DISTRICT COURT OF
WESTERN AUSTRALIA

CIVIL TRIAL PREPARATION PROJECT
FINDINGS PAPER

JUNE 2006

FOREWORD

I am delighted to release the findings of the District Court's Civil Trial Preparation project.

In the Discussion Paper for this project in October 2005, I commented that the optimal results from the project for both the Court and those affected by the work of the Court were likely to be achieved by gathering and reviewing a wide range of ideas from diverse perspectives. We have been pleased, even pleasantly surprised, by the level of interest and responses to the project. The Discussion Paper has been downloaded from the Court's website well over 2,500 times since it was released, an indication of the interest in the project.

The major theme reflected in the changes proposed is that the basic procedures in the Court should be simple, with the ability to add layers of complexity on a case by case basis. The changes proposed should have a positive impact on the quality of the materials coming before trial Judges in civil cases, whilst at the same time reducing the overall cost burden particularly in cases that settle prior to trial.

We are conscious that "District Courts exist for the purpose of providing a simpler and less expensive method of dealing with cases that do not warrant the procedural refinements often associated with litigation in a Supreme Court" to quote High Court Chief Justice Gleeson in his State of the Judicature address last year. To that end, we have made some conscious departures from Supreme Court practice. We have also sought to reduce costs to litigants where at all possible.

Having had a close look at the issues raised, the Court has decided not to make some of the more radical changes seen in some Eastern States jurisdictions at this time. These include dispensing with a general right of discovery in personal injuries litigation in favour of a detailed schedule of damages and moves to limit the number of expert witnesses heard on a particular issue, perhaps to the point of a single court expert. We propose to allow the current suite of initiatives some time to take effect, before returning to look at some of these ideas, perhaps in conjunction with the Supreme Court.

The Court has already briefed Parliamentary Counsel to draft the rule changes necessary to put the initiatives set out in this report into practice. We anticipate that the proposed changes will be in operation well before the end of the year.

I would like to take this opportunity to thank those in the profession and other bodies affected by the work of the Court for the submissions made in the course of this project. The outcomes in this report reflect the benefit of this input.

Antoinette Kennedy
Chief Judge
9 June 2006

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1. OVERVIEW

This report completes the second stage of the District Court's Civil Trial Preparation Project. The first stage was the issuing in October 2005 of a Discussion Paper, both publicly and to Judges and Court staff, raising a series of issues for consideration. The second stage involved seeking feedback on the issues raised in the Discussion Paper. More details about the methodology used are set out in Part 2. The third and final stage is to consider what, if any, changes are required to the way in which civil cases are prepared for trial in response to the issues raised and feedback received.

The purpose of this report is to summarise the feedback received, and to provide interested parties with an indication of the changes the Court proposes to make in response to the work done to date in the project.

Over the course of the review, three general themes emerged which have guided the outcomes of the project to date. They are:

First, do no harm

A significant theme in the feedback is that the civil jurisdiction in the Court is working very well, and that the Court should be careful not to undermine the existing processes in any initiatives it is considering: first, do no harm to what is good about the current system.

Keep it simple

The civil jurisdiction of the Court is a very cost sensitive jurisdiction. Complexity is costly; simplicity is cheap. There was strong support for the Court procedures to have a very simple and straightforward basic procedure, with the ability to add layers of more complex requirements where needed. In most cases, the basics will suffice.

Flexibility is the key

The case management rules in the Court allow it to make a wide range of orders to tailor the case management regime and trial preparation orders to the exact needs of the case. Any initiatives should not undermine the ability of the Court to be flexible. This theme reinforces the simplicity theme. If the underlying rule framework is too prescriptive, it limits the ability of the Court to be flexible.

2. METHODOLOGY

2.1 Stage 2 – Feedback

In setting up the project, the Court took the view that in order to position itself to possibly make major changes to the way in which cases are prepared for trial, it should consult widely. In order for the consultation to be both efficient and meaningful, it was important that the issues be distilled in a way that could draw out focussed responses. That was the purpose of the Civil Trial Preparation Project Discussion Paper: to provide a catalyst for focussed responses.

The Discussion Paper was provided to major stakeholder groups, including the Law Society of Western Australia ("The Law Society"), the Bar Association of Western Australia ("Bar Association") and the Insurance Commission of Western Australia ("ICWA"). Each of these organisations provided a submission. It was also posted on the Court's website, and was downloaded 2,632 times to 29 May 2006. The Court also received informal feedback from practitioners.

The project team also interviewed most of the Judges in the Court, as well as other Court staff.

This Findings Paper represents the position of the Court on the issues raised. However, any proposed rule changes are subject to formal approval by a majority of the Judges of the Court.

2.2 Stage 3

Now all responses have been gathered and analysed, stage 3 involves the Court considering what, if any, changes it should make to its existing practice and procedure. These changes could include:

- Rule changes;
- Practice changes, to be reflected in new Practice Directions or Circulars to Practitioners;
- Administrative changes
- Technology initiatives.

It may well be that the Court will engage in limited additional consultation in relation to implementation and drafting issues.

3. ENTRY FOR TRIAL/ PTCs

Issue 3.1 Timing of the compulsory Court sponsored mediation

Current position

The current position is that the *District Court Rules 2005* ("2005 DCR") provide that a pre-trial conference be held shortly after the action is entered for trial. On the usual case management timetable, the first pre-trial conference should be held within 160 days after the first defence is filed, and within 40 days of the action being entered for trial.

The default position of a holding a pre-trial conference after the action is entered for trial is balanced by the ability of the Court to order mediation or a pre-trial conference at any stage in the action using its case management powers. The net result is a default setting in which a pre-trial conference is held once the case is entered for trial (ie when it is more or less ready for trial), with flexibility to hold a pre-trial conference earlier if that makes sense in the circumstances of the case.

Feedback

Two options were suggested in the discussion paper: maintaining the current position and holding the pre-trial conference at a set time after the filing of the first defence

The feedback received was in favour of retaining the current position. There was some feedback from practitioners that the Court could do more to facilitate the parties participating in a pre-trial conference by:

(a) insisting that proper schedules of damages are filed by both parties prior to the conference, as to which, see issue 3.2 below;

(b) imposing appropriate costs orders if the schedules are not filed, or if proper and meaningful schedules are not filed; and

(c) providing for the certificate of readiness to detail that the parties solicitors have conferred and agree to proceed to a pre-trial conference or a mediation, so that the appropriate appointment can be obtained. If parties disagree, the default position should be to proceed to a pre-trial conference where a registrar can deal with the matter.

Outcome

The Court will maintain its current position as regards pre-trial conferences, namely that there is a default setting in which a pre-trial conference is held once the case is entered for trial, with flexibility to hold a pre-trial conference earlier, or after the listing conference, if that makes sense in the circumstances of the case.

Issue 3.2 Schedules of damages

Current position

A party wishing to enter a matter for trial must file and serve a schedule of damages with the entry for trial form pursuant to 2005 DCR rule 37. Rule 37 sets out the various heads of damages, but is not prescriptive in further detail.

One important issue requiring clarification is the status of the schedules of damages. Are they particulars? Are they submissions? Are they "without prejudice" settlement tools? These issues were recently considered by the Court of Appeal in *Brown v Churchill* [2006] WASCA 17, at par 37. Pullin JA, with whom Steytler P and McLure JA agreed, held that the schedule of damages are in the nature of particulars, and they are not the subject of the privilege that extends to pre-trial conferences.

The schedule of damages is not part of the book of papers for the Judge (see 2005 DCR rule 37(3)(d)). However, it is usual for an updated schedule of damages to be provided to the trial Judge immediately prior to the trial.

Feedback

Five options were put forward in the Discussion Paper:

1. Maintain the current position..
2. Slightly adjust the current position.
3. Tailor the provision of particulars to the stage of the proceeding, requiring the parties to provide a "without prejudice" schedule of damages for settlement purposes at the time the action is entered for trial.
4. A "Scott Schedule" approach in which the defendant responds to the plaintiff's schedule.
5. Dispense with the requirement, leaving the issue of identification of damages claimed to the existing particulars process.

Feedback generally was that the current position should be maintained, though the requirements for the schedule should be tightened to increase the utility of the information provided.

Outcome

The schedule of damages should perform two important roles: to let the opposing parties know what is claimed for the purposes of the compulsory pre-trial conference, and to inform the Judge at trial of the amount claimed under which heads of damages. There is no suggestion that this should be dispensed with. However, at least:

- The schedule should be referred to as "particulars of damage", consistent with the decision in *Brown v Churchill*; and

- The schedule should form part of the Papers for the Judge.

As part of the review, the Court looked at the Rule 15.12 of the *NSW Uniform Civil Procedure Rules* rule 15.12 (Appendix A) and *QLD Uniform Civil Procedure Rules 1999* rule 547 (Appendix B). Both rules require the plaintiff to file and serve a statement of damages shortly after pleadings have closed. Both rules require the plaintiff to identify the documents supporting the particulars; in the NSW rule copies are required, in Qld copies can be requested. The statement of damages takes the place of discovery (see *NSW Uniform Civil Procedure Rules* rule 21.8) (Appendix C).

There are some attributes of the NSW and Qld requirements that should be picked up:

1. The particulars of damages should be filed earlier, perhaps consistent with the timing regime used in the *2005 DCR* (see rules 46 and 47), ie a set number of days after the first defence is filed. The timing for the filing of the particulars could be aligned to the discovery obligation in *2005 DCR* rule 46 (currently 60 days after first defence). This will ensure that defendants receive the plaintiff's particulars well before the action is entered for trial so that any requests for additional particulars, discovery or interrogatories can be done at a much earlier stage than if the schedule is provided when the action is entered for trial.

