



## NSW Legislative Council Hansard

### Civil Procedure Bill

Extract from NSW Legislative Council Hansard and Papers Tuesday 24 May 2005.

#### Second Reading

**The Hon. HENRY TSANG** (Parliamentary Secretary) [5.30 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

#### Leave granted.

The Civil Procedure Bill represents an important advance in how civil litigation is conducted in this State. For the first time, one set of rules will govern the general run of civil proceedings in the Supreme Court, District Court, Local Court and Dust Diseases Tribunal.

The bill will streamline and simplify procedures and remove unnecessary differences between the courts. It will lead to time and costs savings for the courts, the legal profession and the public. The bill will also create a platform upon which courts will, in the future, be able to avail themselves of new technologies such as electronic lodgement of documents by clients and more efficient court management practices.

The idea of having common civil procedures is not new. Over the years there have been various initiatives or attempts to produce common civil procedure rules for the Supreme Court, District Court and Local Court. However, none of those achieved any great success. Work on the present project began in 2003; and there were two main factors driving it.

In 2002 the Public Accounts Committee's report on court waiting times recommended the establishment of a working group to rationalise and simplify civil court rules in New South Wales.

In addition, the Attorney General's Department commenced developing CourtLink, the new computer case management system for the Supreme, District and Local Courts and the Sheriff's Office. It was important to have common and rationalised processes to underpin the new system.

A working party was established in early 2003 and is chaired by Mr Justice Hamilton of the Supreme Court. Its other members are:

- Judge Garling of the District Court;
- Magistrate Cloran of the Local Court;
- Michael McHugh, Greg George and Hamish Stitt, the Bar Association representatives;
- Peter Johnstone, a senior partner of Blake Dawson Waldron, the Law Society representative;
- Tim McGrath, Jenny Atkinson, Stephen Olischlager, Steve Jupp, Peter Ryan, Peter Shiels and Pam Wilde, the representatives from the Attorney General's Department.

The working party has been a highly effective partnership between the courts, the legal profession and the Attorney General's Department. It has met almost weekly whilst developing the bill and rules. On occasions it has met for a full week at a time.

The working party's aim was to consolidate provisions about civil proceedings into a single bill and develop a common set of rules, simplified where possible but without radical changes in substance or form.

The bill and rules largely reflect existing provisions and continue to use phrases that have a settled legal meaning. Where there is change, much of it can be attributed to the fact that drafting styles have changed over the past 30 years. Parties should not be arguing that a rule has changed because a modern drafting style has been adopted if the substance of the rule remains the same. This approach is designed to minimise unnecessary litigation about the meaning of a clause or rule.

Key stakeholders have been consulted during preparation of the bill and rules. An exposure draft bill was also released earlier this year. The working party has considered these comments and made necessary changes to the bill and rules.

I turn now to the bill itself. Part 1 deals with preliminary matters.

The bill and rules deal with civil proceedings. These are defined in clause 3 to mean any proceedings other

than criminal proceedings. Criminal proceedings are defined to mean proceedings against a person for an offence, whether summary or indictable, and include committal proceedings, proceedings relating to bail, proceedings relating to sentence, and proceedings on an appeal against conviction or sentence. This definition is based on the definition of criminal proceedings included in the Criminal Procedure Further Amendment (Evidence) Bill 2005.

The bill and rules will apply to the general run of civil proceedings in the Supreme, District and Local Courts and the Dust Diseases Tribunal. However, clause 4 allows the bill and rules to be applied to other courts and tribunals exercising civil jurisdiction in the future.

There are some civil procedure rules that have not been moved from the court rules to the uniform rules. Time constraints prevented the working party from moving specialist civil rules, such as the probate rules and rules relating to appeals to the Court of Appeal, into the uniform rules. Work will commence on moving many of the specialist rules into the uniform rules after the commencement of the initial set of rules.

Some specialist rules, such as the Corporations Rules and the Admiralty Rules, will not be moved into the uniform rules because these rules are harmonised nationally.

The jurisdiction of courts is generally unaffected by the bill and rules. Clause 5 provides that the Supreme Court's jurisdiction is not limited by the bill and rules. This provision is important, as the Supreme Court has an inherent jurisdiction to deal with matters beyond those dealt with in the bill and rules, and this jurisdiction is not to be cut back.

Clause 5 also provides that the uniform rules do not extend the jurisdiction of other courts, except to the extent to which the bill expressly so provides. This means that if a court does not have jurisdiction to deal with a matter, uniform rules dealing with that subject matter will simply not apply in that court. For example, a Local Court cannot make a charging order, and therefore the rules relating to charging orders will not apply in a Local Court.

There have been some changes to the jurisdiction of the District Court and Local Courts. In particular, changes have been made to the consent jurisdiction of these courts.

