

AN INTRODUCTION TO THE NEW RULES REGIME IN THE INDUSTRIAL RELATIONS COMMISSION OF NSW.

CONDUCT OF COURT PROCEEDINGS / CASE MANAGEMENT CPA PART 6, UCPR PART 2

The CPA and the UCPR gather together a number of provisions that deal with how proceedings are conducted by parties and managed by the court.

The provisions recognise the importance of case management as a tool for increasing the efficiency of the court system and reducing the cost of litigation.

CPA Part 6, Division 1 sets out the guiding principles that are to apply in the conduct of court proceedings.

Overriding purpose

CPA s 56 sets out the overriding purpose of the CPA and UCPR, which in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

The court must seek to give effect to the overriding purpose when it exercises any power given to it by the CPA or by rules of court.

A party to proceedings is under a duty to assist the court to further the overriding purpose and a solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of this duty.

Case management

CPA s 57 deals with the objects of case management. For the purpose of furthering the overriding purpose referred to in CPA s 56, it requires proceedings to be managed having regard to the following objects:

- (a) The just determination of proceedings;
- (b) The efficient disposal of the business of the court;
- (c) The efficient use of available judicial and administrative resources; and
- (d) The timely disposal of those proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

UCPR Part 2 also deals with case management. It gives the court the power to:

- (a) Give such directions and make such orders for the conduct of proceedings that appear convenient for the just, quick and cheap disposal of proceedings (rule 2.1);
- (b) Set a date at any time for giving directions or orders for the conduct of proceedings (rule 2.2); and
- (c) Give a range of case management directions and orders (rule 2.3).

Dictates of justice

CPA s 58 requires the court to act in accordance with the dictates of justice in deciding whether to make any order or direction for the management of proceedings, including orders for amendment or adjournment.

For the purpose of determining what are the dictates of justice in a particular case, the court must have regard to CPA ss 56 and 57 and may have regard to the matters set out in CPA s 58(2)(b). These matters include:

- (a) The degree of difficulty or complexity to which the issues in the proceedings give rise;
- (b) The degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities; and
- (c) The degree of injustice that would be suffered by the respective parties as a consequence of any order of direction.

It is important to note that the dictates of justice are not limited to the dictates of justice only as between the parties (which has been argued to be the effect of the majority judgment in *State of Queensland v J L Holdings Pty Ltd* (1997) 189 CL R 146¹).

Elimination of delay

CPA s 59 requires the court to implement its practices and procedures with the object of eliminating any lapse of time between the commencement of proceedings and their final determination beyond that which is reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial.

Proportionality of costs

¹ but see now *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 (5 August 2009)

CPA s 60 requires the court to implement its practices and procedures with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.

Power to give directions

CPA s 61 sets out:

- (a) The court's power to give directions as to practice and procedure; and
- (b) The sanctions that it may impose where there is a failure to comply with those directions.

CPA s 62 sets out the court's power to give directions in relation to the conduct of a hearing. These include directions:

- (a) About the order of trying questions of fact;
- (b) Limiting the time taken in the examination, cross-examination and re-examination of witnesses; and
- (c) Limiting the time that may be taken by the hearing.

Directions made under this provision must not detract from the principle that each party is entitled to a fair hearing, and must be given a reasonable opportunity to lead evidence, to make submissions, to present a case and, at trial (other than at trial in the Small Claims Division of a Local Court²), to cross-examine witnesses (CPA s 62 (4)).

Courts may have regard to a range of factors when making directions under CPA s 62 which include:

- (a) The efficient administration of the court lists; and
- (b) The interests of parties to other proceedings before the court.

CPA s 63 contains powers to make directions with respect to procedural irregularities.

Other powers of the court

The CPA also contains power in relation to:

- (a) Amending documents (s 64);
- (b) Adjourning proceedings (s 66);
- (c) Staying proceedings (s 67);
- (d) Requiring attendance at court and the production of documents (s 68);
- (e) Making orders in relation to informal proof and admissions (s 70); and

² or the Industrial Court when hearing small claims matters under s 379.

- (f) Conducting certain business in the absence of the public (s 71).

