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Civil Jurisdiction Reforms under the Civil Proceedings Bill 2011 (Qld)

The Civil Proceedings Bill 2011 (Qld) (the Bill) was introduced into the Queensland Legislative Assembly on 24 August 2011 by the Queensland Attorney-General, the Hon Paul Lucas MP. The focus of this Research Brief is on the proposals to:

- enact a new Civil Proceedings Act (CPA) which will contain new provisions covering civil proceedings in the Supreme Court, District Court and Magistrates Court and incorporate and modernise procedural and substantive law provisions from the *Supreme Court Act 1995* (Qld) and the *Supreme Court of Queensland Act 1991* (Qld);
- repeal the *Supreme Court Act 1995* (Qld) and re-enact and relocate those provisions that are of use;
- repeal obsolete provisions of the *Supreme Court of Queensland Act 1991* (Qld) (SCQ Act) and transfer to the new CPA provisions dealing with civil procedure applying to the Supreme Court, District Court and Magistrates Court so that the SCQ Act retains only provisions which are specific to the Supreme Court; and
- amend the *District Court of Queensland Act 1967* (Qld), the *Magistrates Act 1991* (Qld) and the *Magistrates Court Act 1921* (Qld) to ensure that provisions common to all three courts are dealt with in a similar way and to assist in the integration, effectiveness and consistency of the court registries.

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|---|---|
| Bill: | Civil Proceedings Bill 2011 (Qld) |
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| Portfolio: | Attorney-General |
| Hansard Reference First Reading: | Queensland Parliamentary Debates, 24 August 2011, pp 2613-2616 |
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Nicolee Dixon

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Queensland Parliamentary Library
General Distribution Research Team
Research and Information Service

| | |
|--|----------------|
| Ms Karen Sampford, Team Leader | (07) 3406 7116 |
| Mrs Nicolee Dixon, Senior Parliamentary Research Officer | (07) 3406 7409 |
| Mrs Renee Gastaldon, Parliamentary Research Officer | (07) 3406 7241 |
| Ms Mary Westcott, Parliamentary Research Officer | (07) 3406 7372 |
| Ms Kelli Longworth, Parliamentary Research Officer | (07) 3406 7468 |

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Readers may also wish to refer to the report on the Bill by the relevant portfolio committee (or other committee nominated when the Bill was presented) and the Parliament's Record of Proceedings (Hansard).

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Inquiries should be addressed to:

Ms Karen Sampford
Team Leader, General Distribution Research Team
Research and Information Service
Queensland Parliamentary Library
Parliament House
George Street, Brisbane QLD 4000
Tel: (07) 3406 7116
Email: Karen.Sampford@parliament.qld.gov.au

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Key Points

1. The [Civil Proceedings Bill 2011 \(Qld\)](#) (the [Bill](#)) was introduced into the Queensland Parliament on 24 August 2011 by the Hon Paul Lucas MP, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State. The Bill was referred to the Legal Affairs, Police, Corrective Services and Emergency Services Committee on the same date for detailed consideration and report by 19 December 2011 (**Section 1** of this Research Brief).
2. The Supreme Court of Queensland is Queensland's highest court and also comprises the Court of Appeal. The District Court of Queensland is the next highest tier court, followed by the Magistrates Court of Queensland (**Section 2**). While all three courts have both civil and criminal jurisdiction, this Research Brief is concerned only with civil proceedings.
3. A major focus of this Research Brief and, indeed, of the Bill is the proposal for a new **Civil Proceedings Act 2011 (Qld)** which will contain new provisions covering civil proceedings in the Supreme Court, District Court and Magistrates Court and incorporate and modernise procedural and substantive law provisions from the [Supreme Court Act 1995 \(Qld\)](#) (SCQ Act) and the [Supreme Court of Queensland Act 1991 \(Qld\)](#) (SCA). The Bill seeks to repeal the SCA. The Bill's proposals are the outcome of many years of work by the Rules Committee (established under the SCQ Act) to reform and relocate provisions of the aforementioned Acts, many of which are archaic and cumbersome. Draft legislation and accompanying material was released for public comment in late 2010 (**Section 3**).
4. Many provisions in the proposed new **Civil Proceedings Act 2011 (CPA)** are based on existing SCA and SCQ Act provisions and are intended to apply to the Supreme Court, District Court and the Magistrates Courts unless expressly provided otherwise. The key features of the proposed new CPA are summarised under the headings below.

Application of Rules of Law and Equity

The **proposed new Part 2** of the CPA seeks to preserve the ability of all the courts to concurrently apply the rules of **law** and **equity** to ensure that all matters in dispute are completely and finally decided. The courts will be able to provide both legal and equitable remedies in a single proceeding, regardless of whether the relief sought is one given under a court's common law jurisdiction or one administered in a court's equitable jurisdiction. This allows the existing position, which has operated in Queensland since colonial times, to continue (**Section 4.1**).

General and Particular Orders

Proposed new Part 3 reforms and restates the courts' power to make **general orders** and particular orders. The **particular orders** that the courts can make include (**Section 4.2**):

- enabling a party to **amend its pleadings** to add or substitute a new cause of action or to add or substitute parties, in recognition that this may be necessary to achieve justice despite possible impacts on case management;
- that a person with an **interest** in the proceeding be included as a party;
- that persons who have the same interest in the proceeding as the party in the proceeding and could have been party to it will be bound by that order. Sometimes there are a number of people with the same interest in a matter and it may be impractical for them all to be part of a proceeding. In such a situation, the court may permit a '**representative proceeding**' if the persons have a common interest;

- various **interpleader orders** in circumstances where a person has possession or control of property over which two or more other people have a disputed claim and the person applies to the court for an order directing the claimants to resolve the dispute just between themselves;
- new orders concerning the defence of **set-off** of mutual debts between a plaintiff and a defendant – where the defendant attempts to extinguish the plaintiff's claim to the extent of the debt owed by the plaintiff;
- that proceedings are generally not **abated** (ceased) due to the death, bankruptcy or impaired capacity of a party;
- that a proceeding can be **dismissed for want of prosecution** by a plaintiff;
- that a party make a **payment into court** of an amount of money where that party claims he or she is entitled to hold certain property as a form of **security** or **lien** until the other party satisfies an obligation.

Transfer of Proceedings

Pursuant to the **proposed new Part 4** of the CPA, the courts have power to (based on provisions of the *District Court of Queensland Act 1967 (Qld)*) **transfer proceedings** between courts. A **general transfer** may occur between a higher and lower court to that court with the relevant jurisdiction to hear the matter. A transfer may be ordered for **particular reasons** – where a plaintiff wishes to amend the relief claimed and the relief is not within the court's jurisdiction; where the proceeding is beyond the jurisdiction of the court; or a counterclaim is not within the court's jurisdiction (**Section 4.3**).

Directions Conferences

Proposed new Part 5 is a restatement of SCQ Act provisions about:

- **directions conferences** which are conferences directed by the court; and
- conferences required under the court rules for **personal injuries actions**.

The aim of both types of conferences is, through facilitation by a court registrar, for parties to resolve a matter without the need for trial or to, at least, narrow down the issues (**Section 4.4**).

Alternative Dispute Resolution

Alternative dispute resolution (ADR) measures are covered by **proposed new Part 6** which is a reproduction of provisions from the SCQ Act about ADR processes. However, it is now proposed that these measures will apply to all three courts (**Section 4.5**). The two ADR processes are:

- **mediation** through a trained mediator in the attempt to reach agreement; and
- **case appraisal** where a case appraiser provides an opinion on the likely outcome of a dispute.

Subpoenas and Orders

Proposed new Part 7 restates the SCQ Act provisions dealing with situations when an individual or an officer of a corporation **fails to comply** with a **subpoena**. Courts have power to order the issue of a warrant for arrest for non-compliance (**Section 4.6**).

Interest and Assessment of Damages

Provisions of the SCA concerning **interest** on awards in certain proceedings are redrafted as a **proposed Part 8** of the CPA (**Section 4.7**) and the **new Part 9** proposes to simplify the SCA's provisions regarding the reduction of damages awards to take into account income tax and the discount rate to be applied when assessing lump sum damages for a future loss or expense (**Section 4.8**).

