

Civil Court Practice

Vanuatu

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Preface

This is in many ways a second and expanded edition of my earlier book, *Jenshel's Annotated Civil Procedure Rules*, published in 2007. Many readers will be aware that publication of that book was not without incident. The first production run of 40 out of 500 volumes was marked by delays, misaligned covers, crooked printing and poor binding. A few of the best of this bad bunch were distributed during the book's launch at the Australian High Commission in Port Vila in December 2007, having been received only hours earlier.

Continuing technical difficulties eventually forced production offshore and the first batch of just 19 good quality books was obtained in late February 2008 by air freight. These were quickly dissipated among too few of the many who, having requested copies, had waited patiently. It was expected that the balance of the order would follow reasonably soon by sea. It did not. It was later discovered that only 200, rather than the contracted 500, volumes had been printed and that these were gathering dust in a Brisbane warehouse. Full distribution was finally commenced in June 2008, about 9 months behind the original schedule.

To those who have endured the crooked text and falling pages of the first production run and to those who should have received a copy earlier but did not, I sincerely apologise.

It was always intended regularly to update the original book, as is conventional for such works, and I have borne in mind the advice of Lord Justice Brooke¹, speaking of the English *Civil Procedure Rules* 1998:

“It is going to be increasingly important with the regime² under the new Civil Procedure Rules that judges dealing with interlocutory issues are afforded up-to-date assistance on the law by advocates appearing in front of them.”

A loose-leaf format capable of regular updating was originally contemplated but was found to be uneconomical for the small number (376) of pages involved, a problem solved by this “second edition” which includes the full text of, and annotations to, the *Constitutional Procedures Rules*, *Election Petitions Rules*, *Probate and Administration Rules* and *Court of Appeal Rules*. The original annotations to the *Civil Procedure Rules* have also been updated and considerably expanded. Though the book is now considerably more “corpulent”³ I have nevertheless tried to adhere to the *lex parsimoniae*, for both aesthetic and practical reasons.

This additional content has also produced a change of title; one more in keeping with content and ambition. A number of consequential stylistic and layout changes are designed to facilitate more efficient quick-reference and future updating.

An updated and expanded work (of more modest scope) was promised to the Government of Vanuatu by the Vanuatu Legal Sector Project (AusAID/NSWAGD) at a meeting of the Project Coordination Committee in March 2008. At that time the frustration of delays associated with printing *Jenshel's Annotated Civil Procedure Rules* was

¹ *Copeland v Smith* [2000] 1 All ER 457 at 462.

² His Lordship was referring to the regime comprised by Part 1 which is, almost verbatim, the source of Part 1 of the Vanuatu *Civil Procedure Rules* and imported also into the *Constitutional Procedures Rules*, *Election Petitions Rules* and *Probate and Administration Rules*.

³ As Sir Carleton Kemp Allen long ago described the then condition and tendency of the *White Book in Law and Orders* (3rd ed.), Stevens & Sons, London, 1965, p.82.

particularly acute and, thinking I might never see any more than a handful of the book in print, accelerated work on this new publication. The following months were characterised by a state of general panic and emotional debilitation and I was quite tempted by James Thurber's advice to writers: "Don't get it right, just get it written!" The eventual delivery of the volumes in June granted me the luxury to get it written and, I hope, to get it right too.

The aim has been to produce a durable and portable volume containing all the materials a practitioner or judicial officer might require, ready to hand. The tenor is primarily descriptive, though I have not hesitated to offer critique from time to time if it was necessary to describe not only what the law *is*, but what perhaps it *should* be. This has been an especially delicate task due to my personal involvement in several important matters. This cannot be helped and I can offer only that I have borne this tension in mind and have tried to be neither timid nor defensive.

It is my hope that this book will stimulate (further) consideration and debate about the scope and effect of the various rules of court. This should, in turn, lead to (greater) predictability and transparency in the delivery of procedural decisions, bearing in mind Lord Camden's⁴ oft-cited warning:

"...the discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends on constitution, temper and passion. In the best it is very often caprice, in the worst it is every vice, folly and passion to which human nature is liable."