Amendment of originating process after expiry of limitation period

CPA s 65 provides a power to amend an originating process after the expiration of a limitation period provided that the amendment is limited to correcting the identity of a party or changing the cause of action based on substantially the same facts.

Pre-reading of affidavits and witness statements

CPA s 69 facilitates the pre-reading of affidavits and witness statements prior to hearing. Time and costs can be saved if the presiding officer does not have to take time to read the affidavits and witness statements during the hearing.

Disclosure of information

CPA s 72 details the circumstances in which the court may prohibit the disclosure of information identifying a party or a witness in proceedings. Before making an order under CPA s 72, the court must be of the opinion that non publication is necessary to secure the proper administration of justice in the proceedings.

Power to determine questions about compromises and settlements

CPA s 73 gives a court jurisdiction to determine a question as to whether proceedings have been compromised or settled and to make appropriate orders to give effect to any such determination.

CPA s 73(2) makes it clear that the provision does not limit the jurisdiction that a court may otherwise have to determine such questions.

Orders

CPA s 86 provides that the court has the power to make orders by way of leave or direction and to make all or any orders on terms. A court may make any order of its own motion or on the application of a party or any other person who is entitled to make such an application.

Privilege against self-incrimination

CPA s 87 extends the protection against self-incrimination contained in s 128 of the *Evidence Act* 1995 to interlocutory orders for disclosure such as *mareva* relief and Anton Piller orders. (See *Ross v Internet Wines Pty Ltd* [2004] NSWSC 195).

Fresh trial and procedure on fresh trial

CPA s 88 allows the senior judicial officer to nominate another judicial officer before whom proceedings are to be listed for trial where a judicial officer before whom a trial of proceedings has commenced is unable to continue by reason of death, resignation or incapacity.

CPA s 89 provides for the directions that may be given in relation to the use of evidence in fresh trials. The court may direct that evidence given in a previous trial can be used without the need to recall witnesses or it might allow earlier evidence to be used and may direct that witnesses be recalled for limited examination or cross-examination or both.

PRELIMINARY DISCOVERY AND INSPECTION UCPR PART 5 [APPLICABLE ONLY TO INDUSTRIAL COURT]

UCPR Part 5 contains preliminary discovery and inspection rules that are based on Federal Court rules Order 15A.

Rule 5.2 allows the court to order discovery to assist a person to identify a prospective defendant's identity or whereabouts if it appears that:

- (a) The applicant has made reasonable inquiries and is unable to sufficiently ascertain the identity or whereabouts of a person for the purpose of commencing proceedings against that person; and
- (b) Some other person may have information or may have or have had possession of a document or thing that tends to assist in ascertaining the identity or whereabouts of that person.

This rule allows an order to be made for:

- (a) A person to attend court to be examined; and/or
- (b) The discovery of documents.

Rule 5.3 allows the court to order discovery of documents from a prospective defendant if it appears that:

- (a) The applicant may be entitled to make a claim for relief against a prospective defendant;
- (b) The applicant has made reasonable inquiries and is unable to obtain sufficient information to decide whether or not to commence proceedings;
- (c) The prospective defendant may have or have had possession of a document or thing that would assist the applicant to decide whether or not he or she has a claim for relief; and

- (d) Inspection of the document would assist the applicant to decide whether to sue.

Rule 5.4 allows the court to order discovery of documents from a person who is not party to the proceedings if it appears that the person may have or have had possession of a document that relates to any question in the proceedings.

An application for preliminary discovery or inspection is to be made by summons (rule 6.4(1)(c)).

The general rules relating to discovery (rules 21.1 to 21.8) and inspection (rule 23.8) apply to orders made under UCPR Part 5 (rule 5.5).

The court can also make orders for:

- (a) Security of costs (rule 5.6); and
- (b) Costs and other expenses (rule 5.8).

PREPARING AND FILING DOCUMENTS
UCPR PART 4 **[READ IN CONJUNCTION WITH IR RULE**
PART 3]

Preparation of documents

UCPR Part 4 deals with the preparation and filing of documents.

