

The Practitioner's Guide to



**CIVIL  
LITIGATION**



3rd Edition

The Practitioner's Guide to  
**CIVIL LITIGATION**

*3rd Edition*

THE LAW SOCIETY OF NEW SOUTH WALES  
**young**LAWYERS

CIVIL LITIGATION COMMITTEE

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## FOREWORD

Courts in New South Wales actively manage the cases in their lists. Practitioners are required to comply with the case management principles of the Courts and to actively prepare their clients' cases for hearing. This, in turn, places added responsibilities on lawyers. Over the last decade I have observed a significant change in the way that civil litigation is conducted in this State. The emphasis today is upon case management, upon the efficient use of Court time and with an emphasis on the resolution of the real issues in proceedings. *The Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005* emphasise the importance of case management. To quote Section 56(1) of the Act:

The overriding purpose of this Act and of rules of Court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

It is important that lawyers, particularly those who are inexperienced or do not do a lot of work in the civil litigation area, are familiar with what Courts require. It is very important that practitioners are well-prepared and have a full understanding of the matter in which they are representing a client, they need to know what is expected of them and to have a good knowledge of the Court system and to think carefully about the purpose of Section 56 of the Act. I also draw your attention to District Court Practice Note No. 1 at paragraph 4 which goes so far as to set out the high standard of legal representation now required when attending Court.

*The Practitioner's Guide to Civil Litigation* is a valuable guide aimed at younger practitioners and those practitioners who do not regularly practice civil litigation. This third edition has changed significantly from the second edition as a result of the *Civil Procedure Act 2005*, the *Uniform Civil Procedure Rules 2005* and the *Legal Profession Act 2004*. I recommend that all young lawyers read this publication and use it as a guide when entering into civil litigation.

I congratulate the NSW Young Lawyers Civil Litigation Committee for the continued updating and publication of *The Practitioner's Guide to Civil Litigation*. To prepare a guide such as this takes considerable thought, work and dedication. I have no doubt it will be of considerable assistance to young practitioners.

Judge A.F. Garling, Civil List Judge  
District Court of New South Wales

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## ABOUT THIS PUBLICATION

NSW Young Lawyers <<http://www.younglawyers.com.au>> is a professional organisation and division of the Law Society of NSW. It represents lawyers who are 36 years of age or who have been admitted to practice for less than five years, and law students. All lawyers in NSW fitting this description are automatically members of NSW Young Lawyers.

NSW Young Lawyers is comprised of a number of committees, each of which specialises in a particular field of law. This book has been written by members of the Civil Litigation Committee. The Civil Litigation Committee is made up of lawyers, barristers and students who have an interest in civil litigation. The vision of the Committee is to create a profession distinguished by its commitment to excellence in dispute resolution, collegiality and opportunities for practitioners to grow. The Committee specialises in all matters within the realm of civil dispute resolution. Regardless of the method, the jurisdiction or the field of law, we focus on the exciting part of all disputes – resolving them! Advocacy, evidence and procedure are the Committee's main priorities.

This publication, now in its third edition, is aimed at both new and experienced practitioners who attend court and advise on the conduct of civil proceedings. This publication endeavours to provide a general and basic overview of how courts operate and to assist practitioners with understanding how the rules work in practice. Ultimately, I hope that this publication will provide guidance in relation to the efficient and cost effective management and resolution of cases, in a way which ensures that justice is achieved.

I thank all of the authors and reviewers who contributed to this book and are named in the credits, with special thanks to Justin Hogan Doran, Michael Bacina and to Maria Blanco. Without your help, this publication would not be possible.

Joanne Chaina  
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With special thanks to Maria Blanco of Colin Biggers & Paisley lawyers.

Thanks and apologies to anyone who has been inadvertently omitted.

## PREFACE

With the recent global financial crisis, the counter-cyclical nature of litigation suggests that 2010 and beyond will be a busy time for litigation practitioners. Moreover, firms will be shifting junior lawyers and new hires into litigation and out of more transactional type work.

For anyone involved in litigation, or a new aspect of it, nothing is more handy than some readily digestible source of all the basic knowledge needed to answer the oft-asked question 'What do I do now?'. This guide, which draws together legislation, rules of court, practice notes and – invaluable – hard won experience is a first port of call in turbulent times. Given the many changes since the Second Edition, this new edition is all the more warranted.

This edition adds new chapters focused on the specialized practice of certain lists in the Supreme Court, constitutional litigation, and international civil litigation.

As always, the utmost care is given to the preparation of this publication, but the responsibility of the reader to properly inform himself or herself before advising a client remains. If problems persist, contact your nearest expert, be he or she in your office or your profession. I would also advise all young and not-so-young lawyers to join the e-mailing list of the NSW Young Lawyers Civil Litigation Committee, where practical issues of day to day practice and procedure are raised and (hopefully) resolved.

I would like to thank those authors, update authors, reviewers and editors who contributed to this new edition. Special thanks are due to Joanne Chaina for herding the cats into a formidable band of litigators who have brought you this, the Third Edition of the NSW Young Lawyers' *The Practitioner's Guide to Civil Litigation*.

Justin Hogan-Doran  
Barrister, Seven Wentworth Chambers  
Editor-in-Chief



Part 1  
Introduction





# 1. COURTS AND TRIBUNALS

*Hilary Kincaid and Bronwyn Sharp*

## 1.1 Introduction

This section will review the historical foundation, the legislative powers and the types of matters dealt with by the courts and tribunals in New South Wales and at a federal level. In addition, this section considers the *Civil Procedure Act 2005* ('the CPA') which resulted in some amendments to the legislation concerning courts and tribunals.

## 1.2 Supreme Court of New South Wales

The Supreme Court of New South Wales has jurisdiction under the *Supreme Court Act 1970* to hear and dispose of any action subject to certain statutory limitations. For instance, section 38A of the *Judiciary Act 1903* gives exclusive jurisdiction to the High Court in questions involving the limits of inter-constitutional powers and the *Family Law Act 1975* (by operation of section 109 of the Constitution) deprives the Supreme Court of some of its inherent parental jurisdiction. Under Schedule 5, clause 5.47 of the CPA, the Supreme Court has jurisdiction over all civil matters.

Under section 145 of the *District Court Act 1973*, an application for removal to the Supreme Court may be made by filing a summons in the Supreme Court. The application may be made by a plaintiff and the application will be almost always be granted where:

- (a) the damages might exceed the statutory limit of the District Court; or
- (b) related proceedings are on foot in the Supreme Court and an estoppel is likely to arise.<sup>1</sup>

Section 140 of the CPA allows transfer of proceedings to the Supreme Court by order of the District Court in respect of:

- (a) proceedings for possession of land;
- (b) equity proceedings; and
- (c) proceedings under the:

---

1 See *Ritchie v Gumley* (1954) 55 SR (NSW) 344

- (i) *Frustrated Contracts Act 1978*;
- (ii) *Contracts Review Act 1980*; or
- (iii) *Fair Trading Act 1987*.

In the District Court, an application is unlikely to be granted where the action is part heard or after a verdict has been returned.

The *Federal Courts (State Jurisdiction) Act 1999* provides that certain decisions of the Federal Court or the Family Court have effect as decisions of the Supreme Court.

### 1.3. District Court of New South Wales

The District Court is the intermediate court in New South Wales and deals with criminal and civil cases. The jurisdiction of the District Court depends upon the amount of damages sought by the plaintiff in the proceedings (see section 44 of the *District Court Act 1973* (**‘the DCA’**)).

Under Schedule 5, clause 5.12 of the CPA, the District Court has a jurisdictional limit of \$750,000, with some exceptions.

Under section 146 of the CPA the District Court can be vested with further jurisdiction. Under section 133 of the DCA, the District Court is empowered to deal with proceedings for possession of land, the value of which does not exceed an amount of \$20,000.

Section 134 of the DCA sets out the Court's jurisdiction in respect of certain equity proceedings, which for some equitable claims is only available where the amount in issue does not exceed \$20,000. Sections 134A and 134B confer jurisdiction for claims under the *Frustrated Contracts Act 1978* and the *Contracts Review Act 1980* respectively. The District Court has jurisdiction to hear many *Trade Practices Act* claims, provided the value is within the jurisdictional threshold of the court.

The District Court has no power to give declaratory relief unless the relief is incidental to the jurisdiction the District Court is exercising. For example, section 46 of the DCA gives the Court power to grant any injunction which the Supreme Court might have granted if the proceedings had been commenced in the Supreme Court, subject to certain limitations.

In addition to the injunctive power, the Court is granted jurisdiction by section 140 of the DCA to grant temporary injunctions to restrain nuisance, trespass and certain breaches of contract. However, the basic

thrust of this provision is simply to provide a short-term remedy pending the commencement of proceedings in the Supreme Court and its real practical utility may be doubtful. Part 25 of the UCPR has extended the District Court's power to make interlocutory orders including 'Mareva' (asset freezing) orders, *Anton Pillar* (search) orders and a number of other interim orders in the nature of prohibitive and mandatory injunctive relief.

A number of provisions limit the Court's jurisdiction or operate to discourage the exercise of that jurisdiction where some other alternative forum is available. For example, under section 48 of the DCA, proceedings which could have been commenced in the Local Court, where the amount claimed is less than \$4,000, may not be commenced in the District Court except with leave.

Section 49 of the DCA prevents a plaintiff from splitting or dividing its cause of action so as to bring it within the jurisdiction of the Court. The section achieves this by providing that a judgment given or entered up or a final order made on such a split cause of action entitles the other party to judgment in any action which may be commenced against it. Sections 98N and 42 of the District Court Rules apply limits in respect of the recovery of costs in proceedings which could have been brought in a Local Court.

## 1.4 Local Courts of New South Wales

There are 160 Local Courts in NSW. The Local Courts have jurisdiction to deal with:

- (a) the vast majority of criminal and summary prosecutions;
- (b) committal hearings;
- (c) some family law matters;
- (d) child care proceedings;
- (e) juvenile prosecutions and care matters;
- (f) coronial inquiries; and
- (g) civil matters up to the jurisdictional limit.

Under sections 29 and 31 of the *Local Courts Act 2007*, the Court's jurisdictional limit is:

- (a) \$60,000 in relation to the Court sitting in its General Division (and \$72,000 if by consent); and



- (b) \$10,000 in relation to the Court sitting in its Small Claims Division, subject to certain limitations.

The Court's registries administer the sittings of the Local Court and provide registry services to the Local Court's clients. The Chamber Magistrate provides information about legal options and Court proceedings but cannot represent people appearing before the Court. In smaller Courts, the Clerk of the Court often provides the Chamber Magistrate service. Despite being called a Chamber Magistrate, a Registrar usually performs this function.

In the Local Court, Magistrates hear criminal cases that are not punishable on indictment, that is, those which do not require committal or a jury trial. These are called summary offences and include traffic matters, minor stealing, offensive behaviour and some types of assault. Magistrates also hear applications for apprehended violence orders where one person is seeking a restraining order against another.

A Magistrate conducts committal proceedings to decide if there is enough evidence for a serious matter, such as armed robbery or attempted murder, to go before the District Court or the Supreme Court.

The Local Court's civil jurisdiction is subject to a number of limitations. For example, it cannot grant equitable relief and it has only a limited jurisdiction under statutes such as *Contracts Review Act 1980*.

### 1.5 Federal Court of Australia and Federal Magistrates Court of Australia

The Federal Court of Australia, created by the *Federal Court of Australia Act 1976* (Cth), began to exercise its jurisdiction on 1 February 1977. The Court is a superior court of record and a court of equity. It sits in all capital cities in Australia and elsewhere in Australia from time to time. The Court's original jurisdiction is conferred by over 150 statutes of the Australian Parliament.

Jurisdiction is shared with the Family Court of Australia and the newly constituted Federal Magistrates Court. Decisions of single judges of the Federal Court, the Supreme Courts of the ACT and Norfolk Island, as well as limited decisions of Australian State Supreme Courts exercising federal jurisdiction, form the appellate jurisdiction of the Federal Court.

The Court provides operational support to the Federal Magistrates Service, Australian Competition Tribunal, Copyright Tribunal, Defence

Force Discipline Appeal Tribunal and Federal Police Disciplinary Tribunal. This support includes the provision of registry services to accept and process documents for tribunal proceedings, collect tribunal fees (where payable), list matters for hearing and otherwise to assist in the management and determination of proceedings.

In general, the Federal Magistrates Court shares jurisdiction with the Federal Court in matters under the *Administrative Decision (Judicial Review) Act 1977* (Cth) and appeals from the Administrative Appeals Tribunal that are transferred to the Federal Magistrates Court by the Federal Court. The Federal Magistrates Court also shares jurisdiction with the Federal Court in matters under the *Bankruptcy Act 1966* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

The Federal Magistrates Court has concurrent jurisdiction with the Federal Court to review visa-related decisions of the Migration Review Tribunal, the Refugee Review Tribunal and the Administrative Appeals Tribunal.