I am grateful to those people who have provided both praise and constructive criticism of *Jenshel's Annotated Civil Procedure Rules*. This work is certainly much better for the latter. I also reiterate my comments, and renew my gratitude to those mentioned, in the preface there.

Ari Jenshel
Port Vila
October 2008

⁴ *Hindson v Kersey* (1680) 8 How St Tr 57. As to this theme see also *R v Wilkes* (1770) 4 Burr 2527 at 2539; *Caltex Oil v The Dredge "Willemstad"* [1975-6] 136 CLR 529 at 567.

Foreword

The law of civil procedure is a vital bridge connecting two disparate worlds - the substantive law that defines the rights and liabilities of individuals, on the one hand, and the day-to-day work of judicial officers and court officials who administer the law, on the other. Far from being a no-man's land packed with arcane and pedantic rules, civil procedure supplies the machinery essential to enable courts to apply the law in manner that is both just and efficient.

Yet, as many legal practitioners and advocates will vouch, the potential for justice and efficiency is not always realised in practice. Ari Jenshel's *Civil Court Practice* is certain to make a significant contribution to the administration of law in Vanuatu by narrowing the gulf between what the law promises and what it delivers.

The first and most important benefit of this work is its capacity to promote consistency and predictability in judicial decision-making. These attributes are the very hallmarks of the rule of law, and they are no less important in the realm of procedural law than in the realm of substantive law. Judges should aim to apply principles of civil procedure with reasonable consistency, and this task is made much easier if legal practitioners have a fuller understanding of the background of each rule and its application in prior cases.

This publication also has the merit of being specifically tailored to the unique features of the law and courts of Vanuatu. This places the book in a class of its own. It is rare enough to find a legal publication that focuses on the laws of South Pacific jurisdictions as a group. It is rarer still to find one that addresses the law in a single Pacific Island country in such detail. It is a significant achievement that this book collects and analyses local jurisprudence on civil procedure, in so far as it is available.

Any new work on civil procedure these days is necessarily written in the shadow of the encyclopaedic works on civil procedure in other jurisdictions, of which the *White Book* in England is the foremost example. Yet, for all the impressive detail of the progenitors, few lawyers would advocate that these "corpulent" publications should be replicated for Vanuatu. When the language of the local rules is clear, it deserves to be applied, unadorned by the judicial excrescences developed half a world away. But when there is uncertainty or ambiguity, or when the local rules have been modelled consciously on the rules of other jurisdictions, it is simply good sense to have regard to how these rules have been interpreted elsewhere.

Civil Court Practice is due to be widely distributed, free of charge, to judges, legal practitioners and others by AusAID as part of its international development assistance in the law and justice sector in Vanuatu. The importance of thus promoting access to the law cannot be underestimated. While institutions like the Pacific Islands Legal Information Institute (PacLII) have made great strides in facilitating access to legislation and judicial decisions in the Pacific, true access to the law requires more than this. It demands that all who are engaged in legal processes - whether they be litigants, counsel, judges or others - be given the means to understand the law as it operates in practice.

The author of *Civil Court Practice* has provided a great service to Vanuatu in producing a revised edition of his 2007 work. In addition to its annotations on the Civil Procedure Rules, the new edition addresses constitutional procedures, electoral petitions, probate and administration, and the Court of Appeal rules.

It gives me great pleasure to commend this work to the legal profession in Vanuatu and to other Pacific Island countries, which will also profit from its currency, comprehensiveness and accessibility.

Professor Brian Opeskin
University of the South Pacific
Port Vila, Vanuatu.

October 2008

User Guide

General Information

Purpose

The purpose of this book is to provide students, researchers, practitioners and judicial officers with a comprehensive guide to civil procedure in Vanuatu primarily through the medium of annotated rules of court.

Binders

The loose-leaf binder is designed to be durable and portable and is intended to enable users to update the work from time to time. Users should retain the binder and the chapter dividers as these will not be resupplied with future updates.