Wrongful Death Proceedings

The **proposed new Part 10** of the CPA restates and simplifies current SCA provisions covering **wrongful death proceedings** which are statutory based actions brought against a defendant for the wrongful death of a person. The proceedings are brought for the benefit of certain close relatives of the deceased for the loss of that person's financial support and services due to his or her death. However, under the proposed provisions, the action can be brought by the deceased's personal representative or specified family members. Currently, family members can only bring an action if there is no personal representative or six months have passed without the personal representative bringing an action. The proposed provisions preserve the current position that damages are to be assessed by the court without regard to certain payments (e.g. insurance policy payments); or to a surviving spouse's subsequent or possible future relationships; or to any benefits a child of the deceased has received (**Section 4.9**).

Provisions about Ships

The **new Part 11** seeks to introduce **provisions about ships** to deal with actions for damages for personal injury on ships in circumstances that fall outside the scope of the [Navigation Act 1912 \(Cth\)](#) (which covers rules about division of loss and damage for personal injuries in shipping contexts but does not apply to many types of shipping such as certain intrastate voyages or pleasure craft voyages). The new provisions set out the rules about how liability and damages are apportioned between at fault ship owners (**Section 4.10**).

Cost Assessors

A **proposed new Part 12** of the CPA is a restatement of some miscellaneous provisions regarding **cost assessors'** protections and immunities (**Section 4.11**).

Enforcement of Judgments and Orders

The **proposed new Part 13** is a reproduction of existing provisions of the SCQ Act and the SCA regarding how **judgments and orders** are **enforced** under enforcement warrants (e.g. a warrant allowing an enforcement officer to seize and sell property to satisfy a money order debt; or a warrant to redirect wages owing to the judgment debtor). Provisions are also included regarding the Supreme Court's power to issue a warrant for a defendant's arrest in certain circumstances and to deal with enforcement officers generally (**Section 4.12**).

5. The Bill also proposes (in **Part 28**) to **amend the SCQ Act** by omitting provisions, amending and reforming other provisions, and taking some provisions from the SCA (which is sought to be repealed by the Bill) so that the SCQ Act will contain only those provisions specific to the Supreme Court (**Section 5**).

6. The Bill seeks (in **Part 18**) to amend the [District Court of Queensland Act 1967 \(Qld\)](#) to harmonise its provisions with those pertaining to the Supreme Court and Magistrates Court and to establish a single registry for the District Court (**Section 6**).

7. The [Magistrates Act 1991 \(Qld\)](#) and the [Magistrates Court Act 1921 \(Qld\)](#) are also proposed to be amended by **Parts 25** and **26**, respectively, of the Bill to ensure that provisions common to all three courts are dealt with in a similar way. The amendments are also intended to assist in the integration, effectiveness and consistency of the court registries and registry services (**Section 7**).

For further clarification and analysis of the relevant issues, the reader should consult the Research Brief and refer to the Explanatory Notes to the Bill as well as to the Bill itself.

1 Introduction

The [Civil Proceedings Bill 2011 \(Qld\)](#) (the [Bill](#)) was introduced into the Queensland Parliament on 24 August 2011 by the Hon Paul Lucas MP, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State. The Bill was referred to the Legal Affairs, Police, Corrective Services and Emergency Services Committee on the same date for detailed consideration and report by 19 December 2011.

The focus of this Research Brief and the main objectives of the Bill are the proposals to:¹

- enact a new Civil Proceedings Act (CPA) which will contain new provisions covering civil proceedings in the Supreme Court, District Court and Magistrates Court and incorporate and modernise procedural and substantive law provisions from the [Supreme Court Act 1995 \(Qld\)](#) and the [Supreme Court of Queensland Act 1991 \(Qld\)](#);
- repeal the [Supreme Court Act 1995 \(Qld\)](#) (SCA) and re-enact, relocate and modernise SCA provisions that are of use;
- repeal obsolete provisions of the [Supreme Court of Queensland Act 1991 \(Qld\)](#) (SCQ Act) and transfer to the new CPA those provisions dealing with civil procedure applying to the Supreme Court, District Court and Magistrates Court so that the SCQ Act will retain only provisions which are specific to the Supreme Court; and
- amend the [District Court of Queensland Act 1967 \(Qld\)](#), the [Magistrates Act 1991 \(Qld\)](#) and the [Magistrates Court Act 1921 \(Qld\)](#) to ensure that provisions common to all three courts are dealt with in a similar way. The amendments are also intended to assist in the integration, effectiveness and consistency of the court registries and registry services.

2 Brief Overview of Queensland Courts

This Research Brief is concerned only with civil proceedings.

A **'civil proceeding'** is a proceeding or action taken in the civil jurisdiction of a court as opposed to a criminal proceeding taken in a court's criminal jurisdiction.²

2.1 Supreme Court of Queensland

The Supreme Court of Queensland was established in 1861 as a superior court of record with both general civil and criminal jurisdiction. It is the highest court in Queensland and its jurisdiction is defined to ensure that the Court has whatever power is necessary to do justice.³ Supreme Courts have inherent jurisdiction (authority to adjudicate)⁴ to properly exercise their powers, perform their functions and control abuses of process.⁵

¹ The Bill also amends a number of other pieces of legislation which are discussed in 'Key Documents and Links' at the end of this Brief.

² PE Nygh & P Butt, *Butterworths Concise Australian Legal Dictionary*, Butterworths Australia, 1997, p 67.

³ BC Cairns, *Australian Civil Procedure*, LawBook Co, 6th ed., 2005, p 15. The [Constitution of Queensland Act 2001 \(Qld\)](#), s 58, provides that the Supreme Court has all jurisdiction necessary for the administration of justice in Queensland and has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise.

⁴ *Butterworths Concise Australian Legal Dictionary*, p 205.

⁵ BC Cairns, pp 15-16.

The Supreme Court comprises a Chief Justice, a Court of Appeal President and other judges of appeal, a Senior Judge Administrator (and such judges as are appointed by the Governor-in-Council (these judges sit in the trial division)). The Court of Appeal hears appeals from the District and Supreme Courts, and from many tribunals. The Supreme Court's trial division hears serious criminal cases and all civil matters involving amounts of over \$750,000 (SCQ Act, Part 2, Division 1).⁶

2.2 District Court of Queensland

The District Court of Queensland, established by the [District Court of Queensland Act 1967 \(Qld\)](#), is the court below the Supreme Court. It handles serious indictable offences in its criminal jurisdiction, serious civil disputes involving amounts of more than \$150,000, but less than \$750,000, and appeals from Magistrates Court decisions. The Court has various regions throughout the State.⁷

2.3 Magistrates Court of Queensland

The Magistrates Court of Queensland (see [Magistrates Act 1991 \(Qld\)](#) and the [Magistrates Court Act 1921 \(Qld\)](#)) is a lower court and the majority of civil and criminal matters are dealt with by it.⁸ The Magistrates Court operates at a local level throughout the State. It hears civil matters where the amount in dispute is up to \$150,000. Appeals are heard in the District Court. The Magistrates Court also has jurisdiction over domestic violence cases, minor family law matters. It is also a Children's Court for less serious offences by children and a Coroners Court.⁹

3 Development of the Civil Proceedings Bill 2011

Section 118C of the [Supreme Court of Queensland Act 1991 \(Qld\)](#) (SCQ Act)¹⁰ provides for a Rules Committee to be established by the Chief Justice of the Supreme Court which is required, by s 118C(2)(a), to advise the Minister about the repeal, reform or relocation of the provisions of the [Supreme Court Act 1995 \(Qld\)](#) (SCA).

In a recent [address](#) to the Central Queensland Law Association, the Hon Paul de Jersey AC, Chief Justice of Queensland, said that the SCA is a:

[H]otchpotch of 301 disparate provisions dealing with the Court's multifaceted jurisdiction. The reform and relocation of the provisions of the [SCA] were committed to the Rules Committee by legislation in 1999. It has taken the Committee a substantial time, in close consultation with Parliamentary Counsel, but the task has been substantially accomplished.¹¹

In late 2010, the Rules Committee published, on the [Queensland Courts](#) website, a draft Civil Proceedings Bill for public consultation until 19 November 2010. The draft Bill was

⁶ See also, Queensland Courts, [Supreme Court of Queensland](#) website.

⁷ See also, [District Court of Queensland](#) website. This court also operates as a Children's Court for serious cases involving persons under 17 years and as a Planning and Environment Court.

⁸ Committal proceedings for criminal trials are held in the Magistrates Court.

⁹ See also, the [Magistrates Court of Queensland](#) website.

¹⁰ Inserted into the Act in 1998.