2. There should be a slightly higher level of prescription, the benchmark being what may be described as "leading practice" among personal injury lawyers. It may be that the optimal position requires a combination of more prescription in the particulars of damages and specific discovery obligations

It may be that as part of the process of reviewing the proposed new particulars of damages document, as a parallel change the Court prescribes that certain documents be discovered in certain types of cases. For example, the rules could prescribe that in a personal injuries case where damages are claimed for economic loss, the party claiming damages has to discover all tax returns for the period 3 years preceding the accident to the present date.

There should also be a requirement to file and serve an updated set of particulars of damages prior to the trial if there are significant changes. The timing here should dovetail in with other requirements for filing documents shortly prior to trial.

In summary then:

Proposed changes:

1. **The schedule of damages should be referred to as "particulars of damages".**

2. **The particulars of damages should form part of the Papers for the Judge.**

3. **The timing of filing and service of the particulars of damages should be prescribed, with the aim of ensuring that by the time of the first scheduled pre-trial conference the defendants have had an adequate opportunity to test and respond to the schedule.**

4. **There should be a slightly higher level of prescription, the benchmark being what may be described as "leading practice" among personal injury**

lawyers. This may need to be complemented by specific discovery obligations.

5. The plaintiff should have the opportunity to amend the particulars of damages prior to trial.

Issue 3.3 Chronologies

Current position

2005 DCR rule 42(1)(a) empowers the Registrar presiding at a pre-trial conference, when ordering the parties to attend a listing conference, to also order the parties to file and serve a chronology of relevant events. The outcome designed to be achieved by the rule is to provide a concise summary of the key dates in the action.

Feedback

Four options were set out in the Discussion Paper:
1. Maintain the current position
2. Slightly adjust the current position
3. Change the timing
4. Dispense with the requirement

Feedback from within the Court was that a well set out chronology is a very useful aid to understanding a case. However, in practice, the quality of chronologies is variable.

Feedback from the practitioners is that the existing rule should be changed so that there is no bias in favour of ordering a chronology. In many cases, the chronology does not seen to add any value.

Outcome

For a start, the DCR should be amended so that if there is a requirement to provide a chronology, one be filed shortly before the trial.

Second, the practice of the Court should make it clear that the chronology is part of the materials for the Judge.

Third, there should be no requirement to file a chronology. Rather, the Court should leave it to practitioners to determine when a chronology would be useful (with the discretion to order that one be filed in appropriate cases). Having said that, there is merit in providing an example of a chronology that reflects leading practice.

In summary:

Proposed changes:

1. **There should be an invitation to any party, but not a requirement, to file a chronology in the bundle of papers filed shortly before trial.**

2. **If filed, the chronology should form part of the Papers for the Judge.**

3. **The Court should develop some guidance on the form of a chronology.**

Issue 3.4 Summaries of issues

Current position

2005 DCR rule 42(1) empowers the Registrar presiding at a pre-trial conference, when ordering the parties to attend a listing conference, to also order the parties to file and serve "a concise summary of the issues of fact and law that the [party] contends will need to be determined at trial". The rules go on to provide that in case involving a building or engineering dispute, the statement must be in the form of a Scott Schedule. Scott Schedules are dealt with in Issue 3.5 below. The outcome designed to be achieved by the rule is to identify the key issues in dispute in the action.

Feedback

Five options were set out in the Discussion Paper:

1. Maintain the current position
2. Slightly adjust the current position
3. Change the timing
4. Focus on facts not in issue
5. Dispense with the requirement

The feedback from within the Court was mixed. There was some validation of the comment in the Discussion Paper that summaries or statements are only useful when the pleadings were deficient, and that no case should go to trial with deficient pleadings. There was however, strong support for a requirement to file opening submissions prior to the commencement of the trial. This dealt with as Issue 5.4 below.

Feedback from practitioners was also to the effect that a summary of issues is only useful where pleadings are inadequate, and the pleadings should be attended to in that case. However, some form of summary of issues can be useful in complex cases.

Outcome

The Court proposes to dispense with the requirement to file statements or summaries of issues at or shortly after the listing conference.

Issue 3.5 Scott Schedules

Current position

2005 DCR rule 42(1) empowers the Registrar presiding at a pre-trial conference, when ordering the parties to attend a listing conference, to also order the parties to file and serve "a concise summary of the issues of fact and law that the [party] contends will need to be determined at trial". The rules go on to provide that in case involving a building or engineering dispute, the statement must be in the form of a Scott Schedule.

Feedback

Three options were set out in the Discussion paper:

1. Maintain the current position
2. Slightly adjust the current position
3. Require a Scott Schedule in all cases of certain types

Feedback from within the Court was to the effect that more should be done to ensure that well prepared Scott Schedules are filed in cases in which there were numerous items requiring determination. To facilitate that, the Court should issue guidance on what leading practice is in the preparation of Scott Schedules.

Feedback from practitioners was to the effect that Scott Schedules are an extremely useful aid in cases involving disputes as to work performed and charges rendered. They are also of use in cases where there are catastrophic personal injuries as those cases tend to have many more heads of damages than less complex personal injury cases,

Outcome

One issue that arises is that of timing. The rules, as they currently stand, raise the question of a Scott Schedule at the point in time when the action is to be listed for trial. This is too late for two reasons. First, a well drafted Scott Schedule is very useful as an aid to settlement discussions. Areas of dispute become clearer, and the quantified amounts define the parameters for settlement offers. The Schedule can be used as the basis for a conference between experts.

Second, the preparation of Scott Schedules is closely connected with the expert evidence in the case. In most cases, the Scott Schedule cannot be completed until the expert evidence is complete. In drafting the Scott Schedule invariably holes appear in the expert evidence. The expert evidence should be completed well before the action is entered for trial.

The Court considers that the issue of Scott Schedules be brought back to around the point in time when discovery is complete and expert evidence has been exchanged. One option might be to include orders in relation to Scott Schedules when orders are being sought in relation to expert evidence.

Another option is to identify categories of cases in which a Scott Schedule is typically useful and impose a requirement on the parties to such an action to apply for a

directions hearing to discuss whether a Scott Schedule is required. Examples of types of cases in which Scott Schedules are typically useful are:

- Building disputes involving defective workmanship
- Breach of covenants to make good in a lease

The Court suggests there be a requirement to seek directions. In this way the Court has the opportunity to consider the issue, without there being a strict rule that a Scott Schedule be required in every case of the identified kind.

Although an order to file a Scott Schedule can be made as part of the general case management powers of the Court, the merit of a specific application that it provides a clearer pathway to seek the orders. There should be a specific rule power dealing with Scott Schedules in the list of case management powers in 2005 DCR rule 24. This power should be complemented with a Circular to Practitioners. The Circular to Practitioners can set out draft orders. It can also invite parties to seek programming orders in relation to a Scott Schedule

The Scott Schedule should form part of the Papers for the Judge.

The resulting rules and practice directions should obviate the need for practitioners to refer back to the 1974 Supreme Court Practice Direction.

Proposed changes:

1. **The requirement to file and serve a Scott Schedule in DCR rule 42(1) should be dispensed with.**

2. **There should be specific case management power dealing with Scott Schedules, complemented by a Circular to Practitioners.**

3. **The Scott Schedule should form part of the papers for the Judge.**

4. EXPERT EVIDENCE

Issue 4.1 Content of experts' reports

Current position

The DCR does not prescribe any particular content rules for expert reports either in its rules or by usual orders.

Specifically, it is not the usual practice of the Court to require an expert to comply with the sort of orders set out in Supreme Court Common Form 80, paragraph 4 (Appendix D).

Feedback

Four options were set out in the Discussion paper:

1. Maintain the current position
2. Slight variation to the current position
3. Adopt the Supreme Court practice
4. Issue some form of Guidelines

The feedback received was mixed. The consensus view was that the Court should not impose any additional requirements on non-medical witnesses. There was also broad agreement that there was room for some improvement in the way in which expert evidence is presented, though cost is a significant consideration. To the extent there was a preferred option for change, it was in the nature of developing guidelines that non-medical experts needed to comply with.

Common Form 80 was not seen as an appropriate option on the basis that it imposes too much of a burden on the parties. There was also a comment that it would be helpful to be able to call for the qualifications and experience of an expert.

Outcomes

There does seem to be a valid basis for different treatment for medical and non-medical experts. This difference is already recognised in RSC Order 36A. The Court does not propose any change to its practice in relation to the content of reports by medical experts.

There is, however, merit in requiring non-medical experts to acknowledge in their report or substance of evidence that they have read and complied with a set of guidelines issued by the Court. This model seems preferable to a model in which the expert is required to include certain specific statements in his or her report, whether by operation of the Court rules or a common form of order (see Supreme Court Common Form 80). The Federal Court's guidelines were seen as a useful model see Appendix E.

Consideration was given to whether there should be a rule requiring the expert of the parties to disclose the brief given to the expert. The legal position on this point is conveniently summarized in the judgment of Lindgren J in *Australian Securities and*

Investments Commission v Southcorp Ltd (2003) 46 ACSR 438, at 441 – 442. The view was taken that the existing common law position is sufficient to enable the parties' respective interests to be balanced and there is no need for intervention through Court rules. It may well be that in any guidelines issued by the Court, experts can be encouraged to make their reports stand alone for example by including the questions they have been asked and a list of facts assumed.

