (NSW): *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 2(5).

[126]*Compensation to Relatives Act* 1897 (NSW) s 5.

[127]*De Sales v Ingrilli* (2002) 212 CLR 338 at [91].

[128]*Compensation to Relatives Act* 1897 (NSW) s 3(2).

[129]*Compensation to Relatives Act* 1897 (NSW) s 3(1).

[130]For example, *Grand Trunk Railway Co of Canada v Jennings* (1888) 13 AC 800.

[131]*Compensation to Relatives Act* 1897 (NSW) s 4(1).

[132]*Compensation to Relatives Act* 1897 (NSW) s 3(1).

[133]*Harding v Lithgow Municipal Council* (1937) 57 CLR 186, 191; *Kupke v Corporation of the Sisters of Mercy, Diocese of Rockhampton, Mater Misericordiae Hospital – Mackay* (1996) 1 Qd R 300, 306; *British Electric Railway Company Ltd v Gentile* [1914] AC 1024, 1041.

Dependency actions are available in relation to each of the categories of liability previously mentioned. Once again, such proceedings are determined by the Supreme or District Courts, save for dust disease dependency actions which are determined in the DDT.

The loss that a dependant can recover in a dependency action is not limited to a claim for loss of financial support, but includes the value of domestic services that the deceased would have provided to the dependant.[134]

Proceedings under the 1897 Act brought in the DDT are subject to the unmodified common law and, as a consequence, it has been accepted that damages for the dependant's future loss of support are calculated by reference to the 3% actuarial tables rather than the 5% tables that are applied in relation to claims by dependants under the other schemes.[135]

[The next page is 7001]

[134] *Walden v Black* [2006] NSWCA 170 at [96].

[135] See *Civil Liability Act* 2002 (NSW) s 11A(1), 11A(2), 14; *Motor Accidents Compensation Act* 1999 (NSW) ss 127(1)(b), 127(1)(c); *Workers Compensation Act* 1987 (NSW) ss 151E(1), 151E(3), 151J.

Enforcement of foreign judgments

[9-0700] Introduction

Foreign judgments, that is judgments pronounced by a judicial tribunal other than a New South Wales tribunal, are recognised and enforced by New South Wales courts subject to certain specific requirements.

The requirements for enforcement at common law are conveniently set out in Chs 9 and 11 of *Nygh's Conflict of Laws in Australia*, 10th edn, 2019, LexisNexis, Sydney.

It is not proposed to deal with the common law position in this section as, for practical purposes, the field is now covered by two legislative provisions. The statutory regime applies where a country has been designated as a jurisdiction of substantial reciprocity under the Regulations to the *Foreign Judgments Act* 1991 (Cth). For example, decisions of Chinese courts may be enforceable in Australia under the common law procedure for the enforcement of foreign judgments: see *Bao v Qu; Tian (No 2)* (2020) 102 NSWLR 435 at [23]–[30]. Certain exceptions are referred to below at [9-0770].

Since 10 April 1993 any judgment given in Australia including in the external territories, before or after that date, must be enforced under Pt 6 of the *Service and Execution of Process Act* 1992 (Cth).

Judgments given outside Australia must be enforced under the *Foreign Judgments Act* 1991 (Cth) if they fall within the scope of that Act: s 10.

Certain New Zealand judgments can only be enforced in accordance with the provisions of the *Trans-Tasman Proceedings Act* 2010 (Cth) as to which see "Trans-Tasman proceedings" at [5-3580]–[5-3650].

[9-0710] The Service and Execution of Process Act 1992 (Cth)

The Act extends to territories including external territories: ss 5, 7.

Upon lodgment of a sealed copy of a judgment, or a fax in the appropriate court of another State the proper officer of that court must register the judgment: s 105(1).

Subject to what follows, the judgment has the same force and effect as if the judgment had been made by the court in which it is registered: s 105(2)(a).

It may, subject to ss 106 and 108, give rise to the same proceedings by way of enforcement as if made in that court: s 105(2)(b).

Section 106 provides that the court may, on application, order that proceedings for enforcement not be commenced until a specified time or be stayed for a specified period: s 106(1). Such an order must be subject to conditions that, within a period specified in the order, there be an appropriate application for relief and that the application be prosecuted in an expeditious manner: s 106(2)(a). Appropriate relief is an application to set aside, vary or appeal against the judgment made to a court with jurisdiction in the State where the judgment was given: s 106(3). The court may also impose other conditions including provision of security: s 106(2)(b).

This section supports the view, considered the better one, that the court has no jurisdiction to vary the original judgment: see *Bell v Bell* (1954) 73 WN (NSW) 7.

