PRELIMINARY

Title

1.1 These Rules are the Civil Procedure Rules.

[1.1.1] History Rule 18.16 repeals and replaces the pre-Independence *High Court (Civil Procedure) Rules* 1964 and the *Magistrates' Courts (Civil Procedure) Rules* 1976. The new *Civil Procedure Rules* (No 49 of 2002) were made under s.30(1), *Courts* [Cap 122] and commenced on 31 January 2003. At that time the *Courts Act* was slated for repeal and replacement by *Judicial Services and Courts* [Cap 270] which had already received assent on 29 December 2000, well before the new *Rules* were made, but which did not commence until 2 June 2003, after the *Rules* came into operation. Sections 66(6) and 76(5) of the *Judicial Services and Courts Act* provide that rules in force immediately prior to commencement of the Act remain in force and are deemed to have been made under the new Act. Section 66(3) of the *Judicial Services and Courts Act* is the current source of the power to make rules.

[1.1.2] Inherent jurisdiction The power to make rules is also an incident of the inherent jurisdiction of courts to regulate their practice: *Bartholomew v Carter* (1841) 3 Man & G 125 at 131; 133 ER 1083 at 1086. The inherent jurisdiction was usefully described in Sir Jack Jacob's seminal article "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 at 51 as a "reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them". In *Hunter v Chief Constable of West Midland Police* [1982] AC 529 at 536 it was said that courts have an inherent power to prevent misuse of their procedures in a way which, although not inconsistent with the literal application of rules of court, would nevertheless be unfair to a party or otherwise bring the administration of justice into disrepute. See also *Connelly v DPP* [1964] AC 1254 at 1301; [1964] 2 WLR 1145 at 1153; [1964] 2 All ER 401 at 409; *Taylor v A-G* [1975] 2 NZLR 675 at 679**;** *Bremer v South India Shipping* [1981] AC 909 at 977; [1981] 1 All ER 289 at 295; [1981] 2 WLR 141 at 147; [1981] 1 Lloyd's Rep 253 at 257. This inherent jurisdiction usually survives the creation of a statutory rule-making power: *Beavan v Mornington* (1860) 8 HL Cas 525 at 534; 11 ER 534 at 538; *S v S* [1972] AC 24 at 46; [1970] 3 All ER 107 at 113-4; [1970] 3 WLR 366 at 376-7. The inherent jurisdiction of the Supreme Court and Court of Appeal was expressly preserved in s.29(1) of the *Courts Act* and continues to be preserved by s.65(1) of the *Judicial Services and Courts Act*. See also *S v Moti* [1999] VUSC 38; CC 132 of 1998; *Esau v Sur* [2006] VUCA 16; CAC 25 of 2005. Section 78 also provides that the Act does not take, lessen or impair any jurisdiction previously exercised.

[1.1.3] Practice and procedure Sections 30(1) of the *Courts Act* and 66(3) of the *Judicial Services and Courts Act* both permit the making of rules relating to "practice and procedure". This is an important qualification and limitation – see [1.1.5]. The phrase "practice and procedure" is often used as a composite phrase and interchangeably in English authorities (*Poyser v Minors* (1881) 7 QBD 329 at 333-4; *Mitchell v Harris Engineering* [1967] 2 QB 703 at 720; [1967] 2 All ER 682 at 687; [1967] 3 WLR 447 at 459) but the separate words are not necessarily synonymous. The word "procedure" may have a more comprehensive meaning than "practice": *Union Bank v Harrison Jones & Devlin* (1910) 11 CLR 492 at 504; 11 SR (NSW) 283 at 285; *White v White* [1947] VLR 434 at 440; *Price v Price (Nos 1 & 2)* [1963] 4 FLR 43 at 52; *Adam P Brown Male Fashions v Philip Morris* (1981) 148 CLR 170 at 176; 55 ALJR 548 at 550; 35 ALR 625 at 629; *Gosper v Sawyer* (1985) 160 CLR 548 at 558; 59 ALJR 429 at 433; 58 ALR 13 at 18. Substantive law creates rights and obligations whereas procedure is an adjunct to substantive law: *Re Coles and Ravenshear* [1907] 1 KB 1 at 4. It is not always easy, however, to differentiate between substance and procedure: See for example *Black v Dawson* [1895] 1 QB 848 at 849; *Cleland v Boynes* (1978) 19 SASR 464 (production of privileged documents); *Mahfoud v Minister for Immigration, Local Government and Ethic Affairs* (1993) 33 ALD 609 at 612; 43 FCR 217 at 220-1; 115 ALR 603 at 607 (limitation periods); *Harrington v Lowe* (1996) 190 CLR 311 at 324; 70 ALJR 495 at 500; 136 ALR 42 at 49 (right to adduce evidence). Section 66(3)(e) also refers to the making of rules "necessary or convenient", however this should not be read as an extension (beyond matters of practice and procedure) of the permitted scope of the *Rules*: *In the Marriage of Horne* (1997) 21 Fam LR 363 at 373.

[1.1.4] Jurisdiction of the courts Unlike section 30(1) of the *Courts Act,* s66(3)(b) of the *Judicial Services and Courts Act* also permits the making of rules "for or in relation to" the "criminal and civil jurisdiction" of the courts. The extent to which this provision could effectively validate a rule which conferred new jurisdiction on the courts or affected substantive law is uncertain. There are a number of provisions in the *Rules* which purport to do so. Although made under the *Courts Act*, which did not permit such rules, s.76(5) of the *Judicial Services and Courts Act* provides that rules made under the former are deemed to have been made under the latter.