Updates

Updates will be made available from time to time. The frequency of updates will be a function of developments in procedural law. The method of obtaining updates will be advised from time to time.

Users are advised to keep an accurate record of updates to this binder by completion of the update record on p.19. The initial loose-leaf content is numbered as issue 1. Each update will be numbered consecutively, in the lower left corner of each page.

Availability

This book will be made available to legal practitioners and judicial officers of Vanuatu under the Vanuatu Legal Sector Strengthening Project for no charge, subject to availability. A limited number of copies will be made available to libraries and research institutions at the discretion of the Project. Requests should be made to mbrazel@vanuatu.gov.vu or to AusAID.

Chapters

Civil Procedure Rules

This chapter contains the full text of the Civil Procedure Rules 2002, with interposed annotations.

Marginalia contain cross-references to similar rules of court in other jurisdictions. Part 1 is cross-referenced to several jurisdictions due to its novel and important content and the adoption of comparable provisions in other jurisdictions. Other parts are cross-referenced to such of the current (*Civil Procedure Rules* 1998) and/or former (*Rules of the Supreme Court* 1965) English rules as resemble the corresponding Vanuatu rule so as to be of possible interpretive assistance.

Constitutional Procedures Rules

This chapter contains the full text of the *Constitutional Procedures Rules* 2003, with interposed annotations.

Marginalia contain cross-references to rules of court in Vanuatu which are sufficiently similar in terms or content as to be of possible interpretive assistance.

Election Petitions Rules

This chapter contains the full text of the *Election Petitions Rules* 2003, with interposed annotations.

Marginalia contain cross-references to rules of court in Vanuatu which are sufficiently similar in terms or content as to be of possible interpretive assistance.

Probate and Administration Rules

This chapter contains the full text of the *Probate and Administration Rules* 2003, with interposed annotations.

Marginalia contain cross-references to rules of court in Vanuatu which are sufficiently similar in terms or content as to be of possible interpretive assistance.

Court of Appeal Rules

This chapter contains the partial text of the *Court of Appeal Rules* 1973, with interposed annotations. Parts 4 and 5 and the Schedules have been omitted due to obsolescence.

Marginalia contain cross-references to such of the former (*Rules of the Supreme Court* 1965) English rules (upon which they were based) as resemble the corresponding Vanuatu rule so as to be of possible interpretive assistance.

Forms

This chapter collects prescribed forms appended to each of the rules of court and other applicable forms. Accordingly, those schedules containing forms will appear only in this chapter.

The appearance of forms may be slightly different from the authorised reprints, reflecting a desire to standardise format and achieve economy of layout, and therefore ease of reference, within this book. Readers interested in viewing the precise layout of forms should consult the authorised reprint.

Costs and Fees

This chapter collects prescribed costs and fees appended to each of the rules of court. Accordingly, those schedules containing the same will appear only in this chapter.

Related Legislation

This chapter contains the full text of the *Constitution* and extracts from acts and statutory instruments and which may be useful for quick reference.

These appear in consolidated form as at the publication date and will be updated from time to time in the same way as other parts of this publication. Formal parts are omitted.

Index

This chapter contains a subject index. The case index found in the first edition has been abandoned to reduce bulk and also to reduce the burden of updating.

Annotations

Content

This is not a conventionally-arranged book about law. The content is driven and ordered solely by the various rules of court and what can briefly be said about them as is likely to be of benefit to the reader. It is modelled on similar works in other jurisdictions, such as Sweet & Maxwell's *White Book* service. Accordingly, the complete spectrum of procedural law is not addressed.

The content of annotations is intended to be more practical than theoretical. Where, however, historical annotations or more general observations may assist in understanding the validity, scope or nuances of the rule, these have been included.

Appearance and numbering

Annotations appear in smaller font size than the surrounding text so as not unduly to interrupt text flow of the rules. Paragraph numbers correspond to the part of the rule to which the annotation relates. For example, paragraph [2.4.1] to the *Civil Procedure Rules* is the first annotation to r.2.4. The second annotation would be numbered [2.4.2] and so on. Paragraph [8.1] to the *Court of Appeal Rules* is the first annotation to r.8. The second would be [8.2] and so on.

