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NSW CIVIL PROCEDURE

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Civil Procedure Act 2005 (Annotated)

Commentary by David Ash, Barrister

A charging order is a means of enforcement available for judgment debts in the Supreme Court and is therefore able to be made in Federal Court proceedings pursuant to s 53 of the *Federal Court of Australia Act 1976* (Cth). See [CPA 106.22] and [CPA 106.24].

Hewitt v McClymont (No 2) [2024] NSWSC 1453, is an example of the court exercising its discretion to refuse an application to pay the balance of a judgment debt by instalments. See [CPA 107.25]

Copeland v Odeesh (No 2) [2024] FCA 1400 includes an overview of the operation of CPA s 108 with the relevant rules UCPR Pt 38. See [CPA 108.32].

For a discussion of when a debt is “due or accruing”, see *Atidote Pty Ltd (t/as Harcourts, The Property People Sydney) v Najjar* [2024] NSWSC 206. See [CPA 117.30].

The language of s 124A was considered in *Barel v Barel* [2024] NSWCA 257. See [CPA 124A.10].

An example of the operation of s 124A is in *Atidote Pty Ltd (t/as Harcourts, The Property People Sydney) v Najjar* [2024] NSWSC 206. See [CPA 124A.20].

Commentary by Mary-Ann de Mestre, Barrister

Authority has been added to the proposition that the court may order mediation over opposition. See [CPA 26.20].

Authority has also been added regarding the discretion to order mediation. See [CPA 26.40].

Commentary by Carol Webster SC

The following commentary has been updated:

- Delegation of Supreme Court’s functions to Registrars, see [CPA 13.40].
- Delegation of Supreme Court’s functions to Registrar, Court of Appeal, see [CPA 13.60].
- Delegation of Supreme Court’s functions to a Chief Clerk, see [CPA 13.80].
- Delegation of Land and Environment Court’s functions to Registrars, see [CPA 13.100].
- Delegation of District Court’s functions to registrars, see [CPA 13.120].
- Delegation of Local Court’s functions to registrars, see [CPA 13.140].

Commentary addressing the Governor’s regulation-making powers with respect to fees has been updated. See [CPA 18.40] - [CPA 18.1000].

Section 65 does not curtail the general power under CPA s 64: *Commonwealth v Winston* [2024] NSWCA 277. See [CPA 65.40] – [CPA 65.1000].

Practice Note SC Gen 17 - Representative Proceedings (see [SC Gen 17]) applies to all proceedings under CPA Pt 10. Proceedings are to be commenced in the appropriate Division. See [CPA Pt 10.0.60].

Practice Note SC Gen 17 – Supreme Court Representative Proceedings requires that in addition to the requirements of UCPR Pt 6 Div 4, an originating process must include a notation that the proceedings are listed for an initial directions hearing on the Friday 35 days after filing and service. See [CPA 161.40].

Whether a litigation funder is receiving a reasonable rate of return can properly be taken into account in assessing whether a proposed settlement is fair and reasonable: *Augusta Pool 1 UK Ltd v Williamson* (2023) 111 NSWLR 378; [2023] NSWCA 93. See [CPA 173.60].

In *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81; [2024] NSWCA 83, the Court of Appeal was not satisfied that *Wigmans v AMP Ltd* (2020) 102 NSWLR 199; [2020] NSWCA 104 was “plainly wrong” and the majority discussed a remedy. See [CPA 175.40].

The form and content of notices to be given to group members has been reviewed. See [CPA 176.40].

Supreme Court Rules 1970 (Annotated)

Commentary by David Ash, Barrister

GR v Family and Community Services [2021] NSWSC 39, is an example of a contempt application being summarily dismissed for, among other things, a failure to appropriately frame the statement of charge. See [SCR 55.7.20].

For a summary of the rules and principles relevant to subpoenas in criminal proceedings see *R v Hawkins* [2020] NSWSC 1228. See [SCR 75.3.20].

For recent discussions of the principle that costs remain in the discretion of the court see

Alexakis v Masters (No 3) [2023] NSWSC 694. See [SCR 78.0.140].

Supreme Court Practice Notes

Supreme Court Practice Note SC EQ 13 – Adoptions was issued 7 February 2025 and commenced 10 February 2025. It adds paragraphs 26 to 30 and 35 placing greater emphasis on the existing provision at s 9 of the *Adoption Act 2000* (NSW), requiring decision makers to ensure that the child participate in decisions under the *Adoption Act*. It also makes amendments to the clause dealing with the appointment of a legal practitioner to represent a child. See [SC Eq 13].

Use of Generative Artificial Intelligence (Gen AI) – This Practice Note was issued on 21 November 2024 and commences 3 February 2025. It applies to both closed-source and open-source large language model Gen AI. Gen AI is capable of being used to assist legal practitioners and unrepresented parties with various tasks, including drafting documents and summarising information. This Practice Note is directed to the circumstances where such use is acceptable. See [SC Gen 23].