Section 108 provides that interest is payable as in the State of the judgment, and that the judgment creditor must satisfy the court in the enforcement proceedings as to the appropriate amount.

If the copy of the judgment is lodged by fax, a sealed copy is to be lodged within 7 days after the fax is lodged: s 105(3). If that is not done, a proceeding to enforce the judgment is not to be commenced or continued without the leave of the court until the sealed copy is lodged: s 105(4).

A judgment is capable of being enforced only if, and to the extent that, at the time when the proceeding for enforcement is taken, the judgment is capable of being enforced in or by the original court or another court in that State: s 105(5).

The appropriate court means, if the original court were a Supreme Court, the Supreme Court, otherwise the court by which relief as given by the judgment could have been given. If there is more than one such court, the one of more limited jurisdiction is the appropriate court. If there is no such court, the Supreme Court is the appropriate court: s 105.

Costs of enforcement are provided for in s 107.

Section 109 provides that the court must not, merely because of the operation of the rule of private international law, refuse to permit proceedings by way of enforcement to be taken or continued.

[9-0720] Procedure — Supreme Court

An application under s 105(4) is required to be commenced by Summons: SCR Pt 71A r 2. The summons need not be served unless the court otherwise orders: Pt 71A r 4.

An affidavit must be filed, sworn not more than 14 days before proceedings for the enforcement of a registered judgment are taken, stating that the judgment is capable of being enforced and the extent to which the judgment is capable of being enforced in or by the original court or another court in that State: Pt 71A r 6.

The court may notify the Sheriff of any change in the rate of interest: Pt 71A r 6(2).

Costs and expenses under s 107(1) shall be assessed by the court. This may be done without service of the relevant affidavit, in the absence of the public and without attendance by the plaintiff: Pt 71A r 7. The supporting affidavit must contain particulars of the costs and expenses claimed and state the basis upon which they are claimed: Pt 71A r 7(2).

[9-0730] Procedure — District and Local Courts

In proceedings for the enforcement of a registered judgment the court will require evidence that the judgment is capable of being enforced and of the extent to which it is capable of being enforced.

Evidence may also be required on cost and interest issues.

[9-0740] Foreign Judgments Act 1991 (Cth)

For a fuller treatment see *Conflict of Laws*, above, Ch 10.

This legislation does not apply to the enforcement of interstate judgments. However, a duly registered judgment under the Act may be registered in the Supreme Court of another State or Territory under Pt 6 of the *Service and Execution of Process Act* 1992 (Cth).

The legislation applies to the superior courts of specified countries: s 5(1). If the superior courts are specified as such they are taken to be superior courts, however, failure to specify a particular court does not imply that the court is not a superior court: s 5(2). The legislation also applies to specified inferior courts of those countries: s 5(3).

For a list of the specified countries and courts, see *Foreign Judgments Regulations* 1992, as amended.

The judgment to be enforced must be an enforceable money judgment that is final and conclusive and was given in a superior court of a country in relation to which the legislation applies or an inferior court to which it applies: s 5(4).

A judgment is taken to be final and conclusive even though an appeal may be pending against it or it may still be subject to appeal: s 5(5).

The legislation provides for extension by regulation to prescribed non-money judgments of specified countries, however, no such regulation has been made.

Judgments for taxes, fines and penalties are excluded except in relation to certain New Zealand and Papua New Guinea tax matters. See *Quarter Enterprises Pty Ltd v Allardyce Lumber Company Ltd* (2014) 85 NSWLR 404.

For the registration of a foreign judgment against a foreign State, or a separate entity of a foreign State, see the *Foreign States Immunities Act* 1985 (Cth), s 11. For a detailed discussion of the application of the *Foreign States Immunities Act* 1985 (Cth) to proceedings under the *Foreign Judgments Act* 1991 (Cth), see *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31.

[9-0750] Procedure

A plaintiff who has obtained a judgment of the relevant kind may apply to the Supreme Court for registration of the judgment: s 6(1). The application must be made within 6 years after the date of the judgment or the determination of any appeal: s 6(1).

Conflict of Laws at p 201 states that this period may be extended under s 6(5), however it is arguable that s 6(5) applies to an application under s 6(4), as to which see below, and not to s 6(1).

Subject to the Act and proof of matters prescribed by Rules of Court the Supreme Court is to order the judgment to be registered: s 6(3).

The Act provides that the judgment is not to be registered if, at the date of the application, it has been wholly satisfied, or it could not be enforced in the country of the original court: s 6(6).

UCPR r 53.3 sets out the evidence required in support of an application for registration. The application is made by summons joining the judgment creditor as plaintiff and the judgment debtor as defendant: r 53.2. Unless the court otherwise orders the summons need not be served: r 53.2(3).