¹¹ Hon Paul de Jersey AC, Chief Justice of Queensland, '[Address](#) to the Central Queensland Law Association Annual Conference', 23 October 2010, p 2.

accompanied by a draft proposed advice from the Rules Committee to the Attorney-General.¹²

Feedback was received from the Queensland Law Society (QLS), the Bar Association Queensland, Legal Aid Queensland and members of the Queensland legal profession. The [Explanatory Notes](#) (p 4) comment that stakeholders were supportive of the changes and that their feedback was considered by the Rules Committee, resulting in a small number of technical amendments to the Bill.¹³

4 The Civil Proceedings Bill 2011: Proposed New Civil Proceedings Act

This Research Brief focuses on the proposal for a new **Civil Proceedings Act 2011** and for the repeal of the SCA. It also summarises amendments to the SCQ Act, the District Court of Queensland Act and the Magistrates legislation sought to be made as a consequence of these reforms.

Parts 1-14 of the [Bill](#) enact a new **Civil Proceedings Act 2011 (CPA)** seeking to replace the current SCA. The CPA is intended to apply to civil proceedings and contempt of court proceedings in the Supreme Court, District Court and a Magistrates Court unless otherwise expressly provided (**proposed new s 3**). The word ‘court’ is intended to refer to all three courts, depending on context (**proposed new s 5**).

4.1 Law and Equity

Part 2 of the CPA deals with administration of **law and equity** by the courts. ‘Equity’ is a separate body of law that has emerged, having been developed by the Court of Chancery in England, to supplement and ‘fill in the gaps’ of the traditional common (case or judge made) law. Its principles tend to be based on ethical notions of fairness.¹⁴ Until the late 19th Century, equity and common law were administered as two distinct streams of rules and procedures in separate courts in England. For some time, Australian courts followed suit leading to issues such as a party not being able to recover equitable relief if a proceeding was commenced in the wrong jurisdiction of the court.¹⁵

The *Judicature Act 1873* (UK) was then passed (and eventually – although relatively quickly in Queensland (1876) – followed by legislation throughout Australia) to ‘fuse’ common law and equity to allow both to be applied by all courts to matters before them.¹⁶ In all Australian

¹² The draft Bill, draft advice and associated documents (explanation of the SCA provisions sought to be repealed; a mock-up of the SCQ Act incorporating proposed amendments; and a mock-up of the *District Court of Queensland Act 1967* incorporating proposed amendments) are no longer on the Queensland Courts website. These documents are mentioned in the Explanatory Notes to the Bill (pp 3-4).

¹³ The [Explanatory Notes](#) (p 4) also note that proposed amendments to the *Retirement Villages Act 1999* (Qld) and the *Associations Incorporation Act 1981* (Qld) had been separately released for public consultation in a draft Fair Trading and Other Legislation Amendment Bill. Considerable comment had been received from stakeholder representatives on the proposed changes to the *Retirement Villages Act 1999* which had resulted in various revisions and amendments.

¹⁴ See also, *Butterworths Concise Australian Legal Dictionary*, p 139.

¹⁵ J Crawford & B Opeskin, *Australian Courts of Law*, Oxford University Press, 4th ed., 2004, p 135.

¹⁶ J Crawford & B Opeskin, p 135.

states and territories, the fundamental principle is now – and has been in Queensland for some time (see SCA, esp. ss 244, 246) – that the Supreme Court applies both common law and equitable rules and remedies to all civil matters before them so it may not matter, in practical terms, which stream a rule falls into. However, in the event of a conflict between common law and equity, equitable rules prevail.¹⁷

The **proposed new ss 7-12** of the CPA seek to preserve the above position and apply to all three courts, apart from some instances (see below). The provisions allow concurrent operation of the equitable and legal rights, remedies etc. If there is any conflict or difference between the two, the rules of equity prevail. Essentially, a court must exercise its jurisdiction to ensure, as far as possible, that all matters in dispute between parties are completely and finally decided and multiplicity of legal proceedings is avoided.

The provisions also cover matters (many of which are based on current SCA provisions)¹⁸ including (but not limited to) the power to: stay a proceeding; award equitable damages as well as, or instead of, an injunction or specific performance; grant injunctions to restrain a possible breach of contract etc. Some provisions apply only to the Supreme Court (orders concerning declarations; to fulfil personal duties; to appoint a receiver).¹⁹

4.2 Orders a Court can Make

Proposed **Part 3** of the CPA covers the courts' power to make general and particular **orders**.

The **proposed new ss 13-15** are based on existing **general order** provisions of the SCQ Act, ss 79-80 and the SCA, s 221.

It is proposed that the courts can make **particular orders** pursuant to **new ss 16-24** (based on the SCQ Act ss 81-85, 116I, apart from new s 17 which is based on SCA, s 119). These are set out under the headings below.

4.2.1 Amendment for New Cause of Action or New Party

Courts employ case flow management schemes to contain costs and minimise delay which can be caused if parties seek leave to amend pleadings to add or substitute a new cause of action and to add or substitute parties. The High Court has found that, while case management is important, the ultimate aim of a court is to attain justice and that courts should have a broad discretion to allow an amendment to a pleading to prevent injustice.²⁰ As for adding a new party, it seems that this is less problematic and all jurisdictions have rules for adding, substituting or removing parties. The underlying principle appears to be ensuring that all the parties necessary for allowing the court to effectively and completely resolve all the matters in dispute are present.²¹

Pursuant to **proposed new s 16** a court may allow an amendment to a document in a proceeding (e.g. a claim, application or pleadings) to substitute or include a new cause of action or to add a new party. It does not matter that the aforementioned new action arose

¹⁷ R Chisholm & SG Nettheim, p 27.

¹⁸ Including SCA, , ss 180, 244, 246.

¹⁹ SCA, ss 128, 172, 246.

²⁰ BC Cairns, p 225, citing *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

²¹ BC Cairns, pp 239, 246.

after the proceeding began; or a period of limitation, current at the beginning of the proceeding, has now ended.²²

4.2.2 Interested Persons may Become a Party and Bound by Outcome

A court may order that a person interested in the proceeding be either included as a party or given notice of the proceeding. If the person given such a notice does not elect to become a party to the proceeding, he or she will be bound by the outcome (**proposed new s 17**).

4.2.3 Order Binds Persons who are Represented

Sometimes there are a number of people with the same interest in a matter and it may be impractical for them all to sue or be sued and to appear at a proceeding. In such a situation, the court may permit a '**representative proceeding**' if there is a common interest among all the persons and they all have the same interest in the relief sought.²³

The CPA intends to provide that, unless a court orders otherwise, if an order is made in a proceeding, a person or persons who has or have the same interest in the proceeding as the party in the proceeding and could have been party to it will be bound by that order (but the order can be enforced against a person who is not a party only with the court's leave) (**proposed new s 18**).

4.2.4 Interpleader Applications and Orders

What is an Interpleader?

'**Interpleader**' is a procedure where a party faced with competing claims for the same debt or property can avoid multiple liability by obtaining an order to direct the claimants to resolve the dispute among themselves through litigation or settlement. The interpleader procedure allows a person who has control or possession of property, but no interest in the dispute, to avoid becoming a party to proceedings between competing claimants of that property. The interpleader reduces the number of actions in respect of the same property.²⁴

An Interpleader order is only possible if the applicant for the order does not claim any property in the subject matter of the dispute other than costs. Further, the applicant must be willing to pay the money (if the dispute is over money) into court; or to (if the dispute is over goods) dispose of the goods as the court directs. Fulfilment of these prerequisites is essential.²⁵

An example is provided by the case *Olsson v Dyson*²⁶ where the deceased had loaned money to a company which was repayable with interest. The deceased orally instructed the

²² See BC Cairns regarding amendments outside the limitation period (p 233 for pleadings etc; p 253 for parties). Note that the court rules may limit the circumstances in which the said amendments may occur.

²³ BC Cairns, pp 255-256, citing *Duke of Bedford v Ellis* [1901] AC 1.

²⁴ BC Cairns, p 270. Provisions regarding interpleader are found in Part 8, Division 2 of the SCA and are provisions that have been relocated from the *Interdict Act 1867* (Qld). The circumstances for making an application for an interpleader order are set out in a very complex and verbose s 150 of the SCA. Section 150 comprises one sentence consisting of around 270 words!

²⁵ BC Cairns, p 270.

²⁶ (1969) 120 CLR 365, discussed by BC Cairns, p 271.

company and his wife that he had given the money to his wife and that the company should repay his wife. The deceased's executors sued the company to recover the debt and the deceased's wife also made a claim on the company. The company obtained an interpleader order so the matter was litigated between the executors and the wife.

The interpleader process can also apply to the situation where a sheriff/enforcement officer has executed a judgment and has taken goods or money claimed by a third party.²⁷

Interpleader orders

Where the court considers that an interpleader order should be made, the competing claimants can be ordered, among other things, to prepare the issues for trial.