[1.1.5] Limits of rule making power Rules of court, like any other subordinate legislation, must be confined within the limits and purpose marked out by the enabling instrument: *Britain v Rossiter* (1879) 11 QBD 123 at 129; [1874-80] All ER Rep Ext 1483 at 1486; *North London Rwy v Great Northern Rwy* (1883) 11 QBD 30 at 39-40; *Read v Brown* (1888) 22 QBD 128 at 132; *British South Africa v Companhia de Mocambique* [1893] AC 602 at 625 and 628-9; *Carbines v Powell* (1925) 36 CLR 88 at 91; *Foster v Aloni* [1951] VLR 481 at 484; *Shanahan v Scott* (1957) 96 CLR 245 at 250; *Lynch v Brisbane CC* (1961) 104 CLR 353 at 364-5; 35 ALJR 25 at 28-9; [1961] Qd R 463 at 480; *F. Hoffmann-La Roche v Secretary of State for Trade and Industry* [1975] AC 295 at 365-6; [1974] 3 WLR 104 at 131; [1974] 2 All ER 1128 at 1153; *R v Her Majesty's Treasury* [1985] 1 QB 657 at 666-7; [1985] 1 All ER 589 at 593-4; [1985] 2 WLR 576 at 580-1; *Harrington v Lowe* (1996) 190 CLR 311 at 324; 70 ALJR 495 at 500; 136 ALR 42 at 49; *R v Secretary of Social Security, ex parte Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385 at 401-2; [1997] 1 WLR 275 at 292-3.

[1.1.6] Rules and substantive law That a rule intrudes into an area of substantive law does not necessarily rob it of its procedural character - only if the rule, *ex facie* procedural, could not reasonably have been adopted for procedural purposes may it be said to have gone too far: *Watson v Petts* [1899] 1 QB 54 at 55; *Re Marchant* [1908] 1 KB 998 at 1000; *Re Jackson* [1915] 1 KB 371 at 375-6; [1914-5] All ER 959 at 961; *Taylor v Gutilla* (1992) 59 SASR 361; *Harrington v Lowe* (1996) 190 CLR 311 at 324; 70 ALJR 495 at 500; 136 ALR 42 at 49; *Air Link v Paterson (No 2)* (2003) 58 NSWLR 388; [2003] NSWCA 251 at [94]. The validity of a rule does not lie in its ultimate fairness, but in the extent to which it is a reasonable means of attaining the ends of the rule-making power: *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155; *South Australia v Tanner* (1998-9) 166 CLR 161 at 168.

[1.1.7] Practice Directions The inherent power to make rules is sometimes exercised by the issue of Practice Notes or Practice Directions. These are in the nature of informal rules and are, in Vanuatu, comparatively rare. When they are issued, lawyers must abide by them and they may be enforced: *Langley v North West Water Authority* [1991] 3 All ER 610 at 613-4; [1991] 1 WLR 697 at 701-2; *Gittins v WHC Stacy & Son Pty Ltd* [1964-5] NSWR 1793 at 1794-5.

Overriding objective

E *CPR* r1.1
NSW *CPA* s56(1)
Q *UCPR* r5(1)
SA *SCCR* r3(a)
NZ *HCR* r4
CAN *FCR* r1(3)
BC *SCR* r1(5)

1.2 (1) The overriding objective of these Rules is to enable the courts to deal with cases justly.

[1.2.1] History This is the guiding principle behind the *Rules*.. The overriding objective, and most of this Part, is taken, verbatim, from the draft developed by Lord Woolf and appended to *Access to Justice: Final report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London, 1996) which has since become the basis of the *Civil Procedure Rules* 1998 for England and Wales and the inspiration for rules of court in other Commonwealth jurisdictions. The attainment of justice through the rules of court is, of course, hardly a new aspiration and has long been a guiding procedural principle. As long ago as *Coles v Ravenshear* [1907] 1 KB 1 at 4 the court explained the proper approach to rules of court in substantially identical terms: "…the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case". See also *Michel v Director of Finance* [1997] VUSC 40; CC 68 of 1997; *Municipality of Luganville v Garu* [1999] VUCA 8; CAC 8 of 1999; *Schmidt v BNZ Ltd* [1991] 2 NZLR 60 at 63; *Harding v Bourke* (2000) 48 NSWLR 598; [2000] NSWCA 60 at [26]. Similarly, in the context of pleadings, *Astrovlanis v Linard* [1972] 2 All ER 647 at 654; [1972] 2 QB 611 at 620; [1972] 2 WLR 1414 at 1421 referred to "the overriding principle that litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs".

[1.2.2] Difference between English rule and Vanuatu rule It is important to note that this rule is qualitatively different in one important respect from its English counterpart which commences by stating that "These Rules are a new procedural code". The significance of Vanuatu's adoption of Part 1 but excluding reference to the *Rules* being a code is discussed at [1.3.2] *et seq*.

E *CPR* r1.1(2)
NSW *CPA* s58(2)

(2) Dealing with cases justly includes, so far as is practicable:

[1.2.3] Subrule (2) non-exhaustive The language suggests that the list below is not exhaustive. Other factors indicated by the "justice" of the case may be taken into consideration such as, perhaps, a party's history of expedition or compliance: See for example *Ifira Wharf v Kaspar* [2006] VUCA 4; CAC 29 of 2005.

[1.2.4] Criticism of rule Precisely how to deal with a case "justly" is a difficult question. Critics of the corresponding part in Lord Woolf's model have drawn attention to its broad and largely unguided discretions. One commentator thought they permitted "*ad hoc* exercises of subjective, antagonistic and potentially prejudicial judicial discretion to meet the perceived exigencies of individual cases": N Andrews, `The Adversarial Principle: Fairness and Efficiency' in A Zuckerman & R Cranston (eds), *Reform of Civil Procedure: Essays on `Access to Justice',* Clarendon Press, Oxford 1995, 182. See also N Browne-Wilkinson, 'The UK Access to Justice Report: A Sheep in Woolf's Clothing' (1999) 28(2) UWAL Rev 181; M Gleeson, 'Access to Justice – A New South Wales Perspective' (1999) 28(2) UWAL Rev 192. These are ancient concerns, Sir Francis Bacon having warned that "the best law is that which leaves least to the discretion of judges, and the best judge is he who leaves least to his discretion" (cited by Lord Keith of Kinkel, 'Judicial Discretion' (1982) 1 CJQ 22 at 23). The Australian Law Reform Commission has also noted that more questions are raised than answered by such a rule: Discussion Paper 62: *Review of the Federal Civil Justice System*, 1999.