Uniform Civil Procedure Rules 2005 (Annotated)

Commentary by David Ash, Barrister

Regarding service in accordance with agreement between parties, the evidence may not establish any of the alternatives in r 10.6: *Commissioner of the Australian Federal Police v Xin (No 2)* [2024] NSWSC 1606. See [r 10.6.60].

The provisions of UCPR r 10.14 are concerned with taking steps for the purpose of bringing the document to the notice of the person concerned: *Commissioner of the Australian Federal Police v Xin (No 2)* [2024] NSWSC 1606. See [r 10.14.30].

Originating process may be served without determination by the court whether the case is or is arguably within UCPR Sch 6. See [r 11.4.50].

A contempt motion is “an originating process” for the purpose of UCPR r 11.5 where it commences a separate proceeding, the contempt proceeding, within the substantive proceeding. See [r 11.5.50].

For consideration of the issue of “in accordance with” the foreign law, see *Willmott v Adamo* [2024] NSWSC 682. See [r 11.8AC.20].

Part 11A of the UCPR cannot be relied upon if the place of proposed service is within a country not party to the Hague Convention. See [r 11A.1.60].

Copeland v Odeesh (No 2) [2024] FCA 1400, provides an overview of the operation of CPA s 108 with the relevant rules including UCPR 38.3. See [r 38.3.30].

For a recent overview of the operation of CPA s 126, UCPR r 39.44 and the prescribed form 74, see *iNova Pharmaceuticals (Australia) Pty Ltd v Vrkic* [2024] FedCFamC2G 721. See [r 39.44.40].

Whether the court has power to order payment out of the court and into a foreign court was considered in *Kingston Securities Ltd v Lee* [2024] NSWSC 402. See [r 41.11.80].

For a recent summary of the authorities on what amounts to collusion see *Australian Military Bank Ltd v Pike* [2024] NSWDC 350. See [r 43.2.100].

Commentary by Mandy Tibbey, Barrister

In *Mutokoyi v Public Trustee of Queensland* [2024] NSWSC 1005, Kunc J dismissed an application for payment of funds out of court after most of these were paid into court following settlement of a matter, on the application of solicitors who had acted for the Plaintiff. See [r 55.11.20].

Commentary by Dr Sonya Willis

Referees need not indicate adherence to complex evidentiary issues such as shifting burdens of proof because they are not bound by the rules of evidence (r20.20(2)(b)). See [r 20.20.60].

In determining the ultimate interests of justice in adopting a referee report, the court cannot be expected to review the plethora of details considered by the referee. See [r 20.24.60].

A foreign judgment was recognised ex parte where the judgment debtor was keeping house, but service was found to be effected and the common law requirements for recognition of a foreign (Qatari) judgment were found. See [r 53.2.80].

Commentary by Carol Webster SC

Rule 1.21 can be used to determine questions of statutory construction affecting class action procedure. See [r 1.21.40].

Key principles relevant to an application for preliminary discovery under r 5.3 extend to including documents going only as to quantum: *O'Connor v O'Connor* [2018] NSWCA 214. See [r 5.3.60].

Family provision proceedings do not survive the death of the claimant before an order for provision is made. See [r 6.30.40].

Rule 7.1(2)–(3) is not invalid as being inconsistent with the *Judiciary Act 1903* (Cth) s 78: *Tydeman v New South Wales* [2024] NSWSC 1598 See [r 7.1.70].

The role of a representative appointed under r 7.10 was discussed in *Reeves v Reeves (No 2)* [2024] NSWSC 386. See [r 7.10.60].

If the person's capacity changes, a declaration may be sought that the person is (no longer) under a legal incapacity. See [r 7.14.60].

There are specific provisions regarding service in probate proceedings and the need for a person under legal incapacity to answer by a tutor. See [r 7.1 4.80].

The residence of the preponderance of lay witnesses and availability of a judicial officer to hear the lay evidence at the proposed venue as particularly relevant to the interests of justice. See [r 8.2.60].

An order dismissing proceedings under r 12.7 may be made on terms requiring leave of the court to commence fresh proceedings to like effect and prior payment of the costs of the dismissed proceedings. See [r 12.7.40].

What constitutes “relevant to a fact in issue is discussed in light of *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145. See [r 21.10.40].

Similar principles apply to setting aside a notice to produce and a subpoena: *Pallas v Lendlease Corporation Ltd (No 2)* [2025] NSWSC 7. See [r 21.10.60].

Separate questions have been removed in class actions to determine questions of statutory construction affecting class action procedure, and where there was a divergence between Court of Appeal and Full Federal Court authority. See [r 28.2.50].

Provisions which implement the Australian National Standards for Working with Interpreters in Courts and Tribunals, produced by the Judicial Council for Cultural Diversity, have been added. See [r Pt31.20], [r Pt31.Div3.20].