There is also merit in a party being able to call for a statement of qualification and experience of an expert witness if that is required. Many experts used in the Court are well known to lawyers, so no issue arises as to their expertise. Accordingly, it is not necessary to prescribe a rule that a full statement of qualifications and experience be provided in every case.

In summary:

Proposed changes:

1. **The rules should provide that non-medical experts should have to state in their report that they have read and complied with a set of guidelines issued by the Court.**

2. **The rules should provide that a party can call for a statement of the qualification and experience of a witness after exchange of the their report.**

Issue 4.2 Indexes of experts' reports

Current position

2005 DCR rule 42(1) empowers the Registrar presiding at a pre-trial conference, when ordering the parties to attend a listing conference, to also order the parties to file and serve index of the reports of any expert witnesses that the parties intend to adduce at trial. The practice of Registrars is to make this order in most cases.

The outcome designed to be achieved by the rule is to allow the parties to make decisions as to which experts they will need to call and/or respond to at the trial of the action.

Feedback

Three options were set out in the Discussion paper:

1. Maintain the current position
2. Slight variation to the current position
3. Require the parties to provide more detailed information

The feedback received supported the view that the Court should obtain some additional information from the parties about the experts they are going to call. The additional information would allow the Court to consider orders limiting the number of experts to be called on a particular point, and to better manage the length of the trial.

There was mixed feedback from practitioners on the question of whether the parties should be bound to call the experts listed, or obtain the leave of the Court before declining to call the witness.

Outcome

The current practice of the Court is to make orders for the exchange of indexes of expert reports in all cases in which expert evidence is to be relied on pursuant to 2005 DCR rule 42(1) and its predecessor. The index is a valuable document in ensuring that both parties are aware of what expert evidence will be called. This is particularly important in personal injuries cases where experts reports may have been disclosed on different occasions as they came to hand over a period of some time. There does not appear to be any reason to dispense with this requirement.

One amendment considered was that the index set out the estimated time that the expert will take in examination and cross-examination. However, practically, this would be difficult to achieve.

The index should set out any particular requirements relating to the mode of evidence (for example, whether video link is required). This should be far easier to predict.

The NSW *Civil Procedure Rules* rule 31.18ff (Appendix F) incorporate hospital reports into the expert evidence disclosure regime. Another analogous set of documents are GP's notes. There does seem to be merit in incorporating hospital reports and GP's

notes into the index for two reasons. The first is so that the index becomes a comprehensive list of the medical evidence to be relied on. The second is to facilitate the documents being tendered by consent. There is merit in the index including hospital records and notes of treating medical practitioners.

Another amendment could be to require the party to specify the issue to which the expert evidence relates. This would facilitate the Court at the listing conference making orders pursuant to RSC Order 36A rule 5 limiting the number of experts (including medical experts) on a particular issue. An example of an issue would be "the extent of the psychiatric injury suffered by the plaintiff as a result of the accident as pleaded in paragraph 14(f) of the statement of claim".

One issue that arises is the status of the index. To what extent should it bind or limit the parties? SCR Order 36A rules 2 and 3 have the effect that, save with the leave of the Court, if the expert's report is not disclosed, it cannot be relied on at trial. However, there is no requirement to call an expert on the list. Consideration was given to whether there should be a rule to the effect that a party be bound to call each expert on the list, unless the other parties consent to dispense with the calling of that witness or the leave of the Court is obtained. The practice of some defence lawyers in personal injuries cases is not to call particular medical witnesses if the evidence emerging from the plaintiff's case does not raise the issue on which the witness was to give evidence. Binding parties to call witnesses might unduly lengthen trials for no real reason. On the other hand, if, say, a defendant wishes to make sure that a particular doctor gives evidence, the defendant can make independent arrangements for the doctor to attend, over and above the plaintiff's arrangements. On balance the better view seems to be that the parties should be bound to call the experts in the schedule, subject to leave of the Court not to call.

Consideration was given to whether there should be a rule deeming the admission of expert reports. NSW *Uniform Civil Procedure Rules* rule 31.19 (Appendix G) and Victoria *County Court Rules* rule 33.11 (Appendix H) are examples of provisions to this effect. Each provision provides a mechanism for other parties to give notice that they wish to cross-examine the expert. On balance, the Court does not propose to put in place rules to this effect at this time. In most cases in the Court, non-contentious reports are tendered by consent. Where the report is contentious, cross-examination will inevitably be required, and thus there is minimal time saving by having the report go into evidence through admissions in the rules.

Consideration was also given to whether a "Scott Schedule" type of approach should be adopted in which a combined schedule is produced as a result of interactions between the parties. On balance, this approach was not supported as the additional costs did not appear to outweigh the benefits. The Listing Conference is an available opportunity for the parties to liaise in relation to experts if that has not occurred informally. The index format could facilitate this by providing the space for the parties to comment whether they seek to have the report tendered by consent (which is in effect saying that they do not propose to lead evidence in chief beyond the report).

The recommendations set out will be brought into practice in two parts: rule changes for the rule framework and a Circular to Practitioners with examples and guidance.

Appendix I contains a sample index of experts reports reflecting the recommendations set out above.

In summary terms:

Proposed changes:

1. **The requirement to file an index of experts reports be maintained.**

2. **The index should include any particular requirements relating to the mode of evidence (for example, whether video link is required).**

3. **The index should include hospital records and notes of treating medical practitioners (if they exist).**

4. **The index should specify the issue to which the expert evidence relates.**

5. **In addition to rule changes, the Court should issue a Circular to Practitioners with examples and guidance.**

6. **The rules provide that leave of the trial judge, or the consent of the parties, is required to excuse a witness who is listed in the index from being called at trial.**

Issue 4.3 Conferral between experts

Current position

The usual practice of the Court is not to make orders that experts confer with a view to narrowing the issues in dispute. There is an express power to make orders along these lines in the case management directions in 2005 DCR rule 24(2)(f).

Supreme Court Common Form 80 (Appendix D) provides for a conference to occur between the experts with a view to narrowing the issues.

Feedback

Three options were set out in the Discussion paper:

1. Maintain the current position
2. Make conferral orders as a matter of usual practice
3. Narrow the issues earlier

The feedback received from within the Court was in favour of the option 2, making conferral orders as a matter of usual practice. Again, conferral was not seen as useful for medical experts.

The feedback from the profession was mixed. Common Form 80 was not seen as the optimal form of conferral orders, with a preference being expressed that a tailored form of order suitable to each case is preferable. There was also feedback in favour of the Court exercising a degree more control over the exchange of expert evidence early in the life of an action with a view to narrowing the issues between the parties and their experts in amore cost effective manner.

Outcome

The Court will move towards a position that, in all cases involving non-medical experts, there should be preference towards a conference between the experts prior to trial. A conferral option would involve the Court adopting a practice of making conferral orders in most cases when leave is being given to adduce expert evidence. For non-medical experts, it seems appropriate to attach the order to the grant of leave to adduce the evidence, though there needs to be the flexibility to hold the conferral at the optimal time in the circumstances of the case.

The question of the form of the conferral would be determined on a case by case basis as part of the ongoing case management in the action. This would include issues like the timing of the conference and whether it should take place in the presence of a Court Registrar.

The Court proposes to issue a Circular to Practitioners setting out its position in relation to conferral, together with some draft orders. The Circular to Practitioners would form the background against which the Registrar hearing the application for leave to adduce expert evidence would discuss the issue of agreed facts etc with the parties on hearing

the application, and then if an order is to be made, to tailor the order to the needs of the case.

Proposed changes:

The Court proposes to issue a Circular to Practitioners expressing a policy that in appropriate cases in which non-medical evidence is to be given, there be a conference between the experts. The Circular will include draft orders. It will also include draft orders for conferral prior to experts finalising their reports.

Issue 4.4 Expert evidence generally

Current position

In the Discussion Paper, there was a comment that the Court is cognisant that expert evidence:

- Is usually difficult to obtain.
- Often takes time to obtain.
- Often is a major cost of trial preparation.
- Usually impacts on the timing of when a trial can be listed.
- Often is a major cost of the trial.
- Often has a major bearing on the outcome of the trial.

There was a general invitation to suggest other ideas for improving the way in which expert evidence is received.

Feedback

Three other areas to look at regarding expert evidence emerged from the feedback from within the Court:

- The Court should make greater use of video-conference or audio conference facilities for the reception of expert evidence, though the technology has to operate without hitch every time.
- In some cases there are too many experts, with multiple experts giving evidence on the same issue.
- Lawyers could schedule and prepare experts a little better.

The feedback about increasing the use of video evidence from practitioners was mixed. There was, however, general opposition to the idea of having experts follow each other after giving evidence on a particular subject.

Outcome

The use of expert evidence is an area in which further work needs to be done in order to fully consider the optimal way for the Court to receive expert evidence.

It is noted that Eastern States jurisdictions have made significant changes in this area. For example the Queensland *Uniform Civil Procedure Rules* rule 423ff (Appendix J) puts in place a regime to facilitate the appointment of a Court expert. One purpose of this part is to "ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the Court" (rule 423(b)).