[1.2.5] Discretion to be exercised judicially What must always be borne in mind is that the court exercises a judicial power and must discharge its duty judicially: *Lee v Budge Rwy Co* (1871) LR 6 CP 576. Nothing in the *Rules* can be used to deprive a party of the opportunity to present a proper case, nor absolve a party who bears the onus of proof from the necessity of discharging it: *R v Watson* [1976] HCA 39 at [12]; (1976) 136 CLR 248 at 257-8. Indeed, art.47(1) of the *Constitution* states that "The function of the judiciary is to resolve proceedings according to law". There is no reason to think that this requirement excludes procedural law. See further *R v Wilkes* (1770) 4 Burr 2527 at 2539;*VCMB v Dornic* [2010] VUCA 4 at [28]-[33]; CAC 2 of 2010.

E *CPR* r1.1(2)(a)

(a) ensuring that all parties are on an equal footing; and

[1.2.6] Meaning of "equal footing" It has long been recognised that justice cannot always be measured in money and that a judge is entitled to weigh in the balance the strain that litigation imposes upon litigants, a strain that personal litigants are likely to feel more acutely than business corporations or commercial persons: *Ketteman v Hansel Properties* [1987] AC 189 at 220. While judges can ensure that orders are sensitive to these considerations and that both parties comply with rules and directions, and receive equality of treatment generally, there are obvious limits to the ability of a court to ensure equality. See for example the problem in *O'Hara v Rye* [1999] EWCA Civ 779 (inequality arising from "naive, guileless, and tactically suicidal conduct").

[1.2.7] Limiting legal representation and arguments The court probably cannot deprive litigants of the right to counsel of their choice in order to create a more "equal" environment: *Grimwade v Meagher* [1995] 1 VR 446 at 452; *Maltez v Lewis* (1999) *The Times*, 4 May 1999. Neither can the court prevent a party from putting forward important submissions or evidence, though it may legitimately seek to control how those are raised with a view to controlling costs: *McPhilemy v Times Newspapers* [1999] 3 All ER 775 at 794. On the other hand, applications, even those consistent with technical merits, may be refused if the applicant is seeking to take unfair advantage of the other side: *O'Hara v Rye* [1999] EWCA Civ 779. Where a smaller firm or sole practitioner requires more time to complete steps than a larger firm with greater resources, this may be given: *Maltez v Lewis.*

[1.2.8] Requirements of applications under this rule If a party wishes to restrain the procedural steps of another with the aim of achieving greater equality under the rule, the applicant must demonstrate that they are themselves conducting the proceedings with a desire to limit expense: *McPhilemy v Times Newspapers* [1999] 3 All ER 775 at 792-3.

E *CPR* r1.1(2)(b)
NSW *UCPR* r2.1
Q *UCPR* r5(1), (2)
SA *SCCR r*3(e)
V *SCR r*1.4
NZ *HCR r*4
CAN *FCR r*1(3)
BC *SCR r*1(5)

(b) saving expense; and

[1.2.9] Factors affecting expense Active case management may increase costs and the court should be diligent to consider just how much management is required in each case: *A & N Holding v Andell* [2006] NSWSC 55 at [32]. Increased litigation cost may result from the requirement of additional documentation, additional case management events, a high level of case preparation at the "front end" of litigation and an emphasis on written evidence and submissions. Nevertheless, the court often orders written, submissions (where oral submissions would be appropriate) and statements of agreed/disputed issues of fact and law (even when the pleadings are simple).

E *CPR* r1.1(2)(c)
NSW *CPA* s60

(c) dealing with the case in ways that are proportionate:

[1.2.10] Proportionality principle This is associated with the philosophical theories of `distributive justice', discussed by John Rawls (J Rawls, *A Theory of Justice,* Belknap Press, Cambridge Massachusetts 1971), Ronald Dworkin (R Dworkin, *A Matter of Principle,* Harvard University Press, Cambridge Massachusetts 1985), Amartya Sen (A Sen, *On Ethics and Economics,* Blackwell, Oxford 1987, Robert Nozick, (R Nozick *Anarchy, State and Utopia,* Basic Books, New York 1977), John Roemer (J Roemer, *Theories of Distributive Justice,* Harvard University Press, Cambridge Massachusetts 1996) and others. The central theme of the Woolf report was that a sense of *proportionality* should guide the management of litigation – to apply the limited resources available within the civil justice system in such a way as to meet the greatest need: *Lownds v Home Department* [2002] 1 WLR 2450; [2002] 4 All ER 775 at [10].

[1.2.11] Examples In *Reed v Oury* [2002] EWHC 369 (Ch) where the court held that, having regard to the defendant's conduct of the litigation, the weakness of his counterclaim and the fact that even if he was successful on the counterclaim he would still owe a very large sum on the claim (which had proceeded to judgment), the proportionate method of furthering the overriding objective was to stay the counterclaim until the defendant paid what was owed.

E *CPR* r1.1(2)(c)(i)
NSW *CPA* s60

(i) to the importance of the case; and

[1.2.12] Meaning of "importance" The rule does not specify whether it is concerned with the importance of the case to society, to the parties, to the development of the law or otherwise. The importance of a case is, at least partly, a function of its merit, and accordingly, an arguable though dubious claim ought perhaps to be afforded lower priority. As far back as *Willis v Earl Beauchamp* (1886) 11 PD 59 at 63 it was expressly recognised that there was an inherent power to prevent the use of legal machinery to drag defendants through long and expensive litigation for no benefit. See also *Bhamjee v Forsdick (No2)* [2004] 1 WLR 88; [2003] EWCA Civ 1113 at [15]; *Bezant v Rausing* [2007] EWHC 1118 at [129].

E *CPR* r1.1(2)(c)(ii)
NSW *CPA* ss58(2)(b)(i), 60

(ii) to the complexity of the issues; and

[1.2.13] Consequences of complexity The complexity of the case may affect the scope of procedural requirements in a given case. In a simple case the court may, subject to considerations of fairness, prejudice, etc, impose limits on the scope of interlocutory or hearing procedures: See for example *Sita v Sita* [2005] NSWSC 461. Conversely, in complex cases, the court may impose such additional procedural requirements as the dictates of justice require.