Rule 4.2 requires documents that are to be filed to contain certain information including the title of the proceedings and the case number. **Rule 3.1 of the IR Rules specifies further requirements for originating process filed in the Commission:**

The originating process:

- (a) must state that the proceedings may be heard by the Commission, and
- (b) must state the respondent is liable to suffer judgment, or an order against the respondent, unless the defendant or his or her representative attends before the Commission at the time and place stated in the originating process, and
- (c) must further state that, before any such attendance, the respondent must file a notice of appearance, and
- (d) must give the address of the Registry at the place named as the place for attendance

Signing documents

Rule 4.4 sets out who may sign documents on behalf of a party.

Address for service

Rules 4.5 and 4.6 deal with the address for service and changing the address for service.

Separate process for separate documents

Rule 4.8 requires separate process (such as a defence and a statement of cross-claim) to be dealt with in separate documents. A separate document will also have to be filed if a party amends a document.

Filing documents

Rule 4.10 deals with the filing of documents generally including:

- (a) How a person can lodge a document for filing; and
- (b) When an officer of the court may refuse to accept a document for filing.

PARTIES TO PROCEEDINGS AND REPRESENTATION UCPR PART 7

UCPR Part 7 gathers together the party rules including the rules relating to business names and persons under a legal incapacity.

Rule 7.1 details who may commence and carry on proceedings on behalf of a party. Rule 7.1 (4A) and 4(B) continue the current position in relation to industrial agents and proceedings before the Commission:

(4A) Despite subrules (1)–(4), any person may commence and, unless the Commission orders otherwise, carry on proceedings in the Industrial Relations Commission by an industrial agent within the meaning of the *Industrial Relations Act 1996*.

(4B) Subrule (4A) does not apply to or in respect of proceedings in the Industrial Relations Commission when constituted as the Industrial Court.

Rule 7.3 provides that a subpoena (read summons under s 165 of the IR Act) may not be issued without the leave of the court, unless a solicitor represents the party at whose request the subpoena is to be issued.

Rules 7.24 to 7.31 deal with the appointment and removal of solicitors.

SERVICE UCPR PARTS 10 AND 11

Part 10 gathered together service rules from the existing court rules at the time of introduction and has been specifically amended in relation to service on industrial organisations.

Service on active parties

A party that files a document must serve copies of that document on all active parties as soon as practicable after filing, unless the court orders otherwise (rule 10.1).

Manner of service

The UCPR deal with various aspects of service including:

- (a) The various methods of service (rule 10.5);
- (b) Service on an unregistered business (rule 10.9);
- (c) Service on a registered business (rule 10.10);
- (d) Service on a person under a legal incapacity (rule 10.12);
- (e) Acceptance of service by a solicitor (rule 10.13);
- (f) Substituted and informal service (rule 10.14); and
- (g) Service by filing (rule 10.16).

Rule 10.19 deals with waiver of objection to service. A party who files a document in reply to a document alleged to have been served on that party is taken to have waived any objection to the fact or manner of service unless he or she files and serves notice of the objection together with the document so filed.

Personal service

Documents do not have to be personally served unless the rules or the court so requires (rule 10.20).

In Supreme Court, Industrial Court and Industrial Relations Commission, Land and Environment Court, District Court and Dust Diseases Tribunal proceedings, the *originating process* must be personally served.

Rule 10.21 sets out how personal service is effected generally.

Rule 10.29 sets out how service is to be effected on an industrial organisation.

Service outside New South Wales but within Australia

Unless served under rule 10.3, documents to be served outside New South Wales must be served in accordance with the *Service and Execution of Process Act 1992 (Cth)*.

DISCONTINUANCE, WITHDRAWAL AND DISMISSAL AND SETTING ASIDE OF ORIGINATING PROCESS ETC. UCPR PART 12

Discontinuance of claim

Rule 12.1 provides that the plaintiff (read applicant for proceedings before the Commission) may, with the consent of any party on whom the originating process has been served or who has been joined in the proceedings, discontinue the proceedings with respect to:

- (a) The whole of their claim; or
- (b) Their claim against a particular defendant (read respondent for Commission proceedings).

The plaintiff may do so by filing a notice of discontinuance, which must be accompanied by a notice of consent from each other party.