Section 83 of the **SCQ Act** sets out the various **interpleader orders** that a court can make. The **proposed new s 19** of the **CPA** virtually reproduces that existing provision. Thus, a court may do one or more of the things set out in s 19(1). These include (but see s 19 for the full range):

- if there is a pending proceeding against the applicant for the order, it can order a claimant be included as a defendant as well as, or instead of, the applicant;
- order a question between the claimants be stated and tried and direct which of them is to be the plaintiff and which is to be the defendant, and give necessary trial directions;
- order the applicant to pay or transfer the property in dispute or proceeds of sale into court, or dispose of it as the court directs.²⁸

4.2.5 Set-Off in Relation to Mutual Debts

A '**set-off**' is sometimes confused with a 'counter-claim'. A set-off is a defence which stops the plaintiff from enforcing a claim whereas a counter-claim is a completely separate proceeding against the plaintiff (as if the defendant is suing the plaintiff in another action).²⁹ For a set-off to apply the debts must be mutual (the plaintiff and the defendant owe each other a debt). The set-off does not deny that there is a debt; it assumes the existence of the debt and then states why the plaintiff is not entitled to payment. Once the set-off is established it extinguishes the plaintiff's claim to the extent of the set-off.³⁰

A set-off must be specifically pleaded as part of the defence. Rule 173 of the [Uniform Civil Procedure Rules](#) (UCPR) sets out the rules regarding how a defendant can rely on set-off as a defence to all or part of a claim and how a court can deal with the set-off.³¹

The **proposed new s 20** of the CPA (a new provision not based on existing provisions) seeks to clarify the position about set-off and mutual debts, essentially making the same points as those discussed above:³²

²⁷ BC Cairns, p 271; Part 8, Division 3, SCA.

²⁸ See also, proposed s 19(2) where there are several pending proceedings about the property.

²⁹ BC Cairns, p 210.

³⁰ BC Cairns, p 211. A set-off in relation to mutual debts had its origin in the Statutes of Set-off in the UK.

³¹ BC Cairns, pp 213-214. See also, r 168 regarding non-admissions.

³² Note that the [Queensland Law Society Submission](#), 22 November 2010, p 1, to the Rules Committee regarding the draft CP Bill, observed that r 173(3) of the UCPR allows the court to set aside a set-off defence and order it be dealt with in a separate proceeding in certain cases and it may be that the new s 20 may be inconsistent with this in seeming to provide for an absolute entitlement for a defendant to set-off mutual debts by way of defence.

- if the plaintiff and defendant have mutual debts (i.e. any liquidated claims but it will not matter if the mutual debts are different in nature), the defendant may, by way of defence, set off any debt owed by the plaintiff that was due and payable at the time the set-off defence was filed;
- a set-off can apply where one or more of the mutual debts is owed by or to a deceased person who has a personal representative;
- a set-off does not apply where the plaintiff and defendant have agreed that debts may not be set off against each other;
- section 20 does not affect other rights of set-off or obligations and applies subject to any express provision in another Act.

4.2.6 Abatement of Proceedings

Under r 72 of the UCPR, if a party to a proceeding becomes **bankrupt**, or becomes a person with **impaired capacity** or **dies** during the proceeding, a person may take any further step in the proceeding for or against the party *only* with leave of the court. Rule 72 goes on to provide for the court being able to substitute someone else for the deceased party and the steps that have to be taken for this to occur. This way, the proceeding does not abate. However, not all causes of action survive a party's death and if the cause of action is one that does not so survive, the proceeding terminates.³³

Proposed new s 21(1) of the CPA restates this position providing that the death or bankruptcy of a party does not abate proceedings unless the cause of action does not survive the death or bankruptcy. The **new s 21(2)** is based on the current s 116I of the SCQ Act providing that if the proceeding does abate before a costs order is satisfied, the order remains enforceable.

4.2.7 Dismissal for Want of Prosecution and Default Judgments

If a plaintiff does not expeditiously progress a proceeding (e.g. does not take a required step or comply with a court order within a stated time), a defendant can apply to the court for an order to dismiss the proceeding for **want of prosecution**.³⁴ Section 85 of the SCQ Act currently provides the District Court and Magistrates Courts with power to dismiss a proceeding if two years have passed since the last step was taken in a proceeding. The **proposed new s 22** of the CPA merely restates s 85. The Supreme Court has inherent power to dismiss proceedings for want of prosecution.

The equivalent type of result for a plaintiff where a defendant fails to deliver a defence within the required time is to enter a **judgment in default** of appearance. Where a proceeding is on foot, if the defendant fails to take other steps such as discovering documents or failing to comply with a court order, the plaintiff can apply for the defence to be struck out and a default judgment to be entered.³⁵

³³ BC Cairns, p 254.

³⁴ BC Cairns, p 394. See UCPR, r 280.

³⁵ BC Cairns, p 369; UCPR, rr 283-290. The SCQ Act, s 84 provides that a default judgment given by a registrar has the same effect as if it were a judgment given by the court. The **proposed new s 23** of the CPA restates that provision.

4.2.8 Discharge of Lien or Security

A **proposed new s 24** of the CPA³⁶ intends to allow the court to order a payment into court in a particular situation which, according to the Explanatory Notes (p 7), does not currently have any statutory basis.

The provision seeks to apply where a party to a proceeding claims recovery of particular property that is not land (the 'relevant property') and the party from whom recovery is sought claims that he or she is entitled to hold the property because of a **lien** (i.e. the right to retain possession of property of a person as security until that person satisfies a debt or obligation) or as **security** for money. Further, the party from whom recovery is sought must not otherwise dispute the title of the claiming party. In such a case, the court can make an order:

- allowing the claiming party to pay into court, to be held until the proceeding ends, the amount of money that is the subject of the lien or security plus any sum for interest and costs as the court directs; and
- that, on payment into court, such judgment be given for recovery of the relevant property as the nature of the case requires.

4.3 Transfer of Proceedings

The **proposed new Part 4** of the CPA seeks to provide for the **transfer of proceedings** between the courts and is, in part, based on provisions in the [District Court of Queensland Act 1967 \(Qld\)](#) (see esp. ss 81-83, 85-86).

It has been observed that provisions for transfer of civil proceedings have always been much more comprehensive than those for criminal matters because of an initial lack of confidence in lower courts in relation to civil matters. This reticence did not seem to be shown in relation to criminal matters. Transfer of proceedings from a higher court to a lower court which has jurisdiction to hear the matter may enable the matter to be dealt with more quickly and with less cost. A common reason that a matter is transferred to a higher court is that the lower court lacks jurisdiction to hear it.³⁷

4.3.1 Transfers Generally

Proposed new ss 25-26 provide for the Supreme Court to order a proceeding in the District or Magistrates Court to be transferred to the Supreme Court and for a proceeding in the Supreme Court to be transferred to whichever of the District or Magistrates Court has jurisdiction. A similar power exists for the District Court to transfer proceedings between it and the Magistrates Court. Note that the power to transfer rests with the higher court.³⁸

4.3.2 Transfers for Particular Reasons

Other reasons proceedings may be transferred between courts are catered for by the **proposed new ss 27-29** which also set out the mechanisms for dealing with the transfer. A transfer may occur where:

³⁶ New s 24 does not appear to be based on any existing provision,

³⁷ J Crawford & B Opeskin, pp 118, 119.

³⁸ As J Crawford & B Opeskin (p 119) note is generally the case.

- a plaintiff/applicant wishes to amend the relief claimed and such relief is not within the court's jurisdiction;
- the proceeding is beyond the jurisdiction of the particular court in which it is pending;³⁹
- a party files a counterclaim for relief that is not within the court's jurisdiction.

The court to which the proceeding is transferred has power to hear and decide the proceeding (**proposed s 31**). In determining limitation periods, the transferred proceeding/counterclaim is taken as having started when it was originally started (**proposed s 32**).⁴⁰

4.4 Conferences

All of the courts facilitate conferences between the parties before trials and hearings. The **proposed Part 5 (ss 34-36)** seeks to replace, and is based on, ss 77-78 of the SCQ Act, applying to all courts. The new provisions apply to conferences held at the court's direction (**directions conferences**) and a conference required under the rules for personal injury or death actions (**personal injury conference**: see UCPR, r 553).⁴¹

4.4.1 Directions Conference

A directions conference seeks to bring all parties together for a detailed consideration of the matter in dispute. The aim is to have it resolved without the need for a hearing or, at least, to try to narrow down the issues for trial. A party can seek a directions conference after the defence has been filed and served by sending a letter to the registrar of the relevant court. The letter must also indicate why alternative dispute resolution (ADR) is not appropriate. The court can also direct a conference be held on its own initiative.