E *CPR* r1.1(2)(c)(iii)
NSW *CPA* s58(2)(b)(vii)
BC *SCR r*68(13)

(iii) to the amount of money involved; and

[1.2.14] Relative amount of money It is not certain if the rule refers to gross sums or sums relative to the circumstances of the parties. The latter is probably more compelling and consistent with the next subparagraph. It is suggested that non-monetary claims or those which cannot be evaluated in purely financial terms should be assessed under paragraph (i).

E *CPR* r1.1(2)(c)(iv)

(iv) to the financial position of each party; and

NSW *CPA* s58(2)(b)(vii)

[1.2.15] Assessment of financial position There is no guidance as to how information about the financial position of the parties is to be obtained. Parties may be inclined to guard the precise details of their financial position as a matter of strategy and for reasons of privacy, so this is likely to assume significance only where financial disparity is obvious.

[1.2.16] Avoidance of injustice Lord Loreburn LC in *Brown v Dean* [1910] AC 373 at 374; [1908-10] All ER 661 at 662 admonished courts to remember that "people who have means at their command are easily able to exhaust the resources of a poor antagonist." See for example *Singh v Singh* [2002] NSWSC 852. See further r.1.2(2)(a).

E *CPR* r1.1(2)(d)
NSW *CPA* s59
NSW *UCPR* r2.1
Q *UCPR* r5(1), (2)
SA *SCCR r*3(c)
V *SCR r*1.14
WA *SCR* O1r4A
NZ *HCR r*4
CAN *FCR r*1(3)
BC *SCR r*1(5)

(d) ensuring that the case is dealt with speedily and fairly; and

[1.2.17] Relationship between speed, fairness and cost There is clearly a substantial public interest in the elimination of delay: *Hughes v Gales* (1995) 14 WAR 434 at 450; *Asiansky Television v Bayer-Rosin* [2001] EWCA Civ 1792 at [46]. The length of cases also has an important bearing on litigation costs. Speed should not be pursued at the expense of fairness, which would not be consistent with the overriding objective: See for example Sir Anthony Mason in A Mason, "The Courts as Community Institutions" (1998) 9 *Public Law* 83 at 85; *Queensland v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146 at 154; 141 ALR 353 at 357-8. Regrettably, the court is noticeably reluctant to work to dispose of cases that are conspicuously lacking in merit or which are left to lie dormant, even for many years. The warnings in cases such as *VCMB v Dornic* [2010] VUCA 4; CAC 2 of 2010, though entirely appropriate in the context of the procedural denials of natural justice in those cases, have had a certain chilling effect more generally.

[1.2.18] Consequences for procedural appeals This provision has been said to lead to a much diminished enthusiasm for appeals on procedural points: *Kaminski v Somerville College* [1999] EWCA Civ 1169. See further r.21, *CoAR*.

E *CPR* r1.1(2)(e)
NSW *CPA* s58(2)(b)(vii)

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[1.2.19] Distributive justice The right of litigants to be heard is not unrestricted. Case management is intended to avoid unnecessary cost and delay and ensure that courts, like other public resources, are economically managed: *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001; *VCMB v Dornic* [2010] VUCA 4 at [33]; CAC 2 of 2010. "Most judges nowadays accept a responsibility, not merely towards the particular litigants who are currently before them, but also to the others who are waiting in the queue": Sir Murray Gleeson "Access to Justice" (1992) 66 ALJ 270. "Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues": *Ashmore v Lloyd's* [1992] 1 WLR 446 at 448; [1992] 2 All ER 486 at 488; [1992] 2 Lloyd's Rep 1 at 3; see also *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001; *Bhamjee v Forsdick (No2)* [2004] 1 WLR 88, [2003] EWCA Civ 1113 at [15]. It has been explained that "It is no longer the rule of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately proportionately used in accordance with the requirements of justice": *Dow Jones & Co v Jameel* [2005] EWCA Civ 75; [2005] QB 946; [2005] 2 WLR 1614 at [54]. These considerations are especially important to a jurisdiction with modest resources: S Farran & E Hill 'Making Changes With Rules in the South Pacific: Civil Procedure in Vanuatu' (2005) 3(2) JCLLE 27 at 37.

[1.2.20] Balance between administration of justice and parties The most important change wrought by the new system is that it does not confine the court to considering only the relative positions of the parties – the court must also consider the effect on the administration of justice generally: *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 at 1933; [1999] 4 All ER 934 at 940 per Lord Woolf; *Morris v Bank of America* [2000] 1 All ER 954 at 971. What might be perceived as injustice to a party when considered in a narrow party/party context may not be so when considered in the wider context including the public interest: *Sali v SPC* [1993] HCA 47; 116 ALR 625 at 629. Accordingly, in *Stephenson v Mandy* (1999) *The Times*, 21 July 1999 the court declined to hear an appeal from an interim injunction preventing the defendant from breaching a negative covenant in an employment contract where the appeal was scheduled for 30 June and the substantive trial for 20 July. It was said not to be an appropriate use of the court's resources to hear the appeal given the imminence of the

substantive trial. Similarly, in *Adoko v Jemal* (1999) *The Times*, 8 July 1999 an appeal was dismissed (with indemnity costs) where the court wasted over an hour trying to sort out the confusion created by the appellant's failure to comply with directions and his defective notice of appeal (of which prior warning was given by the other side). The court should consider the state of the list from time to time as well as general matters of efficiency: *Bomanite v Slatex* (1991) 32 FCR 379 at 383-4; 104 ALR 165 at 169.

Courts to apply overriding objective

E *CPR* r1.2
NSW *CPA* s58
Q *UCPR* r5(2)
WA *SCR* O1r4B
CAN *FCR r*1(3)

1.3 The courts must give effect to the overriding objective when they:

[1.3.1] Nature of obligation The English provision states that the court "must *seek* to give effect…" to the stated objectives. The Vanuatu provision seems more stringent; the court *must* give effect to the overriding objective. The obligation probably applies even when the parties themselves do not wish to conduct the proceedings quickly or cheaply: *Sherborne Estate (No 2)* (2005) 65 NSWLR 268; [2005] NSWSC 1003 at [29].