When making the order for registration the court must specify the period in which an application may be made to set the registration aside: s 6(4). That period may be extended: s 6(5).

The registered judgment may be enforced and carries interest as if the judgment had originally been given and entered in the Supreme Court on the date of registration: s 6(7).

Rule 53.6(1) provides that a notice of the registration must be served on the judgment debtor. Service must be personal except where the judgment debtor has entered an appearance, is in default of appearance or the court otherwise orders. The notice of registration must inform the judgment debtor of his right to apply to set aside the registration or seek a stay of the judgment: r 53.6(3).

Once registered and subject to allowing time for an application to set aside to be made and determined, the judgment may be enforced as a judgment of the court: r 53.8. Before any step is taken for enforcement, an affidavit of service of the notice of registration must be filed or the court otherwise satisfied of service: r 53.8(2).

An application to set aside should be made by notice of motion. Section 7(2)(a)(i)–(xi) provides that the court is obliged to set the registration aside if it is satisfied:

(i) that the judgment is not, or has ceased to be, a judgment to which this Part applies; or

(ii) that the judgment was registered for an amount greater than the amount payable under it at the date of registration; or

(iii) that the judgment was registered in contravention of this Act; or

(iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or

(v) that the judgment debtor, being the defendant in the proceedings in the original court, did not (whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear; or

(vi) that the judgment was obtained by fraud; or

(vii) that the judgment has been reversed on appeal or otherwise set aside in the courts of the country of the original court; or

(viii) that the rights under the judgment are not vested in the person by whom the application for registration was made; or

(ix) that the judgment has been discharged; or

(x) that the judgment has been wholly satisfied; or

(xi) that the enforcement of the judgment, not being a judgment under which an amount of money is payable in respect of New Zealand tax, would be contrary to public policy; …

The court may set the registration aside if it is satisfied that the matter in dispute had been the subject of a final and conclusive judgment by a court having jurisdiction in the matter before the judgment was given: s 7(2)(b).

As to the question of jurisdiction, reference should be made to the criteria set out in s 7(3)–(5).

[9-0760] Stay of enforcement of registered judgment

If the court is satisfied that the judgment debtor has appealed, or is entitled and intends to appeal, the court may order a stay: s 8(1). If the appeal has not been made, the court must specify a time for it to be made: s 8(1). A condition of pursuing the appeal in an expeditious manner is imposed (s 8(3)), and other conditions may be imposed: s 8(4).

[9-0770] Exceptions

Non-money judgments are not, presently, covered by the legislative scheme, and must be enforced at common law. See *Conflict of Laws*, above. Also see s 104 of the *Family Law Act* 1975 (Cth).

Legislation

- *Family Law Act* 1975 (Cth) s 104
- *Foreign Judgments Act* 1991 (Cth) ss 5, 6, 7, 8, 10
- *Foreign Judgments Regulations* (Cth) 1992
- *Foreign States Immunities Act 1985*, s 11
- *Service and Execution of Process Act* 1992 (Cth) ss 5, 7, Pt 6
- *Trans-Tasman Proceedings Act* 2010 (Cth)

Rules

- SCR Pt 71A
- UCPR Pt 53

References

- A Bell, "Private international law in practice across the divisions: some recent developments and case law" (2020) 14 *TJR* 229
- M Davies et al, *Nygh's Conflict of Laws in Australia*, 10th edn, 2019, LexisNexis, Sydney
- D Butler, "Enforcement of foreign judgments: does an issue estoppel arise from a foreign court's determination of its own jurisdiction?" (2019) 93 *ALJ* 558.

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Contempt generally

Nature of contempt

[10-0300] Civil and criminal contempt

Contempts of court still fall to be classified as civil or criminal. Contempt by breach of an order or undertaking is regarded as a civil contempt unless "it involves deliberate defiance or, as it is sometimes said, if it is contumacious": *Witham v Holloway* (1995) 183 CLR 525 at 530. See *He v Sun* [2021] 104 NSWLR 518 as to "contumacious disregard of orders".

The distinction has been described as "unsatisfactory" in *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 109, and in *Witham v Holloway*, above, the High Court held that the criminal standard of proof applies to all contempts (cf *ASIC v Sigalla (No 4)* [2011] NSWSC 62 at [92]–[94]). However, the distinction remains for some purposes. For example, an appeal may be brought against acquittal on a charge of civil contempt: see s 101(6) of the SCA and *Hearne v Street* (2008) 235 CLR 125. For discussions of the distinction see *Matthews v ASIC* [2009] NSWCA 155 and *Pang v Bydand Holdings Pty Ltd* [2011] NSWCA 69.