In trade practices matters, the Federal Magistrates Court has the same jurisdiction as the Federal Court in relation to unfair trade practices matters arising under Division I of Part V of the *Trade Practices Act 1974* (Cth) and product safety and information matters arising under Division IA of Part V of the *Trade Practices Act*, with a power to award damages up to a maximum of \$200,000.

The Federal Magistrates Court has jurisdiction to hear and determine civil copyright matters under the *Copyright Act 1968* (Cth), as amended by the *Copyright Amendment (Parallel Importation) Act 2003* (Cth). In particular, the Court can deal with matters arising under Parts V, VAA, IX and section 248J of the *Copyright Act*.

## 1.6 Land and Environment Court

Schedule 5, clause 5.24 of the *Civil Procedure Act 2005* prescribes the Court's jurisdictional limits. The Court has the same status as the Supreme Court of NSW and is established under the *Land and Environment Court Act 1979*. The Court has jurisdiction to deal with civil and criminal enforcement in regard to environmental planning and protection. The main pieces of legislation which grant the Court jurisdiction to hear and determine matters are:

- (a) *Environmental Planning & Assessment Act 1979*;
- (b) *Local Government Act 1993*;

- (c) *Protection of the Environment Operations Act 1997*;
- (d) *Heritage Act 1977*;
- (e) *Threatened Species Conservation Act 1995*;
- (f) *Native Vegetation Act 2003*;
- (g) *Contaminated Land Management Act 1997*;
- (h) *Roads Act 1993*; and
- (i) *Land Acquisition (Just Terms Compensation) Act 1991*.

The Land and Environment Court has eight Judges who have the same status as the Judges of the Supreme Court. It also has nine Commissioners who have relevant expertise and/or qualifications in planning and development as set out in the *Land and Environment Court Act*.

Pursuant to Part 3 of the *Land and Environment Court Act*, the jurisdiction of the Court is divided into seven classes of proceedings:

**Class 1** *Environmental planning and protection appeals*

Includes appeals on the merits only against refusals or deemed refusals of development consent or conditions on development consent; third party appeals against designated development; and appeals against council orders.

**Class 2** *Local government and miscellaneous appeals and applications*

Includes appeals against building approvals or conditions which have been imposed.

**Class 3** *Land tenure, valuation, rating and compensation matters*

Includes appeals involving compensation for compulsory acquisition; the determination of property boundaries; encroachment matters and aboriginal land claims.

**Class 4** *Environmental planning protection and civil enforcement*

Includes prosecutions for breaches of planning law (e.g. carrying out a development without consent); breaches of conditions of development consent; and proceedings which question the legal validity of consents or refusals of consent by consent authorities.

Class 5 *Environmental planning and protection summary criminal enforcement*

Includes prosecutions for environmental offences, for example prosecutions by the Environmental Protection Authority for pollution offences.

Class 6 *Appeals by defendants from convictions relating to environmental offences imposed by magistrates in the Local Court*

Class 7 *Appeals from Magistrates in respect of environmental prosecutions which previously would have been heard by the Supreme Court*

A Commissioner generally hears proceedings in classes 1 and 2 and some in class 3. A Judge always hears proceedings in classes 4, 5, 6 and 7.

In classes 1, 2 and 3, the Court exercises original jurisdiction. The Court places itself in the position of the original decision-maker and determines a proceeding on its merits. In class 4, the Court is vested (among other things) with the power 'to enforce any right, obligation or duty conferred or imposed by a planning or environmental law', including applications for contempt of Court. The relevant 'planning or environmental law' is specified in section 20(3) *Land and Environment Court Act*. Class 5 constitutes the criminal jurisdiction of the Court and classes 6 and 7 are the appellate jurisdiction.

The Land and Environment Court may order remedies to correct an environmental wrong. Remedies may be an injunction or a declaration. For non-criminal disputes a range of alternative resolution processes may be available.

For all disputes, parties may use expert or other witnesses when presenting their case. However, the Court now encourages the use of Court Appointed Experts (particularly in class 1 merit appeals) to allow for the quick and cost effective determination of disputes.

## 1.7 Administrative Appeals Tribunal

The Administrative Appeals Tribunal is a Federal tribunal made up of 6 divisions, each responsible for particular areas. The divisions, established under section 19 of the *Administrative Appeals Tribunal Act 1975*, are:

- (a) General Administrative Division;
- (b) Medical Appeals Division;

- (c) Security Appeals Division;
- (d) Taxation Appeals Division;
- (e) Valuation and Compensation Division; and
- (f) such other divisions as are prescribed. At present, the Veterans Appeals Division is the only other division which has been prescribed.

The main role of the Administrative Appeals Tribunal is to review administrative decisions of Commonwealth government agencies, including freedom of information decisions. The Tribunal also has jurisdiction in:

- (a) disciplinary proceedings relating to certain professions;
- (b) equal opportunity complaints under the *Anti-Discrimination Act 1977*; and
- (c) decisions in relation to *the Migration Act 1958*.

### 1.8 Children's Court and Children's Court Clinic

The Children's Court has the power to make orders for the care and parental responsibility of a child or young person under the *Children and Young Persons (Care and Protection) Act 1998*. The District Court has an appellate jurisdiction in care appeals.

The Children's Court Clinic was established under the Act to provide clinical assessment of children, young people and their families and provide reports to Court. These reports represent independent, expert assessments and may be ordered by the court at the request of the parties or of its own motion in care proceedings in the Children's Court and in appeals to the District Court. The Clinic is part of the New South Wales Attorney-General's Department and is established under the *Children and Young Persons (Care and Protection) Act 1998*. The Children's Court Clinic is located in Sydney consists of a small unit of staff who are responsible for a state-wide service which is administered by the Director.

### 1.9 Coroner's Court

Coroners inquire into the circumstances surrounding deaths that are reported to them and are Local Courts conferred with special jurisdiction under the *Coroners Act 1980*.

The State Coroner's role is to ensure that all deaths, fires and explosions which are under the Coroner's jurisdiction are properly investigated and, where the law requires an inquest to be held or in cases where the Coroner believes an inquest is necessary, a full inquest is undertaken.

The Coroner does not have the power to impose custodial sentences or fines in relation to deaths, but rather may make findings, recommendations and/or referrals to the Director of Public Prosecutions (sections 19 and 22A of the *Coroners Act* 1980).

## 1.10 Drug Court of New South Wales

The Drug Court commenced operation in New South Wales in 1999. The Drug Court's objectives, as defined in section 3 of the *Drug Court Act* 1998, are:

- (a) to reduce the drug dependency of eligible persons and eligible convicted offenders;
- (b) to promote the re-integration of such drug dependent persons into the community; and
- (c) to reduce the need for such drug dependent persons to resort to criminal activity to support their drug dependencies.

The conduct of proceedings in the Drug Court is governed by the *Drug Court Act* 1998, the *Drug Court Regulations* 2005, policies and past decisions of the Drug Court. The Drug Court has Local Court and District Court jurisdiction. Local or District Courts in the defined area must refer offenders to the Drug Court if they appear to meet the Drug Court obligatory criteria.

Before the offender is brought to the Drug Court, the Drug Court Registry staff may conduct a preliminary eligibility screening based on the person's age, location of residence and the referring Court.

The Court works in collaboration with a number of other organisations. These include the Department of Corrective Services (including the Probation and Parole Service), the Department of Health, through the Corrections Health Services and the Western Sydney, South Western Sydney, Central and South Eastern Area Health Services. In addition, a large number of residential rehabilitation services provide treatment for Drug Court participants. Officers of the Director of Public Prosecutions, the NSW Police Force and the Legal Aid Commission also form part of the drug team.

## 1.11 Dust Diseases Tribunal of New South Wales

Under the *Dust Diseases Tribunal Act 1989*, the Dust Diseases Tribunal hears and determines claims for a narrow range of respiratory diseases, most often the asbestos-related asbestosis and mesothelioma. This is a unique tribunal because these respiratory diseases are usually fatal very soon after the first symptoms arise. Conventional courts simply cannot respond quickly enough to plaintiffs who have days to live after diagnosis. Claims include compensation for workers against employers and claims for nervous shock. The claims may be based in negligence, breach of statutory duty and product liability and can include claims against suppliers and manufacturers.

The Dust Diseases Tribunal follows the procedural rules of the Supreme Court of New South Wales. The process begins when the plaintiff's solicitor files a statement of claim in the registry. Documents filed in the registry must comply with the Supreme Court forms.

## 1.12 Industrial Relations Commission of NSW (NSW IRC)

The NSW IRC comprises non-judicial and judicial members. They sit either as a Commission or, when exercising judicial powers, in Court Session (as the Industrial Court of NSW). It is established under the *Industrial Relations Act 1996* (NSW) (**'the State IR Act'**).

As a Commission, it exercises administrative powers to conciliate and arbitrate to resolve industrial disputes, set conditions of employment and fix wages and salaries by making industrial awards, approve enterprise agreements and decide claims of unfair dismissal. As a Court, it exercises criminal jurisdiction.

Due to the impact of Federal legislation (both the Howard Government's *Workplace Relations (Work Choices) Amendment Act 2005* (Cth) and the Rudd Government's replacement legislation, *Fair Work Act 2009* (Cth)), the NSW IRC has little authority over such employment matters involving Federal Constitutional corporations (i.e. within section 51(xx) of the Australian Constitution).

The Court does continue to exercise its jurisdiction and powers under the State IR Act with respect to the employees of sole traders, partnerships, government agencies and some other entities being non-constitutional corporations. In addition to exercising its residual jurisdiction under the State Act, the Court also continues to hear:

- 1) prosecutions under the *Occupational Health and Safety Act 2000* (NSW);
- 2) appeals from Local Court decisions relating to occupational health and safety and recovery of money pursuant to statutory entitlements; and
- 3) claims concerning unfair contracts and unfair dismissal filed by employees before 27 March 2006.

Proceedings in the Court are principally governed by the *Industrial Relations Commission Rules 1996* and in some instances by the *Criminal Procedure Act 1986* and Rules, and the *Criminal Appeals Act 1912*.

### 1.13 Australian Industrial Relations Commission and Fair Work Australia

The Australian Industrial Relations Commission (AIRC) was a tribunal established during the Howard Government under the *Workplace Relations Act 1996* with conciliation and arbitral functions. On 1 July 2009, the Rudd Government's *Fair Work Act 2009* entered into force.

As a result of these changes, the AIRC was replaced by Fair Work Australia ('FWA') as the national workplace relations tribunal.

FWA has take over responsibility for:

- (a) most of the AIRC's functions, including:
  - (i) approving collective agreements;
  - (ii) unlawful termination disputes (where the complaint for unfair dismissal arose after 1 July 2009) and other disputes under awards and agreements under the former Act and the new legislation;
  - (iii) arbitration of disputes under awards and enterprise agreements;
  - (iv) right of entry disputes;
  - (v) ordering good faith bargaining;
  - (vi) approving conduct of protected action ballots before protected industrial action can be initiated by unions; and
  - (vii) disputes under employer and employee organisations,
- (b) minimum wage fixing (from the Australian Fair Pay Commission); and
- (c) collective agreement approval (from Workplace Authority).



Given the recent commencement of this body, the *Fair Work Act 2009*, and, from January 2010, the National Employment Standards which will be administered by FWA, practitioners should familiarise themselves with the new legislation and the transitional provisions of the *Fair Work (Transitional Provisions And Consequential Amendments) Act 2009*.

**Tip:** For more detailed information on court rules, forms, fees, practice notes and other useful information for practitioners for all NSW courts and tribunals (including the Federal Court), see the Courts and Tribunals portal available at <http://www.lawlink.nsw.gov.au/>.



Part 2  
Types of Disputes





## 2. PERSONAL INJURY

*Theresa Assaker, Nicole Cerisola, Juliet Eckford,  
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### 2.1 Introduction

Personal injury claims fall into a number of different categories including:

- (a) common law claims, (e.g. occupiers liability);
- (b) motor vehicle accidents;
- (c) work injuries; and
- (d) victims compensation.

There are separate tribunals for dealing with workers compensation, motor vehicle accidents and victims compensation. These tribunals often work in conjunction with the courts, as plaintiffs will, for example, sometimes have an action in common law as well as an action under the workers compensation scheme.

The jurisdiction in which the matter is decided is dependent on the amount claimed or amount likely to be awarded, however the majority of personal injury claims are brought in the District Court. The following chapter will be confined to the procedures for managing a matter in the District Court.