Conferences are usually conducted by a court registrar who acts as a facilitator seeking to help parties in their discussions. The conference is not a mediation (ADR processes are covered in the proposed Part 6 of the CPA).

The possible outcomes include the parties reaching agreement and recording it in writing (best case scenario); or there no agreement and the matter needs to go to a hearing (worst case scenario). In between these extremes, parties might make admissions and the length of trial is shortened accordingly; or other appropriate directions may be made. If a party fails to attend after being directed to do so, the registrar can give judgment against that party. The current s 77 of the SCQ Act provides that where parties agree on a whole or part resolution of their dispute, the agreement must be written down and signed by or for each party and it has effect as a compromise. **Proposed new s 35** of the CPA does likewise.

³⁹ In this instance, if the transfer is not allowed, the court must strike out the proceeding and may order costs against the party who started the proceeding.

⁴⁰ Costs are generally in accordance with the scale of costs applicable to the court in which the proceeding was pending when the costs were incurred (**proposed s 33**). See also, **proposed s 30** (copy of the order and filed documents must be given to the registrar of the court to which the matter is transferred).

⁴¹ The information under this heading is adapted from the Queensland Courts, '[Directions Conferences](#)' factsheet. See also, UCPR, Ch 13, Part 9 (Magistrates Courts), Division 3 (directions conferences).

To facilitate open discussion, anything said or done in a conference is confidential. Accordingly, evidence of things said or done, admissions made, or documents tendered is not admissible at the trial or in another civil proceeding⁴² unless all the parties agree (see s 78 of the SCQ Act, replicated by **proposed new s 36** of the CPA).

4.4.2 Personal Injuries Conference

As noted above, the new **ss 34-36** are also intended to apply to personal injuries conferences required under the UCPR. In personal injuries matters, towards the end of the pleadings stage, the plaintiff has to serve a statement of loss and damage on the defendant and the defendant has to serve a statement of expert and economic evidence – both documents seeking to ensure that both parties have enough particulars to determine if the matter can be resolved before trial.⁴³ After service of the statement of loss and damage, a party can give other parties a notice for the holding of a conference to discuss the matters in dispute and reach agreement, if possible. The process and outcome is similar to that for a directions conference (see proposed ss 35-36).

4.5 Alternative Dispute Resolution (ADR) Processes

The **proposed new Part 6** of the CPA covers **ADR processes** and essentially reproduces Part 8 of the SCQ Act. However, whereas, at present, the SCQ Act's ADR provisions apply just to Supreme Court proceedings, the proposed provisions seek to apply to all three courts. Given the minor nature of the changes regarding ADR – apart from seeking to apply to all the courts – just a brief summary is given here.⁴⁴

In essence, an '**ADR process**' is **mediation** or **case appraisal** under which parties are helped to achieve negotiated settlement or resolution of their dispute within the legislative framework (**proposed new s 37** (objects of ADR)). As it is regarded as integral to pre-trial case management, ADR is nearly always compulsory.⁴⁵

'**Mediation**' involves using a trained mediator to assist in achieving negotiated agreement. '**Case appraisal**' is where a case appraiser provisionally decides a dispute but that decision is not binding until the deadline for filing an election to go to trial has passed and a court order gives effect to the appraiser's decision (**proposed new ss 39-41**, reproducing SCQ Act, ss 95-97).

The ADR **process** is set out in the **proposed new ss 42-47** (similar to the SCQ Act, ss 101-106). Parties may agree to an ADR process but the court can, nevertheless, on its own initiative or on the application of a party, refer the matter to mediation or case appraisal.⁴⁶ If a referring order is made, parties must attend the ADR and not impede the process, or the court may impose sanctions (e.g. taking the non-complying party's action into account when awarding costs). However, persons cannot be subpoenaed to a mediation and can only be subpoenaed

⁴² However, see proposed s 36(2).

⁴³ BC Cairns, p 65.

⁴⁴ A useful overview to ADR in Queensland courts is provided in BC Cairns, pp 63-64. Note that ADR under the new provisions is not intended to apply to employment claim disputes under the *Magistrates Court Act 1921* (**new s 38**).

⁴⁵ BC Cairns, p 63.

⁴⁶ The proposed s 43(4) sets out the matters the court may consider when deciding whether to send a dispute to case appraisal (e.g. the likelihood of a compromise).

to a case appraisal by way of a court order.⁴⁷ The case appraisal procedure is set out in the proposed s 45 and is geared towards providing an opinion on the likely outcome of the dispute.

The **proposed new ss 48-51** (similar to the SCQ Act, ss 107-111) provide for what happens at the **end** of the **ADR process**. Similarly to the outcomes reached at the abovementioned conferences, parties may mediate a whole or part resolution of their dispute; the agreement must be reduced to writing and signed by each party and the mediator. Parties can also apply to the court for an order giving effect to a mediation after a mediator's certificate has been filed. If the prescribed time mentioned in s 51 is satisfied, a party can apply for an order giving effect to a case appraiser's decision.

The **proposed new ss 52-54** are similar to ss 112-114 of the SCQ Act and deal with protection, immunity and confidentiality issues.⁴⁸

In the [Queensland Law Society Submission](#) (p 2) to the Rules Committee during consultation on the draft Bill, the QLS queried whether the provisions regarding case appraisal were still relevant given that such appraisal did not seem to be common practice (QLS no longer holds a list of approved appraisers) and mediation was seeming the preferred option.

4.6 Compliance with Subpoena or Order

Proposed new Part 7 (ss 55-57) are based on the current SCQ Act, ss 93I-93K. They enable all the courts to deal with situations when an individual or an officer of a corporation **fails to comply** with a **subpoena**. Courts have power to order the issue of a warrant for the arrest of the individual (or the officer of the corporation) and the production of those persons in court (and can also order payment of costs and expenses wasted through the noncompliance). Noncompliance without lawful excuse is a contempt of court. These noncompliance provisions also apply in relation to the failure to attend a case appraisal when subpoenaed to do so.⁴⁹

4.7 Interest

The **proposed new Part 8 (ss 58-59)** of the CPA is basically a simplified redraft of the current ss 47-48 of the [SCA](#). The provisions deal with interest in relation to proceedings for **payments of money** and allow a **money order** to carry interest in specified situations.

4.8 Assessment of Damages

Proposed new Part 9 covers **assessment of damages** for personal injury, loss of dependency and wrongful dismissal.

⁴⁷ The proposed ss 55-56, (compliance with subpoenas (discussed later)) apply to case appraisals.

⁴⁸ ADR convenors may be liable to a penalty if they disclose information, without reasonable excuse (see proposed s 54(2)), coming to their knowledge through an ADR process.

⁴⁹ Note that **Part 17** of the Bill seeks to amend the [Criminal Code](#) to insert a new Ch 63A to make similar provision for arrest warrants in relation to individuals and corporations failing to comply with a subpoena.

The **proposed new s 62** is a redraft (welcomed by the QLS (QLS submission, p 3)) of s 15 of the SCA. It states that **damages** based on deprivation/impairment of earning capacity; loss of earnings; and loss of future probable earnings must be **reduced** by the **amount of income tax** that would have been paid on the relevant earnings had they been received.

The **proposed s 61** applies to some (but see s 61(2)) damages awards for deprivation/impairment of earning capacity or for liability to incur future expenditure. When the court assesses damages as a **lump sum** for a future loss or expense, the amount must be the present value of that loss and calculated using the prescribed discount rate.⁵⁰ The provision considerably simplifies the current s 16 of the SCA.

4.9 Wrongful Death Proceedings

4.9.1 Background

In simple terms, if a defendant wrongfully causes a person to die, a statutory cause of action can be brought for the benefit of certain relatives of the deceased for the loss of the financial support and services suffered due to that person's death.⁵¹ The common law did not permit actions for wrongful death in the United Kingdom or Australia. Consequently, legislation was passed to create a statutory cause of action for the benefit of certain family members of the deceased.⁵² In Queensland, ss 17-23D of the SCA currently provide the statutory basis for a wrongful death action.