E *CPR* r1.2(a)
NSW *CPA* ss56(2), 58
CAN *FCR r*1(3)

(a) do any act under these Rules; or

E *CPR* r1.2(b)
NSW *CPA* s56(2), 58
NZ *HCR r*4
CAN *FCR r*1(3)

(b) interpret these Rules.

[1.3.2] Persuasiveness of earlier authorities This obligation raises difficult questions in relation to the applicability of earlier procedural case law. Lord Woolf described the *Rules* as a "self-contained code" and said that "earlier authorities are no longer of any relevance" and "would mislead rather than inform". He subsequently endorsed a decision at first instance where the judge stated that it was his "firm belief that authorities decided under the old procedure should not be taken as binding or probably even persuasive upon this court": *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 at 1932; [1999] 4 All ER 934 at 939; *Lombard NatWest v Arbis* (unreported, Chancery Division, 29 October 1999); *MacDonald v Thorn* [1999] TLR 691; *Asiansky Television v Bayer-Rosin* [2001] EWCA Civ 1792 at [46]; *Price v Price (Poppyland Headwear)* [2003] EWCA Civ 888 at [38]; [2003] 3 All ER 911. This attitude is lent support by the (English) rules themselves, which are described as a code (see [1.2.2]), a description that was specifically added later to discourage parties from referring back to old authorities, but is absent in the (Vanuatu) *Rules*. Nevertheless, absent a specific description as a code in *Lenijamar v AGC* (1990) 27 FCR 388 at 394-5; (1990) 98 ALR 200 at 206-7 the Federal Court of Australia showed a marked disinclination to look back to authorities predating the creation of that court. Yet there are indications that English courts have not been rigid in this approach and will not hesitate to look to older cases as a guide to the exercise of discretions where the old procedure is similar to the new: See for example *Walsh v Misseldine* [2000] EWCA Civ 61 at [80] - [81] (citing *Purdy v Cambran* [1999] CPLR 843 where May LJ explained Lord Woolf's decision in *Biguzzi* as "not saying that the underlying thought processes of previous decisions should be completely thrown overboard"); *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318; *Nomura International plc v Granada Group Ltd* [2007] EWHC 642; [2007] 2 All ER (Comm) 878. It seems that the English courts will continue to have regard to older cases on similar procedural processes but will no longer feel so constrained to follow them. There are indications that a similar approach is taken in Vanuatu. As Lord Nicolas Browne-Wilkinson observed, it would indeed be brave to "throw away 120 years of experience in construing and working out the parameters of procedures which will continue to apply": 'The UK Access to Justice Report: A Sheep in Woolf's Clothing' (1999) 28(2) UWAL Rev 181 at 184. Procedural authorities do not, in any event, cut down the jurisdiction of the court, though they afford valuable guidelines as to the applicable principles, especially in cases involving similar facts: *Re Baxters and Midlands Rwy* (1900) 95 LT 20 at 23.

[1.3.3] Persuasiveness of recent authorities Of course, the requirements of this rule will undoubtedly be raised as justification for distinguishing even recent authorities and perhaps also for departing from the strict requirements of the *Rules* on the basis that slavish adherence to the letter rather than the spirit, effect and totality of the *Rules* is not a recipe for a just and equitable disposition of a matter": *Food-Tech v APV-Bell Bryant* (1989) 3 PRNZ 222 at 225; *Bomanite v Slatex* (1991) 32 FCR 379 at 391; 104 ALR 165 at 177; *Idoport v NAB* (2000) 49 NSWLR 51; [2000] NSWSC 338 at [28]. While such observations have obvious merit, there is also a very real danger that individualised procedure confers too much judicial discretion which is relatively

unchecked by appellate supervision. Variations of style, and even whim or caprice, can quickly rob civil procedure of core values such as consistency and predictability. It is respectfully suggested that there are a growing number of procedural authorities in Vanuatu that are difficult to reconcile with one another. In many of these the overriding objective is invoked as a mystical substitute for proper judicial reasoning and it is respectfully suggested that this practice is profoundly unsatisfactory and debilitating. Rules of court typically afford judges a broad discretion, however the traditional role of judges is to do justice *according to law*: *Jimmy v Rarua* [1998] VUCA 4; CAC 2 of 1999; *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246 at 252; *R v Wilkes* (1770) 4 Burr 2527 at 2539. Moreover, the process of applying the overriding objective should result in the development and clarification of relevant criteria, etc which can then be applied (albeit flexibly) to the case at hand *and* to subsequent cases with relative certainty. The direct application of a policy such as the overriding objective in each case without formulating relevant principles will lead only to uncertainty and judicial diversity: *Caltex Oil v The Dredge "Willemstad"* (1975-6) 136 CLR 529 at 567.

[1.3.4] Plain meaning The *Rules* are drafted in plain language. Accordingly, the court should give effect to the natural meaning of the words used and avoid results which depart from them: *Vinos v Marks and Spencer plc* [2001] 3 All ER 784 at [20]. Neither should the overriding objective be used to interpret the *Rules* in such a way as to confer on the court a jurisdiction which does not in fact exist, even in a deserving case: *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478 at [45].

Courts' duty to manage cases

E *CPR* r1.4(1)
NSW *CPA* s56(3), 57
WA *SCR* 029A

1.4 (1) In particular, the courts must actively manage cases.

[1.4.1] Purpose of active case management It has been said that the adoption of active case management represents more than a mere change in the mechanics of litigation and signifies the development of a "new philosophy of procedure": A Zuckerman, `Justice in crisis: Comparative Dimensions of Civil Procedure' in A Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure,* Oxford University Press 1999, 48. See also G Watson, `From an Adversarial to a Managed System of Litigation: A comparative critique of Lord Woolf's interim report' in R Smith, *Achieving Justice,* Legal Action Group, London 1995, 65. It has been said that case management is consistent with the "prevailing theory" as to modern judicial function which "encourages active case management to reduce issues, avoid surprise and embarrassment, minimise cost and delay, and provide expeditious and efficient justice": *Cockerill v Collins* [1999] 2 Qd R 26 at 28.