Section 51 of the District Court Act 1973 is amended to create a deemed consent jurisdiction. Parties are deemed to have consented to the District Court having jurisdiction to deal with proceedings where the amount of the claim is up to 50 per cent above the court's jurisdictional limit, if no objection to the extended jurisdiction is raised by three months prior to the trial.

A new section 66 will be included in the Local Courts Act 1982 to give a Local Court a general consent jurisdiction and a deemed consent jurisdiction up to 20 per cent above its jurisdictional limit.

The changes to the consent jurisdiction will allow parties to save costs and avoid the delays caused by having to transfer proceedings to a higher court, when it becomes apparent that the original court does not have the jurisdiction to deal with the proceedings.

The bill will repeal a number of Acts dealing with civil procedure, including the *Arbitration (Civil Actions) Act 1983*, the *Damages (Infants and Persons of Unsound Mind) Act 1929*, the *Judgment Creditors Remedies Act 1901*, and the *Local Courts (Civil Claims) Act 1980*. Provisions from these Acts have generally been moved into the bill and rules and the *Local Courts Act 1982*.

Clause 6 and schedules 4, 5 and 6 make consequential amendments to a number of Acts and deal with savings and transitional matters. Many of the consequential amendments relate to replacing references to the *Supreme Court Act 1970* or the *Local Court (Civil Claims) Act 1970* with references to the *Civil Procedure Act 2005*.

Part 2 of the bill deals with administrative matters.

Clause 8 establishes a Uniform Rules Committee. This committee will be chaired by the Chief Justice and is largely based on the model used for the Queensland Uniform Rules Committee. The Supreme Court, the Court of Appeal, the District Court, the Local Courts, the Bar Association and the Law Society will be represented on the committee. The committee will be able to make new rules and amend the rules that are contained in schedule 7. Its constitution and procedure are set out in schedule 2 and its rule-making powers are set out in schedule 3.

Whilst the aim of the project has been to create a uniform regime, it has sometimes been necessary to preserve differences between courts. This approach recognises the fact that not all proceedings are the same. Simple debt claims in a Local Court should not be subject to the same requirements as complex proceedings in the Supreme Court.

Some provisions and rules apply differently in different courts. For example, rule 6.2 states that an originating process is valid for service for six months in the Supreme and Local Courts and for one month in the District Court if the defendant is to be served within New South Wales. This rule reflects the different case management requirements of each court.

Clause 11 provides another mechanism for allowing necessary differences to be preserved between courts. It provides that the uniform rules will prevail over a court's "local" rules to the extent of any inconsistency, unless the uniform rules expressly provide that a local rule is to prevail.

The bill and rules generally refer to "the court" exercising a power. They do not generally state who may exercise power on behalf of the court. In practice, registrars will exercise a number of the powers of the court under the bill and rules. Clause 13 provides that the senior judicial officer of a court may, by instrument in writing, direct that any function of the court may be exercised by such registrars or other officers of the court, in such circumstances as are specified in the instrument. A person who constitutes the court under the Supreme Court Act 1970, the District Court Act 1973 or the Local Courts Act 1982 will still be able to exercise a function of the court, even if a registrar or other officer is also permitted to exercise that function.

The senior judicial officer of a court will be able to issue practice notes to deal with specific aspects of civil proceedings in a court. Clause 15 provides that the practice notes will be subject to the rules and they will be disallowable under part 6 of the Interpretation Act. Each court is currently reviewing its practice notes and expects to reissue necessary practice notes when the bill and rules commence operation.

Clause 17 allows the Uniform Rules Committee to approve forms for use in civil proceedings. The Attorney General's Department and representatives from the legal profession are developing simple, new common forms for use with the bill and rules. The new forms address a number of concerns that have been raised about the existing forms and will meet future e-filing requirements. The forms will be available on court web sites, at court registries and through legal publishers. The fact that one set of forms will be used in all courts, instead of three different sets of forms, is an important cost-saving feature of the scheme.

Court fees will continue to be set by regulation under clause 18. A new Civil Procedure Regulation is being developed to set fees in the Supreme, District and Local Courts. It is expected to commence operation at the same time as the main parts of the bill and rules.

The Civil Procedure Regulation will replace most aspects of the Supreme Court Regulation 2000, the District Court Regulation 2000, the Local Courts (Civil Claims) Regulation 2000, and the Local Courts (Transitional Fees) Regulation 2004.

The existing regulations also deal with matters related to criminal proceedings. It is intended that the Criminal Procedure Regulation 2000 will regulate these matters. Schedule 5 amends the Criminal Procedure Act 1986 to extend the regulation-making power to deal with these matters.

Part 3 of the bill deals with commencing and carrying on proceedings generally. It deals with matters including a defendant's right to cross-claim and set-off.

