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NSW CIVIL PROCEDURE

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Civil Procedure Act 2005 (Annotated)

Commentary by Carol Webster SC

By amendments to Sch 1 of the *CPA*, the *CPA* now applies to all civil proceedings in the Industrial Relations Commission including the Commission in Court Session from 1 July 2024. See [CPA 4.20], [CPA Pt9.10] – [CPA Pt9.15].

Part 9 Div3 of the *CPA* permits the transfer of proceedings between the Supreme Court and the Industrial Court. The provisions are relevantly the same as those of Div 2A providing for transfer of proceedings between the Supreme Court and the Land and Environment Court. See [CPA Pt9.Div3.20].

Schedule 1 to the UCPR specifies those kinds of proceedings to which the UCPR applies generally and now includes the Industrial Court as from 1 July 2024. See [r 1.5.40].

Commentary by Mandy Tibbey, Barrister

For a recent, simple example of the application of r 16.6, see *BMW Australia Finance Ltd v Fantastic Removals Pty Ltd* [2024] NSWSC 303. See [r 16.6.40].

For a recent example of an admission on pleadings, judgment pursuant to r 17.7 and possible joinder of a trustee in bankruptcy, see *Bendigo and Adelaide Bank Ltd v Stolyar* [2024] NSWSC 710. See [r 17.7.60].

Undertakings as to damages are usually required when applying for interim preservation orders, though not invariably: see *Chong v David* [2024] NSWSC. See [r Pt25.20].

For a case where it was found that the plaintiffs had an arguable case that a transfer had prospects of being voided pursuant to s 37A of the *Conveyancing Act 1919* (NSW) or s 121 of the *Bankruptcy Act 1966* (Cth) see [r 25.14.20].

In *Idle Time Pty Ltd v Greinert* [2024] NSWSC 901, Pike J discharged search orders but also ordered that the material gathered in the search be preserved, in case a further order was sought. See [r 25.20.1].

In *Marino v Bello* [2024] NSWDC 149, an unrepresented plaintiff obtained orders for default judgment against his brother-in-law for maliciously lodging and continuing applications for an ADVO, without reasonable or probable cause, utilizing the ADVO for his own ends in family law proceedings, a collateral abuse of process. See [r 30.1.60].

For a recent discussion of r 54.3 and the breadth of the Court's power to supervise the administration of trusts, see *Re Aston* [2024] NSWSC 804. See [r 54.3.20].

For a recent consideration of the ambit of s 63(1) of the *Trustee Act 1925* see *Re Pascoe* [2024] NSWSC 738. See [r Pt55.40].

In *NSW Trustee and Guardian v Matthews* [2024] NSWSC 595, an application for judicial advice before Meek J, was, with the agreement of the parties, treated as a construction suit, so that the issues in dispute could be determined efficiently. See [r Pt55.40].

Parties should be alert to the reasonableness of their actions in bringing and maintaining an application, knowing that costs are discretionary. See *Aurora Australasia Pty Ltd v Hunt Prosperity Pty Ltd* [2024] NSWSC 756. See [r 55.3.10].

It is noted that an adult can become adopted: see *Re Adoption of Louis* [2024] NSWSC 946. See [r 56.1.20].

If notice has been appropriately given, and the proposed adoption is not contested, the application will proceed for judicial consideration. See [r 56.6.40].

Commentary by Dr Sonya Willis

Courts may consider the relative success of the parties in allocating referee costs. See [r 20.18.60].

An incorrect judicial direction to a referee to exclude an amount from consideration can be successfully appealed. See [r 20.21.60].

There is no obligation to litigate a dispute regarding referee methodology at an interlocutory stage where the referee was on notice of the dispute and had provided her referee report on both disputed bases enabling the court to utilise the report whichever way it found on the methodology issue resulting in no prejudice or delay. See [r 20.21.60].

A court is more likely to exercise its discretion regarding referees reports on issues of law or mixed fact and law such as valuation methodology where the valuation adopted needs to accurately reflect the law. Further, Unreasonable objections by a party to a referee report can influence orders as to payment of costs in proceedings. See [r 20.24.60].

In *Re Sunnys Pty Ltd* [2024] NSWSC 415, Black J determined that service of contempt proceedings were criminal rather than civil pursuant to the *Trans-Tasman Proceedings Act 2010* (Cth) and should, therefore, be ordered pursuant to r 11.5 and r 11.8AB of the UCPR. See [r 32.2.40].

The Federal Court has given leave with respect to only part of a proposed subpoena, noting that, for s 31(3)(a) of the *Trans-Tasman Proceedings Act 2010* (Cth), the “extent to which the proposed subpoena has a legitimate forensic purpose is a central consideration” in exercising the discretion to grant leave. See [r 32.5.60].

A physical copy of the judgment must be provided to the registering court pursuant to r 17 of the *Trans-Tasman Proceedings Regulation 2012* (Cth) even where the rules of the rules of the jurisdiction allow electronic lodgment. See [r 32.8.20].

Wikeley v Kea Investments Ltd [2024] FCA 631 is considered in terms of the Federal Court's jurisdiction to order security for costs against an Australian resident individual. See [r 32.10.20].

In *Wang v Yu (No 2)* [2024] NSWSC 4, Meek J confirmed the need for "appropriate decorum and solemnity" in audio visual appearances. See [r 32.13.60].

Although the *Foreign Judgments Act 1991* (Cth) does not extend to any judgments of any courts of the United States of America, s 11 may be considered in determining common law enforcement of United States decisions. See [r 53.1.20].

Where there is evidence that the solicitor retainer was revoked prior to a successful foreign appeal and the defendant had no knowledge of the appeal, the evidence of initial representation at proceedings which favoured the defendant was insufficient for summary judgment enforcing the foreign appellate proceedings finding against the defendant due to the risk of denial of natural justice.

Further, an appearance in a foreign court after foreign judgment is awarded seeking to set aside that foreign judgment does not negate a finding of insufficient notice of the foreign proceedings pursuant to s 7(2)(a)(v). See [r 53.7.120].