A wrongful death action is different to an action brought by the person wronged in that it is restricted to a claim for financial loss (e.g. loss of income) and loss of domestic and similar services.⁵³ Hence, damages are not given for the family members' emotional suffering.⁵⁴ In the past, wrongful death actions were often called 'dependency claims' as the family member bringing the action (e.g. child or spouse) was generally financially dependent on the deceased. These days, however, many families have dual incomes. As the QLRC points out, it has never been necessary for a family member to show actual dependency on the deceased, just that there was a reasonable expectation of benefit from the deceased's continued living.⁵⁵

4.9.2 Proposed New Provisions

Proposed new Part 10 of the CPA (**wrongful death proceedings**) contains simplified and modified versions of ss 17-23D of the SCA.

⁵⁰ Prescribed under a regulation or, if no regulation, it is 5% (s 61(4)).

⁵¹ A comprehensive overview of actions for wrongful death in the Queensland context is provided in pp 1-3 and Chapter 2 of the Queensland Law Reform Commission's (QLRC's) [Report No 57 – Damages in an Action for Wrongful Death](#), November 2003.

⁵² Such actions have often been termed 'Lord Campbell's Act actions'.

⁵³ QLRC, *Damages in an Action for Wrongful Death*, pp 6, 7.

⁵⁴ QLRC, *Damages in an Action for Wrongful Death*, p 6, citing *Woolworths Ltd v Crotty* (1942) 66 CLR 603, 618. However, the QLRC notes that the Northern Territory and South Australia make specific provision for non-pecuniary loss. Also, depending on the circumstances, there may be grounds for seeking damages for nervous shock suffered by a family member caused by the negligent act resulting in death of the deceased (*Jaensch v Coffey* (1984) 165 CLR 549).

⁵⁵ QLRC, p 7.

When is a person liable for a death?

If a death is caused by a defendant's **wrongful act/omission** (whether or not an offence) which would, if death had not resulted, have entitled the deceased to recover damages in a personal injury proceeding, the defendant is liable for damages despite the death. The court may award the members of the deceased's family the damages it considers to be proportional to the damage to them resulting from the death (**proposed new s 64**).

A '**member of the deceased's family**' means the deceased's children (including a grandchild or step child); a person to whom the deceased acted in place of a parent; a parent of the deceased or a person who acted in the place of such a parent; or a spouse (**proposed new s 62**). The definitions of '**child**' and '**parent**' reflect s 13 of the SCA and the proposed broad definition of '**spouse**' under **new s 63** mirrors the current s 18(2) of the SCA.

Who may bring the action?

The proceeding may be brought by the **personal representative** of the deceased or by any one or more of the **members of the deceased's family** who suffered damage because of the death. The amount of damages awarded must, after deducting any costs not recovered from the defendant, be divided among the family members in the shares the court decides. Only one proceeding can be brought.

While the **proposed new s 65** of the CPA is based on ss 18-19, there are some differences:

- it is proposed to expressly allow either a member of the deceased's family who suffered damage or the personal representative to bring the action. Currently, s 21 of the SCA allows an action to be brought by a family member only if there is no personal representative or no action is brought by the personal representative within six months of death. The QLS Submission (p 3) observed that the six month timeframe from the date of death for a non-personal representative to bring proceedings was neither practical nor realistic and supported the change;
- additional provisions are made to cater for family members bringing the action. **New s 65(3)** provides for the giving of notices under the Act and the **proposed new s 66** enables a family member to also pursue certain action under s 66 of the *Succession Act 1981* (Qld).⁵⁶ Directions can also be sought from the Supreme Court regarding steps required before commencing proceedings.

How are damages assessed?

As mentioned earlier, the eligible family members of the deceased can recover only for pecuniary/financial loss – usually loss of present and future income and domestic services – which would reasonably have been expected to continue had the deceased lived. The damages are compensatory and are intended to put the family member in a position as nearly as possible to that which he or she would have been in had not the deceased been killed. Thus, because the damages are paid as a lump sum, the court not only assesses the damages already suffered but also attempts to predict the person's likely future position and the extent of losses in the future. Because the future is uncertain, damages are often adjusted to take account of possible future events/contingencies.⁵⁷ Examples of matters taken into account might include that the deceased may have been promoted and provided

⁵⁶ The family member must account to the personal representative for such amount recovered.

⁵⁷ QLRC, *Damages in an Action for Wrongful Death*, p 14.

more financial support for his or her family or, conversely, begun suffering ill-health and been unable to provide as much support.⁵⁸

Insurance payments and other benefits

At one time, any benefit, such as an insurance policy payment, to which the plaintiff became entitled on the deceased's death was taken into account in reducing the award of damages. The current s 23 of the SCA (proposed to be replaced by **new s 70** of the CPA), sets out the items that *cannot* be taken into account to reduce damages payable to the family member. These include amounts payable upon the death of the deceased under an insurance contract; or under a contract with bodies such as trade unions, friendly societies etc.; superannuation and similar payments; and other government pensions, benefits, allowances; and gratuities.⁵⁹

Subsequent relationships and possible future relationships⁶⁰

It was also traditionally the case that the assessment of damages awarded to a surviving spouse might be affected by the spouse forming a relationship of financially supportive cohabitation (e.g. marriage or de-facto relationship) or by the prospect of there being such a relationship in the future. In late 2002, the High Court in [De Sales v Ingrilli](#) found that, usually, damages should not be reduced because of the possibility of a remarriage or other financially beneficial relationship but if there is evidence of a new relationship at the time of the trial, account can be taken of this fact.⁶¹

The QLRC, in its [Damages in an Action for Wrongful Death](#) Report (pp 54-55), said that, in its view, *'taking account of the possibility that the surviving spouse may form a relationship of financially beneficial cohabitation is a highly speculative exercise, and ... the inquiries necessary to determine such a possibility are intrusive and demeaning to a surviving spouse'*.⁶² While acknowledging the risk of over-compensation, the QLRC nevertheless recommended that in assessing a spouse's damages, no account be taken of the possibility of a future relationship of financially beneficial cohabitation.

Where there is evidence that the surviving spouse has formed a new relationship since the death of the deceased, the QLRC recommended that any resulting monetary support and domestic services resulting from that relationship should be able to be considered in the assessment of damages but with some reservations regarding the financial support and services continuing into the future. If the spouse intends to enter into such a relationship, this should not affect the assessment of his or her damages.⁶³

In 2004, the SCA was amended to include s 23A to give effect to the QLRC's recommendations.⁶⁴ The **proposed new s 67** of the CPA essentially replicates s 23A. Thus, in the assessment of damages for wrongful death in relation to a surviving spouse:

- the court must not take account of any financial benefits the spouse may receive as a result of entering into a new relationship in the future, even if the spouse intends to enter into such a relationship;

⁵⁸ QLRC, *Damages in an Action for Wrongful Death*, pp 15-16.

⁵⁹ See also, QLRC, *Damages in an Action for Wrongful Death*, p 16.

⁶⁰ **Proposed new s 69** is a transitional provision.

⁶¹ (2002) 212 CLR 338, as discussed by the QLRC in *Damages in an Action for Wrongful Death*, pp 24-25.

⁶² The quoted passage is at p 54.

⁶³ QLRC, *Damages in an Action for Wrongful Death*, p 78, stating that its views were consistent with the view of the majority of the High Court in *De Sales v Ingrilli*.

⁶⁴ See [Explanatory Notes](#) to the Justice and Other Legislation Amendment Bill 2004 (Qld), p 1. The QLRC had also recommended legislation to give effect to its recommendations (see p 55).

- if there is evidence of a new relationship at the time of trial, the court can take into account any financial benefits the spouse has received and is likely to continue to receive. However, the court must not assume that the new relationship will necessarily continue or that the spouse will continue to receive the same financial benefits as he or she has already received.

Claims made on behalf of a child

In its Report (p 99), the QLRC said that a claim on behalf of a child of the deceased should be considered independently of the status of the relationship, if any, between the surviving parent and the deceased. It also considered that any monetary benefits and/or services the child has received, or may receive from any person (other than the deceased) should be irrelevant to the assessment of damages. Even if the surviving parent had remarried or formed a new relationship, the deceased would have had a continuing obligation to maintain the child under family law and child support legislation. The QLRC made recommendations accordingly.

In 2004, s 23B was inserted into the SCA, which is sought to be replaced by the identical **proposed new s 68** of the CPA. It provides that when the court is assessing damages regarding the financial benefits lost by a child of the deceased as a result of the wrongful death:

- it is irrelevant that any relationship between the deceased and the surviving parent before the wrongful death would or would not have continued apart from the death;
- damages must not be reduced because the relationship between the deceased and the surviving parent ended before the death of the deceased;
- in assessing damages, the court may not take into account any financial benefits the child has received or may receive from other persons, including from a partner in a new relationship that the surviving parent has entered into or may enter into.