Clause 21 reintroduces the law of set-off, as recommended by the Law Reform Commission in report No. 94. Set-off is a mechanism that allows one party to apply a debt owed to him or her by another party to discharge all or part of a debt that he or she owes to the other party. This mechanism saves parties from having to bring separate proceedings with respect to each of the debts.

Parts 4 and 5 of the bill carry over the mediation and arbitration provisions currently contained in the Supreme Court Act, the District Court Act, the Local Courts (Civil Claims) Act and the Arbitration (Civil Actions) Act 1983.

Part 6 of the bill introduces a number of new provisions relating to the conduct of court proceedings. The provisions recognise the importance of case management as a tool for increasing the efficiency of the court system and for reducing the cost of litigation. They seek to strike a balance between protecting the interests of justice in an individual case and protecting the interests of justice for other litigants and the courts.

Clause 56 sets out the overriding purpose of the bill and rules which, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. This clause is based on part 1 rule 3 of the Supreme Court Rules.

Clause 57 deals with case management. For the purpose of furthering the overriding purpose in clause 56, proceedings are to be managed having regard to the objects of:

- The just determination of proceedings; the efficient disposal of the business of the court;
- The efficient use of available judicial and administrative resources; and

- The timely disposal of those proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

Case management is also dealt with in part 2 of the rules.

Clause 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. The clause sets out the factors that the court must and may consider when deciding what are the dictates of justice in a particular case.

It is important to note that the dictates of justice will not be limited to the dictates of justice only as between the parties, which has been argued to be the effect of the majority judgment in one of the leading cases on case management—*State of Queensland v J L Holdings Pty Ltd* (1997) 189 Commonwealth Law Reports page 146.

Clause 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.

Clause 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.

Clause 61 sets out the court's power to give directions in relation to practice and procedure. Failure to comply with directions to take specified steps within a specified time is an important reason why proceedings can be delayed. Delays in one set of proceedings have a flow-on effect on other proceedings before the court. Clause 61 allows the court to impose sanctions if parties fail to comply with directions. Clause 62 sets out the court's power to give directions in relation to the conduct of a hearing.

The remaining provisions in part 6 of the bill deal with other powers of the court, proceedings involving persons under a legal incapacity and interim payments. They introduce some new concepts and terminology, and move some rules into the bill. Examples include:

- Clauses 64 and 65, which move rules into the bill in relation to amendment of documents and amendment of originating process after the expiry of a limitation period. This has been done to remove any doubt about lower courts' ability to make rules dealing with amendments to originating process outside a limitation period, as argued in *Air Link Pty Ltd v Paterson (No 2)* [2003] New South Wales Court of Appeal page 251.
- Division 4, which replaces the Damages (Infants and Persons of Unsound Mind) Act 1929, introduces the term "person under a legal incapacity" to replace a number of terms such as "disabled person" or "incommunicate person".
- Clause 86 deals with the court's power to make orders. In particular, it provides that the court can make all or any of its orders on terms, and that it can make any order on its own motion or on the application of a party or person entitled to make such an application. The inclusion of this provision in the bill means that it is no longer necessary to repeatedly refer to such matters in the rules.
- Clause 87, which is a new provision, extends the privilege against self-incrimination currently dealt with in section 128 of the Evidence Act 1995 to interlocutory matters.

Part 7 of the bill deals with judgments and orders. It incorporates provisions from the Supreme Court Act, the District Court Act and the Local Courts (Civil Claims) Act and the Supreme Court Rules.

Clauses 98 and 99 carry over provisions dealing with the court's power as to costs and its power to make costs orders against legal practitioners. Clauses 100 and 101 carry over provisions dealing with the payment of interest up to and after judgment.

Part 8 of the bill deals with the enforcement of judgments and orders. It incorporates provisions from the Attachment of Wages Limitation Act 1957, the Judgment Creditors Remedies Act 1901, and the respective court Acts and rules.

The opportunity has been taken to address issues of concern about the enforcement process including:

- Providing, in clause 108, for the issue of an examination notice, except in the Supreme Court, as the first step in the process of finding out about a judgment debtor's ability to pay a judgment debt. This procedure will allow a judgment debtor to provide information to a judgment creditor about his or her financial circumstances without having to attend court to be examined. The judgment creditor will still be able to apply for an examination order

if the examination notice does not provide the necessary information.

- Streamlining the process for registering a writ at land and property information in clause 113 and in the amendments to the Real Property Act 1900 in schedule 5 to the bill.
- Making it clear in clause 122 that garnishee orders cannot reduce the net weekly income of a judgment debtor, that is, after tax and after deducting other sums required to be deducted under an Act, to less than 80 per cent of the standard workers compensation weekly benefit. Garnishees have sometimes misunderstood the existing formula, and have calculated the amount to be paid on a garnishee order with reference to a judgment debtor's gross salary. The effect of this approach can be that the judgment debtor is left with no income, once the tax on the gross salary is deducted from the standard workers compensation weekly benefit.
- Allowing a garnishee order against wages and salary to operate until the judgment debt is paid, instead of operating for four weeks, which is to be found in clause 119. The existing four-week limitation period forced judgment creditors to come back to court and apply for a new garnishee order just before the end of the four-week period. This provision will not prevent judgment debtors from applying to pay the judgment debt by instalments which, in most cases, will have the effect of allowing the judgment debtor to retain a larger proportion of his or her salary.