### 2.2 *Civil Liability Act 2002*

The *Civil Liability Act 2002* (**the CLA**) has a wide-ranging effect on personal injuries litigation. In particular, the CLA provides specific rules relating to liability for:

- (a) injuries caused by an obvious risk (Part 1, Division 4 of the CLA);
- (b) injuries sustained taking part in recreational acts (Part 1, Division 5 of the CLA);
- (c) injuries causing mental harm (Part 3 of the CLA);
- (d) public authorities (Part 5 of the CLA); and
- (e) intoxicated plaintiffs (Part 6 of the CLA).

Part 2, Divisions 2 and 3 of the CLA refers to the level and types of damages capable of being awarded.

Significantly, the provisions at Part 4 of the CLA relating to proportionate liability do not apply to personal injury matters.

### 2.3 Common law claims

District Court Practice Note 1 (Practice Note 1) apply to all matters in the Sydney, Sydney West, Gosford, Newcastle and registries and deal with the case management of civil actions in the District Court.

The District Court aims to complete civil actions within twelve months of filing the statement of claim.

At any stage in the proceedings, if the Court considers that a party has seriously or repeatedly breached Court orders, the matter may be referred to a directions hearing, with the party or parties required to show cause why the statement of claim or cross claim should not be dismissed or its defence struck out.<sup>1</sup>

Clause 4 of Practice Note 1 provides that the Court requires proper representation by lawyers. It is inappropriate for parties to be represented by agents or clerks and costs orders may be made against lawyers personally if they are not adequately represented.

#### 2.3.1 Commencing proceedings

Under clause 2.5 of Practice Note 1, the plaintiff's solicitor must advise the plaintiff in writing about the requirements of Practice Note 1 prior to commencing proceedings or filing a defence.

Personal injury actions are commenced by way of an ordinary statement of claim, which needs to comply with rules 6.2, 6.12 and 6.13 of the *Uniform Civil Procedure Rules 2005* ('the UCPR'). A certificate pursuant to section 347 of the *Legal Profession Act 2004* must be included in the statement of claim and must be signed by the solicitor on the record. The certificate must state that the practitioner believes the claim has a reasonable prospect of success.

When the statement of claim is served, or as soon as practicable after service, the plaintiff must serve on the defendant:

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1 Clause 11.3 of Practice Note 1

- (a) specific documentary evidence of injuries, loss of earnings and out of pocket expenses relating to the claim;<sup>2</sup> and
- (b) a statement detailing the plaintiff's injuries, disabilities and claims for damages.<sup>3</sup>

The plaintiff must serve a timetable for the future conduct of the case on the defendant together with the statement of claim.<sup>4</sup> The timetable must include all steps necessary to ensure that the case will be ready either to be referred to mediation/arbitration or listed for trial at the status conference.

The statement of claim must be served within one month from the date on which it is filed.<sup>5</sup>

### 2.3.2 Filing a defence and cross claim

Within 28 days of the date of service of the statement of claim, the defendant must file either a notice of appearance<sup>6</sup> or a defence.<sup>7</sup>

The defence must also contain a certificate pursuant to section 347 of the *Legal Profession Act* 2004. The certificate must state that the lawyer believes the defence has a reasonable prospect of success and must be signed by the solicitor on the record.

It is usual practice for the defendant to request further and better particulars of the statement of claim and the defendant may defer filing a defence until these have been received. UCPR 14.3(1) allows the Court to order a defence be filed and served on a date other than 28 days after receipt of the statement of claim.

If the defence is not filed within the required time, the plaintiff may apply for an order for judgment.<sup>8</sup> Care should be taken that the plaintiff consents to any extension of the time for filing the defence.

Under UCPR 9.1, a cross-claim must be filed at the same time as the defence is filed. A cross-claim must be accompanied by a certificate pursuant to section 347 of the *Legal Profession Act* 2004.

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2 Rule 15.12(2) of the *Uniform Civil Procedure Rules* 2005 (NSW)

3 Rule 15.12(3) of the *Uniform Civil Procedure Rules* 2005 (NSW)

4 Clause 3.1 of Practice Note 1

5 Rule 6.2(4)(b) of the *Uniform Civil Procedure Rules* 2005 (NSW)

6 Rule 6.9 of the *Uniform Civil Procedure Rules* 2005 (NSW)

7 Rule 14.3 of the *Uniform Civil Procedure Rules* 2005 (NSW)

8 Rule 13.1 of the *Uniform Civil Procedure Rules* 2005 (NSW)

When the cross-defendant was not previously a party to the proceedings, the cross-claimant must also serve copies of all pleadings filed to date.<sup>9</sup>

The cross-defendant should file a defence to the cross-claim<sup>10</sup> unless the claim is only for contribution pursuant to section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946*.<sup>11</sup> A defence to a cross-claim must be accompanied by a certificate pursuant to section 347 of the *Legal Profession Act 2004*.

A defendant should start its preparation for trial based on the allegations in the statement of claim and the particulars of the claim.

### 2.3.3 Subpoenas

Subpoenas for production must be filed as soon as possible.<sup>12</sup> Generally, subpoenas for production are issued to the plaintiff's treating doctors, the plaintiff's employer and any third parties who may be liable to contribute. A return date will be fixed at the pre-trial conference if the parties have not already issued subpoenas.<sup>13</sup>

### 2.3.4 Pre-trial conference

Once a statement of claim is filed, a matter will be allocated dates for:

- (a) a pre-trial conference to take place within 2 months of the date that the statement of claim was filed; and
- (b) a status conference to take within 7 months of the date that the statement of claim was filed.

Under clause 3.2 of Practice Note 1, if the defendant disagrees with the plaintiff's timetable, the defendant must serve a timetable for conduct of the case on the plaintiff at least 7 days before the pre-trial conference.

Under clause 2.3 of Practice Note 1, the court will expect that the parties will, prior to the pre-trial conference, have:

- (a) issued subpoenas;
- (b) briefed experts;

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9 Rule 9.7 of the *Uniform Civil Procedure Rules 2005* (NSW)

10 Rules 9.4 and 9.5 of the *Uniform Civil Procedure Rules 2005* (NSW)

11 Rule 9.11 of the *Uniform Civil Procedure Rules 2005* (NSW)

12 Clause 6.1 of Practice Note 1

13 Clause 6.2 of Practice Note 1

- (c) served requests for further particulars;
- (d) served any primary medical reports; and
- (e) if possible, served defences and cross claims.

At the pre-trial conference, the Court will usually make orders in line with the suggested timetable, which are likely to include filing and/or service of:

- (a) the plaintiff's responses to requests for particulars;
- (b) the defence and cross claims;
- (c) expert evidence; and
- (d) the plaintiff's particulars required by rule UCPR 15.12.

### 2.3.5 Status conference

The parties are expected to have completed service of all evidence prior to the status conference. However, orders must be made at the status conference:

- (a) to rely on any expert evidence served within the preceding 28 days;<sup>14</sup>
- (b) for an expert conference; and/or
- (c) concurrent expert evidence at trial.<sup>15</sup>

The parties must be ready to take a trial and/or arbitration/mediation date. The parties should have details of all witness and counsel availability, and the estimated length of time the trial will take.<sup>16</sup> Matters will generally be allocated a mediation date unless the parties can satisfy the Court that mediation is not appropriate.<sup>17</sup>

If a party is not ready to take a hearing or mediation date at the status conference, orders will be made for further preparation and costs orders made. The party liable for the matter not being ready may have to show cause why its pleadings should not be dismissed.<sup>18</sup>

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14 Clause 8.6 of Practice Note 1

15 Clause 8.7 of Practice Note 1

16 Clause 8.4 of Practice Note 1

17 Clause 8.3 of Practice Note 1

18 Clause 8.5 of Practice Note 1



Cases with an estimated trial time of two weeks or more will be listed for case management directions.<sup>19</sup>

### 2.3.6 Adjournment of trial

Once a matter is listed for trial, it will only be adjourned for very good reason. Failure to comply with an order is not normally considered a reason for adjournment. Parties may be disallowed from adducing evidence at trial if it is not served in compliance with the orders.<sup>20</sup>

If a trial date is in jeopardy, it is the responsibility of either party to file an affidavit in the Registry.<sup>21</sup> Costs will be ordered against the defaulting party and may be assessed as a fixed sum and payable on a nominated date.<sup>22</sup>

## 2.4 Motor vehicle accidents

Many of the procedures outlined above for general personal injury claims apply equally to motor vehicle accidents claims that proceed to Court.

However, personal injury claims arising from motor vehicle accidents occurring on or after 5 October 1999 fall within the *Motor Accidents Compensation Act 1999* ('**the MAC Act**'). Claims arising from motor vehicle accidents occurring before 5 October 1999 fall within the provisions of the *Motor Accidents Act 1988*.

On 1 October 2008, the *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Act 2007* commenced, which imposes more stringent requirements on both claimants and insurers. Many of the provisions apply to claims made on or after 1 October 2008, and other provisions apply only to accidents occurring on or after 1 October 2008.

The District Court has an unlimited jurisdiction to deal with personal injury matters arising from motor vehicle accidents. However, before proceedings may be commenced, the requirements of the MAC Act must be met.

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19 Clause 9.4 of Practice Note 1

20 Clause 12.2 of Practice Note 1

21 Clause 12.1 of Practice Note 1

22 Clause 12.4 of Practice Note 1

### 2.4.1 Motor vehicle accidents: making a claim

The accident must be reported to a member of the NSW Police with 28 days<sup>23</sup> otherwise the claimant will be required to provide the insurer with a full and satisfactory explanation of the delay.<sup>24</sup>

A claim must then be made by giving notice to the relevant insurer, by lodging a Motor Accidents Authority ('the MAA') claim form,<sup>25</sup> within 6 months of the date of the accident or, if the claim relates to the death of a person, the date of that person's death.<sup>26</sup> The claim is usually made against the compulsory third party insurer of the vehicle allegedly at fault.

If the driver at fault cannot be found or is not insured, or if the vehicle is unregistered, a claim may be made against the Nominal Defendant.<sup>27</sup> Once the MAA receives a claim against a Nominal Defendant, the MAA will then proceed to allocate the claim to one of the CTP insurers.<sup>28</sup> For the purposes of this chapter, all references to "insurer" include the nominal defendant.

If the claim is not made within the required 6 months, a full and satisfactory explanation must be provided by way of statutory declaration from the claimant and anyone else who contributed to the delay in lodging the claim.<sup>29</sup> If an insurer has not rejected a claim within two months after its receipt on the grounds of delay or on the grounds that it is not in the correct form, the insurer loses the right to reject the claim.<sup>30</sup>

After notice has been given of the claim, the insurer has a duty to give written notice as to whether the insurer admits or denies liability for the claim as expeditiously as possible<sup>31</sup> and this must occur within three months.<sup>32</sup> If no such notice is provided, the insurer is taken to have given notice to the claimant wholly denying liability for the claim, this

23 Section 70(1) of the *Motor Accidents Compensation Act 1999* (NSW)

24 Section 70(2) of the *Motor Accidents Compensation Act 1999* (NSW)

25 Section 74 of the *Motor Accidents Compensation Act 1999* (NSW)

26 Section 72 of the *Motor Accidents Compensation Act 1999* (NSW)

27 Details of address for service of the Nominal Defendant can be found on the Motor Accidents Authority website at <<http://www.maa.nsw.gov.au/>>

28 See sections 33 and 34 of the *Motor Accidents Compensation Act 1999* (NSW)

29 Section 73 of the *Motor Accidents Compensation Act 1999* (NSW)

30 Sections 73(3) and 76 of the *Motor Accidents Compensation Act 1999* (NSW)

31 Section 80 of the *Motor Accidents Compensation Act 1999* (NSW)

32 Section 81 of the *Motor Accidents Compensation Act 1999* (NSW)

is known as a deemed denial.<sup>33</sup> Unless liability is wholly denied, the insurer has a duty to make a reasonable offer of settlement within one month after the claimant's injuries have sufficiently recovered or within two months after the claimant has provided all relevant particulars about the claim, whichever is the later.<sup>34</sup> Once liability is admitted, the insurer has a duty to commence payment of reasonable medical and rehabilitation expenses.<sup>35</sup>

### 2.4.2 Motor vehicle accidents: assessment of claims

Under the MAC Act, claims for personal injury arising from motor vehicle accidents must now be referred to the Claims Assessment & Resolution Service ('CARS') of the MAA for assessment and determination of the claim, prior to commencing proceedings in the District Court.<sup>36</sup> Litigation may not be commenced unless either a certificate is obtained from a CARS Assessor stating that the matter is excluded from assessment on grounds as set out in sections 92 or 93 of the MAC Act. A matter may be exempted from CARS on grounds of:

- (a) complexity;
- (b) if the claimant is a minor;
- (c) liability has been wholly denied; or
- (d) contributory negligence of 25% or more has been alleged.