Civil contempts are normally left to the offended party to enforce, whereas the Attorney General or the court has a more clearly defined role in the prosecution of criminal contempts since these more directly involve interference with the administration of justice.

In *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 89, *Witham v Holloway* (1995) 183 CLR 525 at 534 and *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 89 ALJR 622 at [35] the High Court held that while contempt of court may be criminal in nature, proceedings for punishment of contempt were brought in the civil jurisdiction of the court and were "civil proceedings". Hence, where a charge of criminal contempt is brought in the Supreme Court by motion in "civil proceedings", as defined in the CP Act, s 3(1), that Act and the UCPR apply: CPA, s 4(1), Sch 1; UCPR, r 1.5(1), Sch 1: *Kostov v YPOL Pty Ltd* [2018] NSWCA 306 at [16], [17].

The power to punish for contempt in civil proceedings is not fettered by criminal law statutes relating to procedure and sentencing: *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229; at [43]–[45]; *He v Sun* [2021] 104 NSWLR 518 at [66]. The *Crimes (Sentencing Procedure) Act* 1999 does not apply to sentence proceedings for contempt in the court's civil jurisdiction: *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229 at [12], [57]–[58]; *He v Sun* [2021] NSWCA 95 at [38]; [62]. The power to suspend a sentence, although no longer available under the *Crimes (Sentencing Procedure) Act* 1999, survives in cases of contempt by virtue of Pt 55 r 13 of the Supreme Court Rules. Rule 13(3) relevantly provides that the court may make an order for punishment on terms, including a suspension of punishment: *He v Sun* at [39]–[40]; [66]. In committing a person to prison for contempt in civil proceedings, while the court may apply general law protections afforded to persons accused of a criminal offence, the court is nevertheless operating in its civil jurisdiction and criminal statutes are not engaged: *Dowling* at [46], [57]–[58]; [139];

Section 101(5) of the *Supreme Court Act* 1970 provides that the Court of Appeal, rather than the Court of Criminal Appeal, has jurisdiction to hear and determine an appeal from a judgment or order of the Supreme Court in proceedings relating to contempt of court. Note also that the *Mental Health (Forensic Provisions) Act* 1990 (rep) has been held not to apply to criminal contempt proceedings: *Prothonotary of the Supreme Court of NSW v Chan (No 15)* [2015] NSWSC 1177; *Kostov v YPOL Pty Ltd* at [19]. Note: the 1990 Act has been replaced by the *Mental Health and Cognitive Impairments Forensic Provisions Act* 2020 (commenced 27 March 2021).

The common-law requirement that a criminal trial not proceed unless the accused is fit to plead is a safeguard applicable to civil proceedings for criminal contempt: *Kostov v YPOL*, at [18], [19].

[10-0305] Sentencing principles for contempt

See *Thunder Studios Inc (California) v Kazal (No 2)* [2017] FCA 202 at [4]–[5] and *Seven Network (Operations) Ltd v Dowling (No 2)* [2021] NSWSC 1106 at [2]–[12] for the principles and rationale for sentencing for contempt.

Sentencing principles summarised by the court in *Commissioner for Fair Trading v Rixon (No 5)* [2022] NSWSC 146 include:

- Despite the non-application of the *Crimes (Sentencing Procedure) Act*, alternatives to full-time imprisonment are available as part of the power to punish an individual for contempt: at [24].
- The underlying rationale of every exercise of the contempt power is the necessity to "uphold and protect the effective administration of justice": at [25].
- It is not however clear that, in the absence of a legislative basis, there is a foundation for allowing a discount based solely on the utilitarian value of a plea of guilty given the potential discriminatory effect. It can be accepted that, while these proceedings are not criminal in nature, the same policy considerations that apply with respect to pleas of guilty to criminal offences apply: at [59].

See also *Sentencing Bench Book* at [20-155] and N Adams and B Baker, "Sentencing for contempt of court", National Judicial College of Australia and the Australian National University Sentencing Conference, 29 February 2020, Canberra.

Contempt by publication

[10-0310] Time at which the law of contempt commences

For the purposes of sub judice contempt, the law of contempt does not begin to operate until proceedings are pending in a court. It is not sufficient that proceedings be imminent: *James v Robinson* (1963) 109 CLR 593.

[10-0320] Test for contempt

To amount to a sub judice contempt of court, a publication must have, as a matter of practical reality, a tendency to interfere with the course of justice in a particular case: *John Fairfax & Sons Pty Ltd and Reynolds v McRae* (1955) 93 CLR 351. The tendency to prejudice proceedings must be clear, or "real and definite". There should be a substantial risk of serious interference: *Hinch v Attorney General (Vic)* (1987) 164 CLR 15. See also *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800 at [76]–[78], [84].