4.10 Provisions about Ships

The Supreme Court of Queensland, as do other Supreme Courts, has **admiralty and maritime jurisdiction** conferred on it by a combination of [s 39](#) of the *Judiciary Act* 1903 and [s 76\(iii\)](#) of the *Commonwealth Constitution*.⁶⁵ A recent Queensland case involving negligence in the shipping and navigation context is [Balnaves v Smith & Anor; Malone v Smith & Ors](#).⁶⁶

Part IV, Division 11 of the Commonwealth [Navigation Act 1912](#) covers the rules for the division of loss and damages for personal injuries in situations where the Act applies (see s 2). Where the Act does not apply, relevant state and territory laws operate.⁶⁷ For Queensland purposes, the effect of s 2 is that the Navigation Act will not apply to trading ships on intrastate voyages in Queensland; Australian fishing vessels or fishing fleet support vessels on interstate or intrastate voyages; inland waterways vessels; or pleasure craft.

A **proposed new Part 11 (ss 71-72)** of the CPA will provide statutory laws for situations concerning damages for personal injury on **ships** that are outside the scope of the Navigation Act (e.g. trading ships on intrastate voyages, pleasure craft). The new sections seek to reflect provisions in Part IV, Division 11 of the Navigation Act (NA). In summary, it is proposed that:

⁶⁵ See also, J Crawford & B Opeskin, pp 136-137.

⁶⁶ [2010] QSC 39.

⁶⁷ M Davies & A Dickey, *Shipping Law*, 3rd ed., LawBook Co. 2004, p 36.

- where loss of life or personal injury is suffered by a person on board a ship because of the fault of the ship and other ships, the liability of the owners (under new s 71, ‘owner’ also includes charterers and other persons responsible for the navigation and management of the ship)⁶⁸ shall be joint and several (**new s 72**).⁶⁹ While s 72 is based on [s 260](#) of the NA, s 72(3)(c) provides that nothing in s 72 affects the operation of s 10 of the [Law Reform Act 1995 \(Qld\)](#) which sets out how the court apportions liability when the injured or deceased person has been partly responsible for the outcome due to his or her contributory negligence;⁷⁰
- provision be made for a liable ship owner to seek contribution to the damages awarded to the plaintiff from other liable ship owners (**new s 73**, reflecting [s 261](#) of the NA);
- provision be made for proportionate liability among ships where one or more ships suffer property damage because of the fault of two or more ships (**new s 74**, based on [s 259](#) of the NA);
- there is no presumption of fault solely because the relevant ship infringed regulations for the prevention of collisions at sea (see **new s 75** and [s 263](#) of the NA)

4.11 Assessors

In a court proceeding, the court can order one party (usually the unsuccessful party) to pay the costs of the other. **Costs assessments** are dealt with under Chapter 17A of the UCPR where a bill of costs is prepared itemising all the work undertaken and disbursements incurred that the other party is liable to pay. The bill is then assessed by an assessor who conducts a costs proceeding and may call evidence and receive documents.⁷¹

The **proposed new Part 12** of the CPA is virtually identical to the current ss 93LA-93LC of the SCQ Act. The provisions give the same protection and immunity to cost assessors, parties and witnesses attending the assessment as those persons would have in Supreme Court proceedings. This also applies to documents used or produced at the assessment. A confidentiality provision to prevent disclosure of information about a person’s affairs is also included as is a provision to ensure that privilege continues despite any disclosure to an assessor.

4.12 Enforcement

Part 13 forms part of the proposed new CPA to deal with **enforcement of judgments**. The proposed provisions are based on existing provisions of the SCQ Act, and to a lesser extent, SCA provisions.

An order is enforceable as a judgment if it disposes of a proceeding and, then, both the judgment and order are enforceable. The enforcement is the actual carrying out of the judgement/order by an officer of the court under particular processes of execution.⁷²

The way in which enforcement occurs depends on the nature of the judgment. For instance, if the judgment is for a payment of money to someone, it may be enforceable by various

⁶⁸ Which is reflected in [s 265A](#) of the Navigation Act 1912.

⁶⁹ ‘Joint and several’ liability means that all defendants can be proceeded against or just one defendant without affecting the right to proceed against others later (see, e.g., *Butterworths Concise Australian Legal Dictionary*, p 221).

⁷⁰ See also, [Balnaves v Smith & Anor; Malone v Smith & Ors](#) [2010] QSC 39, para 122.

⁷¹ BC Cairns, p 523.

⁷² BC Cairns, p 579.

processes including a warrant of seizure and sale, or a garnishment of wages. For a judgment for the return of goods, the court may, for instance, direct the payment of the value of the goods.⁷³ All enforcement processes must follow exactly the terms of the judgment (e.g. the amount sought by the officer must be the amount stated in the judgment).

4.12.1 Judgments

The following proposed provisions are based, to some extent, on ss 24-25 of the SCA.

Judgment for detention of goods⁷⁴ must be that the defendant (**new ss 80-83**):

- return specific goods to the plaintiff (which is enforceable by an enforcement warrant to seize and deliver);⁷⁵ or
- return specific goods or pay their value (new s 82 makes provision for where the value has, and has not, been assessed and when the judgment can be enforced as a money order); or
- pay the value of the goods, with or without a condition.

A money order has the effect of a judgment. Under proposed s 85, an enforcement warrant to enforce a money order also authorises the levying of interest pursuant to new s 59 (discussed above under 'Interest').

4.12.2 Enforcement Generally

The **proposed new ss 84-89** of the CPA are similar to ss 86-90 of the SCQ Act. In summary:

- it is not necessary to demand compliance with an order before starting enforcement proceedings (new s 84);
- the proposed ss 86-87 cover enforcement against a partnership and ss 88-89 deal with enforcement against the property of a business.

4.12.3 Enforcement Warrants

The **proposed new ss 90-99** of the CPA are based on ss 92-93H of the SCQ Act.

To enforce an original order (other than an order for payment of money into court) a person may obtain an enforcement warrant (warrant) from the court. This warrant may contain any order directed to enforcing the original order, including authorising (see new ss 90(2)(a)-(f)):

- an enforcement officer to seize and sell real and personal property to satisfy a money order debt;
- the redirection to an enforcement creditor of particular earnings of the enforcement debtor or of particular debts owing to the debtor from a third person;
- an enforcement officer to enter and deliver possession of land; or to seize and deliver specific goods or to seize and detain property.⁷⁶

⁷³ BC Cairns, pp 579-580. The types of processes are set out in the UCPR, Chs 19-20A.

⁷⁴ The judgment can also provide for damages for detention (s 80(3)).

⁷⁵ If a time is stated for return of the goods and the timeframe is not met, the judgment can also be enforced by punishment for contempt and a warrant to seize and deliver property (s 81).

⁷⁶ Provision is also sought to be made in new s 90 for warrants containing a charging order (issuable only by the Supreme Court and includes an order charging all or part of an enforcement debtor's interest in property such as annuities, stocks, shares, bonds etc).

The warrant ends one year after issue unless otherwise stated to end earlier.

Proposed new s 92 provides that a payment under a warrant discharges the person doing so to the extent of such payment. The new s 93 states that where an enforcement officer holds certain documents (e.g. cheques, promissory notes) as security for the amount to be recovered under a warrant to enforce a money order, he or she may receive amounts payable by liable persons under the documents.

The proposed ss 94-99 concern the redirection of moneys owed to an enforcement debtor (e.g. moneys held by the debtor in a joint fund; a State debt; a partnership debt).⁷⁷

4.12.4 Warrant for Defendant's Arrest

Under the **proposed new s 100** (based on s 93L of the SCQ Act), the Supreme Court can issue an arrest warrant (no other court can do so even if the defendant is sued in that court) where a defendant has absconded or is about to abscond and the absence would materially prejudice the plaintiff in prosecuting the proceeding or enforcing any judgment.

4.12.5 Enforcement Officers

The **proposed new ss 101-103** of the CPA concern matters involving enforcement officers, based on ss 100 and 216 of the SCA.

4.13 Miscellaneous Provisions

The **proposed new Part 14** of the CPA contains a range of miscellaneous provisions. These include grants of representation in relation to deceased defendants; prevention of a new trial just because a court has made a certain ruling about stamp duty; and Regulation making power.