A claimant who proceeds to CARS Assessment and is not satisfied with the CARS Assessor's determination may also be entitled to commence court proceedings. A claimant must meet certain thresholds before commencing proceedings. These thresholds include establishing that the claimant believes it can exceed the quantum determined by the CARS Assessor by at least 25%. Unlike the claimant, if the insurer is dissatisfied with the CARS Assessment they have no avenue of appeal unless it can be shown that a material error has been made. A detailed explanation of the assessment process, including time limits, can be found in Part 4.4 of the MAC Act.

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33 Section 81(3) of the *Motor Accidents Compensation Act 1999* (NSW)

34 Section 82 of the *Motor Accidents Compensation Act 1999* (NSW)

35 Sections 83 and 84 of the *Motor Accidents Compensation Act 1999*

36 Section 108 of the *Motor Accidents Compensation Act 1999*

### 2.4.3 Motor vehicle accidents: time limits

The MAC Act contains various time limitations on the commencement of proceedings. The *Limitation Act 1969* does not apply.<sup>37</sup> A claimant may only commence proceedings with the leave of the court if more than three years have passed since:<sup>38</sup>

- (a) the date of the accident; or
- (b) in the case of proceedings arising from the death of a person, the date of that person's death.

Leave will only be granted if satisfactory reasons for delay can be provided and the claim is likely to result in substantial damages. Leave will not be granted unless the likely damages awarded are 25% or more of the maximum amount that may be awarded for non-economic loss<sup>39</sup> unless the claimant is legally incapacitated due to age or mental capacity.<sup>40</sup>

The limitation period of 3 years does not include the period of time between the date when the claimant referred the matter to CARS Assessment and exemption and the date 2 months after the certificate as to assessment or exemption has been issued. In other words, whilst the matter is in the CARS process, the limitation clock stops until a determination is issued.<sup>41</sup> Referrals to the Medical Assessment Service does not suspend time under section 109 of the MAC Act.

Where the insurer gives a claimant a notice requiring the claimant to commence Court proceedings, the claimant must commence proceedings within 3 months of receipt of the notice or the claim is taken to be withdrawn.<sup>42</sup>

Where a claimant qualifies for and is an interim participant in the Lifetime Care and Support Scheme, time in respect of lodging a claim for damages will not run.<sup>43</sup>

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37 Section 109(5) of the *Motor Accidents Compensation Act 1999*

38 Section 109(1) of the *Motor Accidents Compensation Act 1999*

39 Sections 109(3) and 134 of the *Motor Accidents Compensation Act 1999*

40 Section 109(4) of the *Motor Accidents Compensation Act 1999*

41 Section 109(2) *Motor Accidents Compensation Act 1999*

42 Sections 110(1), 110(2) and 110(3) of the *Motor Accidents Compensation Act 1999*

43 Section 11 of the *Motor Accidents (Lifetime Care and Support) Act 2006*

#### 2.4.4 Motor vehicle accidents: commencing proceedings

If a matter has been exempted from assessment or has been assessed and the determination of the assessor is disputed, proceedings may be commenced in a court of competent jurisdiction, most commonly the District Court, provided the thresholds are met.

Proceedings are commenced in the District Court by way of an ordinary statement of claim. The statement of claim must be:

- (a) served in accordance with the UCPR;
- (b) accompanied by a statement of particulars as set out above; and
- (c) a statement under Part 24C, rule 11 of the *District Court Rules* 1973. The statement must set out the plaintiff's compliance with sections 70, 72, 108 and 109 of the MAC Act.

Under clause 1.3 of Practice Note 1, for cases under the MAC Act the plaintiff should obtain evidence that the relevant impairment threshold for damages for non-economic loss has been reached before commencing proceedings. This evidence can either be by way of written agreement between the insurer and the claimant, or by way of certificate issued by the Medical Assessment Service of the MAA.

Once the statement of claim has been filed and served, proceedings relating to personal injuries arising from motor vehicle accidents will be managed in accordance with Practice Note 1 and the procedures outlined above for general personal injury claims. The only differences are that:

- (a) the defendant should inform the plaintiff prior to the pre-trial conference whether they agree that the threshold has been reached; and
- (b) the defendant has until 4 months after the filing of the statement of claim to apply to have the application struck out for non-compliance with the MAC Act.

### 2.5 Work injury claims

Where a worker has sustained an injury and the worker's employment was a substantial contributing factor to the injury, the worker is generally entitled to compensation from their worker's employer and pursuant to the *Workers Compensation Act 1987* ('the **WCA**') and the *Workplace Injury Management Act 1998* ('the **WIM Act**').

The Workers Compensation Commission ('WCC') deals with disputes arising in workers compensation matters. However, the District Court retains residual jurisdiction from the former Compensation Court concerning claims made by coal miners and in other limited circumstances.

The District Court and Supreme Court continue to deal with common law claims for work injury damages, provided the worker meets the thresholds outlined under the WCA and complies with all the pre-litigation procedural requirements.

Generally, a worker may be entitled to bring a claim for work injury damages under the common law if:

- (a) the worker have sustained an injury that has caused at least 15% permanent impairment;
- (b) the employer was negligent; and
- (c) as a result of the employer's negligence the worker sustained an injury.

Once satisfied of these elements, there a number of steps that need to be undertaken before court proceedings can commence:

- (a) A notice of claim for work injury damages should be served on the employer and the employer's insurer, setting out particulars of the claim.
- (b) A pre-filing statement in accordance with the WCA and WIM Act should then be served on the employer and employer's insurer. The pre-filing statement must attach a copy of the statement of claim proposed to be filed by the worker.
- (c) Neither party may rely on other information which is not included in the pre-filing statement of the pre-filing defence. Parties are often required to mediate the matter via the WCC. Should the matter not resolved by mediation, a certificate of outcome of mediation is issued by the WCC. This certificate enables the worker to commence proceedings in the relevant jurisdiction.

Once proceedings are commenced, work injury damages matters will generally be listed for hearing on the first return date. The court will expect that the matter should be reading for hearing at the time proceedings were commenced.

There are a number of very important and complex limitation periods that arise in respect of work injury damages claims. Generally, the

limitation period is 3 years from the date of injury. Proceedings may only be commenced outside this time limit with the leave of the court. However, time does not run from the date a claim is made for permanent impairment until such the time the degree of permanent impairment is either:

- (a) agreed between the parties; or
- (b) determined by an approved Medical Specialist appointed by the WCC.

Young lawyers should refer to the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*. Guidelines are available on the WCC website <<http://www.wcc.nsw.gov.au/>>.

## 2.6 Victims compensation

People who are injured as a result of violent crime may apply for compensation to the Victims Compensation Tribunal with respect to those injuries. Persons who are eligible to receive compensation include:

- (a) primary victims;<sup>44</sup>
- (b) secondary victims (such as witnesses);<sup>45</sup> and
- (c) family members of a homicide victim.<sup>46</sup>

Compensation may be claimed for both compensable injuries and actual loss which can include financial losses, damage to property and medical treatment and associated expenses.

To make a claim, an application must be lodged with the Victims Compensation Tribunal in the approved form, along with documentary evidence such as medical reports and certificates, wages documents, receipts and police statements and material.<sup>47</sup> The application must be lodged within two years after the relevant act of violence.<sup>48</sup>

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44 Section 6 of the *Victims Support and Rehabilitation Act 1996*

45 Section 8 of the *Victims Support and Rehabilitation Act 1996*

46 Section 9 of the *Victims Support and Rehabilitation Act 1996*

47 Section 25 of the *Victims Support and Rehabilitation Act 1996*

48 Section 26 of the *Victims Support and Rehabilitation Act 1996*

To be successful, an applicant must establish that an act of violence caused an injury<sup>49</sup> and the injury claimed exceeds the minimum compensable injury threshold amount of \$7,500.00.<sup>50</sup>

A Compensation Assessor will determine the claim. Generally, there is no requirement for any party to attend the assessment. The claim is determined only on the basis of documentary evidence. The claimant may appeal a determination to the Victims Compensation Tribunal and have the matter heard or re-assessed.<sup>51</sup> The applicant must lodge a notice of appeal within 3 months of the date of the notice of determination. A decision of the Victims Compensation tribunal may be appealed to the District Court if a party considers that the Tribunal has made an error of law.<sup>52</sup>

Detailed information regarding the procedures involved in obtaining victims compensation can be found in the *Victims Support and Rehabilitation Act 1996* and on the Victims Compensation Tribunal's website <<http://www.lawlink.nsw.gov.au/vct>>.

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49 Section 5 of the *Victims Support and Rehabilitation Act 1996*

50 Schedule 1 of the *Victims Support and Rehabilitation Act 1996*

51 Section 36 of the *Victims Support and Rehabilitation Act 1996*

52 Section 39 of the *Victims Support and Rehabilitation Act 1996*



## 3. DECEASED ESTATES (REVISED VERSION, 25 AUGUST 2010)

*Ramena Kako, Wendy Bure and Caroline Law*

### 3.1 Introduction

Litigation concerning deceased estates typically falls into one of two classes:

- (a) probate litigation, which includes disputes about whether a document is a will, who should be executor and what a will means; and
- (b) family provision litigation, which concerns disputes about the distribution of assets when the meaning of a will is clear.

The *Uniform Civil Procedure Rules* ('the **UCPR**') and *Supreme Court Rules* 1970 (as amended by *Supreme Court Rules (Amendment No 405)* 2005) provide that the specialised jurisdiction of the Supreme Court, including its probate and family provision work, is exercised subject to the specialised rules found in the *Supreme Court Rules*.

Accordingly at this time, Part 78 of the *Supreme Court Rules* still applies to probate proceedings.

Further, Schedule J of the *Supreme Court Rules* applies to *Family Provision Act* ('**FPA**') and *Succession Act* proceedings. There is now a practice note applicable to such proceedings in the Supreme Court, SC Eq 7 – Family Provision.

### 3.2 Probate

Generally, grants of probate are made in chambers by the Probate Registrar of the Supreme Court. However, where a grant of probate is contested, the Court will list the contested application for directions in contemplation of a hearing.

The matter is listed before the Probate Registrar, who currently has a list every Monday at 9.00 am in the Equity Division of the Supreme Court. Once all the evidence has been filed by the parties, the matter is given a hearing date before, usually, the Probate List Judge. Non-contested

grants of probate continue to be made pursuant to the procedure set out in Part 78 of the *Supreme Court Rules*.

### 3.3 Form

If proceedings are to be entered in the probate division of the Supreme Court you must include additional information within the originating process such as: Estate of [insert name]; Date of Death [of the deceased person]; Gross value of the estate; and Net value of the estate; and Pages in Will (if applicable) and mark the form for entry into the Probate List.

To ensure that the most recent form requirements are met, please consult the Guide at: <[http://www.lawlink.nsw.gov.au/lawlink/spu/ll\\_ucpr.nsf/pages/ucpr\\_forms](http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_forms)>.

### 3.4 Family Provision claims

The *Family Provision Act 1982* was repealed by the *Succession Amendment (Family Provision) Act 2008*. However, the FPA is still operative where the deceased died before 1 March 2009. In cases where the deceased died on or after 1 March 2009, the *Succession Act 2006* applied.

Proceedings for family provision orders are commenced by filing a Summons in the Equity Division of the Supreme Court. For all Summonses filed on or from 1 June 2009, Sc Eq Practice Note 7 applies. That practice note indicates that the plaintiff must file and serve with the Summons his or her affidavit in chief. A template for the affidavit is set out in the practice note. It also deals with the nature of affidavits to be served by the defendant executor, and allows for evidence of property values or health to be given by non-experts.

There is also provision for the making of on-line consent orders, so as to reduce the need for a court attendance. Practitioners will need to register for on-line court by ending an email to [onlinecourt\\_supreme-court@agd.nsw.gov.au](mailto:onlinecourt_supreme-court@agd.nsw.gov.au).

At the point of filing the summons, the Court allocates a mention date for making directions for the service of affidavits. The usual order of affidavits is:

- (a) the plaintiff must serve its affidavits in support of its summons at the time of filing the Summons;

- (b) the defendant must then serve its affidavits together with the affidavit required by section 1.5 Schedule J of the *Supreme Court Rules*; and
- (c) the plaintiff then has a right to reply to the defendant's affidavits.

