



Examiner's Comments

15 PRACTICE AND PROCEDURE

September 2025 Examinations

The exam comprised of four questions. Candidates were required to answer four questions. Each question was of equal marks.

Question 1

Question 1 required candidates to demonstrate a practical understanding of procedural steps in a multi-party breach of contract dispute involving claims for damages and potential cross-claims. Candidates were expected to identify the District Court of New South Wales as an appropriate forum, given the monetary amount and the absence of equitable relief, while also recognising that transfer to the Supreme Court might be warranted if the matter's complexity or third-party issues justified it. They were to explain the proper commencement of proceedings under the *Uniform Civil Procedure Rules 2005 (NSW)*, the defendant's procedural options in responding to the claim, and the mechanisms for bringing a cross-claim against Stable Design Pty Ltd, including service interstate.

Candidates were expected to demonstrate familiarity with the stages of litigation from pleadings through to trial, including discovery, expert evidence, interlocutory applications, and pre-trial review, with reference to Practice Note DC (Civil) No 1. The question also tested understanding of the *Civil Procedure Act 2005 (NSW)*, particularly the overriding purpose and duties of parties under ss 56–60, and the timing and role of mediation under s 26.

Question 2

Question 2 required candidates to identify and justify the urgent remedies available to protect Aquila's proprietary and commercial interests in the face of an apparent misuse of confidential information and breach of a joint development arrangement. Candidates were expected to recognise that the Supreme Court of New South Wales was the appropriate forum, given the likely need for interlocutory equitable relief beyond the

monetary jurisdiction of the District Court, and to identify the proper originating process under the *Uniform Civil Procedure Rules 2005* (NSW). The question tested understanding of the procedural mechanisms for obtaining urgent interlocutory injunctions to restrain use or disclosure of confidential material, the return of physical prototypes, and the possible grant of ancillary freezing orders under UCPR r 25.11 to prevent dissipation of assets or transfer of proceeds offshore. Candidates were also expected to understand when an application could be made *ex parte* and how it would be listed before the Duty Judge.

Candidates were required to demonstrate knowledge of the legal and evidentiary requirements for equitable relief, including the need to establish a serious question to be tried, risk of irreparable harm, and the balance of convenience, as reflected in the case law studied in the lectures. The question tested awareness of the content and structure of supporting affidavit material, including the inclusion of evidence of confidentiality, ownership of the information, and evidence of the threatened breach. Strong answers also addressed undertakings as to damages, notice to the opposing party, and potential follow-on proceedings for breach of confidence or contractual breach. Candidates were expected to refer to relevant practice notes governing urgent or duty applications, and to explain the sequencing of interlocutory relief, service, and subsequent case management.

Question 3

Question 3 required candidates to demonstrate a comprehensive understanding of costs protection and cost recovery in commercial litigation. Candidates were expected to identify that Summit could apply for security for costs under UCPR r 42.21, and to explain the evidentiary and legal requirements for such an order, including proof of impecuniosity, the existence of a bona fide defence, and the balancing of justice between the parties. Candidates were expected to refer to relevant authorities addressing the discretion to order security, and to discuss forms of security (such as payment into court or bank guarantee) and timing considerations, particularly the risk of delay once proceedings are advanced.

The question also tested candidates' understanding of how to manage costs exposure arising from unsubstantiated allegations of fraud and the professional and procedural implications of making unfounded allegations of that kind, including potential breach of the Barristers' Rules and Solicitors' Conduct Rules, and the Court's power to make costs orders personally against practitioners where misconduct is established. Candidates were further expected to address the strategic use of offers of compromise and Calderbank offers to protect Summit's position. Strong responses also discussed how such offers can secure indemnity costs and promote settlement, the importance of reasonableness and timing, and the interaction of these mechanisms with the overarching obligation to facilitate the just, quick, and cheap resolution of proceedings.

Question 4

Question 4 tested candidates' command of key procedural concepts and their capacity to express them precisely and economically. It required clear understanding of the purpose and structure of pleadings, mechanisms for discovery, and distinctions between related procedural tools such as notices to produce and subpoenas. Candidates were expected to demonstrate familiarity with interlocutory and final relief, joinder, and procedural applications such as motions for particulars and judgment on admissions, all within the framework of the *Uniform Civil Procedure Rules 2005* (NSW) and the *Civil Procedure Act 2005* (NSW).

Strong answers showed efficiency by moving directly to the relevant rule, statutory provision, or authority, giving short, accurate explanations in plain terms. They reflected an ability to locate each answer within the procedural framework, to cite the correct section or case where necessary, and to express the answer concisely without unnecessary elaboration.

Characteristics of poor or average responses

Poor or average responses were typically characterised by:

- Minimal engagement with the relevant procedural rules, legislation, or case law. Answers often recited general principles without identifying their source or legal authority.

- Failure to analyse the factual scenarios against the applicable legal framework. Many students could identify a correct procedural step — such as commencing by statement of claim or selecting the Equity Division — but did not articulate *why* that step was appropriate by reference to facts, rules, or legislation.
- Vague or formulaic responses that relied heavily on paraphrased textbook language, with little or no attempt to apply concepts to the problem at hand.
- Weakness in dealing with cross-jurisdictional elements, particularly the procedural mechanics and legislative basis for interstate or overseas service.
- Poor written expression. In a number of cases, answers lacked clarity or structure to the point that the examiner could not confidently discern the student's intended reasoning or conclusion.

Characteristics of very good or excellent responses

Strong responses were marked by:

- Accurate and precise application of the relevant rules and principles, including references to UCPR, CPA, SCA, SCR, court practice notes, and leading authorities.
- Structured responses showing clear progression from issue identification to legal framework and factual application.
- Sophisticated understanding of how procedural tools (e.g., interlocutory relief, offers of compromise) intersect with litigation strategy.
- Concise and well-expressed writing, with appropriate legal references even within dot point format.

Common mistakes

- Failure to identify specific performance as an equitable remedy, requiring consideration of the appropriate division and jurisdiction of the court.
- A lack of understanding of the monetary and equitable jurisdiction of the District Court, including its limited capacity to grant equitable relief.

- Misapplication of cross-vesting principles, or failure to recognise that state courts have jurisdiction to determine claims under s 18 of the Australian Consumer Law.
- Inadequate or inaccurate treatment of Calderbank principles, including when indemnity costs may be awarded and the distinction between offers made under the UCPR and those governed by Calderbank principles.

Areas for improvement

Candidates would benefit from:

- Stronger command of procedural rules, particularly for interlocutory applications, and costs.
- Greater fluency with practice notes and the court's approach to case management in commercial matters.
- Increased attention to cross-border service and the evidentiary requirements for urgent or *ex parte* relief.
- More disciplined use of legal language and clearer structuring of responses to match question subparts.

Other comments

Overall, most candidates demonstrated a basic working knowledge of the procedural framework but lacked precision in application. Those who treated each question as a practical problem rather than an abstract legal essay tended to perform better.