The court may also give leave for a plaintiff to discontinue proceedings in relation to the whole of the plaintiff's claim or in relation to a particular defendant (rule 12.2).

Withdrawal of appearance or pleading

Active parties may withdraw an appearance with leave of the court (rule 12.5).

A party may withdraw a matter in a defence or subsequent pleading by filing a notice of withdrawal of the matter, which states the extent of the withdrawal (rule 12.6).

A party may not withdraw an admission, or any other matter that operates for the benefit of another party, except with the consent of the other party or the leave of the court (rule 12.6(2)).

Dismissal of proceedings etc. for lack of progress

The court may dismiss proceedings or strike out a defence if the plaintiff or defendant fails to conduct the proceedings with due despatch (rule 12.7).

Setting aside originating process etc

Rule 12.11 enables the defendant to apply for a number of orders including:

- (a) An order setting aside the originating process
- (b) An order setting aside service of the originating process; and

- (c) An order declaring that the court has no jurisdiction over the defendant in respect of the subject-matter of the proceedings.

An application for an order under this rule must be made by notice of motion within the time limited for filing a defence (read response or reply for the Commission). The defendant does not have to enter an appearance but must give an address for service.

SUMMARY DISPOSAL UCPR PART 13

UCPR Part 13 deals with the summary disposal of proceedings.

Rule 13.1 allows the court to give such judgment for the plaintiff (or applicant) or to make such order on the claim or part of the claim as the case requires where:

- (a) There is evidence of the facts on which the claim or part of the claim is based; and
- (b) There is evidence, given by the plaintiff or by some other responsible person that the defendant has not defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed.

Rule 13.4 allows the court to dismiss proceedings generally or in relation to a claim where it appears to the court that:

- (a) The proceedings are frivolous or vexatious; or
- (b) Disclose no reasonable cause of action; or
- (c) The proceedings are an abuse of process.

Rule 13.6 gives the court a power to dismiss proceedings where there is a non-appearance by a plaintiff.

PARTICULARS UCPR PART 15

UCPR Part 15 details rules relating to particulars.

Particulars can be included in a pleading or set out in a separate document that is filed with the pleading (rule 15.9).

The court can order a party to file:

- (a) Particulars of a claim, defence or other matters;
- (b) A statement of the nature of the case on which a party relies; or
- (c) Particulars relating to general or other damages if the party is claiming damages (rule 15.10).

A party must give particulars of any allegation of fraud, misrepresentation, breach of trust, wilful default, undue influence or any condition of mind (rules 15.3 and 15.4)

ADMISSIONS UCPR PART 17

UCPR Part 17 sets out the procedure to allow parties to make admissions about facts and documents that are not in dispute, and so narrows the questions that have to be decided at the hearing.

CPA s 70 deals with informal proof and admissions.

MOTIONS UCPR PART 18

UCPR Part 18 deals with motions.

All interlocutory or other applications are to be made by motion, unless the UCPR provides otherwise (rule 18.1).

A notice of the motion must generally be filed and served before a person may move the court to make an order. There are some exceptions to this principle, which include where there is consent to the making of the order and the UCPR or the practice of the court provides that prior filing or service of the notice of motion is not necessary (rule 18.2).

Unless the court otherwise orders, a notice of motion must be served at least 3 days before the date fixed for the motion (rule 18.4)

Rule 18.3 deals with the contents of a notice of motion. A person will only be identified as an applicant or a respondent if the person is not already a party to the proceedings. An existing party is always identified as that party.

The notice of motion must state if it is to be dealt with in the absence of the public (rule 18.3(3)). The UCPR and the practice of the court allow some motions to be dealt with in the absence of the public eg. urgent stay applications.

A notice of motion must be served personally if the person on whom it is to be served:

- (a) Is not a party to the proceedings, or
- (b) Is a party to the proceedings, but is not an active party (otherwise than because the party has failed to comply with the requirements of these rules with respect to entering an appearance) (rule 18.5).

The court can:

- (a) Deal with motions in the absence of a party who has been duly served (rule 18.7);
- (b) Fix a further hearing if a motion is not disposed of on the day (rule 18.8); and
- (c) Give directions as to the conduct of proceedings on a notice of motion (rule 18.9).