Where the plaintiff has not filed its affidavit in support of its summons within 6 months from the date the claim was commenced, the Court will automatically list the matter for preliminary directions before the Registrar of the Equity Division. If no evidence is filed by that time, and unless the Court is persuaded otherwise, the court may dismiss the proceedings. If the plaintiff wishes to continue the proceedings, short minutes of order should be prepared which set out directions for the filing of affidavits and seek leave to file in Court the plaintiff's affidavit in support of the summons.

Unlike contested grants of probate which are dealt with in the Probate List, *Family Provision* matters are listed in the General Equity List. Once all the evidence is served, the proceedings are set down for compulsory court-ordered mediation. The mediator is usually a Court Registrar and presently, the mediations are held at the King Street Courts. The Practice Note sets out the documents the parties are required to prepare for the mediation, including statements as to the costs of the proceedings to the time of mediation.

If the proceedings settle at mediation, the Registrar can make the final orders then and there and vacate any future directions hearings.

If the proceedings do not settle at mediation, a hearing date is set at the next directions hearing. The Registrar allocates hearing dates based upon estimates for length of trial given by the parties. The usual order for hearing is usually made, which includes a direction for the provision of a Court Book – see SQ Eq Practice Note 7.

*Family Provision* proceedings are usually heard by Associate Judges, however sometimes they may be heard by a Judge.

There is an FPA running list for hearing dates and these dates are available from the Supreme Court website.<sup>1</sup>

The Registrar sits on Tuesdays at 2:00 pm to deal with Family Provision proceedings. Urgent applications may be dealt with in the Equity General list at 9:15 am each day.

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1 <[http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_index](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_index)>

### 3.5 Time limits

The time limit to bring a claim under the FPA is 18 months from the date of death. The time for bringing a claim for family provision under the *Succession Act 2006* is within 12 months from the date of death. This is an important change in the legislation. If proceedings are commenced out of time, a prayer should be sought in the summons seeking leave to bring the claim out of time and the affidavit should deal with the reasons why a claim was not made within time. The application for leave is usually heard at the same time as the hearing.

At the time of serving the summons, the plaintiff should also serve a notice upon the personal representative of the estate, showing who, in his or her opinion, is or may be an eligible person under section 7 of FPA pursuant to section 1.9 of Schedule J to the *Supreme Court Rules* (or see categories of eligible persons under s 57 of the *Succession Act 2006*). The personal representative must then serve a notice of the application upon the eligible persons using Form 89B, and an affidavit of service must be prepared. If the proceedings are to be defended, a notice of appearance must be filed within 2 weeks.

It is not usually appropriate to commence Family Provision proceedings before a grant of probate or administration has been made. This is because the administrator or executor of the estate must be joined as a defendant under section 1.6 of Schedule J to the *Supreme Court Rules*. If proceedings are commenced before the grant, then no defendant should be named and an order should be sought that the likely administrator be named as a defendant to represent the estate for the purposes of the hearing. A grant must be made before an order can be made under the FPA or *Succession Act*.<sup>2</sup>

Leave of the Court is required for discovery and administering interrogatories for Family Provision proceedings commenced by summons.

Before the date of the hearing, the solicitors for each of the parties must file and serve on their client and the other parties an affidavit setting out the anticipated legal costs incurred and to be incurred to hearing.

After the hearing and if a final order is made for provision out of the deceased's estate, a personal representative must, unless the Court orders otherwise, lodge in the Registry the Probate, Letters of Administration or a copy of Election bearing a copy of the minute of order pursuant to sections 1.11(1) and 1.11(2) of Schedule J to the *Supreme Court Rules*.

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2 See *Leve v Reynolds* (1986) 4 NSWLR 590

The family provision orders made become a codicil to the will of the deceased.

### 3.6 Costs

The usual costs order in FPA proceedings is for the plaintiff's costs to be ordered on a party/party basis and the defendant's costs to be ordered on an indemnity basis, both to be paid out of the estate.<sup>3</sup> This applies unless special circumstances exist, and the Court can exercise its discretion otherwise. Where a Calderbank letter or offer of compromise concerning costs has been sent, and the offer was more advantageous than the result, costs from the estate are likely to be ordered up to the date of the letter only.<sup>4</sup>

### 3.7 UCPR Part 7 Rule 10

Apart from the deceased estate litigation discussed above, the UCPR allows for the appointment of a representative of a deceased person's estate, by the own Court's motion, in certain limited circumstances. Rule 7.10 of the UCPR applies to proceedings in which it appears to the Court that:

- (a) a deceased person's estate has an interest in the proceedings, but is not represented in the proceedings; or
- (b) the executors or administrators of a deceased person's estate have an interest in the proceedings that is adverse to the interests of the estate.

If the Court finds either of the above, it may:

- (a) order that the proceedings continue in the absence of a representative of the deceased person's estate; or
- (b) appoint a representative of the deceased person's estate for the purposes of the proceedings, but only with the consent of the person to be appointed.

The Court may order that the proceedings continue in the absence of a representative of the deceased person's estate in a number of situations including where:

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3 For example see *McIntyre v McIntyre* [2005] NSWSC 1216

4 *Dobb v Hackett* (1993) 10 WAR 532

- (a) there are other parties in the proceedings who have the same interest as the estate;<sup>5</sup>
- (b) the deceased person's interest is small or contingent; or
- (c) deceased person has no practical beneficial interest in the property involved in the proceedings.<sup>6</sup>

The Court may appoint any person it considers appropriate to act as representative of the deceased person's estate, provided that person consents to the appointment. As a result, lawyer's may find themselves in non-typical litigation involving deceased estates.

Further, rule 7.10 of the UCPR provides:

- (3) Any order under this rule, and any judgment or order subsequently entered or made in the proceedings, binds the deceased person's estate to the same extent as the estate would have been bound had a personal representative of the deceased person been a party to the proceedings.
- (4) Before making an order under this rule, the court may order that notice of the application be given to such of the persons having an interest in the estate as it thinks fit.

A party served with any application pursuant to rule 7.10 of the UCPR should carefully consider the orders sought against the deceased estate and consider whether it is worth opposing any application on behalf of the estate. For instance, if the order is small or contingent against the deceased estate, any application to oppose may be unsuccessful as the Courts are usually happy to continue proceedings in the absence of a representative in such circumstances.

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5 *Borough of Drummoyne v Hogarth* (1906) 23 WN (NSW) 243

6 *Porters v Cessnock City Council* [2005] NSWSC 1275

## 4. DEBT RECOVERY

*Michael Bacina, Stuart Cork and Katrine Narkiewicz*

### 4.1 Letter of demand

A letter of demand should be issued to an alleged debtor ('debtor') unless there is a real fear that the debtor will remove assets from the jurisdiction before legal proceedings can be commenced.

A letter of demand notifies the debtor that legal proceedings will be commenced and can occasionally persuade the debtor to pay the debt to avoid additional legal costs and interest. A letter of demand assists the plaintiff in an application for costs if the demand is served and ignored.

A letter of demand should correctly identify:

- (a) your client;
- (b) the debtor;
- (c) the basis for your client's claim;
- (d) the particulars of the debtor's default;
- (e) that your client requires payment of the full amount of the debt by a certain date (often 7 days);
- (f) the address for payment of the debt;
- (g) the method by which payment will be accepted;
- (h) if you have instructions to commence legal proceedings, that proceedings will be commenced;
- (i) that legal costs and interest will be claimed if proceedings are commenced; and
- (j) that no further warnings will be given prior to proceedings being commenced.

Review the basis for your client's claim and whether your client has an entitlement to interest or costs under their contract. Interest due under a contract may be claimed in a letter of demand. Statutory interest may not.

If the debt exceeds \$1,000, interest may be claimed in accordance with Rule 36.7 of the *Uniform Civil Procedure Rules* ('the **UCPR**') from the date legal proceedings are commenced. To protect your client's posi-

tion regarding legal costs and interest, consider including words to the following effect in the letter of demand:

In the event that legal proceedings are commenced, our client will seek to recover interest on the principal outstanding debt in accordance with section 100 of the *Civil Procedure Act 2005* (NSW), together with legal costs in accordance with Schedule 2 of the *Legal Profession Regulation 2005* (NSW), in addition to the principal outstanding debt.

The letter of demand should not:

- (a) include any claim for the legal costs of issuing the letter of demand unless your client has a lawful entitlement to claim these costs;
- (b) make any threat of criminal proceedings against the debtor;
- (c) contain any statement calculated to mislead the recipient of the demand;
- (d) be issued if:
  - (i) there is a real possibility you may end up in an interstate or international jurisdictional fight, as you may tip off the other party to commence proceedings in their jurisdiction of choice; or
  - (ii) the other party may shift their assets out of the jurisdiction.<sup>1</sup>

Also, see Rule 34 of *The Law Society of New South Wales Professional Conduct and Practice Rules (1995)*.

If the contract under which the debt is due contains a notice provision, your client should follow the procedure set out in that notice provision. Failure to do so may damage your client's ability to bring legal proceedings.

While service of the letter of demand is not required to be in accordance with UCPR 10.5 and 10.20, as a practical matter, you should send a copy of the letter of demand to the debtor's:

- (a) usual place of residence;
- (b) place of business; and
- (c) if the debtor is a corporation:
  - (i) the company's registered office; and

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<sup>1</sup> In this event, consider an asset freezing order under Part 25 of the *Uniform Civil Procedure Rules 2005* (NSW)



- (ii) the address of each of the company's directors and shareholders.

You should make all reasonable efforts to locate the debtor to bring the letter of demand to the debtor's attention. Best practice is to follow the standard for substituted service set out under UCPR 10.14 and 10.15, that is you should be satisfied that the manner of 'service' of the letter of demand has, in all likelihood, brought the existence of the letter of demand to the attention of the intended recipient of the document.

This will help address any subsequent allegation by a debtor that no demand was received, and provide evidence that any contractual notice provisions have been met by your client.

It will often be sufficient to show that the letter of demand was served at the last known residential or business address of the debtor.

## 4.2 Proceedings against corporations

If you receive instructions to recover a debt from a company, you should obtain a 'historical company extract' from the Australian Securities and Investments Commission ('ASIC').<sup>2</sup>

If the debtor company has had an administrator or liquidator appointed, contact the administrator or liquidator immediately to discuss the debt. You may need instructions to prepare and lodge a proof of debt with the liquidator.<sup>3</sup>

If the company is not under administration or liquidation, the company search will reveal if any winding-up applications have been previously made, or are currently on foot. This may be a sign that the company has been subject to other debt recovery proceedings or judgment recently.

Further, you should consider whether to proceed by way of a letter of demand and a statement of claim against the company or by issuing a statutory demand (see Chapter 6).

When serving a statement of claim or statutory demand on a company, consider the deemed service provisions in section 109X of the *Corporations Act 2000*. However, best practice is to serve a copy of the

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2 See online information brokers such as <<http://www.discoverie.com.au/>> or <<http://www.esearch.net.au/>>

3 See chapter 7

demand on the company's principal place of business as well as the company's registered office.

### 4.3 Proceedings against individuals

When commencing proceedings against an individual, conduct an online search of the National Personal Insolvency Index ('NPII') maintained by the Insolvency Trustee Service Australia ('ITSA').

Other searches, such as credit reports, may be useful when advising whether a client should commence legal proceedings. However, there are a number of restrictions on the types of information that can be obtained this way.<sup>4</sup> To overcome these restrictions, your client will need the debtor's written consent to the information being released.

If there is doubt as to the debtor's ability to pay the amount demanded, it may be useful to conduct further searches about the debtor's assets (such as a property search)<sup>5</sup> and the debtor's credit rating before commencing legal proceedings.

### 4.4 Evidence

While rarely done in practice, taking early statements in affidavit form from your client can provide an advantage in debt recovery proceedings. Identify and address all elements necessary to prove the claim in the statements.

For example, in a contract-based action you should identify:

- (a) the terms of the contract;
- (b) whether the terms are express, implied or both;
- (c) if the contract was written, the contract document(s);
- (d) if the contract was oral, what was said, when and by whom. Identify the words that were spoken, when and where the conversation took place. Note if anyone else was present at the time of the conversation and take that person's statement too, if possible;
- (e) when and how the contract was breached;
- (f) whether and in what manner the contract has been terminated (if the contract has been terminated); and

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4 See the *Privacy and Personal Information Protection Act 1998* (NSW)

5 See <[http://www.lands.nsw.gov.au/land\\_titles](http://www.lands.nsw.gov.au/land_titles)>

- (g) identify the legal costs your client has incurred, annexing any supporting documentation.

See Part 8 for further details on preparing evidence.

See Part 1, Chapter 5 and Parts 3 and 4 of this guide for further information concerning commencing proceedings.