The tendency of a publication to prejudice proceedings is to be determined objectively having regard to the nature of the material published and the circumstances existing at the time of publication: *Attorney General v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 386; *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616 at 626. As to the time at which an internet publication takes place, see *Tate v Duncan-Strelec* [2014] NSWSC 1125 at [145].

[10-0330] Intention

While the act of publication must be intentional, an intention to prejudice the due administration of justice is not an element of contempt: *John Fairfax & Sons Pty Ltd and Reynolds v McRae*, above, at 371.

[10-0340] Relevant considerations

Factors to be considered in determining whether a publication has the necessary tendency to cause serious prejudice to a trial include (per Mason CJ in *Hinch*, above, at 28):

- the nature and the extent of the publication
- the mode of trial (whether by judge or jury), and
- the time which will elapse between publication and trial.

The practical tendency of a publication to endure and influence prospective jurors must be viewed against its background of pre-existing legitimate publicity: *Attorney General v John Fairfax & Sons Ltd and Bacon* (1985) 6 NSWLR 695 at 711.

The likely delay between the date of publication and the commencement of the subject proceedings is an important consideration. It is also appropriate to take into account that, during this period, jurors will be assailed by the media with sensational reports of other events: *Victoria, State of and Commonwealth of Australia v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 136; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, per Spigelman CJ at [100].

[10-0350] Influencing the tribunal of fact

The most common and obvious form of media contempt is influencing the tribunal of fact. There will generally not be a danger of this in civil proceedings, where no jury will usually be present. It is essentially established that a publication or broadcast will not be regarded as presenting a substantial risk of prejudice by influencing a judge: *Victoria, State of and Commonwealth of Australia v Australian Building Construction Employees and Builders Labourers Federation*, above, at 58.

The same principle has been extended to magistrates: *Attorney General v John Fairfax & Sons Ltd and Bacon*, above.

[10-0360] Influencing witnesses

Contempt may be committed by publications that have a real tendency to influence the evidence of witnesses or to deter them from attending. Publication of photographs may risk contamination of identification evidence: *Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596 at 598.

The premature publication of evidence may have a tendency to influence the evidence of witnesses or potential witnesses: see *Attorney General v Mirror Newspapers Ltd* [1980] 1 NSWLR 374.

[10-0370] Influencing parties

Improper public pressure upon litigants, which has a real tendency to deter or influence them in relation to proceedings, may amount to contempt: *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 27.

[10-0380] Fair and accurate report of proceedings permitted

A fair and accurate report of judicial proceedings may be published in good faith notwithstanding that it may present a risk of prejudice to pending proceedings: *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255 at 257.

[10-0390] Public interest in publication

No contempt will be established unless it can be demonstrated that the risk of prejudice to the administration of justice, is not outweighed by the public interest in freedom of discussion on matters

of public concern: *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242 at 249; *Hinch* per Mason CJ at 27, Wilson J at 43 and Deane J at 51; *Attorney General v X* (2000) 49 NSWLR 653.

[10-0400] Contempt by prejudgment

There is an arguable basis of contempt by prejudgment in that, even if the tribunal of fact is unlikely to be influenced, such as when it is constituted by a judge only, prejudgment by the media may undermine public confidence in the administration of justice. The principle has been doubted in Australia: *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540 at 553–560, 570, 571.

[10-0410] Scandalising contempt

Scurrilous, unjustified criticism of the court may amount to contempt by having a real tendency to undermine public confidence in the administration of justice: *The King v Dunbabin, Ex parte Williams* (1935) 53 CLR 434 at 442. For more recent consideration, see *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229; *State Wage Case (No 5)* [2006] NSWIRComm 190; *Environment Protection Authority v Pannowitz* [2006] NSWLEC 219; *Tate v Duncan-Strelec* [2014] NSWSC 1125 at [193] et seq, and *Mahaffy v Mahaffy* (2018) 97 NSWLR 119 per Simpson JA at [170]–[244].

Misconduct in relation to parties, witnesses, etc

[10-0420] Misconduct in relation to pending proceedings

Conduct that has a real tendency to improperly influence or deter a witness, judicial officer, juror, party or other person having a role in judicial proceedings may amount to contempt.

The test at common law is whether the action taken against the person had a tendency to interfere with the administration of justice: In the matter of *Samuel Goldman, Re; sub nom Re Goldman* [1968] 3 NSWR 325 at 327, 328. It is not necessary to show actual interference: *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 29.