[1.4.2] Parties no longer to drive case management The traditional approach was to permit the claimant to drive the case on the assumption that expedition was in his interest, however experience has shown this to be an unreliable assumption: *Rastin v British Steel* [1994] 1 WLR 732 at 739; [1994] 2 All ER 641 at 646. Increased judicial involvement in cases should be expected under active case management: See D Ipp, 'Judicial Intervention in the Trial Process' (1995) 69(5) ALJ 365 at 384; J Wood, 'The Changing Face of Case Management: The New South Wales Experience' (1995) 4 *Journal of Judicial Administration* 121; *Asiansky Television v Bayer-Rosin* [2001] EWCA Civ 1792 at [48]; *Aon Risk Services v ANU* [2009] HCA 27 at [156]. There remains, however, an important role for litigant autonomy and the court should be careful not to overlook the wishes of a party for whose most direct benefit case management orders are ostensibly made: *Government of Vanuatu v Carlot* [2003] VUCA 23; CAC 19 of 2003. Unfortunately, the efficiencies promised by active case management are as yet unrealised in Vanuatu. Attempts by parties to have matters listed or otherwise dealt with on an urgent basis are often futile. Letters to the court are seldom answered. Extraordinary delays in listing, frequent re-listing, long delays in judgment and interlocutory judgment delivery, and other problems have shown that the court is far *less* able to dispense active case management than parties are able to receive it. Those few examples where the court adopts aggressive schedules are often inexplicable and as likely to be inappropriate.

[1.4.3] Case management not an end in itself Case management is not an end in itself, but an important and useful aid for ensuring the prompt and efficient disposal of litigation, and it must always be borne in mind that the ultimate aim of the court is the attainment of justice: *Queensland v J L Holdings* [1997] HCA 1; (1997) 189 CLR 146 at 154; 71 ALJR 294 at 296; 141 ALR 353 at 357;*Abbey National Mortgages plc v Key Surveyors Nationwide* [1996] 3 All ER 184 at 186-7. Of course, the attainment of justice includes consideration of the public interest in efficiency: *Aon Risk Services v ANU* [2009] HCA 27.

E *CPR* r1.4(2)

(2) Active case management includes:

[1.4.4] Subrule (2) non-exhaustive The language suggests that the following list is not exhaustive. The Victorian Magistrates Court *Civil Procedure Rules* contains, for example, an additional paragraph, (m), to the effect that case management also includes "limiting the time for the hearing or other part of the case, including at the hearing the number of witnesses and the time for the examination or cross-examination of a witness." In *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001 the Court of Appeal also identified the discouragement of interlocutory applications in favour of determination on the merits as an aspect of case management.

E *CPR* r1.4(2)(a)
Q *UCPR* r5(4)
SA *SCCR r3*(b)

(a) encouraging the parties to co-operate with each other during the proceedings; and

[1.4.5] Meaning of "co-operation" One commentator has opined that the application of the overriding objective will result in an immense increase in correspondence from lawyers to their clients and opposition, not for the chivalrous purpose of providing additional information, but to make a good impression on the court: R Harrison, "Will Woolf Change the Way We Behave?" (1998) 148 NLJ 1853 at 1854. This does not mean that lawyers are not permitted to litigate robustly, only that they balance their obligations to the client against the necessity of preserving justice: *R v Wilson & Grimwade* [1995] 1 VR 163. See further r.1.5.

[1.4.6] Examples of encouragement Applications, even those consistent with technical merits, may be refused if the applicant is seeking to take unfair advantage of the other side: *O'Hara v Rye* [1999] EWCA Civ 779. The court's "encouragement" may also extend to tailoring costs orders (including punitive costs orders) in appropriate cases: *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001; *Hertsmere Primary Care v Rabindra-Anandh's Estate* [2005] EWHC 320 Ch; [2005] 3 All ER 274 at [11]; *Dinh v Samuel* [2010] VUCA 6 at [43]; CAC 16 of 2009 (where service is strategically withheld).

E *CPR* r1.4(2)(b)

(b) identifying the issues at an early stage; and

[1.4.7] Benefits and examples The early identification of issues through case management is likely to encourage early settlement of disputes and reduce the duration of proceedings. Post-trial amendments are likely now to be viewed with greater strictness than in the past: *Nikken Kosakusho Works v Pioneer Trading Co* [2005] EWCA Civ 906. There seems, however, to be a marked, though unexplained, reluctance selectively to strike out parts of statements of the case or sworn statements to achieve this purpose. There also seems to be a similar reluctance to invoke r.12.4.

E *CPR* r1.4(2)(c)

(c) deciding promptly which issues need full investigation and trial and resolving the others without a hearing; and

[1.4.8] Scope of rule This paragraph does not supplant the inherent jurisdiction to strike out nor does it create an additional option to striking out in which there is a preliminary trial adopting the standard of proof applicable to a trial: *Royal Brompton Hospital v Hammond (No 5)* [2001] EWCA Civ 550 at [21], [23]. There is, however, a principle implied in the overriding objective that it is not just to subject a defendant to a lengthy and expensive trial where there is no realistic prospect of success: *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [88]-[93], [132]-[134], [192]; [2003] 2 AC 1; [2001] 2 All ER 513; [2001] Lloyd's Rep Bank 125; *Sutradhar v Natural Environment Research Council* [2006] UKHL 33 at [3] *et seq*; [2006] 4 All ER 490. See further paragraph (c).

[1.4.9] Preliminary issue trials The court should be slow to deal with single issues where there will need to be a full trial on liability involving evidence in any event and/or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial: *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [92]; [2003] 2 AC 1; [2001] 2 All ER 513; [2001] Lloyd's Rep Bank 125; *Wragg v Partco* [2002] EWCA Civ 594 at [27]; [2002] 2 Lloyd's Rep 343. See further r.12.4.

E *CPR* r1.4(2)(d)

(d) deciding the order in which issues are to be resolved; and

[1.4.10] Preliminary issue trials Costs and judicial resources can be saved by identifying decisive issues and trying them first. The resolution of one issue, although not itself decisive, may facilitate settlement of the remainder of the dispute. See further r.12 .4.