AMENDMENT UCPR PART 19

Amendments to a filed document must be made by filing a fresh document (rule 19.6).

CPA s 64 deals with the amendment of documents generally.

COMPROMISE UCPR PART 20, DIVISION 4

[APPLIES ONLY TO THE INDUSTRIAL COURT]

Note: The provisions of this division do not apply until after a conciliation has been conducted in accordance with s 109 of the IR Act.

Compromise

A party can make an offer of compromise to any other party in the proceedings (rule 20.36(1)).

A party can accept an offer of compromise at any time during the period for acceptance. The period for acceptance is:

- (a) The expiration of the time limited for the offer, or if no time is limited, the expiration of 28 days after the offer is made; or
 - (b) The final deadline for offers in respect of the claim to which the offer relates
- whichever first occurs.

The final deadline for an offer means (as far as the Industrial Court is concerned):

the time at which the judicial officer begins to give his or her decisions or his or her reasons for decision, whichever is the earlier, on a judgment (except an interlocutory judgment).

If the offer of compromise is made for a limited time, rule 20.26(7) requires:

- (a) The closing date for acceptance to be not less than 28 days after the date on which the offer is made, if the offer is made 2 months or more before the date set down for commencement of the trial; or
- (b) The offer to be left open for a reasonable time if the offer is made less than 2 months before the date set down for commencement of the trial.

DISCOVERY, INSPECTION AND NOTICE TO PRODUCE DOCUMENTS UCPR PART 21

Note: This part does not apply to proceedings before the Commission except to the extent which the Commission orders that the Part is to apply.

Discovery and inspection

Discovery is a procedure that enables parties to obtain access to documents that are relevant to the issues in the litigation.

Rules 21.1 to 21.8 in relation to discovery and inspection are based on the Supreme and District Court rules.

A court may make an order that one party give discovery to another party of:

- (a) Documents within a class or classes specified in the order; or
- (b) One or more samples (selected in such manner as the court may specify) of documents within such a class (rule 21.2).

A party must comply with an order for discovery within 28 days or such other time as the court orders by serving on the party who applied for the order, a list of documents. The list of documents must comply with rule 21.3(2).

The party must keep the documents readily accessible and capable of convenient inspection by the party who applied for the order (rule 21.5).

The party is required to disclose documents of which the party becomes aware after the initial list of documents is provided and before the end of the hearing (rule 21.6).

Notice to produce before hearing

A party can require another party to produce:

- (a) A document or thing referred to in any originating process, pleading, affidavit or witness statement filed or served by the other party; and

- (b) Any other specific document or thing that is clearly identified in the notice and is relevant to a fact in issue (rule 21.10).

Rule 21.11 requires the other party to comply with the notice within a reasonable time by:

- (a) Producing the documents; or
- (b) If a document is not produced, serving a notice in accordance with rule 21.11(1)(b).

INTERROGATORIES

UCPR PART 22

[APPLIES ONLY TO INDUSTRIAL COURT]

Parties require the leave of the court to administer interrogatories (rule 22.1).

A party must file a copy of the proposed interrogatories with the application for an order for interrogatories (rule 22.1).

The court will not order interrogatories unless it is satisfied that such an order is necessary at the time it is made (rule 22.1(4)).

A party may only object to being ordered to answer interrogatories if:

- (a) The interrogatory does not relate to any issue in dispute between that party and the party seeking the order;
- (b) The interrogatory is vexatious or oppressive; or
- (c) The answer to the interrogatory could disclose privileged information (rule 22.2)

If a party fails to sufficiently answer an interrogatory within 28 days or the time specified in the order, the court may make a further order or may order the party to attend to be orally examined (rule 21.4).

If a party fails to sufficiently answer an interrogatory after an order is made under rules 21.1 or 22.4, the court may give or make such judgment or order as it thinks fit including an order that the proceedings be stayed or dismissed or that the defence be struck out (rule 22.5).

INTERIM PRESERVATION

UCPR PART 25

[APPLIES ONLY TO INDUSTRIAL COURT]

UCPR Part 25 deals with interim preservation and freezing orders.