Cases involving pressure upon parties to proceedings will often require an assessment of whether that pressure was improper: *Bhagat v Global Custodians Ltd* [2002] NSWCA 160, per Spigelman CJ at [35]. The mere fact that something that is lawful is threatened does not mean that the pressure is necessarily proper: *Harkianakis*, above, at 30. Contempt by improper pressure on a party or witness may derive from misuse of the court's processes, such as by filing, or threatening to file, defamatory material by affidavit: eg *Y v W* (2007) 70 NSWLR 377.

As to threats to seek costs, including costs against lawyers, see *Nuclear Utility Technology & Environmental Corp Inc (Nu-Tec) v Australian Broadcasting Commission (ABC)* [2009] NSWSC 78. As to inappropriate use of statutory powers to gain an advantage, see *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 cf *Zhang v Woodgate and Lane Cove Council* [2015] NSWLEC 10.

In *Ulman v Live Group Pty Ltd* [2018] NSWCA 338 at [77], the court noted the distinction to be drawn between a contempt arising from conduct that interferes with the administration of justice in a particular case and interference with the administration of justice generally. In the former case, no contempt will have been committed unless proceedings are pending: see *James v Robinson* (1963) 109 CLR 593 at 602–607. In *The Prothonotary v Collins* (1985) 2 NSWLR 549, McHugh JA observed, at 567:

> Time and again the courts have said that there can be no contempt unless proceedings are pending: see *James v Robinson* (1963) 109 CLR 593 at 602–607. Cases of interference with the administration of justice as a continuing process are no doubt an exception to this rule. Their rationale is different from

> publications which interfere with particular proceedings. They rest on the need to protect the courts and the whole administration of justice from conduct which seeks to undermine the authority of the courts and their capacity to function.

See also *Mirus Australia Pty Ltd v Gage* [2017] NSWSC 1046 per Ward CJ in Eq at [130]ff.

Improper pressure on prospective parties, before any proceedings have been commenced, can constitute a contempt. This is upon the basis that it represents an interference with the administration of justice generally: *Live Group Pty Ltd v Rabbi Ulman* [2017] NSWSC 1759.

[10-0430] Reprisals

Liability for misconduct in relation to those discharging a role in judicial proceedings is not confined to something said or done while the proceedings are pending, or even in the course of being heard. Reprisals may influence or deter the person affected, and persons generally, in relation to access to the courts (in the case of parties), or the performance of such roles. See *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 (witness); *Prothonotary v Wilson* [1999] NSWSC 1148 at [21(c)] (judge); *Clarkson v Mandarin Club Ltd* (1998) 90 FCR 354 (party); *Principal Registrar, Supreme Court of New South Wales v Katelaris* [2001] NSWSC 506 at [20] (counsel); *Prothonotary of the Supreme Court of NSW v Katelaris* [2008] NSWSC 389 (juror); *Tate v Duncan-Strelec* [2014] NSWSC 1125.

Temporal and geographical elements may be relevant, but it is immaterial whether the conduct was committed in or outside the court so long as it is an interference with the administration of justice.

[10-0440] Intention

An intention to interfere with the administration of justice is not an element of contempt of court: *John Fairfax & Sons Pty Ltd and Reynolds v McRae*, above, at 371; *Harkianakis* at 28. However, intention is relevant and sometimes important: *Lane v Registrar of the Supreme Court of NSW* (1981) 148 CLR 245 at 258.

What needs to be established is an intention to do an act that has a clear objective tendency to interfere with the administration of justice: *Principal Registrar v Katelaris*, above, at [23].

If the likely effect of the conduct is not self-evident (for example, if it is not clear whether the action has been taken to influence a person in relation to proceedings, or as a reprisal arising from proceedings) further inquiries may be made regarding motive, in order to demonstrate a nexus to the subject person's role in the legal proceedings, see *Registrar of the Supreme Court of NSW (Equity Division) v McPherson* [1980] 1 NSWLR 688 at 699, and, on appeal, *Lane*, above, reviewed in *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at [54].

If intention to influence or deter can be proved, that is usually sufficient to establish liability: *Harkianakis* at 28.

[10-0450] Statutory offences

Part 7 Div 3 of the *Crimes Act* 1900 contains offences relating to threats to or reprisals against, judicial officers, witnesses, jurors, etc.