5. TRIAL MATERIALS

Issue 5.1 Pleadings

Current position

A regular reader of District Court judgments will be aware that comment is made from time to time by Judges about the poor quality of the pleadings, in particular that the pleadings did not accurately define the issues the subject of the trial. In addition, it is not uncommon for the pleadings to be amended, or sought to be amended, on the eve of the trial. One outcome that is undesirable is for the trial to be vacated shortly before commencement because one of the parties needs to amend its pleadings in a way which causes the other to seek more time in which to prepare its case. This all suggests that there is room for improvement in the standard of pleadings in matters going to trial in the Court.

The 2005 DCR require the solicitor entering the matter for trial to certify that "the matter is in all respects ready for trial". The 1996 DCR did not contain an equivalent certification. This certification implicitly includes the fact that the pleadings are in order, though only from the perspective of the entering party.

Feedback

The feedback from within the Court validated the comments set out above. There was specific mention of the practice of defendants in personal injuries cases of not providing any clue in the pleadings as to the main issues in dispute. It was acknowledged that in many cases the detail of the plaintiff's claim is in the particulars, and that in the usual course opposing parties do not plead in response to particulars.

Feedback from the practitioners was generally supportive of the current position. There was some support for a rule that there be no amendment to pleadings after the entry for trial without leave of the Court. There is a provision to this effect in the 1996 DCR.

Outcome

There seems to a be a need to take at least some steps to try to improve the quality of pleadings in cases going to trial, and in particular to avoid cases in which late pleadings change cause the trial dates to be vacated.

Any additional hurdle in the way of late pleadings changes should not be applied until after the pre-trial conference. It is not uncommon for the dispute as discussed around a mediation table to diverge from the dispute as pleaded, leading to amendments.

The key seems to be to get trial counsel to review the pleadings at an early stage. The certification process at the listing conference needs to be tightened.

In most cases going to trial, the pleadings are amended subsequent to the Entry for Trial papers being lodged. This means that in most cases going to trial the Papers for the Judge filed with the Entry for Trial papers are superseded by the time of trial. The

requirement to file and serve a set of Papers for the Judge at the time of Entry for Trial can be dispensed with, and moved closer to trial.

Proposed changes:

1. **There be a requirement in each case to file a counsel certificate at the listing conference.**

2. **The 2005 DCR should include a provision that there be no leave to amend subsequent to the pre-trial conference unless the justice of the case otherwise requires, mirroring the provision in 1996 DCR 0rder 1 rule 3(b). There should also be a rule mirroring 1996 DCR order 5 rule 10 that an interlocutory application that may result in adjournment of a trial will only be granted upon special circumstances being shown by affidavit. The rule could provide that every application once an action is listed for trial must be accompanied by an affidavit setting out special circumstances.**

3. **Counsel should certify in the listing certificate that the pleadings are in order, accurately reflect the issues in dispute and will not be amended. Counsel should also certify that all witnesses have been proofed.**

4. **Any application for leave to amend the pleadings once the action has been allocated trial dates be accompanied by an affidavit from counsel who signed the listing certificate or the solicitor for the parties setting out the facts which have arisen since the listing certificate was signed justifying leave to amend being granted.**

5. **The requirement to file and serve Papers for the Judge at Entry for Trial be dispensed with.**

6. **The Plaintiff should have an obligation to file and serve amended Papers for the Judge with the trial documents 4 weeks prior to the commencement of the trial. The Court should have the power to order a party other then the plaintiff to file and serve the papers for the Judge.**

Issue 5.2 Trial documents

Current position

There is no current routine practice in the Court to require parties to file books of trial documents. There is the power to make orders of this kind as part of the general case management powers (see 2005 DCR rule 24). Orders to file books of trial documents have been made under these powers.

Feedback

Four options were set out in the Discussion paper:

1. Maintain the current position
2. Use the Supreme Court model
3. A customised model- perhaps like the example set out in the Discussion Paper
4. A simple model

The usual order in the Supreme Court is set out in Common Form 78 (Appendix K)

The feedback received was varied over the four options.

Feedback from within the Court was uniformly to the effect that where counsel provide bundles of documents for use at trial, this significantly assists in the smooth and efficient running of the trial. There is also an acute awareness of the need not to unnecessarily increase costs.

Feedback from practitioners was mixed. There was support for a simple model where it is left for the parties. There was also support for the Supreme Court model, due to the familiarity of practitioners with this model and to achieve consistency where possible.

Outcome

The Court proposes to make changes to mandate some form of documents order for all trials.

The Supreme Court model set out in the Discussion Paper (see Common Form 78 – Appendix K) was seen to be too complex for cases in the District Court. Further, the agreed bundles produced are often produced too late for counsel to use for final trial preparation. The comment as to complexity applies to the more customised model set out as Option 3 in the Discussion Paper. In particular, there does not seem to be a need in every case to require the parties to confer with a view to producing an agreed bundle of documents to be tendered by consent, nor even an agreed bundle of documents that are to be tendered. A typical case in the District Court is not document intensive. Having said that, there always needs to be the option to make more complex orders if the case requires it.

The model set out in Rule 34A of the *Victorian County Court Rules* (see Appendix L) has much to commend it. Under the rule:

- Each party files a Court book.
- Only documents in the Court book may be tendered (save with leave of the Court).
- The Court book is filed at a time directed by the Court.
- The Court book includes both documents that would be in the papers for the Judge under the current rules and a copy of each document the party intends to tender.
- The parties can agree to file a joint book – but there is no specific requirement to confer.

The Court proposes to adopt a similar regime.

There would seem to be merit in the rules specifying a default time for service of the Court book tailored to typical cases so that there is no need for a specific direction unless the case has some complex issues. The proposed default timetable is:

- Filing and service of the index 4 weeks prior to the date of commencement of the trial for the Plaintiff.
- Filing and service of the index 3 weeks prior to commencement for the Defendant and any other parties.
- Service of a copy of the book of documents (which will be referred to as the "MFI Bundle" - Marked for Identification) 7 days prior to commencement.
- Filing of the MFI Bundle at the commencement of the trial. There would need to be three sets of each book of documents filed – one original set, one for the Judge (to mark up), one for the use of witnesses.

The DCR would allow for customised orders to be made. It may be useful for the Court to specify in a Circular to Practitioners some of the orders that practitioners may wish to seek – for example, an order that certain documents in the bundle be sealed and not read by the trial Judge prior to the question of admissibility being determined.

By requiring only an Index to be filed 4 or 3 weeks prior to trial, the risk of costs being wasted in an action that settles is minimised.

It would also make sense for the rules to allow an agreed bundle of documents ("Agreed Bundle") to be filed subsequent to the parties serving the indexes to the individual bundles on each other. The service of the individual parties bundles is likely to be the catalyst for an Agreed Bundle. The Agreed Bundle could be filed with a set of agreed facts relating to the documents, signed by solicitors for the parties. In that way, the parties can tailor admissions to the specific circumstances of the case. Thus there is a framework for parties to agree to tender documents by consent, but minimal other prescription.

The parties should also have the option of filing an Agreed Bundle for some documents as well as a MFI Bundle for other documents.

The Court did consider whether there should be some automatic admissions in relation to discovered documents along the lines set out in the NSW *Uniform Civil Procedure Rules* rule 17.5 (Appendix M) However, it was felt that this added unnecessary complexity to typical cases in the Court, and that a model allowing for tailored admissions was preferable.

There would also be merit in specifying the format of the Agreed and MFI Bundle to lock in consistent leading practice.

Consistent with the comments on the papers for the Judge – see Part 5.1 – the book of documents would not include the Papers for the Judge.

The Court is conscious of the risk that the proposed rule framework could provide excuses for adjournments if there were non-compliance. However, our sense is that the benefits of this process outweigh these risks.

Video evidence

Consistent with the theme of organising immediate pre-trial disclosure around a set date, another rule that needs to be considered is SCR Order 36 rule 4, which provides that:

> "Unless before or at the trial the Court otherwise orders, no plan, photograph or model shall be receivable in evidence at the trial of the action unless at least 10 days before the trial the parties, other than the party who intends to produce it, are given the opportunity to inspect it and agree to its admission without further proof."

Significantly for the District Court, this rule applies to video surveillance evidence: *Boyes v Collins* (2000) 23 WAR 123.

This rule would need to be integrated into the immediate pre-trial disclosure regime set out above. It should be expressly widened to include video evidence (defined to allow the evidence to be introduced on DVD or other means).

The Court's proposal is that the index of the Agreed or MFI Bundle include all plans, photographs, videos and models. There should be a general right of inspection of any documents not previously inspected. While multiple copies of photographs and plans should be provided, the rules should specify that multiple copies of videos and models need not be provided.

The MFI Bundle should include medical and other expert reports, as well as GP notes and hospital records. The requirements for the index should give parties the flexibility to organise the exhibits in whatever way seems most efficient. This may include the medical and other expert reports being in separate parts of the file, or in separate files.

The rules should be general enough to allow a party to file a couple of different bundles (eg bundles for medical evidence, special damages and a general bundle).