Annotations are divided, so far as possible, into paragraphs which deal with discrete content and numbered consecutively in accordance with the above style. A bold-type key phrase appears at the beginning of most annotations to facilitate quick-reference.

Selection of Citations

Selection of case law appearing in annotations follows these general rules: (1) All relevant Vanuatu cases as appear on PacLII are mentioned in annotations plus a few which do not and which coincidentally came to the attention of the author; (2) Court of Appeal decisions are cited before decisions of the Supreme Court and, if the former are comprehensive, the latter are omitted; (3) Foreign case law is cited if there is insufficient or otherwise less comprehensive domestic case law on the subject under consideration; (4) Foreign case law is selected for its persuasiveness and the extent to which it illustrates the act or rule under consideration; (5) Foreign cases are cited after Vanuatu cases where the latter is reasonably comprehensive and the former are complementary, otherwise cases appear in chronological order; (6) Among foreign cases, those from England (including Privy Council decisions) are preferred where there is a choice of authority, but otherwise all reasonably persuasive Commonwealth (especially Pacific) case law may be mentioned.

Citation Format

For several reasons, most notably the modesty of library resources in Vanuatu, case citations appear in a slightly unorthodox format. Wherever a case is available freely on the internet, the media-neutral citation is given first. Following will appear any

authorised report of the case and finally, any unauthorised report(s). As to the latter, only the more common series have been referenced.

References are given to paragraph numbers wherever convenient and available and otherwise to page numbers. A reference which appears without either is usually cited for general relevance. Unfortunately, many decisions handed down in Vanuatu contain no paragraph numbers and only the original published decisions, which are seldom generally available, contain page numbers. Accordingly, readers may have to look carefully to identify that part of the decision to which the annotation refers. References to page numbers assigned by PacLII are not given.

Abbreviation of Case Names

In order to reduce bulk and to facilitate speed of reference, case names appearing in annotations may be abbreviated.

Abbreviations

Abbreviations

In order to reduce bulk and to facilitate speed of reference, a number of abbreviations to acts and rules have been used.

Abbreviations of Rules

Full name	Abbreviated name
Civil Procedure Rules 2002	<i>CPR</i>
Constitutional Procedures Rules 2003	<i>ConPR</i>
Election Petitions Rules 2003	<i>EPR</i>
Probate and Administration Rules 2003	<i>PaAR</i>
Court of Appeal Rules 1973	<i>CoAR</i>

Abbreviations of Chapters in this Book

The above abbreviations also correspond with major chapters. For simplicity, the same abbreviations are used, with one exception: An abbreviated reference to an act or rule will appear in italics, an abbreviated reference to a chapter will not (and will usually also appear with a paragraph number in square brackets). For example, a reference to “CPR [1.2.2]” is a reference to an annotation paragraph in the chapter “Civil Procedure Rules” whereas a reference to *CPR* r.7.2 is a reference to a particular rule in the *Civil procedure Rules*.

Abbreviations in Marginalia

Marginalia utilise the above abbreviations and also the following:

Full name	Abbreviated name
Rules of the Supreme Court 1965 (Eng)	E RSC
Civil Procedure Rules 1998 (Eng)	E CPR

Civil Procedure Act 2005 (NSW)	NSW CPA
Uniform Civil Procedure Rules 2005 (NSW)	NSW UCPR
Uniform Civil Procedure Rules 1999 (QLD)	Q UCPR
Supreme Court Civil Rules 2005 (SA)	SA SCCR
Supreme Court (General Civil Procedure) Rules 2005 (VIC)	V SCR
Supreme Court Rules 1971 (WA)	WA SCR
High Court Rules, Sch.2 Judicature Act 1908 (NZ)	NZ HCR
Federal Court Rules 1998 (CAN)	CAN FCR
Supreme Court Rules 1990 (BC)	BC SCR

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