Breach of orders or undertakings

[10-0460] Validity of orders

An order made by an inferior tribunal is invalid if made without jurisdiction. It is regarded as a nullity and breach of it will therefore not constitute a contempt: *Attorney General v Mayas Pty Ltd* (1988)

14 NSWLR 342 at 357; *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at [27]. The situation is otherwise in respect of the order of a superior court of record, which is taken to be valid until set aside: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 620; see also *Papas v Grave* [2013] NSWCA 308 and *Rumble v Liverpool Plains Shire Council* (2015) 90 NSWLR 506.

As to the validity of suppression orders see [1-0410].

[10-0470] Construction of orders

As to the construction of court orders (including the relevance of the context in which the order was made), see *Athens v Randwick City Council* (2005) 64 NSWLR 58. Hodgson JA observed at [27] that:

> [t]he construction of an order in respect of which a finding of contempt is sought may involve two inter-related questions. First, what does the order require, on its true construction? And second, is this sufficiently clear to the person affected by the order to support enforcement of that order against that person?

In order to support a prosecution for contempt, an order must be clear in its terms, but if it is, it is no defence that the contemnor may have been mistaken as to its effect: *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483.

For recent judicial consideration, see *City of Canada Bay v Frangieh* [2020] NSWLEC 81 at [61]; see also *Rafailidis v Camden Council* [2015] NSWCA 185 and *Brown Brothers v Pittwater Council* (2015) 90 NSWLR 717.

[10-0480] Breach of orders and undertakings

Wilful (rather than casual, accidental or unintentional) breach of an order or undertaking by which a person is bound and of which the person has notice, will amount to contempt: *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd*, above. It is not necessary to prove a specific intention to disobey the court's order: *Anderson v Hassett* [2007] NSWSC 1310. For a review of applicable principles, see *Doe v Dowling* [2017] NSWSC 202 at [39]–[50].

As to the requirement for notice of orders, see *Amalgamated Televisions Services Pty Ltd v Marsden* (2001) 122 A Crim R 166. As to the availability of inferring notice of an order on the basis that "informed instructions" must have been given to legal representatives, see *Young v Smith* [2016] NSWSC 1051.

A court may generally accept an undertaking from a party in substitution for making an order, subject to the same jurisdictional limitations: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 165. For the purposes of the law of contempt, an undertaking given to the court is treated as if it was an order. Aliter if undertaking given inter partes: *Srotyr v Clissold* [2015] NSWSC 1770.

While the Commonwealth and the State are expected to comply with court orders, enforcement by contempt proceedings is not available: *Hoxton Park Resident's Action Group Inc v Liverpool City Council* [2014] NSWSC 704.

Breach of suppression orders

There are several distinct categories of contempt of court under the common law; breach of suppression orders is one: *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 46; *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800 at [78]. To establish guilt, the applicant must prove beyond reasonable doubt that the respondent published the article (or caused it to be published); the publication of the article frustrated the effect of the suppression order because it contained material that was contrary to or that infringed the terms of the order; and when the article was published,

the relevant respondent's knowledge of the terms and effect of the order was such that a reasonable person with that knowledge would have understood that the continued publication of the article would have the tendency to frustrate the efficacy of the order: *R v The Herald & Weekly Times (Ruling No 2)* [2020] VSC 800 at [81]. Where the breach of an order relied upon is deliberate breach of a suppression order, proceedings could be brought under s 16 of the *Court Suppression and Non-publication Orders Act* 2010 (NSW) which provides for a penalty of 1,000 penalty units or imprisonment for 12 months for breaching an order for an individual, or 5,000 penalty units for a body corporation.

[10-0490] Implied undertakings in relation to use of documents provided in proceedings

> Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence … : *Hearne v Street* (2008) 235 CLR 125 at [96].

The types of material disclosed to which this principle applies include documents inspected after discovery (as to which see also UCPR r 21.7), documents produced on subpoena, witness statements served pursuant to a judicial direction and affidavits: *Hearne v Street* (2008) 235 CLR 125 at [96]. While previously categorised as an "implied undertaking" to the court, this is an obligation of substantive law, and binds third parties who receive the documents knowing of their origin.

As to considerations relevant to granting leave, see *Prime Finance Pty Ltd v Randall* [2009] NSWSC 361 (application for leave to provide copies of affidavits to police on the basis that they disclosed criminal offences). As to the scope of the obligation in relation to affidavits, see *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 533 cf *Tate v Duncan-Strelec* [2014] NSWSC 1125 at [188].

[10-0500] Deliberate frustration of order by third party

Deliberate frustration of court orders will amount to contempt, provided that the purpose of the orders is clear: *CCOM Pty Ltd v Jiejing Pty Ltd* (1992) 36 FCR 524 at 531; *Attorney General v Mayas Pty Ltd*, above, at 355; *Baker v Paul* [2013] NSWCA 426.