## 5. THE LOCAL COURT SMALL CLAIMS DIVISION

*Roslyn Cook and Tannie Kwong*

### 5.1 Introduction

The Small Claims Division of the Local Court (‘the **Small Claims Division**’) is the forum for disputes concerning \$10,000 or less and is unlike the General Division of the Local Court, the District or Supreme Court. The Small Claims Division has special procedures in place to facilitate the just, quick and cheap resolution of disputes. These procedures often take lawyers by surprise. This chapter will identify the important differences.

The Chief Magistrate has stipulated that disputes in the Small Claims Division should be finalised within 6 months of the date the originating process was filed. Whilst a minority of matters will fall outside of this timetable, the Court Registrars will often push the court timetable along so that disputes can be resolved in a timely manner.

#### 5.1.1 Judicial officers

In many Sydney metropolitan courts, dedicated Assessors will sit in the Small Claims Division. Assessors have the same powers as Magistrates but only for the Small Claims jurisdiction. Assessors are addressed as ‘Mr Assessor’ or ‘Madam Assessor’ instead of ‘Your Honour’. Assessors should be identified as ‘Assessor [Surname]’, for example, ‘Assessor Roberts’.

In country areas and some Sydney metropolitan courts, Magistrates will also hear the Small Claims Division matters. The courts generally give preference to criminal matters and matters in the General Division. Accordingly, if a matter is listed at 9:00am, do not be surprised if it commences at 3:30pm.

#### 5.1.2 Appearances

The Small Claims Division does not conduct directions hearings, mentions, call-overs, conciliations, hearings, motions and the like. There are generally only two types of appearances the pre-trial review and the trial.

The pre-trial review is a combination of direction hearings, mentions, call-overs, conciliations and motions. All procedural steps and some

substantive steps before the Small Claims Division take place at the pre-trial review. The trial, commonly known as the Assessment Hearing, is when evidence is admitted and submissions are made.

### 5.1.3 Rules and Practice Notes

In many courts, the *Uniform Civil Procedure Rules* 2005 ('the **UCPR**') are the source of all Court Rules, and the only source for Court Rules. This allows everything to be found in one place; not so in the case of the Small Claims Division.

Many rules in the UCPR do not apply to proceedings in the Small Claims Division. The list of rules that do not apply is set out in Schedule 5 to the UCPR.

The rules set out in the *Local Courts (Civil Procedure) Rules* 2005 ('the **LCCPR**') apply to the Small Claims Division. These are rules made pursuant to the *Local Courts Act* 1982.

In addition to the rules in the LCCPR, Local Court Practice Note 2 of 2005 "Case Management of Proceedings in the Small Claims Division of the Local Court" (**Practice Note 2**) is a comprehensive guide to procedure. This practice note is always attached to the Notice of Listing for the pre-trial review. You should *always* read the Practice Note before appearing.

### 5.1.4 Assignment of business

Any matters falling within the jurisdiction of the Local Courts must be assigned to either the Small Claims Division or the General Division. The assignment usually depends on the amount in dispute: \$10,000 or less and it is heard in the Small Claims Division; any amount above \$10,000 and the matter is heard in the General Division. The subject matter of the claim does not affect in which division a matter is heard.

There is one important exception to this rule. Proceedings may be transferred to the Court's General Division if, at any time before judgment is given, the Court is of the opinion that the matters in dispute are so complex, difficult or are of such importance that the proceedings ought more properly to be heard in the Local Court's General Division.<sup>1</sup>

If a matter is commenced in the Small Claims Division and a cross claim for over \$10,000 is filed, the matter will be automatically transferred to the General Division at the time a cross claim is filed.

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<sup>1</sup> Rule 7 of the *Local Courts (Civil Procedure) Rules* 2005

### 5.1.5 Motions

As a general rule, motions are handled differently in the Small Claims Division. Part 18 of the UCPR does not apply to motions in the Small Claims Division, except in limited circumstances.<sup>2</sup> Instead, Rule 12 of the LCCPR prescribes *applications* instead of *motions*, and requires applications to be made orally. Though the rule does not say so, the oral application occurs at the pre-trial review. To determine which rules apply to a motion:

- (a) first, consult the UCPR to see if the rules apply; and
- (b) second, consult the LCCPR to see if the rules apply.

The most common motions/applications to which the UCPR apply, but the LCCPR does not, are motions/applications to:

- (a) set aside default judgment;
- (b) transfer proceedings between the Small Claims Division and the General Division;
- (c) inspect property; and
- (d) file enforcement proceedings or other procedures post judgment.

### 5.1.6 Subpoenas, discovery and production of documents

In the Small Claims Division, there is *no right* to issue a subpoena, or have orders made for discovery or production.<sup>3</sup>

If documents are not in the possession of either party, and a party wishes to issue a subpoena to a non-party to the proceedings, then an *application* must be made seeking leave to issue a subpoena to a person for a *specific document*. Such an application should be made at the pre-trial review. Fishing expeditions are frowned upon, even if neither side objects. You must know what you want, and why you want it, if you hope to issue a subpoena.

Some of the most useful documents are those in possession of the police. The New South Wales and Australian Capital Territory police issue copies of reports on application without the need for a subpoena. In a case where a report is likely to be relevant, an application should be made to the Police Information Unit as soon as instructions are obtained, instead of waiting to make an application at the pre-trial review.

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2 See Schedule 5 to the *Uniform Civil Procedure Rules 2005*

3 Schedule 5 of the *Uniform Civil Procedure Rules 2005*

There are no strict provisions for discovery in the Small Claims Division. However, with the policy of the just, quick and cheap resolution of disputes, litigants are encouraged by Assessors to provide access to documents in their possession if requested by the other side. There must of course be some forensic benefit to examining those documents.

## 5.2 The pre-trial review

Pre-trial reviews comprise two parts, a conciliation attempt to try and bring the parties to a settlement, and a review for trial that attempts to identify the matters in dispute. The rules concerning the pre-trial review are found in Rule 9 of the LCCPR.

All parties to the proceedings must be in attendance at the review, either in person or by a legal representative who has *general authority to negotiate a settlement of the proceedings*. Parties may also mention matters for their opponents by consent, although this is not recommended.

The Assessor first attempts conciliation. If the parties are legally represented, the Assessor will assume the lawyers are familiar with the requirement for conciliation, and the parties will be sent out to “discuss the matter” (see below). If one or more of the parties are unrepresented, then the Assessor will explain to the parties the need to “discuss the matter”, and will answer questions the parties may have.

When the parties “discuss the matter” the parties should:

- (a) explore settlement;
- (b) consider whether the matter should be transferred to the General Division;
- (c) consider whether the pre-trial review needs to be adjourned for some reason (for example, a defendant may wish to seek the Court's leave to issue a cross-claim out of time and time may be required to serve the cross-claim, or if parties are close to reaching a settlement and may prefer not to set the matter down for trial);
- (d) particularise any part of the claim in respect of which the other party is unclear;
- (e) request and exchange documents in the parties' possession;
- (f) identify the agreed facts and issues in dispute. “All issues in dispute” is a motto to be adopted only by the masochistic. Parties should make a real effort to narrow the issues to be decided; and

- (g) if the matter cannot reach settlement and a trial date needs to be obtained, consider whether the hearing should be semi-formal or formal.

If any interlocutory application needs to be made (for example, applications to transfer or issue subpoenas) the party moving the court makes the application. This includes applications to adjourn the pre-trial review without the consent of the other parties to the action.

If a trial date is set, then the plaintiff summarises its case. This is in effect an opening address. The first defendant then summarises its case. The other defendants summarise their cases and so on until every party has summarised its case. The Registrar may clarify what issues are agreed to and what remains in dispute. The plaintiff then summarises the evidence to be led at trial in support of its case. The other parties summarise their evidence. A date is set for trial.

At the busier courts, such as the Downing Centre Local Court and North Sydney Local Court, parties will need to complete a pre-trial review sheet if the matter is ready for trial. The pre-trial review sheet should contain a summary of your client's version of the matter and should list the types of evidence that will be adduced at trial.

As the normal practice is for trials to proceed without witnesses giving oral evidence, it is usual that written statements will be provided by the parties in support of their case. Almost invariably therefore the evidence will include reference to "a statement by Mr Smith". You should know from whom you are getting your statement. If you don't know the matter well enough for that, the Court can always suggest that this shows your inability to conciliate the matter and may justify an order that the pre-trial review be adjourned at your cost to give you some reading time.

Even if the Registrar grants an adjournment or direction in your favour, the Registrar may still award costs against your client. Keep in mind that the practice note dictates that disputes have to be processed quickly, justly and cheaply.

### 5.3 Witness statements

If a trial date is obtained at the conclusion of the pre-trial review, the Registrar will also make orders for written statements to be filed and *simultaneously* exchanged, typically 2 weeks before the date for trial. Statements should be *received* by the other party on or before the due



date. If evidence is exchanged late, the Assessor may make a direction to strike out the late evidence.<sup>4</sup>

It is not necessary for written statements to be sworn, prepared recently or even prepared for the particular proceedings. The following are also routinely accepted as evidence:

- (a) insurance claim forms;
- (b) police reports;
- (c) letters;
- (d) memoranda and file notes; and
- (e) transcripts.

However, judicial officers suggest that evidence be set out in numbered paragraphs so that parties can easily refer to the evidence adduced at trial.

UCPR 14.7 states that pleadings cannot be adduced as evidence.

## 5.4 Small Claims Assessment Hearings

Unless the Court orders otherwise, proceedings are to be heard and determined on the basis of written statements. Small Claims Assessment Hearings are typically listed in 30-minute blocks. The Assessor will usually give a verdict and judgment at the conclusion of the Hearing.

After parties announce their appearances, the Assessor will read the statements that have been previously filed and ask whether parties wish to raise any preliminary issues before submissions are made.

The Assessor then hears oral submissions from the parties. Typically, the plaintiff will go first, followed by the first defendant and any other defendants. This is known as an informal hearing and is usual in the Small Claims Division. An informal hearing is conducted by way of documentation without the necessity and expense of witnesses attending.

Parties should not give evidence from the bar table, particularly self-represented litigants. If parties seek to rely on legislation, regulations or cases, an additional copy of each should be ready for the Assessor and an additional copy of each should be ready for each party to the proceedings.

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<sup>4</sup> *Oliveri Legal Pty Ltd v Lohning International Pty Ltd* [2004] NSWSC 987

After both parties have made submissions, the plaintiff has a right of reply to respond to issues raised in the defendant's submissions.

After all parties have had the opportunity to make submissions, the Assessor will make a determination. An oral verdict and judgment is delivered immediately. The Assessor will also calculate and make a determination on legal costs and disbursements.

After the Hearing, the Registrar may be asked by the Assessor to calculate interest on the claim. The Registrar will send a written notice for payment to the parties which sets out the judgment amount, costs and disbursements. The notice confirms when payment of the judgment is due.

The Small Claims Division does not provide interpreters for self-represented litigants. However, a party will usually be permitted to bring a friend to help interpret at the Hearing.

## 5.5 Semi-Formal Hearings

Because Hearings in the Small Claims Division are generally held by way of written evidence only, there are some circumstances where parties may wish to ask for a Semi-Formal Hearing at the pre-trial review.

Semi-Formal Hearings may be necessary when the identity of a person is not known or is in dispute, or if the credibility of a witness (particularly an allegedly independent witness) is in question.

Semi-Formal Hearings are heard by an Assessor and involve examination, cross-examination and re-examination of the parties. However, as the rules in the *Evidence Act 1995* are relaxed, it is rare for the parties to object to evidence given.

An application for oral testimony can be made at any time before judgment. If the need arises, an application should be made immediately. The beginning of the hearing may be the first time that there is any indication that cross-examination of a witness is necessary. If necessary, seek an adjournment of the hearing to enable the witness(es) to attend. If no application is made, then it is too late to raise the issue on appeal.

## 5.6 Costs

The only legal costs which may be awarded in a Small Claims proceeding are those available for default judgment.<sup>5</sup> Indemnity costs cannot be awarded in the Small Claims Division. An unrepresented party who succeeds at Hearing may apply to the Assessor for their loss of earnings for their time at court or other expenses (for example transport to and from court).

## 5.7 The Consumer, Trader and Tenancy Tribunal

If the dispute is a contractual dispute between a business and a customer, it may be wise to consider commencing the dispute at the Consumer, Trader and Tenancy Tribunal ('the CTTT'). Assessors of the Small Claims Division will recommend that parties settle before Hearing and often suggest that parties transfer consumer related disputes to the CTTT, particularly if a party is not legally represented.

The CTTT conducts hearings around New South Wales and deals with matters under eight divisions – Tenancy, Home Building, Strata & Community Schemes, Retirement Villages, Residential Parks, Motor Vehicles, General and Commercial.