SEPARATE DECISION OF QUESTIONS AND CONSOLIDATION UCPR PART 28

UCPR Part 28 deals with rules on separate decision of questions and the rules on consolidation of proceedings.

TRIALS UCPR PART 29

CPA s 3 defines a trial as “any hearing that is not an interlocutory hearing”.

With modern case management, it is no longer appropriate for a party to decide when a matter is ready for trial and to file a notice to set the proceedings down for trial. The courts control the progress of proceedings and their fixing for trial.

Procedure on Fresh Trial

CPA s 89 provides that at a fresh trial after an appeal or where a fresh trial has been listed under CPA s 88 (following the death, resignation or incapacity of a judicial officer) or where a judicial officer has discharged himself or herself, the court may give directions that all or any part of the evidence given at the previous trial be evidence in the fresh trial or give directions that all or any of the witnesses be recalled to give evidence.

EVIDENCE UCPR PART 31

Note: Section 163 of the IR Act provides that the Commission (as opposed to the Industrial Court) is not bound by the rules of evidence or legal formality and this Part has limited application to Commission proceedings. However, the provisions of Part 31.1 (Manner of giving evidence at trial); 31.2 (Evidence in chief by affidavit); Part 31.3 (Evidence by telephone, video link, etc); Part 31.4 (Direction to file witness statement); Part 31.11 (Production of court documents); Part 31.12 (Proof of court documents); and Part 31.16A (Return of exhibits) may be applied by the Commission.

Rules 31.17 to 31.27 deal with experts that are called by the parties.

Rule 31.18 requires each party to serve each other active party with expert reports and hospital reports:

- (a) In accordance with any order of the court;
- (b) In accordance with any practice note if no order is in force; or

- (c) No later than 28 days before the date of the hearing at which the report is to be used, if no order or practice note is in force.

Except with the leave of the court or the consent of the parties, a report is not admissible if it is not served in accordance with rule 31.18. Leave will not be given unless the court is satisfied that there are exceptional circumstances that warrant the granting of leave or the report merely updates an earlier report that has been served in accordance with the rule.

A party may require the attendance for cross-examination of an expert by serving a notice on the party who served the expert's report (rule 31.18A).

Rules 31.20 to 31.22 carry over the Supreme Court rules in relation to the fees for a medical expert to comply with a subpoena, service of subpoenas on medical experts and subpoenas requiring the production of medical reports.

Rule 31.25 provides for compulsory conferences between experts.

Rule 31.26 deals with the time and manner of giving of expert evidence. The rule is generally based on FCR Order 34A r 3. It enables what is known as "hot tubbing", that is, calling all of the expert witnesses at the same time. The rule is wider than the Federal Court rule in that it provides for the experts to ask each other questions.

Rules 31.28 to 31.35 detail rules in relation to experts appointed by the court.

The expert witness code of conduct is set out in UCPR Schedule 7.

SUBPOENAS UCPR PART 33

The UCPR carried over old SCR Part 37 on subpoenas. The rules were harmonised nationally with other jurisdictions, and were developed under the auspices of the Council of Chief Justices.

Note: The definition of subpoena includes a summons under section 165 of the IR Act.

Subpoenas or to produce any document or thing or both (rule 33.2).

A subpoena is not to be issued:

- (a) If the court has made an order, or there is a rule of the court, having the effect of requiring that the proposed subpoena:
 - (i) not be issued, or

- (ii) not be issued without leave of the court and that leave has not been given, or
- (b) Requiring the production of a document or thing in the custody of the court or another court (rule 32.3).

Rule 33.13 sets out the procedures to be followed if a party seeks production of a document or thing in the custody of a court.

Subpoenas must be in the approved form (rule 33.3).

Subpoenas must be personally served on each other party in the proceedings (rule 33.5). Rules 10.20 to 10.26 detail the requirements for personal service.

A person does not have to comply with a subpoena to attend and give evidence unless conduct money is tendered (rule 33.6).

A person may produce copies of documents to the court, with the consent of the person issuing the subpoena (rule 33.7).

The UCPR also provides in relation to:

- (a) Fees payable for medical experts to comply with a subpoena (rule 31.20);
- (b) The service of subpoenas on medical experts (rule 31.21); and
- (c) Subpoenas requiring production of medical records (rule 31.22).