In summary:

Proposed changes:

1. **There be a requirement on the parties to file and serve a bundle of trial documents marked for identification ("MFI Bundle") shortly prior to trial.**

2. **Only documents in the MFI Bundle may be tendered. Leave may be given to tender additional bundles.**

3. **The Plaintiff should file and serve an index to the MFI Bundle 4 weeks prior to commencement of the trial for the Plaintiff.**

4. **The Defendant and other parties should file and serve their index 3 weeks prior to commencement.**

5. **The parties should also have the option of filing an Agreed Bundle for some documents as well as a MFI Bundle for other documents. The Agreed Bundle could be filed with a set of agreed facts relating to the documents, signed by solicitors for the parties.**

6. **Each party should serve a copy of their MFI Bundle 7 days prior to commencement, unless the parties agree to file an Agreed Bundle, in which case the plaintiff would serve copies of the Agreed Bundle 7 days prior to commencement.**

7. **At commencement of the trial, the parties (or the Plaintiff where there is an Agreed Bundle) would file three sets of the MFI Bundle -one original set, one for the Judge (to mark up), one for the use of witnesses.**

8. **A Practice Direction would specify the format of the MFI Bundle.**

9. **The MFI Bundle would include all plans, photographs, videos and models. The relevant SCR would be integrated into the proposed District Court framework.**

10. **There should be a general right of inspection of any documents (including videos) not previously inspected (only non-privileged documents would be included in the MFI Bundle)**

11. **The MFI Bundle should include medical and other expert reports.**

12. **The requirements set out above should subject to a discretion in the Court to make different orders.**

Issue 5.3 Exchange of witness statements

Current position

There is no current routine practice in the Court to require parties to exchange witness statements. There is the power to make orders of this kind as part of the general case management powers (see 2005 DCR rule 24). Orders to exchange witness statements have been made under these powers.

Feedback

Three options were set out in the Discussion paper:

1. Maintain the current position, meaning the Court would not routinely order the exchange of witness statements, but had the power to do so in appropriate cases.
2. Use the Supreme Court model in which witness statements are routinely ordered to be exchanged.
3. A customised model, for example, where the evidence of "subsidiary" witnesses goes in by statement.

The feedback from both within the Court and outside the Court was mixed. One argument raised in favour of maintaining the current position is a significant part of the caseload of the Court (at present) is personal injuries. In personal injuries cases much turns on the credibility of the plaintiff, so there is considerable benefit to be derived by the trial Judge in hearing the plaintiff give his or her account of the facts.

Outcome

The advantages of requiring the parties to exchange witness statements include:

- It means each party is clearly on notice of the case it has to meet at trial.
- It ensures that witnesses are comprehensively proofed well prior to the trial.
- It can reduce trial time when statements are ordered to stand as evidence in chief.

The disadvantages include:

- Additional costs in preparing witness statements in a form suitable for exchange.
- There is a risk that the lawyer drafting the statement will "improve" the evidence to be given by the witness, even if only subconsciously or by correct use of grammar.
- The risk that any trial time saved by the use of witness statements will be used in dealing with objections to the form of the witness statement.
- The Judge is deprived of the opportunity to see the witness give their account of the facts.

On balance, the Court does not propose any changes to the DCR to include a requirement for the parties to exchange witness statements.

However, in certain types of cases it may make sense for the parties to exchange witness statements. To cover that eventuality, the Court proposes to provide a common

form of orders for the exchange of witness statements that dovetails in with the proposed changes to the DCR relating to the service and filing or trial documents.

Proposed changes:

1. **The Court should not mandate the exchange of witness statements in every case either by rule or practice direction.**

2. **The Court should publish a pro forma set of orders for the exchange of witness statements that dovetails with the rules relating to the service and filing of trial documents.**

Issue 5.4 Outlines of submissions

Current position

The requirement to file outlines of submissions is contained in 2005 DCR rule 61 (which applies to cases otherwise governed under the 1996 DCR by the Consolidated Practice Direction).

The Court has noted that submissions are not consistently filed in relation to actions proceeding to trial. This may be because parties are interpreting Rule 61(2) to require submissions to be filed in relation to a trial where a Judge or Registrar has ordered that this occur.

Where submissions are required, they have to be filed and served at least 2 clear days prior to the date of the hearing (2005 DCR rule 61(5)).

Feedback

The feedback from within the Court was that it is of considerable assistance to have written opening submissions filed prior to trial.

Practitioner feedback was against a rule requiring parties to file opening submissions at trial. For other hearings the existing rules were considered sufficient.

There was also feedback that if there was to be a requirement to file submissions prior to trial, it should be badged as "opening submissions" to reflect the fact that the course of evidence invariably changes as the trial progresses, which leads to consequential changes in submissions. Any rule should not preclude closing submissions from being filed. Feedback from those involved in representing defendants in personal injuries cases is that there is little merit in a requirement to file opening submissions where damages only are in issue.

Outcome

The current position is somewhat vague: Practitioners do not seem to understand that the Practice Direction requires submissions to be filed. This needs to be clarified one way or the other.

Consideration was given making it optional for the parties in personal injuries case to file opening submissions where liability has been admitted and the case does not involve any novel points of law. However, feedback from Judges is that they are still seeing cases in which the defendant's case is not apparent from the pleadings. Typically, these are personal injuries cases. At one level, this position is understandable if the essence of the defence comes from its response to the plaintiff's particulars. However, there does seem to be a need for some document that flags the real issues in dispute.

There is a need for some form of quality control on the submissions filed. At the moment, the summaries of issues are patchy in their quality. Even the more detailed

ones are open to criticism on the basis that there is so much information that the important issues are blurred.

The Court recognises that opening submissions from defendants is problematic as the defendant's case will often be significantly shaped by the plaintiff's evidence. The best balance seems to be to having submissions, but limit them to say 3 key issues of fact and submissions of law. By limiting the issues to 3 key issues of fact, it prempts any argument that a party is limited in the case they may present to the issues raised in a written opening submission. On the other hand, the document will alert the trial Judge to the significant areas of dispute.

The timing for the submissions should be as part of the trial documents, which we have recommended be filed 4 weeks out from trial for the plaintiff and 3 weeks prior to trial for other parties, subject to other order of the Court. For example, where a case is managed by a Judge prior to trial, the Judge may set a different timetable. Consideration was given to the view that any opening submissions should only be filed shortly prior to trial. However, preparing written opening submissions is likely to tease out any last minute pleading changes, especially if Counsel is not retained until shortly prior to trial. By requiring the opening submissions to be filed a couple of weeks prior to trial, there is time for any last minute pleading change to be heard and determined prior to trial. There is also merit in having all the immediate pre-trial work consolidated around one date so that counsel only has to engage to produce \one set of documents, and does not have to engage and disengage several times around the time of the trial.

With the proposed abolition of a general obligation to file summaries of issues (see Part 3.4 above), the case management powers need to include a specific power to order the parties to file a document in the nature of a summary of issues. This is a tool to allow a case managing Judge or Registrar to ascertain the key issues where the pleadings are obscure.

Proposed changes

1. **There should be a specific rule requiring the parties to file and serve written summary of key issues (perhaps limited to 3) and submissions of law for trials.**

2. **The opening submissions should be filed 4 weeks prior to trial for the plaintiff and 3 weeks prior to trial for other parties, subject to other order of the Court.**

3. **The case management powers be changed to include a specific power to order the parties to file a document in the nature of a summary of issues.**

6. OTHER ISSUES

Issue 6.1 Reduction of trial cost and length

Aside from the issues set out above, the participants were asked if there were any other rules, procedures or practices of the Court which cannot be justified on the basis of the value they add to a trial when compared with the costs involved.

Outcomes

Consistent with many of the themes set out above, there would seem to be a good case for the Court to marginally increase the level of case management oversight for cases that have been listed for trial. The proposal is:

The Court should initiate a trial review system whereby long or complex trials are given to a Judge for a trial review following listing for trial.

Issue 6.2 Commercial list

Current position

In May 2005 the Court's general civil jurisdiction increased from $250,000 to $500,000. In September, partially in response to this, the Court published a Circular to Practitioners (CIV 2005/10) which introduced a commercial list.

Three general principles underpin the management of the Commercial List, as follows:

(a) The Commercial List will operate on an opt-in basis – any party to a commercial action will be able to request the matter to be included in the Commercial List. There will be no specific barrier to entry of the Commercial List (eg no requirement for an affidavit setting out grounds for expedition).

(b) Once a case is within the Commercial List, it will be subject to active case management oversight, meaning that timelines will be set and monitored by the Court.

(c) The timing of any pre-trial mediation will be tailored to the circumstances of the action, and will not necessarily occur after the matter has been entered for trial.

Feedback

The participants were asked if there were any other initiatives that the Court should consider introducing especially for commercial cases, which would facilitate the more optimal resolution of commercial disputes. There was a positive response to the

introduction of the Commercial List. The one major suggestion to emerge from the feedback is that the Court should seek to have its equitable jurisdiction increased.

Outcome

The Court proposes to request the Attorney-General to consider increasing its general equitable jurisdiction.

Issue 6.3: Meeting community expectations

Participants were asked generally if they thought that the civil trial process is meeting community expectations.

All participants felt the civil trial process is meeting the community's needs and expectations and there was no specific suggestions for change or improvement.