Depending on the division, CTTT applications usually cost less than the filing fee at the Local Court. Particularly where the disputed amount is small, parties will often find that it is quicker and cheaper to have matters heard by the CTTT.

## 5.8 Appeals from the Small Claims Division

Under section 39(2) of the *Local Court Act 2007*, a party to proceedings in the Small Claims Division may appeal to the District Court, but only on the ground of lack of jurisdiction or denial of procedural fairness.<sup>6</sup>

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5 Rule 14(4) of the *Local Courts (Civil Procedure) Rules 2005*

6 Formerly, appeals were made from the Small Claims Division to the Supreme Court, but the number of misconceived appeals appears to have led to a change to the law from when the 2007 Act replaced the *Local Court (Civil Claims) Act 1970* (section 69). Much of the useful jurisprudence on such appeals can be found in decisions of the Supreme Court.

## 6. PROCEEDINGS IN THE SUPREME COURT CORPORATIONS LIST

*Amanda Beattie, Joanne Chaina and Thomas Storer*

### 6.1 Introduction

Proceedings under the *Corporations Act* 2001 (Cth) (*'Corporations Act'*) are usually brought in the Supreme Court or the Federal Court, although there are also certain claims which can be brought in inferior Courts. This chapter focuses on proceedings in the Supreme Court. Procedure in the Federal Court is very similar due to the uniform rules for proceedings under the Act.

Matters arising under the *Corporations Act* often have two characteristics: they are short, and they need to be resolved swiftly. Thus many company applications are disposed of on a final basis within a relatively short time of commencement and without cross-examination. Claims for damages or compensation or other relief for breach of directors' duties tend to be exceptions because they need to be fully pleaded and are typically neither short nor urgent.

The Supreme Court has a *Corporations List* which is part of the *Equity Division*. Practice Note SC Eq 4 issued on 12 April 2010<sup>1</sup> (**'the Practice Note'**) is the current Supreme Court Practice Note relevant to the Corporations List. The Practice Note deals with matters relevant to proceedings in the Corporations List, including details in relation listing arrangements and specific matters that are regularly dealt with in the Corporations List such as appointments of liquidators by the Court. You must familiarise yourself with the Practice Note (especially as it may change from time to time).

Corporations matters include proceedings and interlocutory applications that arise out of the Corporations Act or the *Supreme Court (Corporations) Rules* 1999 (**'the Rules'**), or seek relief under any of those provisions, and proceedings relating to other incorporated bodies such as co-operatives and incorporated associations.

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<sup>1</sup> This Practice Note was issued on 12 April 2010 and commences on 31 May 2010. It replaces former Practice Note SC Eq 4 issued on 11 March 2009

### 6.1.1 Corporations Judges

The List Judge and at least one other Judge of the Equity Division (Corporations Judges) are the Judges allocated to hear Corporations matters only.

The List Judges will manage matters in the Corporations List on Monday of each week, as follows:

Interlocutory applications will be listed at 9:30 am for the purpose of calling through the matters in that list and, if appropriate, allocating a hearing time on that day before one of the Corporations Judges. Directions will be listed from 10 am.<sup>2</sup>

### 6.1.2 Corporations Duty Judge

Urgent applications in Corporations Matters are dealt with by the Corporations Duty Judge. If an urgent application needs to be made, a practitioner should contact the List Judge's Associate by telephone or email (during court hours). The Associate will indicate which Corporations Judge should be approached.

### 6.1.3 Corporations Registrar's List

Applications are listed before the Corporations Registrar's List, which is run by the Registrar in Equity at 9.00am each day.<sup>3</sup> Routine insolvency proceedings and statutory demand cases are dealt with by the Registrar. Available dates are posted on the Supreme Court website, on the Corporations Matters webpage.

## 6.2 Appearing in the Corporations List

When preparing for the Corporations List, be sure to consult the:

- (a) Practice Note, which sets out the operation of the Corporations List. If you are appearing in the List, you are expected to be familiar with its contents;
- (b) *Supreme Court (Corporations) Rules 1999* (NSW) ('the **Supreme Court Rules**') and the prescribed forms. These rules are part of a uniform scheme. Note that the Federal Court has corresponding rules; and

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<sup>2</sup> Practice Note SC Eq 4 at 15

<sup>3</sup> See "Registrar's Lists" in Practice Note SC Eq 1

- (c) Corporations Matters webpage.<sup>4</sup>

If an application is not made in a proceedings already commenced in Court, proceedings are commenced by filing an Originating Process (not a Summons); in any other case (whether final or interlocutory relief is claimed), proceedings are commenced by filing an Interlocutory Process.

The Court expects that practitioners appearing in Corporations Matters will:

- (a) reach agreement with the parties on a timetable for the preparation of matters for trial, mediation or reference out;
- (b) hand up Consent Orders to the List Judge during the directions hearing or to the List Judge in Chambers on days other than Monday by application in writing to the List Judge's Associate;
- (c) reach agreement with the parties if there is any slippage in an agreed timetable;
- (d) only request intervention from the Court when agreement with the parties has proved impossible;
- (e) brief Trial Counsel at the earliest possible time;
- (f) inform the Court at the earliest possible time of:
  - the matter's suitability for mediation, for reference out of all or some of the issues, and
  - the matter's suitability for the use of a single expert, or a Court appointed expert or the use of an appropriate concurrent expert evidence process;
- (g) reach agreement on any issues in dispute; and
- (h) brief Trial Counsel to appear at the directions hearing when the matter is set down for hearing;
- (i) if the proceedings settle, have the List Judge make Orders finalising the litigation, and not file Terms or Orders with the Registry. Those orders may also be made by consent in Chambers.

The Corporations List applies the following procedures in Corporations Matters (unless otherwise ordered):

- (a) Discovery: paragraphs 27 to 32 of Practice Note SC Eq 3.
- (b) Evidence: paragraphs 33 to 36 of Practice Note SC Eq 3.

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<sup>4</sup> See <[http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_corporationsmatters](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_corporationsmatters)>

- (c) Stopwatch Hearings: paragraphs 50 to 53 of Practice Note SC Eq 3.
- (d) Proportionate Liability: paragraph 56 of Practice Note SC Eq 3.
- (e) Summary Judgment: paragraph 62 of Practice Note SC Eq 3.

### 6.3 Statutory demands and applications for winding up or appointment of liquidator

Statutory demand matters, like other corporations matters, are usually returnable in the Registrar's Corporations List. When the Registrar forms the view that the matter is ready for trial, it is referred to the Monday Corporations List.

When appearing for a winding-up application, you should be very familiar with all the relevant dates, such as the date:

- (a) when the Statutory Demand was served;<sup>5</sup>
- (b) that the company failed to comply with the Statutory Demand;<sup>6</sup>
- (c) of the affidavit verifying the Originating Process; and
- (d) of the affidavit of debt sworn the day of or the day immediately preceding the hearing date of the Originating Process.

Where an application is made to the Court for an order that a company be wound up or for an official liquidator to be appointed as a provision liquidator of a company, an official liquidator must consent in writing to be appointed.<sup>7</sup> The Practice Note makes particular provision for appointment of liquidators by the Court. The Registrar maintains a list of registered official liquidators who have consented in writing to accept all appointments made by the Court. The plaintiff in winding-up proceedings may nominate a liquidator on the list by filing and serving a proper consent with the originating process.

Normally, the Court will appoint the nominated liquidator, but is not obliged to do so. If no such consent is filed, the Registry will select a liquidator by rotation from the Court's list. A listed liquidator may only decline appointment on the grounds of conflict of interest. If this occurs,

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5 See Section 76(1)(b) of the *Interpretation Act* 1987 (NSW) and Section 160(1) of the *Evidence Act* 1995 (Cth)

6 Section 459F(2)(b) of the *Corporations Act* 2001 (Cth)

7 Section 532(9) of the *Corporations Act* 2001 (Cth) and Rule 6.1(1) of the *Supreme Court (Corporations) Rules* 1999 (NSW)

the plaintiff must nominate another liquidator by filing and serving a consent, or else approach the Registry for selection by rotation.

See also the Practice Note and Rules in relation to disclosure of remuneration by liquidators and insolvency practitioners.



## 7. BANKRUPTCY

*Michael Bacina and Joshua Knackstredt*

### 7.1 Introduction

Bankruptcy arises when an individual is insolvent (that is, they cannot pay all their debts as and when they become due and payable). The bankruptcy order, called a sequestration order, has the effect of vesting all of a person's assets (apart from some personal items) in a trustee to be sold and distributed amongst creditors. In Australia, only individuals can be made bankrupt, whereas companies are wound up in insolvency (unlike in the United States).

Bankruptcy then provides the bankrupt debtor with protection by releasing him or her from his or her debt(s).<sup>1</sup> At the same time, the trustee acquires legal title in all the bankrupt's assets, collects money from debtors, identifies the creditors and arranges for the assets to be distributed to creditors on a pro-rata basis.

A 'bankrupt', as amended,<sup>2</sup> is a person:

- (a) against whose estate a sequestration order has been made (involuntary bankruptcy); or
- (b) who has become bankrupt by virtue of the presentation of a debtor's petition (voluntary bankruptcy).

The Federal Court of Australia and the Federal Magistrates Court of Australia have jurisdiction over bankruptcy. Bankruptcy procedure is governed by the following:

- (a) *Bankruptcy Act 1966* (Cth);
- (b) *Bankruptcy Regulations 1996* (Cth); and
- (c) *Federal Court (Bankruptcy) Rules 2005* (Cth) or the *Federal Magistrates Court (Bankruptcy) Rules 2006* (Cth).

This area of law is highly technical. Great care should be exercised when drafting or settling court documents, as minor errors can invalidate proceedings.

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1 Note that a bankrupt is not released from debts incurred under government funded higher education programs. See section 82(3AB) of the *Bankruptcy Act 1966* (Cth)

2 Section 5 of the *Bankruptcy Act 1966* (Cth)

This chapter focuses on involuntary bankruptcy, as this is the most common form of bankruptcy. There are separate rules for petitions filed by administrators against bankrupt estates (Part XI of the *Bankruptcy Act 1966* (Cth)), which are not discussed here.

## 7.2 Involuntary bankruptcy

Proceedings are commenced by filing and serving a creditor's petition. However, a creditor can only issue a creditor's petition if the debtor has committed an "act of bankruptcy".<sup>3</sup> The most common act of bankruptcy is a failure to comply with a bankruptcy notice.

### 7.2.1 Bankruptcy notices

A bankruptcy notice must:

- (a) relate to a debt (or debts) outstanding by the debtor to the creditor is \$2,000 or more;<sup>4</sup>
- (b) be based on a final judgment, the execution of which has not been stayed;
- (c) be in the form prescribed by the regulations.<sup>5</sup>
- (d) be lodged in triplicate with the Official Receiver (the Insolvency Trustee Service of Australia ('ITSA')) together with:
  - (i) evidence of the final judgment or final order.<sup>6</sup> This is usually a certified copy of the judgment entered against the debtor; and
  - (ii) the filing fee for the bankruptcy notice.<sup>7</sup>

At the time of filing the bankruptcy notice, it is standard practice to search the National Personal Insolvency Index to ensure that the debtor is not already bankrupt.<sup>8</sup>

A failure to fill out the notice correctly can result in it being of no effect. Even a minor error in the bankruptcy notice may invalidate the notice,

3 See section 40 of the *Bankruptcy Act 1966* (Cth)

4 Section 41(1) of the *Bankruptcy Act 1966* (Cth)

5 See section 41(2) *Bankruptcy Act 1966* (Cth) and Schedule 1 to the *Bankruptcy Regulations 1996* (Cth)

6 Section 40(1)(g) of the *Bankruptcy Act 1966* (Cth)

7 Presently \$400

8 See online information brokers such as Australian Business Research <<http://www.abr.com.au/>>

despite the saving provisions in *Bankruptcy Act 1966* (Cth).<sup>9</sup> For example, the amount claimed on the bankruptcy notice must be the correct amount as set out in the certificate of judgment.

It is essential that:

- (a) the correct interest rate is claimed on judgment(s). If a creditor claims post-judgment interest, the creditor must not include the interest from the date of judgment to the date of entry of judgment. Particular care is needed for interest claims, and often it is best to leave the claim for interest out all together;<sup>10</sup>
- (b) a correct address for the debtor is stated. However, if it is incorrect, ITSA may amend and re-stamp the bankruptcy notice before it is served;
- (c) you have not crossed out any of the paragraphs or notes on the bankruptcy notice;
- (d) the consequences of failure to comply are stated on the notice; and
- (e) the creditor gives an address for service in Australia and attaches the final certificate of judgment.