5 Amendment of the Supreme Court of Queensland Act 1991

The Bill seeks to amend the SCQ Act so that it will contain only those provisions specific to the Supreme Court and to make other technical amendments. The changes sought to be effected by **Part 28** are covered by the [Explanatory Notes](#) (pp 25-27). In summary, the more significant proposed amendments include:

- interpretative type matters in ss 2A-6 being identified as obsolete and, therefore, omitted (see Explanatory Notes (p 25) to cl 179);
- the existing Part 2 being replaced by **new Part 2 (ss 4-27)** to deal with the jurisdiction and composition of the Supreme Court. In essence:
 - Division 1 describes the court's composition and that the court has an Office of the Chief Justice and two divisions – the Court of Appeal and the Trial Division. It also provides for acting judges and a number of other matters about the court's functioning;
 - Division 2 deals with the Office of Chief Justice (e.g. appointment, responsibilities and powers);
 - Division 3 covers matters relating to judges generally (e.g. retirement at age 70; seniority; temporary judicial holdings).

⁷⁷

If a third party does not comply with the redirection nor object to or dispute the claim, enforcement can be taken against the third party. If a warrant redirects an employee's earnings, it is an offence for an employer to dismiss the employee (ss 98-99).

Many new provisions mirror existing SCQ Act provisions:

- a **new s 56A** (cl 188) which is a modernised s 297 of the SCA. It deals with what happens to a criminal proceeding when a judge dies, resigns or becomes otherwise incapable of sitting. The current s 297 covers civil as well as criminal matters;
- the proposed introduction of a **new Part 4, Divisions 3-4** (cl 190), which is a modified version of the current Part 16 of the SCA concerning renaming the central, northern and far northern districts of the Supreme Court as ‘regions’ and providing for the respective judges.⁷⁸ Clause 190 also takes some relevant provisions from Part 18 of the SCA in relation to commercial and other lists;
- the insertion (by cl 192) of a proposed **new ss 69A-69B** to provide that leave of the court is required to appeal an order made by the consent of the parties or a costs order/judgment;
- a proposed replacement (see cl 194) of Parts 7-8 (as many provisions thereunder have been subsumed by proposed CPA provisions so they relate to all courts). The **new Part 7** contains modern provisions about the Supreme Court Registry. **New Part 8** provides for court officers (e.g. principal and other registrars, bailiffs and sheriffs, judges’ associates);
- a **proposed s 118AA** to enable the Chief Justice to issue guidelines about matters prescribed under the admission rules (cl 199);
- various omissions of obsolete provisions or those made redundant by the new CPA provisions; inclusion of transitional provisions; amendments to Sch 1 (list of subject matter for rules); and amendments to the dictionary in Sch 2.

There are also some new provisions which do not appear to mirror existing provisions (e.g. the Court seal, the Chief Justice deciding the Court sittings).

6 Amendment of the District Court of Queensland Act 1967

The main intention of the **Part 18** amendments to the [District Court of Queensland Act 1967 \(Qld\)](#) is to harmonise its provisions with those pertaining to the Supreme Court and Magistrates Court and to improve the operation of the court registries. The matters dealt with include providing for where a judge dies or is unable to continue to sit at a proceeding; the establishment of a single registry for the District Court with an office at each place at which the District Court is held instead of the current separate registries for each district; and provisions concerning bailiffs. Other amendments reflect changes discussed under the previous heading in relation to the amendments of the SCQ Act (e.g. keeping of commercial and other lists; leave required to appeal from consent orders and costs orders; administrative matters concerning the court).

7 Amendment of Magistrates Act 1991 and Magistrates Court Act 1921

Part 25 of the Bill seeks to amend the [Magistrates Act 1991 \(Qld\)](#). A proposed s 49A is comparable to proposed amendments to the District Court of Queensland Act and the SCQ Act and seeks to provide for the situation where a magistrate dies, resigns or becomes otherwise incapable of continuing at a proceeding.

⁷⁸ Clause 208 provides for the insertion of schedules from the SCA defining the regions of the court.

Part 26 proposes to amend the [Magistrates Courts Act 1921 \(Qld\)](#). Many of the proposed amendments are omissions of provisions consequential to the enactment of the proposed provisions of the new CPA covering all the courts. Provisions are sought to be inserted to, among other things, align the Court's operations with those of the other courts.

8 Consequential Amendments to Other Acts

A number of Acts are sought to be amended due to the proposed new CPA, repeal of the SCA and amendments to the SCQ Act. These are discussed in the Explanatory Notes to Parts 19, 21-25 and 27 of the Bill.

Key Documents and Links

Bill; Explanatory Notes; Second Reading Speech

- [Civil Proceedings Bill 2011 \(Qld\)](#); [Explanatory Notes](#); [Introduction and Referral](#) (pp 2613-2616)

Acts Amended or Affected

As a consequence of the proposed introduction of the Civil Proceedings Act 2011:

- the [Supreme Court Act 1995 \(Qld\)](#) (SCA) is sought to be repealed by **Part 29** of the Bill;
- the [Supreme Court of Queensland Act 1991 \(Qld\)](#) (SCQ Act) is proposed to be amended, as explained in this Research Brief;
- the [District Court of Queensland Act 1967 \(Qld\)](#); the [Magistrates Act 1991 \(Qld\)](#) and the [Magistrates Court Act 1921 \(Qld\)](#) are intended to be amended, as explained in this Research Brief;
- consequential and minor amendments are sought to be made to various Acts.

More substantive amendments are proposed for the following:

- The [Associations Incorporation Act 1981 \(Qld\)](#) to allow incorporated associations to transition to the Commonwealth legal regimes for corporations and Aboriginal and Torres Strait Islander corporations;
- the [Births, Deaths and Marriages Registration Act 2003 \(Qld\)](#) and the [Cremations Act 2003 \(Qld\)](#) to require the person in charge of the disposal of a body to electronically lodge a cremation or burial notice; and to prescribe requirements for crematoriums when labelling ashes;
- the [Electoral Act 1992 \(Qld\)](#) to clarify a provision about enrolment to vote up to the day before polling day and to change the notice deadline to 6pm; and to provide for regulation making power to state which agencies may receive electoral roll information and for what purposes;
- the [Justices of the Peace and Commissioners for Declarations Act 1991 \(Qld\)](#) to allow Justices of the Peace and Commissioners for Declarations to record details of proof of identity documents sighted in the performance of their duties;
- the [Queensland Civil and Administrative Tribunal Act 2009 \(Qld\)](#) to enable a member of the Queensland Civil and Administrative Tribunal to continue to sit after his or her appointment has expired in order to finalise a proceeding;
- the [Retirement Villages Act 1999 \(Qld\)](#) to require particular exit fees when a resident leaves a retirement village to be calculated on a daily basis;
- the [Information Privacy Act 2009 \(Qld\)](#) and the [Right to Information Act 2009 \(Qld\)](#) to give Queensland Government agencies greater flexibility to provide personal information to agencies of other Australian jurisdictions for law enforcement purposes.

Referral Committee's Website

[Legal Affairs, Police, Corrective Services and Emergency Services Committee:](#)

- [Inquiry into the Civil Proceedings Bill 2011 \(Qld\)](#)
- [Media Release](#)

Queensland Courts Website

- [Queensland Courts](#)

Stakeholder Submissions to Rules Committee

- [Queensland Law Society Submission](#), 22 November 2010

Recently Tabled Documents (17 October 2011)

- [Advice of the Rules Committee pursuant to section 118C\(2\)\(a\) of the Supreme Court of Queensland Act 1991 relating to the Civil Proceedings Bill 2011](#) (27 July 2011)
- [Advice of the Rules Committee pursuant to s 118C\(2\)\(a\) of the Supreme Court of Queensland Act 1991 specifically in relation to each section of the Supreme Court Act 1995](#) (27 July 2011)
- [Letter from The Honourable P de Jersey AC and The Hon Justice J D M Muir to The Honourable Paul Lucas MP regarding the Civil Proceedings Bill](#) (12 September 2011)

Books

- BC Cairns, *Australian Civil Procedure*, 6th ed., LawBook Co., 2005
- J Crawford & B Opeskin, *Australian Courts of Law*, 4th ed., Oxford University Press, 2004
- M Davies & A Dickey, *Shipping Law*, 3rd ed., LawBook Co., 2004
- PE Nygh & P Butt, *Butterworths Concise Australian Legal Dictionary*, Butterworths Australia, 1997

Journal Articles

- Hon Paul de Jersey, 'In our Courts the Future is Now', *Proctor*, 28(3), April 2008, pp 19-20
- Hon Paul de Jersey AC, Chief Justice of Queensland, '[Address to the Central Queensland Law Association Annual Conference](#)', 23 October 2010