[1.4.11] Case stated The power, to state a case for consideration of the Court of Appeal is contained in s.31(5), *Judicial Services and Courts* [Cap 270]. It has been suggested that this should only be invoked in special circumstances where a real advantage can be shown: *Benard v Citizenship Commission* [2007] VUSC 71; CC 230 of 2006 at [7]. A magistrate may state a case for the Supreme Court pursuant to s.17(1) of the Act.

E *CPR* r1.4(2)(e)
SA *SCCR r*3(b)

(e) encouraging parties to use an alternative dispute resolution procedure if the court considers it appropriate, and facilitating its use; and

[1.4.12] Meaning of "alternative dispute resolution" The term "alternative dispute resolution" is not defined but is generally understood to refer to some form of mediation by a third party*: Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [5]; [2004] 1 WLR 3002; [2004] 4 All ER 920. See further Part 10 and s.42A, *Judicial Services and Courts* [Cap 270].

[1.4.13] Encouragement by costs Costs orders would usually be a source of encouragement: See for example *Dunnett v Railtrack* [2002] EWCA Civ 303 at [15]; [2002] 1 WLR 2434; [2002] 2 All ER 850; *Leicester Circuits v Coates Brothers* [2003] EWCA Civ 333. See however r.10.6.

E *CPR* r1.4(2)(f)

(f) helping the parties to settle the whole or part of the case; and

[1.4.14] Nature of help Although it is clear that case management aims to provide a framework within which to promote the early compromise of cases, the precise nature of the "help" contemplated by this paragraph is unclear. Presumably, it might include a greater willingness for judges to share their tentative views as to the merits of a case or some issue: "At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx": *Johnson v. Johnson* (2000) 201 CLR 488; 74 ALJR 1380; 174 ALR 655; 26 Fam LR 627; [2000] HCA 48 at [13]. "Now, it is the court's duty to help 'the parties to settle the whole or part of the case' as a part of active case management. If the court must just sit, like "patience on a monument," saying nothing that can never be done": *Hart v Relentless Records* [2002] EWHC 1984 at [47]-[48] (also citing the dictum of Sir Thomas Bingham MR in *Arab Monetary Fund v Hashim (No 8)* (1994) 6 Admin LR 348 at 356 as being "reinforced" by the new active case management philosophy).

E *CPR* r1.4(2)(g)

(g) fixing a timetable for the case or otherwise controlling its progress; and

[1.4.15] Control of long-running cases Active case management should, in theory, eliminate those cases which drag on for many years due to inaction of the claimant and eventually lead to an application to dismiss for want of prosecution: *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 at 1933; [1999] 4 All ER 934 at 940; *Khan v Falvey* [2002] EWCA Civ 400 at [56]. The ability to control such delay was previously constrained by authorities such as *Birkett v James* [1978] AC 297; [1977] 3 WLR 38; [1977] 2 All ER 801; but the situation under the *Rules* is now very different: *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 at 1932; [1999] 4 All ER 934 at 939. See however [1.4.2].

[1.4.16] Control of interlocutory issues In *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001 it was suggested that it was appropriate to intervene in litigation to discourage interlocutory applications and force substantive issues on for early trial.

E *CPR* r1.4(2)(h)

(h) considering whether the likely benefits of taking a particular step justify the costs of taking it; and

[1.4.17] See further r.1.2(2)(c).

E *CPR* r1.4(2)(i)

(i) dealing with as many aspects of the case as it can at the one time; and

[1.4.18] Extent of utilisation See further r.7.2(2). It is noted that this requirement is frequently overlooked, many judges preferring to deal with single interlocutory issues at a time, even where the balance of interlocutory issues are simple and the parties willing.

E *CPR* r1.4(2)(j)

(j) dealing with the case without the parties needing to be at court; and

[1.4.19] Telephone conferences A telephone conference may often be convenient and sensible, but not suitable for long or complex matters: *Commissioner of Police v Luankon* [2003] VUCA 9; CAC 7 of 2003. This option is rarely explored, if ever. It would be especially convenient as a replacement for routine chambers appearances in Santo. See further *Babbings v Kiklees* (2004) *Times*, 4 November.

E *CPR* r1.4(2)(k)

(k) taking advantage of technology; and

[1.4.20] Use of technologies The court should, subject to considerations of fairness and public interest, embrace whatever available technologies might enhance justice or the efficient and economical disposition of cases: *Tari v Minister of Health* [2002] VUSC 42; CC 36 of 2001. See further r.11.8.

E *CPR* r1.4(2)(l)

(l) giving directions to ensure that the trial of a case goes ahead quickly and efficiently.

[1.4.21] Control of interlocutory issues In *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001 the Court of Appeal indicated that it was appropriate to intervene in litigation to discourage interlocutory applications and force substantive issues on for early trial. It is respectfully suggested that this admonition is sometimes taken to extremes, with trial dates being urged upon the parties before the slightest inquiry as to the necessity of interlocutory steps. On the other hand, there is a marked disinclination to strike out cases which are conspicuously untenable.

Duties of the parties

E *CPR* r1.3
NSW *CPA* s56(3)
Q *UCPR* r5(3)

1.5 The parties to a proceeding must help the court to act in accordance with the overriding objective.

[1.5.1] Critique of rule Litigation would function better if parties worked cooperatively and undertook proportionate work. On the other hand, real questions arise as to how such conduct can be mandated in an adversarial system, especially where it might conflict with duties to, or instructions from, clients. In the English provision the word “must” was replaced with “are required to” after practitioners considered that “must” imposed a new professional duty inconsistent with that to the client.

[1.5.2] Adversarialism, strategy, etc Lord Woolf recognised that the success of his reforms would depend on changing the legal culture to minimise adversarialism and tactical game play: Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales,* HMSO, London, 1996 at 7. In *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001 the Court of Appeal echoed these sentiments, considering it “regrettable” that the parties appeared to be “taking every technical and tactical point” and hinted at costs sanctions and greater intervention in the future. The spirit of the rules must be borne in mind: *Pooraka v Participation Nominees* [1991] SASC 2692 at [6]; *Municipality of Luganville v Garu* [1999] VUCA 8; CAC 8 of 1999 (“Litigation is about problem-solving not game-playing”); *Tremeer v City of Stirling* [2002] WASCA 281 at [33] (“Litigation is not a game, played for the amusement of the lawyers engaged to conduct it, in which they are free to take advantage, in any way they like, of errors, incompetence or dilatoriness on the part of their opponents.”); *Fujitsu (NZ) v International Business Solutions Limited & Ors* [1998] VUCA 13; CAC 7 of 1998; *VCMB v Dornic* [2010] VUCA 4 at [29]; CAC 2 of 2010 and *Dinh v Samuel* [2010] VUCA 6 at [43]; CAC 16 of 2009.