For a consideration of the liability of a director for orders directed to a company, see *Mahaffy v Mahaffy* (2018) 97 NSWLR 119.

Refusal to attend on subpoena/give evidence

[10-0510] Liability for refusal to attend on subpoena or to give evidence

Refusal to attend in response to a subpoena is a contempt of court, though it is not a contempt "in the face of the court": *Registrar of the Court of Appeal v Maniam (No 1)* (1991) 25 NSWLR 459; see also UCPR r 33.12.

Refusal to be sworn, or refusal to answer material questions, will constitute contempt, in the absence of any relevant privilege: *Smith v The Queen* (1991) 25 NSWLR 1; *Registrar of the Court of Appeal v Craven (No 2)* (1995) 80 A Crim R 272.

See also procedure, including for the issue of warrant, under s 194 of the *Evidence Act* 1995.

As to proofs required for contempt by failure to comply with a subpoena to produce documents, see *Markisic v Commonwealth* (2007) 69 NSWLR 737; [2007] NSWCA 92 at 748; *Mahaffy v Mahaffy*, above, at [152].

[10-0520] Duress

Duress may be raised as a defence to contempt: *Registrar of the Court of Appeal v Gilby* (unrep, 20/8/91, NSWCA). The principles to be applied are those set out in *R v Abusafiah* (1991) 24 NSWLR 531 at 545. It is not sufficient that there be a generalised fear or apprehension of retaliation, although this may be a matter relevant to penalty: *Gilby*, above; *Principal Registrar of Supreme Court of NSW v Tran* (2006) 166 A Crim R 393; *R v Razzak* (2006) 166 A Crim R 132 at [24].

[10-0530] Prevarication

While the giving of false answers in the courts of evidence is likely to interfere with the administration of justice, such conduct will not usually constitute contempt. It may amount to contempt if it consists in giving palpably false answers so as to indicate that the witness is merely fobbing inquiry: *Coward v Stapleton* (1953) 90 CLR 573 at 578–579; see also *Keeley v Brooking* (1979) 143 CLR 162 at 169, 172, 174, 178; *Commissioner for the Police Integrity Commission v Walker (No 2)* [2006] NSWSC 696.

Jurisdiction and procedure

[10-0540] Supreme Court and Dust Diseases Tribunal

Contempt of court in the face, or in the hearing of, the Supreme Court may be dealt with under the summary procedure in SCR Pt 55 Div 2 (see [10-0060]) or by directing the registrar to commence proceedings under SCR Pt 55 Div 3. Contempt not in the face or hearing of the court must proceed under Div 3: see [10-0120].

Proceedings for contempt in the face or hearing of the Supreme Court, or for breach of orders or undertakings, are assigned to the division of the court (or the Court of Appeal, as the case may be) in which the contempt occurred: SCA ss 48(2), 53(3). Contempt proceedings in respect of contempts of the Supreme Court, or of any other court, are otherwise assigned to the Common Law Division: SCA s 53(4).

The Dust Diseases Tribunal has the same powers for punishing contempt of the tribunal as are conferred on a judge of the Supreme Court for punishing contempt of a division of the Supreme Court: *Dust Diseases Tribunal Act* 1989 s 26.

[10-0550] District Court and Local Courts

The District Court has power to punish contempt of court committed in the face of the court or in the hearing of the court: DCA s 199.

The Local Court has the same powers as the District Court in respect of contempt of court committed in the face or hearing of the court: LCA s 24(1).

The District Court may refer an apparent or alleged contempt to the Supreme Court under DCA s 203 and the Local Court may refer an apparent or alleged contempt to the Supreme Court under LCA s 24(4) (see [10-0130]).

A possible contempt may alternatively be referred to the Attorney General for consideration of appropriate action.

Legislation

- *Civil Procedure Act* 2005 (NSW), 3(1), 4(1), Sch 1
- *Crimes Act* 1900, Pt 7 Div 3
- DCA ss 199, 203

- *Dust Diseases Tribunal Act* 1989, s 26
- *Evidence Act* 1995, s 194
- LCA s 24(1), (4)
- *Mental Health (Forensic Provisions) Act* 1990 (rep)
- *Mental Health and Cognitive Impairments Forensic Provisions Act* 2020
- SCA ss 48(2), 53(3), 101(5), 101(6)

Rules

- SCR Pt 55 Div 2
- UCPR rr 1.5(1), 21.7, 33.12
- Supreme Court (General Civil Procedure) Rules 2005 (Vic)

Further reading

- N Adams and B Baker, "Sentencing for contempt of court", National Judicial College of Australia and the Australian National University Sentencing Conference, 29 February 2020, Canberra

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