A new rule prohibits use of generative artificial intelligence to generate the content of witness statements and affidavits, and the content of an annexure or exhibit to an affidavit unless the court has granted leave. Practice Note SC Gen 23 – Generative AI addresses the rationale for this and other amendments including new r 35.3B regarding affidavits. A definition of *generative artificial intelligence* now appears in the Dictionary to the UCPR. See [r 31.4.45], [r Pt31.Div2.Sdiv3.40]–[r Pt31.Div2.Sdiv3.1000], [r 51.12.60], [r 51.13.60], [r Pt 51 Div 5 Subdiv 4.25], [r 51.36.60], [r 51.45.60].

Commentary regarding the calling of expert witnesses has been updated. See [r 31.19.40]–[r 31.19.1000].

Practice Note SC Gen 23 – Generative AI has been issued and rule amendments made regarding the use of Generative Artificial Intelligence. See [r 51.12.60], [r 51.13.60], [r Pt 51 Div 5 Subdiv 4.25], [r 51.36.60], [r 51.45.60] and [r 59.8.45].

Regarding r 51.22 it is noted that the question is what is “involved” in the appeal, exclusive of costs. See [r 51.22.60].

Detailed provision is made regarding court approval of the form of the Important Public Notice and opt out notice in CPA s 176 and Practice Note SC Gen 17. See [r 58.2.40].

Failing to file and serve a response summarising all substantive arguments sought to be relied upon may cause the court to refuse to order costs. See [r 59.8.40].

Marks v Berri Pty Ltd [2024] NSWDC 279 notes the residence of the preponderance of lay witnesses and availability of a judicial officer to hear the lay evidence at the proposed venue as particularly relevant to the interests of justice. See [r 8.2.60].

Relevant to a fact in issue: A fact is in issue if it is “apparently relevant” or “will materially assist on an identified issue or there is a reasonable basis beyond speculation that it is likely the documents subpoenaed will so assist”. See [r 21.10.40].

Pallas v Lendlease Corporation Ltd (No 2) [2025] NSWSC 7, collects the authorities whereby similar principles apply to setting aside a notice to produce and a subpoena. See [r 21.10.60].

Commentary by Wen Wu, Barrister

It must be remembered that the Online Court is the Court. Parties and their representatives are expected to conduct themselves in Online Court in the same manner as an in-person appearance in court. See [r 3.8.80].

Commentary by Commissioner Janet McDonald

Where there are a number of issues in the proceedings on which there have been varying degrees of success, see *Access Training Group Ltd v Jane* [2024] NSWCA 204 for a discussion as to calculation of costs. See [r 42.1.50].

Whether an issue is sufficiently dominant to warrant separate treatment in relation to costs will depend on the time taken in preparation and/or presentation at trial, of that issue. See [r 42.1.120].

In *Birketu Pty Ltd v Atanaskovic* [2025] HCA 2 the High Court, by majority held that an unincorporated law firm is entitled to claim professional fees under a costs order for work done by its employed solicitors. See [r 42.2.60].

The power to cap costs under r 42.4 is available in relation to an appeal pursuant to r 51.1(3) and (4), however, such an order will be likely be rare. See [r 42.4.40].

In *Mendonca v Tonna* Basten AJA expressed the view that a capping order should not be made as a protection against unreasonable costs as such protection lies in the costs assessment process. See [r 42.4.100].

In *Pirrottina v Pirrottina (No 2)* [2024] NSWSC 1053, Rees J explained the purpose of the Notice to Admit regime. See [r 42.8.40].

In *Langdon v Carnival plc (t/as P&O Cruises Australia)* [2024] NSWCA 168 the Court of Appeal discussed the awarding of costs where an offer of compromise has been made. See [r 42.15A.20].

Commentary by Jo Shepard

Black J in *Re Black Lab Design Pty Ltd (in liq)* [2023] NSWSC 661 considered the court's approach on an application for approval of receivers' remuneration. See [r 26.4.40].

The power under Pt 27.1 of the UCPR extends to an order that the land be vacated for the purposes of allowing the sale to proceed. See [r 27.1.20].

It is noted that, r 35.3B Use of generative artificial intelligence in affidavits was introduced in February 2025 to avoid the improper use of generative artificial intelligence in place of a deponent's accurate and faithful recollection of their observations relevant to the issues. See [r 35.3B.20]–[r 35.3B.1000].

Commentary by Mary-Ann de Mestre

It is noted that the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) was repealed by the *Evidence (Audio and Audio Visual Links) Amendment Act 2000* (NSW). See [r 24.1.40].

It is also noted that the method of entry into the Commercial Arbitration List is to be made by summons and entered in the manner specified in the Commercial Arbitration List Practice Note as amended from time to time, most recently the Supreme Court Practice Note SC Eq 9 Supreme Court Equity Division – Commercial Arbitration List.