Part 9 of the bill deals with the transfer of proceedings between courts.

It carries over provisions from the Supreme Court Act, the District Court Act and the Local Courts (Civil Claims) Act dealing with the transfer of proceedings between higher and lower courts and between Local Courts.

Clause 149 is a new provision that makes it clear that a lower court has and may exercise all of the jurisdiction of the higher court in relation to any proceedings that are transferred to that court by the higher court. This jurisdiction includes jurisdiction to determine any question arising in the transferred proceedings.

As I mentioned earlier, the rules are contained in schedule 7 to the bill. Once the Act commences the rules will operate as a stand-alone instrument, and schedule 7 will be omitted from the Act.

The rules adopt a decimal numbering system similar to that used in the new High Court Rules. It is intended that a uniform rule will be referred to as rule 1.3 instead of part 1, rule 3, or part 1, rule 1.3.

The rules carry over a large number of the existing rules and generally follow the existing order of rules. However the opportunity has been taken to group like rules together where appropriate. For example, the rules in relation to parties to proceedings are grouped together in part 7 instead of being scattered throughout the rules.

Some new matters are addressed in the rules. These include:

- Part 5, which replaces the existing preliminary discovery rules with preliminary discovery and inspection rules that are based on the Federal Court Rules Order 15A. The new rules allow for more extensive preliminary discovery than is currently available under the Supreme and District Court rules. They apply in the Supreme and District Courts as well as the Local Courts. With the increase in its jurisdiction, cases are arising where it may be useful for a Local Court to make such orders.
- Rule 31.26, otherwise known as the hot tubbing rule, allows multiple experts to be sworn in one after the other. The rule is similar to the practice in the Land and Environment Court, which is said to reduce the time taken in court by examination in chief and cross-examination by half or more.

The bill will commence on a day or days to be proclaimed. At this stage it is expected that the provisions relating to the establishment of the Uniform Rules Committee will commence in June this year. This will enable the Uniform Rules Committee to approve the new civil forms and to deal with any amendments that need to be made to the rules prior to the commencement of the main provisions in the bill and rules. The main provisions are then expected to commence in July, subject to completion of related tasks, including:

- Preparation of the Civil Procedure Regulation,
- Preparation of amendments to existing court rules to delete rules that are moved into the uniform rules,
- Revision of the practice notes, and
- Staff training.

When they commence, the bill and rules will apply to all civil proceedings. This will save parties having to deal with two sets of rules for existing and new proceedings.

Important safeguards have been included in the savings and transitional provisions in schedule 6. Clause 5 allows the court to dispense with such requirements of the rules as are appropriate in the circumstances in relation to existing proceedings.

As I mentioned earlier, a regulation will be made under this Act setting the fees to be charged in relation to civil proceedings. A standard provision has been included in schedule 6 of the bill allowing regulations to be made dealing with savings and transitional matters.

With a package as large as this, I cannot hope to address all of the matters covered by the bill and rules. If honourable members want more information they can log onto the Attorney General's Department at [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au). The web site contains a copy of the detailed information paper on the bill and rules, which I tabled at the beginning of this speech. It also contains copies of the new forms and comparative tables showing the links between the uniform and the existing rules.

The web site and a dedicated email address, [uniformcivilprocedures@agd.nsw.gov.au](mailto:uniformcivilprocedures@agd.nsw.gov.au), have been set up to facilitate the flow of information between the public, the legal profession, staff and the working party.

The law publishers are well advanced in preparing the new loose-leaf services on the bill and rules. This will mean that practitioners will have resources available as they start to operate under the new regime.

In closing, I acknowledge the support and efforts of a number of people without whom this project would not have been possible.

I thank the Chief Justice, the Chief Judge, the Chief Magistrate, the New South Wales Bar Association and the Law Society of New South Wales for their support and strong commitment to the project.

I acknowledge the enormous effort put into this project by the working party, in particular by Mr Justice Hamilton. They have put many hours into the project to bring it to fruition, much of which has been carried out in their own time. The legal profession representatives have given their time free of charge.

I also wish to acknowledge the support of the Parliamentary Counsel's office, in particular the work of the drafting officer, David Mills. This complex and time-consuming project has been made easier by the support provided by that office.

The changes being introduced by this bill will bring savings in time and costs in how civil proceedings are conducted in this State. It builds on the work carried out by the courts to manage proceedings and to reduce delays.

I commend the bill to the House.