AFFIDAVITS

UCPR PART 35

Rule 35.3 details who may make an affidavit if a party is required to make an affidavit or to verify any matter by affidavit.

Rule 35.7A details a requirement to include the legal practitioner's or commissioner for affidavit's name on the affidavit.

Rule 35.7B details a requirement for each page of an affidavit to be signed by the deponent and by the person before whom the affidavit is sworn.

Rule 35.8 provides that an affidavit of service must not annex a copy of the document that has been served.

Rule 35.9 provides that an affidavit must not be filed unless it is filed in accordance with:

- (a) The uniform rules;
- (b) Other rules of court applicable to the court in which it is filed; or

- (c) A practice note applicable to the court in which it is filed.

JUDGMENTS AND ORDERS
CPA PART 7, UCPR PART 36

CPA s.90 requires the court to give such judgment or make such orders, as the nature of the case requires.

INTEREST
CPA ss. 100 and 101

Pre judgment interest

The Court may award pre judgment interest under CPA s 100 at the prescribed rate or such rate as the court may determine. The rate of interest is prescribed in UCPR Schedule 5.

Post judgment interest

CPA s101 reflects SCA s 95.

COSTS
CPA ss 98 and 99, UCPR PART 42

**[APPLIES ONLY TO INDUSTRIAL COURT
COSTS IN CIVIL PROCEEDINGS BEFORE COMMISSION
DEALT WITH IN IR RULES – PART 12 – SEE ALSO S 181
IR ACT.]**

When costs order can be made

The court may make costs orders at any stage of proceedings or after the conclusion of the proceedings (CPA s 98(3)).

Costs against a legal practitioner

Costs can be imposed against a legal practitioner if unnecessary costs are incurred due to the failure or delay by the legal practitioner. The court must give the legal practitioner a reasonable opportunity to be heard before making such an order (CPA s 99).

An order for costs may be made against a legal practitioner who has previously represented a party to the proceedings, whether or not the party is still his or her client (CPA s 99).

Entitlement to costs

Costs are in the discretion of the court and it has full power to determine by whom, to whom and to what extent costs are to be paid. The court may order that costs are to be awarded on the ordinary basis or on an indemnity basis (CPA s 98).

The general rule is that costs will follow the event, unless the court makes some other order as to costs (rule 42.1).

Rule 42.3 provides that costs orders cannot be made against non-parties, subject to rule 42.27 (dealing with costs where there is a failure to comply with an order to attend court).

The court has power to make orders in relation to:

- (a) maximum costs (rule 42.4);
- (b) indemnity costs (rule 42.5); and
- (c) disobedience to a rule, judgment, order or direction (rule 42.10).

Unless the court orders otherwise, interlocutory costs and reserved costs are not payable until the conclusion of the proceedings (rule 42.7).

Part 42 details the costs rules in relation to:

- (a) offers of compromise (rules 42.13 to 42.17);
- (b) proceedings that are discontinued or dismissed (rules 42.19 and 42.20); and
- (c) security for costs (rule 42.21).

Smyth orders

At any stage of proceedings, the court can order a legal practitioner serve a notice on their client that specifies:

- (a) (i) an estimate of the largest amount (inclusive of costs) for which judgment is likely to be given if the party is successful; and
(ii) an estimate of the largest amount (by way of costs) that the party may be ordered to pay if the party is unsuccessful;
or
- (b) (i) an estimate of the best outcome that the party is likely to achieve if the party is successful; and
(ii) an estimate of the worst outcome that the party is likely to undergo if the party is unsuccessful.

**APPEALS TO THE COMMISSION OR THE COURT
CHAPTER 4, PART 7 OF IR ACT
IR RULE PART 8**

Provisions relating to Appeal are not dealt with under the CPA or UCPR, the provisions of the IR Act and Rules being retained.

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³ contents of this paper drawn, with adaptation, from "An Introduction to the *Civil Procedure Act* 2005 and Uniform Civil Procedure Rules 2005" Atkinson J & Olischalger, S, 2005 available at http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_publications