7. Conclusion

In the course of making the recommendations set out above, we have been conscious of a number of overriding themes as follows:

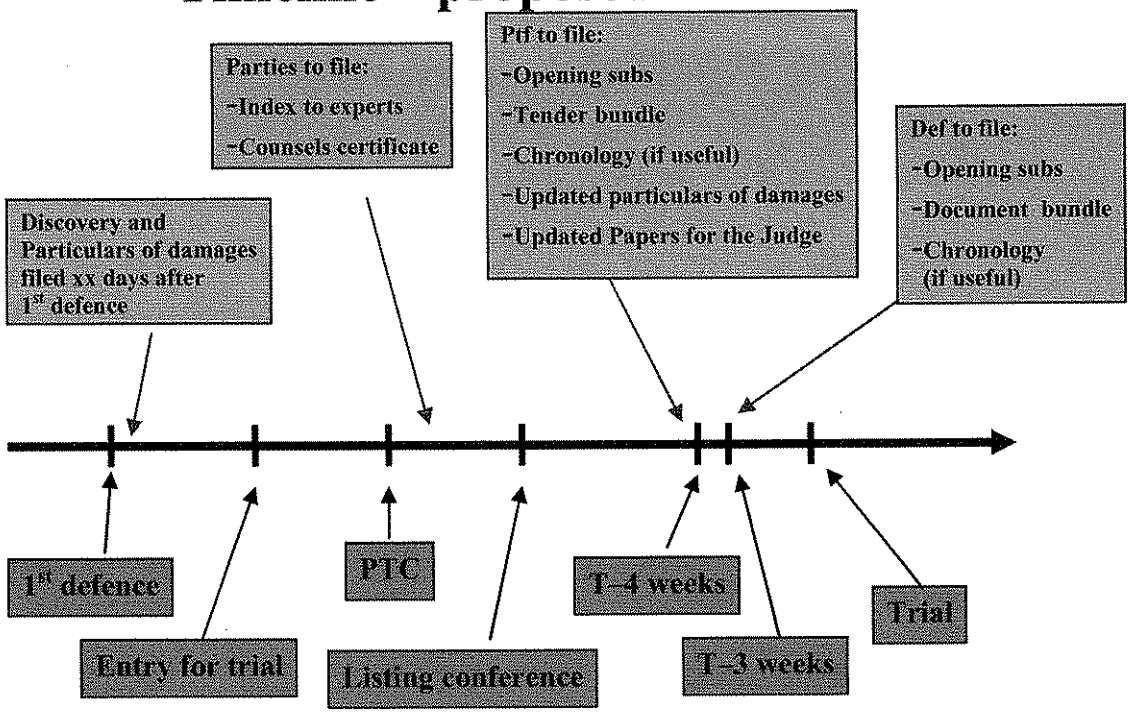
- First do no harm, keep it simple and flexibility, as outlined in Part 1.
- The need for the benefits of proposed changes to outweigh any additional costs.
- The desirability of clustering requirements to file and serve documents around a limited number of timing points to minimise the need for Counsel to refresh themselves with the matter on multiple occasions.

In summary terms the main changes made are:

What goes	• The requirement to file Papers for the Judge on entry for trial in simple cases. • Summaries of issues • Chronologies (may be filed at party's option)
What gets added	• Requirement to file and serve bundles of documents prior to trial. • Requirement for non-medical experts to acknowledge Court guidelines. • Counsel certification of accuracy of pleading at the listing conference.
What gets changed/ clarified	• Schedule of damages are filed earlier, with more prescriptive requirements • The requirements regarding Scott Schedules are clarified, in particular to bring back the point in time at which they are ordered. • Obligation to file opening submissions confirmed, with the submissions being filed earlier. • Indexes of experts are expanded.
Not Implemented	• Impose a requirement to file and serve witness statements

Another way to look at the recommendations as a whole is through a timeline, as follows:

Timeline – proposed new Rules



APPENDIX A

Uniform Civil Procedure Rules 2005 (NSW)

15.12 Particulars required for proceedings generally

(cf DCR Part 9, rule 27 (2)–(5))

(1) This rule applies to a claim for damages in respect of personal injuries arising from any event (***the accident***), other than a claim that is the subject of proceedings under the *Compensation to Relatives Act 1897*.

(2) On or as soon as practicable after serving the statement of claim, the plaintiff must serve on the defendant, or on the defendant's insurer or solicitor, a statement accompanied by the following documents:

(a) copies of all documents available to the plaintiff in support of a claim for special damage and economic loss, whether past, present or continuing, including:

(i) hospital, medical and similar accounts, and

(ii) letters from a workers' compensation insurer indicating moneys paid to or for the plaintiff, and

(iii) letters from employers, wage records, income records and group certificates, and

(iv) reports, award rates and correspondence relied on to support any claim in respect of domestic assistance or attendant care,

(b) copies of all hospital and medical reports available at the time of serving the statement on which the plaintiff intends to rely at the hearing.

(3) The statement must set out the following particulars:

(a) particulars of injuries received,

(b) particulars of continuing disabilities,

(c) particulars of out-of-pocket expenses.

(4) If the statement makes any claim in respect of domestic assistance or attendant care, it must also set out full particulars of the claim.

(5) If the statement makes any claim in respect of loss of income, it must also set out the following particulars:

(a) the name and address of each employer during the 12 months immediately before the accident, together with details of the periods of employment,

capacity in which employed and net earnings during each period of employment,

(b) the name and address of each employer since the accident, together with details of the periods of employment, capacity in which employed and net earnings during each period of employment,

(c) the amount claimed in respect of loss of income to the date of the statement (by comparison between what the plaintiff has earned since the accident and what the plaintiff would have earned but for the accident) setting out, in respect of what the plaintiff would have earned but for the accident, including, where appropriate:

(i) particulars of the earnings of comparable employees and the identity of those employees, or

(ii) particulars of any payment that the plaintiff would have received under a relevant award or industrial agreement, together with the title of that award or industrial agreement,

(d) particulars of any alleged loss of earning capacity and future economic loss,

(e) if the plaintiff is self-employed or has been self-employed at any time during the 12 months immediately before the accident, such additional particulars as will achieve full disclosure of the basis of the claim for loss of income.

(6) If the statement makes any claim in respect of loss of income, it must also be accompanied by the following documents:

(a) a letter from the employer or employers (if any) of the plaintiff immediately before the accident the subject of the proceedings, providing particulars of:

(i) the dates on which the plaintiff was absent from work due to the accident, and

(ii) the total net remuneration lost by the plaintiff in respect of that absence, including overtime, and

(iii) if the plaintiff returned to work for that employer, the plaintiff's classification and duties, and any alteration in the remuneration paid to the plaintiff, after that return, and

(iv) if that employment has been terminated, the date of and reason for the termination,

(b) if the plaintiff was self-employed immediately before the accident, copies of any accountants' reports or other documents on which the plaintiff intends to rely to establish his or her pre-accident income,

(c) copies of the plaintiff's income tax returns relating to income received during the period of 2 financial years ending immediately before the financial year that included the date of the accident, together with copies of any income tax returns lodged by the plaintiff since the date of the accident.

(7) If any, or any part of, any document required to be served by subrule (6) cannot be served, a statement of the reasons why it cannot be served must be included in the documents served.

APPENDIX B

Uniform Civil Procedure Rules 1999 (Qld)

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547 Plaintiff's statement of loss and damage

(1) The plaintiff must serve on the defendant a written statement of loss and damage, signed by the plaintiff, within 28 days after the close of pleadings.

(2) The statement must be served before a request for trial date is filed.

(3) The statement must have the following information—

a) details of any amount claimed for out of pocket expenses and documents in the possession or under the control of the plaintiff about the expenses;
b) if there is a claim for economic loss—
   I. the name and address of each of the plaintiff's employers, the period of employment by each employer, the capacity in which the plaintiff was employed by each employer and the plaintiff's net earnings for each period of employment—
      (A) in the 3 years immediately before the injury;
      and
      (B) since the injury; and
   II. if the plaintiff is self-employed, details of the plaintiff's net income—
      (A) in the 3 years immediately before the injury;
      and
      (B) since the injury; and
   III. details of the amount the plaintiff claims (if any) for loss of income to the date of the statement; and
   IV. details of any disability resulting in loss of earning capacity and of the amount the plaintiff claims for future economic loss; and
   V. if the plaintiff is self-employed—additional details substantiating the plaintiff's claim for economic loss; and
   VI. details of the educational level reached by the plaintiff, including any trade or professional qualifications held;
c) details of the pain and suffering experienced by the plaintiff and the loss of amenities caused by the injuries (including the physical, social and recreational consequences of the injuries sustained);
d) details of any other amount sought as damages;
e) the names and addresses of all hospitals, doctors and experts who have examined the plaintiff or who have given reports on the plaintiff's injury, loss (including economic loss) or treatment;
f) the documents in the possession or under the control of the plaintiff about the plaintiff's injury, loss (including economic loss) or treatment;
g) details of any accident, injury or illness suffered by the plaintiff—

(i) in the 3 years immediately before the injury; and
(ii) since the injury.

APPENDIX C

Uniform Civil Procedure Rules 2005 (NSW)

21.8 Personal injury claims

(cf SCR Part 23, rule 5; DCR Part 22, rule 5)

In any proceedings on a common law claim:

(a) for damages arising out of the death of, or bodily injury to, any person, or

(b) for contribution in respect of damages so arising,

an order for discovery may not be made in relation to any document unless the Court, for special reasons, orders otherwise.

APPENDIX D

Supreme Court of Western Australia Common Form 80

(1) The parties have leave to adduce expert evidence at the trial.

(2) By the plaintiff provide the defendant with a copy of the report or the substance of the evidence of any expert witness whose evidence is to be adduced by the plaintiff.

(3) By the defendant provide the plaintiff with a copy of the report or the substance of the evidence of any expert witness whose evidence is to be adduced by the defendant.