[1.5.3] Scope of duty In *R v Wilson and Grimwade* [1995] 1 VR 163 the Supreme Court of Victoria described the general responsibility of lawyers: "…part of the responsibility of all counsel in any trial, criminal or civil, is to cooperate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed: if the present adversary system of litigation is to survive, it demands no less… This is not to deny that counsel are entitled and obliged to deploy such skill and discretion as the proper protection of their clients' interest demands. Whether the cost of legal representation be privately or publicly borne, counsel are to understand that they are exercising a privilege as well as fulfilling a duty in appearing in a court of law…" Accordingly, the duty is wide and may include a duty for lawyers to cooperate (*Hertsmere Primary Care v Rabindra-Anandh's Estate* [2005] EWHC 320 Ch at [11]; [2005] 3 All ER 274), to offer realistic estimates of time and to brief counsel, experts, etc in a timely manner (*A & N Holding v Andell* [2006] NSWSC 55 at [45]), to consult with each other and the court to ascertain convenient hearing dates (*Matthews v Tarmac Bricks & Tiles* [1999] EWCA Civ 1574), to disabuse the other side of a misconception (*White v Overland* [2001] FCA 1333 at [4]; *Nowlan v Marson Transport* (2001) 53 NSWLR 116; [2001] NSWCA 346 at [1], [29], [46]; *Tremeer v City of Stirling* [2002] WASCA 281 at [33]), to ascertain the reasons for a party's absence (*Municipality of Luganville v Garu* [1999] VUCA 8; CAC 8 of 1999; *Dinh v Polar Holdings* [2006] VUCA 24; CAC 16 of 2006; *Dinh v Samuel* [2010] VUCA 6 at [42]; CAC 16 of 2009), to simplify and concentrate issues rather than advance a multitude of ingenious arguments (*Ashmore v Lloyd's* [1992] 2 All ER 486 at 487-8, 493; [1992] 1 WLR 446 at 447-9, 453-4), to help identify the rule or other power under which an interlocutory application is made (*Maltape v Aki* [2007] VUCA 5; CAC 33 of 2006); to keep up to date with authority and bring relevant authorities to the court's attention (*Copeland v Smith* [2000] 1 All ER 457 at 462-3; [2000] 1 WLR 1371 at 1375-6), to bring to a Judge's attention failures to comply with the *Rules* and avoid process errors by encouraging courts to ensure that everybody concerned may bring forward their cases and have them properly considered (*Duduni v Vatu* [2003] VUCA 15; CAC 28 of 2003) and not to use unfair or dishonest means or tactics to hinder the other side (*VCMB v Dornic* [2010] VUCA 4 at [29]; CAC 2 of 2010; *Dinh v Samuel* at [43]; *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at [111]; (2005) 223 CLR 1).

Application of these Rules

1.6 (1) These Rules apply in all civil proceedings in the Supreme Court and the Magistrates Court except:

(a) in proceedings of the kind set out in subrule (2); or

(b) where these Rules state they only apply in the Supreme Court or in the Magistrates Court.

(2) These Rules do not apply to:

(a) a constitutional petition brought under section 218 of the Criminal Procedure Code; or

(b) a proceeding for which other Rules made under an enactment are in force.

(3) In these Rules, a reference to "court" is a reference to either the Supreme Court or the Magistrates Court or both, depending on the context of the provision.

Position if no provision in Rules

1.7 If these Rules do not deal with a proceeding or a step in a proceeding:

(a) the old Rules do not apply; and

NSW *UCPR* r2.1
NZ *HCR* r9

(b) the court is to give whatever directions are necessary to ensure the matter is determined according to substantial justice.

[1.7.1] Inherent jurisdiction The *Rules* are complementary to the inherent jurisdiction to act effectively within the court's jurisdiction: *Connelly v DPP* [1964] AC 1254 at 1301; [1964] 2 WLR 1145 at 1153; [1964] 2 All ER 401 at 409; *R v Bloomsbury and Marylebone CC* [1976] 1 WLR 362 at 366; [1976] 1 All ER 897 at 901; *Esau v Sur* [2006] VUCA 16; CAC 28 of 2005. This includes an untrammelled power to regulate its own proceedings: *Abse v Smith* [1986] 1 QB 536 at 555; [1986] 2 WLR 322 at 335; [1986] 1 All ER 350 at 361. It is proper to exercise the power not only where it is strictly necessary, but also to secure or promote convenience, expedition and efficiency: *O'Toole v Scott* [1965] AC 939 at 959; [1965] 2 WLR 1160 at 1170; [1965] 2 All ER 240 at 247. See further [1.1.2].

[1.7.2] Absence of specific procedure Where there is no specific procedure the court may use its best efforts to address the dictates of justice and may employ *ad hoc* procedures: *Edgar v Greenwood* [1910] VLR 137 at 145; *A-G for Ontario v Daly* [1924] AC 1011 at 1015; *Browne v Commissioner for Railways* (1935) 36 SR (NSW) 21 at 29.

[1.7.3] Procedural justice Substantial justice has been held to include procedural justice: *Public Prosecutor v Kaltabang* [1986] VUSC 3; [1980-1994] Van LR 211.

Interpretation

1.8 (1) Some words used in these Rules have a particular meaning. They are defined in Part 20.

(2) The Notes in these Rules do not form part of the Rules and are for information only.

[1.8.1] The notes are not reproduced as their content is subsumed by the annotations.

Forms

1.9 A reference to a Form by number is a reference to the form identified by that number in Schedule 3 at the end of these Rules.

[1.9.1] See further r.18.9. In this book Schedule 3 is reproduced in the chapter "Forms".