(4) A copy of the report or the substance of the evidence of any expert witness shall include the name of the witness, the facts and matters relied upon to qualify him to give expert evidence, and shall identify the facts and other material upon which he bases his opinion. The witness must include in the report or in some other writing submitted to the Court before or when the evidence is formally tendered at trial a statement to the effect that the witness has made all inquiries which the witness believes are desirable and appropriate and that no matters of significance which the witness regards as relevant have, to the knowledge of the witness, been withheld from the Court.

(5) By if there are differences between the evidence of the respective expert witnesses a conference shall be held between them in the presence of the solicitors for the parties for the purpose of narrowing or removing the differences.

(6) If following the conference points of difference remain between the expert witnesses the solicitors for the parties and the expert witnesses shall attend a mediation conference before a mediation registrar at a time and place to be determined by him and the plaintiff shall contact the associate to the registrar no later than to make arrangements for such a conference.

(7) Three (3) working days before the conference the plaintiff shall lodge with the registrar's associate copies of the expert evidence as exchanged together with a note of the points of difference outstanding between the experts.

(8) By the plaintiff shall file and lodge with the associate to the judge making this order, a report signed on behalf of each party:

(a) confirming that the conference has occurred as directed; and

(b) recording of the substance of any resolution or narrowing of the points of difference between the experts resulting from the conference.

APPENDIX E

Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia on)

This Practice Direction replaces the Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia issued on 4 September 2003.

Practitioners should give a copy of the following guidelines to any witness they propose to retain for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based on the specialised knowledge of the witness (see - Part 3.3 - Opinion of the *Evidence Act 1995 (Cth)*).

M.E.J. BLACK
Chief Justice
19 March 2004

Explanatory Memorandum

The guidelines are not intended to address all aspects of an expert witness's duties, but are intended to facilitate the admission of opinion evidence (footnote #1), and to assist experts to understand in general terms what the Court expects of an expert witness giving opinion evidence. Additionally, it is hoped that the guidelines will assist individual expert witnesses to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them.

Ways by which an expert witness giving opinion evidence may avoid criticism of partiality include ensuring that the report, or other statement of evidence:

(a) is clearly expressed and not argumentative in tone;
(b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;
(c) identifies with precision the factual premises upon which the opinion is based;
(d) explains the process of reasoning by which the expert reached the opinion expressed in the report;
(e) is confined to the area or areas of the expert's specialised knowledge; and
(f) identifies any pre-existing relationship between the author of the report, or his or her firm, company etc, and a party to the litigation (eg a treating medical practitioner, or a firm's accountant).

An expert is not disqualified from giving evidence by reason only of the fact of a pre-existing relationship with the party that proffers the expert as a witness, but the nature of the pre-existing relationship should be disclosed. Where an expert has such a relationship with the party the expert may need to pay particular attention to the identification of the factual premises upon which the expert's opinion is based. The expert should make it clear whether, and to what extent, the opinion is based on the personal knowledge of the expert (the factual basis for which might be required to be established by admissible evidence of the expert or another witness) derived from the ongoing relationship rather than on factual premises or assumptions provided to the expert by way of instructions.

All experts need to be aware that if they participate to a significant degree in the process of formulating and preparing the case of a party, they may find it difficult to maintain objectivity.

An expert witness does not compromise objectivity by defending, forcefully if necessary, an opinion based on the expert's specialised knowledge which is genuinely held but may do so if the expert is, for example, unwilling to give consideration to alternative factual premises or is unwilling, where appropriate, to acknowledge recognised differences of opinion or approach between experts in the relevant discipline.

The guidelines are, as their title indicates, no more than guidelines. Attempts to apply them literally in every case may prove unhelpful. In some areas of specialised knowledge and in some circumstances (eg some aspects of economic "evidence" in competition law cases) their literal interpretation may prove unworkable. The Court expects legal practitioners and experts to work together to ensure that the guidelines are implemented in a practically sensible way which ensures that they achieve their intended purpose.

Guidelines

1. General Duty to the Court (footnote #2)

1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
1.2 An expert witness is not an advocate for a party.
1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.

2. The Form of the Expert Evidence (footnote #3)

2.1 An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.
2.2 All assumptions of fact made by the expert should be clearly and fully stated.
2.3 The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and state the qualifications of the person who carried out any such test or experiment.
2.4 Where several opinions are provided in the report, the expert should summarise them.
2.5 The expert should give reasons for each opinion.
2.6 At the end of the report the expert should declare that "[the expert] has made all the inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court."
2.7 There should be included in or attached to the report (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials which the expert has been instructed to consider.
2.8 If, after exchange of reports or at any other stage, an expert witness changes a material opinion, having read another expert's report or for any other reason, the change should be communicated in a timely manner (through legal representatives) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court (footnote #4).
2.9 If an expert's opinion is not fully researched because the expert considers that

insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report (footnote #4).
2.10 The expert should make it clear when a particular question or issue falls outside the relevant field of expertise.
2.11 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports (footnote #5).

3. Experts' Conference

3.1 If experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement about matters of expert opinion, they should specify their reasons for being unable to do so.

footnote#1
As to the distinction between expert opinion evidence and expert assistance see Evans Deakin Pty Ltd v Sebel Furniture Ltd [2003] FCA 171 per Allsop J at [676].

footnote #2
See rule 35.3 Civil Procedure Rules (UK); see also Lord Woolf "Medics, Lawyers and the Courts" [1997] 16 CJQ 302 at 313.

footnote #3
See rule 35.10 Civil Procedure Rules (UK) and Practice Direction 35 – Experts and Assessors (UK); HG v the Queen (1999) 197 CLR 414 per Gleeson CJ at [39]-[43]; Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd [2000] FCA 1463 (FC) at [17]-[23]

footnote #4
The "Ikarian Reefer" [1993] 20 FSR 563 at 565

footnote #5
The "Ikarian Reefer" [1993] 20 FSR 563 at 565-566. See also Ormrod "Scientific Evidence in Court" [1968] Crim LR 240.

APPENDIX F

Uniform Civil Procedure Rules 2005 (NSW)

31.18 Disclosure of experts' reports and hospital reports

(cf SCR Part 36, rule 13A; DCR Part 28, rule 8; LCR Part 23, rule 3)

(1) Each party must serve experts' reports and hospital reports on each other active party:
   (a) in accordance with any order of the court, or
   (b) if no such order is in force, in accordance with any relevant practice note, or
   (c) if no such order or practice note is in force, not later than 28 days before the date of the hearing at which the report is to be used.

(2) An application to the court for an order under subrule (1) (other than an order solely for abridgment or extension of time) may be made without serving notice of motion.

(3) Except by leave of the court, or by consent of the parties:
   (a) an expert's report or hospital report is not admissible unless it has been served in accordance with this rule, and
   (b) without limiting paragraph (a), an expert's report or hospital report, when tendered under section 63, 64 or 69 of the *Evidence Act 1995*, is not admissible unless it has been served in accordance with this rule, and
   (c) the oral expert evidence in chief of any expert is not admissible unless an expert's report or hospital report served in accordance with this rule contains the substance of the matters sought to be adduced in evidence.

(4) Leave is not to be given as referred to in subrule (3) unless the court is satisfied:
   (a) that there are exceptional circumstances that warrant the granting of leave, or
   (b) that the report concerned merely updates an earlier version of a report that has been served in accordance with subrule (1).

APPENDIX G

Uniform Civil Procedure Rules 2005 (NSW)

31.19 Admissibility of expert's report in District Court and Local Courts

(cf SCR Part 36, rule 13B; DCR Part 28, rule 9; LCR Part 23, rule 2)

(1A)This rule applies to proceedings in the District Court or a Local Court.

(1) If an expert's report is served in accordance with rule 31.18 or an order made under that rule, the report is admissible:

(a) as evidence of the expert's opinion, and

(b) if the expert's direct oral evidence of a fact on which the opinion was formed would be admissible, as evidence of that fact,

without further evidence, oral or otherwise.

(2) Unless the Court orders otherwise:

(a) it is the responsibility of the party requiring the attendance for cross-examination of the expert by whom an expert's report has been prepared to procure that attendance, and

(b) the party requiring the expert's attendance must notify the expert at least 28 days before the date on which attendance is required.

(3) Except for the purpose of determining any liability for conduct money or witness expenses, an expert does not become the witness for the party requiring his or her attendance merely because his or her attendance at Court has been procured by that party.

(4) A party who requires the attendance of a person as referred to in subrule (2):

(a) must inform all other parties to the proceedings that the party has done so at least 28 days before the date fixed for hearing, and

(b) must pay to the person whose attendance is required (whether before or after the attendance) an amount sufficient to meet the person's reasonable expenses (including any standby fees) in complying with the requirement.

(5) If the attendance of an expert is required under subrule (2), the report may not be tendered under section 63, 64 or 69 of the *Evidence Act 1995* or otherwise used unless the expert attends or is dead or the Court grants leave to use it.

(6) (Repealed)

(7) The party using an expert's report may re-examine an expert who attends for cross-examination under a requirement under subrule (2).

(8) This rule does not apply to proceedings on a trial with a jury.

APPENDIX H

County Court Rules of Procedure in Civil Proceedings 1999 (Vic)

rule 33.11

33.11 Medical report admissible

(1) This Rule does not apply in the case of the trial of a proceeding before a Judge with a jury.

Rule 33.11(2) amended by S.R. No. 128/1999 rule 11(1).

(2) A medical report which was served under this Order is admissible as evidence of the opinion of the medical expert who gave the report and, where the medical expert's oral evidence of a fact upon which the opinion was based would be admissible, as evidence of that fact.

Rule 33.11(3) substituted by S.R. No. 128/1999 rule 11(2).

(3) Subject to paragraphs (4) and (5), a medical report may be used in evidence by the party who served the report or by any party on whom it was served.

Rule 33.11(4) amended by S.R. No. 128/1999 rule 11(3).

(4) If a medical report is tendered by the party who served the report, that party shall cause the medical expert who gave the report to attend at the trial of the proceeding to be cross-examined if notice that such attendance is required is served on the party by any other party not later than five days before the commencement of the trial, and if the medical expert does not attend for cross-examination the Court may order that the medical report be not received in evidence.

Rule 33.11(5) amended by S.R. No. 128/1999 rule 11(4).

(5) If a medical report is tendered by a party on whom the report was served—

(a) that party shall cause the medical expert who gave the report to attend at the trial of the proceeding to be cross-examined, and if the medical expert does not attend the Court may order that the medical report be not received in evidence;

(b) if the report is received in evidence and the medical expert is cross-examined by any party against whom the report is received, at the conclusion of the cross-examination the party who tendered the report may examine the expert as if by re-examination.

APPENDIX I

Sample plaintiff index of experts' reports

Witness	Reports	Issues	Ptf comments	Special requirements	Def comments
Dr Hamlet	12.4.03	Extent of psychological injury	To be called.		Propose to XXN
	14.7.04				
	12.4.05				
Dr Macbeth	11.6.03	Extent of back injury	Results of MRI scans. Seek tender by consent. Do not propose to call witness		Reports can be tendered by consent
	13.7.04				
	14.6.07				
Dr Cassius	13.5.03	Extent of injuries generally, including timing of symptons	Substitute for usual GP. Seek tender by consent. Do not propose to call witness.	If to be called, will need to be available by video.	Tender opposed. Wish to XXN.
Mr Othello	12.12.03	Extent of back injury	To be called.		Propose to XXN.
	4.7.04				
	12.3.05				

APPENDIX J

Uniform Civil Procedure Rules 1999 (Qld)

423 Purposes of pt 5

The main purposes of this part are to—

(a) declare the duty of an expert witness in relation to the Court and the parties; and

(b) ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the Court; and

(c) avoid unnecessary costs associated with the parties retaining different experts; and

(d) allow, if necessary to ensure a fair trial of a proceeding, for more than 1 expert to give evidence on an issue in the proceeding.

APPENDIX K

Supreme Court of Western Australia Common Form 78

Form 78 — Trial Documents Order

(1) No later than fourteen (14) working days prior to the date fixed for commencement of the trial, each party will by notice in writing to each other party, specify the documents he intends to tender at the trial, and if inspection has not been directed, where the documents may be inspected.

(2) Within five (5) working days thereafter, each party will advise each other party in writing which of the specified documents may be tendered by consent, and whether the authenticity of any of the remaining documents (specify which) is disputed and give reasons in writing as to why consent to tender the remaining documents is withheld.

(3) No later than 4.00 pm on the fifth (5th) last working day prior to the date fixed for commencement of the trial, each party other than the plaintiff will deliver to the plaintiff a copy of each of the documents which that party intends to tender and which were not included in the plaintiff's notification pursuant to para (1) hereof.

(4) No later than 4.00 pm on the third (3rd) last working day prior to the date fixed for the commencement of trial, the plaintiff will deliver to the listing co-ordinator, duly indexed and paginated, a bundle of clear, legible copies of documents to be tendered at the trial by the parties. The index will indicate the identity of the party who will tender each document and which documents are to be tendered by consent.

(5) No later than 4.00 pm on the third (3rd) last working day prior to the date fixed for the commencement of trial, the plaintiff will deliver a copy of the bundle referred to in para 4 to all other parties.

(6) The plaintiff will have ready for production at the commencement of the trial a further bundle of documents containing, wherever possible, the originals of the documents, copies of which are included in the bundle delivered in accordance with para (4) hereof, similarly indexed and paginated, and in the absence of originals, clear legible copies. Any party, other than the plaintiff, in possession of original documents to be included in such bundle will deliver such original documents to the plaintiff together with the copies referred to in para (3) hereof.

(7) The plaintiff will have ready a further bundle in the form described in para (4) for the exclusive use of witnesses in the course of their examination.

APPENDIX L

County Court Rules of Procedure in Civil Proceedings 1999 (Vic)

PART 7—COURT BOOK

34A.27No trial without Court book

Unless the Court otherwise orders, the trial of a proceeding shall not be held if any Court book required to be filed and served in accordance with this Order has not been filed and served.

34A.28Time for serving and filing Court book

A party shall file and serve a Court book at such time as the Court directs.

34A.29Failure to include document in Court book

Save with the leave of the Court or by consent of the parties, a party shall not tender in evidence at the trial of a proceeding a document a copy of which the party was required to include in the Court book of the party but which the party did not include.

34A.30Court book of each party

(1) The plaintiff shall file and serve a Court book.

(2) Subject to paragraph (3), each defendant shall file and serve a Court book.

(3) Where a solicitor acts for two or more defendants, those defendants shall file and serve a single Court book.

(4) A third party who has filed an appearance shall file and serve a Court book.

(5) A party to whom Rule 34A.34 applies shall file and serve a Court book.

34A.31Court book of plaintiff

The Court book of the plaintiff, unless the Court otherwise orders, shall contain and contain only—

(a) an index of its contents;
(b) a copy of the writ or originating motion;
(c) a copy of the latest version of any pleadings served between the plaintiff and the defendant and particulars of any such pleading served between the plaintiff and the defendant given pursuant to an order of the Court or the request of a party, and any such order or request by a party in writing for particulars;
(d) a copy of each document the plaintiff intends to tender in evidence.

34A.32Court book of defendant

The Court book of a defendant, unless the Court otherwise orders, shall contain and contain only—

(a) an index of its contents;

(b) a copy of the latest version of any pleadings served between the defendant and any party other than the plaintiff and particulars of any such pleading served between the defendant and the other party other than the plaintiff given pursuant to an order of the Court or the request of the other party, and any such order or request by the other party in writing for particulars;

(c) a copy of each document the defendant intends to tender in evidence.

34A.33Court book of third party

The Court book of a third party, unless the Court otherwise orders, shall contain and contain only—

(a) an index of its contents;

(b) a copy of the third party notice;

(c) a copy of the latest version of any pleadings served between the third party and any party other than the defendant and particulars of any pleading served between the third party and the other party given pursuant to an order of the Court or the request of the other party, and any such order or request by the other party in writing for particulars;

(d) a copy of each document the third party intends to tender in evidence.

34A.34Court book of fourth or subsequent party

(1) Rule 34A.33 shall apply to a person joined by the third party as if that party were a third party.

(2) Paragraph (1) shall, with any necessary modification, apply where a person joined as party by a third party joins another person as party and so on successively.

34A.35Court books—particular proceedings

(1) This Rule applies to a proceeding—

(a) that includes a claim for damages in respect of death or bodily injury; and

(b) of a kind referred to in Rule 34A.03(c)(ii); and

(c) of a kind referred to in Rule 34A.03(c)(iii).

(2) The parties may agree, not less than 7 days before—

(a) the trial of a proceeding referred to in sub-paragraph (1)(a); or

(b) the hearing of an application in a proceeding referred to in sub-paragraphs (1)(b) or (c)—

to file a joint Court book.

(3) If the parties have agreed to file a joint Court book in accordance with paragraph (2), it must be filed by the plaintiff at the commencement of the trial or at the commencement of the hearing of the application as the case requires.

(4) Unless the Court otherwise orders, a Court book or a joint Court book shall contain and contain only—

(a) an index of its contents;

(b) a copy of the writ or originating motion;

(c) a copy of the latest version of any pleadings served between the parties and particulars of any such pleading pursuant to an order of the Court or the request of a party, and any such order or request by a party for particulars;

(d) a list of any documents a party intends to tender in evidence or which a party otherwise intends to use at the trial or at the hearing of the application (as the case requires).

(5) If the parties have not agreed to file a joint Court book in accordance with paragraph (2), each party must serve a Court book not less than 7 days before the trial or the hearing of the application (as the case requires) and must file it at the commencement of the trial or at the commencement of the hearing of the application (as the case requires).

APPENDIX M

Uniform Civil Procedure Rules 2005 (NSW)

17.5 Admission of documents discovered

(cf SCR Part 18, rule 4; DCR Part 15, rule 4)

(1) In this rule:

admitting party means the party on whom a list of documents is served under rule 21.3.

requesting party means the party by whom a list of documents is served under rule 21.3.

(2) If a requesting party allows inspection of any documents referred to in a list of documents under rule 21.5, the admitting party is taken to have made the following admissions in favour of the requesting party, unless the Court orders otherwise:

(a) in respect of each document described in the list as an original document, that the document is an original document and was printed, written, signed or executed as it purports to have been,

(b) in respect of each document described in the list as a copy of an original document, that the document is a true copy.

(3) Subrule (2) does not apply to a document referred to in the list of documents if the admitting party:

(a) has, by his or her pleading, denied the authenticity of the document, or

(b) has served on the requesting party, within 14 days after the time limited under rule 21.5 for inspection of a document, a notice to the effect that the admitting party disputes the authenticity of the document.

(4) The admitting party and the requesting party are taken to be in the same position as they would have been in had the admitting party, on the date of service of the list of documents, served on the requesting party a notice requiring production at the trial of such of the documents specified in the list as are in the possession of the requesting party.