Once the notice has been issued by ITSA, it must be served on the debtor within 6 months of issue.<sup>11</sup> The bankruptcy notice is usually personally served, however service by post to the debtor's last known address is acceptable.<sup>12</sup> If service of the bankruptcy notice cannot be effected, you apply to the Federal Magistrates Court for an order for substituted service and provide affidavit evidence including property, white pages, internet and electoral role searches and file notes of any communications you have had with the debtor.

### 7.2.2 Creditor's petition

If the debtor fails to pay the debt within 21 days of the date of service of the bankruptcy notice, the debtor has committed an act of bankruptcy and the creditor may file and serve a creditor's petition.

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9 Section 306 of the *Bankruptcy Act 1966* (Cth)

10 See *General Motors Acceptance Corporation Australia v Marshall* [2002] FCA 1006; *Adams v Lambert* (2006) 225 ALR 396

11 Regulation 4.02A(a) of the *Bankruptcy Regulations 1996* (Cth)

12 Regulation 16.01(a) of the *Bankruptcy Regulations 1996* (Cth) and section 160 of the *Evidence Act 1995* (Cth)

The signed and witnessed creditor's petition should be filed with the Federal Magistrates Court together with:

- (a) a copy of the bankruptcy notice;
- (b) the affidavit of service of the bankruptcy notice;<sup>13</sup>
- (c) an affidavit of search of the Federal Court Registry records confirming that no other creditor's petitions (or applications to set aside the bankruptcy notice) are on foot involving the debtor;<sup>14</sup>
- (d) an affidavit verifying the creditor's petition;<sup>15</sup> and
- (e) a consent to act of the trustee in bankruptcy.<sup>16</sup>

The creditor's petition must be in the correct form and must be verified by an affidavit sworn by a person with knowledge of the outstanding debt.

You should file at least three copies of the above documents (**'creditor's petition documents'**).<sup>17</sup> The creditor's petition documents must be personally served on the debtor within 6 months of the expiry of the bankruptcy notice.<sup>18</sup>

Part 4 of the *Federal Magistrates Court (Bankruptcy Rules) 2006* (Cth) and Part 4 of the *Federal Court (Bankruptcy) Rules 2005* (Cth) govern the procedure for a creditor's petition in those courts (see also Part IV Division 2– of the *Bankruptcy Act 1966* (Cth) and Part 4, Division 2 *Bankruptcy Regulations 1996* (Cth)).

If the documents are accepted, the Registrar will issue the petition and set a date for the hearing of the petition. Within 3 business days, you must file a copy of the creditor's petition documents with ITSA.<sup>19</sup>

You should note that a petition will lapse after 12 months from the date of issue.<sup>20</sup>

13 Regulation 4.04(1)(b) of the *Federal Court (Bankruptcy) Rules* (Cth)

14 Regulation 4.02 of the *Federal Court (Bankruptcy) Rules* (Cth)

15 Regulation 4.02 of the *Federal Court (Bankruptcy) Rules* (Cth) and section 47(1) of the *Bankruptcy Act 1966* (Cth)

16 Regulation 4.05 of the *Federal Magistrates Court (Bankruptcy) Rules 2006* (Cth) and regulation 4.05 of the *Federal Court (Bankruptcy) Rules 2005* (Cth)

17 Regulation 4.02(3)(a) of the *Federal Court (Bankruptcy) Rules* (Cth)

18 Section 44(1)(c) of the *Bankruptcy Act 1966* (Cth)

19 Regulation 4.05 of the *Bankruptcy Regulations 1996* (Cth)

20 Sections 52(4) and (5) of the *Bankruptcy Act 1966* (Cth)

The creditor's petition bundle must be served before the first hearing date.<sup>21</sup> Once the creditor's petition documents have been served, your process server will provide an affidavit of service of the creditor's petition. This affidavit should annex a full set of all of the creditor's petition documents. Check this affidavit carefully as process servers often make small errors which can waste costs and cause difficulties later.

Before the hearing date, you should prepare:

- (a) an affidavit of final search that is sworn no earlier than the day before the hearing;
- (b) an affidavit of final debt that is sworn as soon as practicable before the hearing date;<sup>22</sup> and
- (c) a creditor's run through sheet that lists in chronological order all of the relevant dates and documents. A copy of this should be handed to the Registrar of the Court to assist in the application.

If you act for the debtor and have instructions to oppose a creditor's petition, at least 3 days before the hearing date the you must file:

- (a) a notice of appearance (Form 4);
- (b) a notice stating the grounds upon which the debtor opposes the application (Form 5); and
- (c) an affidavit in support of the grounds of opposition.<sup>23</sup>

The debtor must also serve the above notices and supporting affidavit on the creditor at least 3 days before the hearing.

Most objections to creditor's petitions are on technical grounds. If the debtor disputes the notice because they are solvent and have funds, the the creditor would necessarily be paid and would discontinue the petition with an order for costs. If a debtor seeks more time to pay a debt, the Court will almost always grant a number of adjournments to the debtor, particularly if the debtor is self represented.

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21 Regulation 4.06(2) of the *Federal Magistrates Court (Bankruptcy) Rules 2006* (Cth) and regulation 4.06(2) of the *Federal Court (Bankruptcy) Rules 2005* (Cth)

22 Regulations 4.06(3) and (4) of the *Federal Magistrates Court (Bankruptcy) Rules 2006* (Cth) and regulations 4.06(3) and (4) of the *Federal Court (Bankruptcy) Rules 2005* (Cth)

23 Regulation 2.06 of the *Federal Magistrates Court (Bankruptcy) Rules 2006* (Cth) and regulation 2.06 of the *Federal Court (Bankruptcy) Rules 2005* (Cth)

If the creditor's petition is successful, then the Court will make a sequestration order against the debtor and a trustee in bankruptcy will be appointed to manage the estate of the bankrupt.

### 7.2.3 Sequestration order

The debtor becomes bankrupt on the day the sequestration order is made. A bankrupt will remain bankrupt until he or she is discharged automatically 3 years after filing a statement of affairs or the bankruptcy is annulled (e.g. through a composition or payment of the debt).

Once the sequestration order is made, the creditor must give a copy to ITSA within 2 working days (Form 7).

## 7.3 Voluntary bankruptcy

An individual may present a debtor's petition to seek voluntary bankruptcy. Sometimes, this occurs after a bankruptcy notice has been served. Restrictions apply to voluntary bankruptcies to stop a debtor using the procedure to avoid paying debts.

The debtor must also have a connection with Australia<sup>24</sup> and provide ITSA with:

- (a) a completed debtor's petition;
- (b) a statement of affairs of assets and liabilities; and
- (c) a consent to act as trustee.

If these documents are in order, there are no pending creditor's petitions and none of the other limitations in section 55 of the *Bankruptcy Act 1966* (Cth) apply, ITSA will accept the petition and the debtor will become a bankrupt.

ITSA may accept, reject or refer a debtor's petition to a court for hearing.<sup>25</sup> In certain circumstances, a decision to reject a petition may be appealed to the Administrative Appeals Tribunal.<sup>26</sup>

Separate rules apply for debtor's petitions presented against a partnership<sup>27</sup> or by joint debtors.<sup>28</sup>

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24 Section 55(2A) of the *Bankruptcy Act 1966* (Cth)

25 Section 55(3B) of the *Bankruptcy Act 1966* (Cth)

26 Section 55(3AC) of the *Bankruptcy Act 1966* (Cth)

27 Sections 56A to 56G of the *Bankruptcy Act 1966* (Cth)

28 Section 57 of the *Bankruptcy Act 1966* (Cth)

## 7.4 Further reading

*Australian Bankruptcy Law and Practice* by McDonald, Henry and Meek.

*Bankruptcy Law* 2nd edition by Weule, Warburton and Brading.

## 8. ADMINISTRATIVE APPEALS TRIBUNAL

*Caroline Law and Bronwyn Sharp*

### 8.1 Introduction

The Administrative Appeals Tribunal (‘the AAT’) provides independent, merits review of a wide range of administrative decisions made by the Commonwealth Government, and some non-government bodies. It is distinguished from the Administrative Decisions Tribunal which operates as a review body for the decisions of the New South Wales government and some non-government bodies.

### 8.2 Statutory background

The AAT was established by the *Administrative Appeals Tribunal Act 1975* (Cth) (‘the AAT Act’). The AAT Act and the *Administrative Appeals Tribunal Regulations 1976* set out the Tribunal’s powers, functions and procedures. The AAT maintains a website at <<http://www.aat.gov.au>>.

### 8.3 Power of review

The AAT does not have a general power to review any decision made under Commonwealth legislation. The Tribunal can only review a decision if an Act, regulation or other legislative instrument provides specifically that the decision is subject to review by the Tribunal. Jurisdiction extends to decisions made under approximately 400 separate Acts and legislative instruments. A list of all jurisdictions subject to AAT review is available for download at <<http://www.aat.gov.au/LegislationAndJurisdiction/JurisdictionList.htm>>.

The AAT reviews decisions “on the merits”. The Tribunal makes a fresh decision, which it considers to be the appropriate decision to be made in all the circumstances of the particular case. This decision can be to confirm, vary or set aside the original decision. In making its determination the AAT exercises the same statutory powers, and is subject to the same statutory limitations, as the primary decision maker.

### 8.4 Evidence

The AAT may have regard to the evidence that was before the primary decision-maker, and any additional evidence that the parties put before



it, either in documentary or oral form at hearing. The AAT can also call for further evidence if it considers that to be necessary. Like many Tribunals, the AAT is not bound by formal rules of evidence.

## 8.5 Jurisdiction

The jurisdiction of the AAT depends upon the existence of a *decision*,<sup>1</sup> which includes:

- (a) making orders;
- (b) giving certificates and permissions;
- (c) issuing certificates;
- (d) imposing conditions;
- (e) making declarations; and
- (f) doing or refusing to do any other act or thing.

The meaning of *decision* is derived from the enactment that is the source of the decision itself. The decision under review need not be valid in terms of the powers upon which the administrator relies, but need only be made in the intended or purported exercise of the power conferred by the enactment.

The AAT is made up of 6 divisions:

- (a) General Administrative Division;
- (b) Medical Appeals Division;
- (c) Security Appeals Division;
- (d) Taxation Appeals Division;
- (e) Valuation and Compensation Division; and
- (f) Veterans Appeals Division.

Decisions in the areas of social security, taxation, veterans' affairs and workers' compensation constitute the bulk of the AAT's workload. However, the AAT also reviews decisions in areas as diverse as bankruptcy, civil aviation, corporate law, customs, freedom of information, Commonwealth employee's compensation and superannuation, immigration and citizenship, industry assistance and security assessments undertaken by the Australian Security Intelligence Organisation.

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<sup>1</sup> Section 3(3) of the *Administrative Appeals Tribunal Act 1975* (Cth)

## 8.6 Procedure

Usually, the AAT will hold one or two conferences with parties to discuss the issues in dispute, identify any further material that the parties may wish to obtain and explore whether the matter can be settled. Referral to another form of alternative dispute resolution such as mediation, case appraisal or neutral evaluation may also be made. In the absence of a resolution being reached, a hearing will be conducted by the AAT.

Hearings are conducted by a panel comprising one, two or three tribunal members. The members of the AAT include former judges, lawyers and persons with specialist knowledge such as accountants, doctors or former members of the Australian Defence Force.

The AAT may choose to deliver its decision orally on the day although a party has the right to request written reasons.<sup>2</sup> If the decision is in writing then the Tribunal must record its findings on the material facts and the evidence which was relied upon to make those findings.

## 8.7 Appeals

A party to a proceeding before the AAT may only appeal to the Federal Court on a question of law arising from the decision of the Tribunal in that proceeding.<sup>3</sup>

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2 Section 43(2) of the *Administrative Appeals Tribunal Act 1975* (Cth)

3 See Part IVA of the *Administrative Appeals Tribunal Act 1975* (Cth)

## 9. PROCEEDINGS IN THE SUPREME COURT POSSESSION LIST

*Natalie Ballard and Wendy Bure*

### 9.1 Introduction

The possession list is part of the common law division of the Supreme Court and is the forum for all proceedings relating to claims for possession of land.

The possession list runs at 9:00am each day usually in front of a Registrar. Please check the daily court lists for the room number.

### 9.2 Practice Note

Supreme Court Practice Note SC CL 6 (**'Practice Note 6'**) specifically deals with matters listed in the possession list.

### 9.3 Background to commencing proceedings

Proceedings in the possession list are usually brought by financial institutions following a default by a mortgagor under the terms of its mortgage, such as a mortgagor's failure to pay a scheduled mortgage repayment (also known as a monetary default).

If a mortgagor fails to pay his/her mortgage repayment at the scheduled time, a financial institution is required to serve a notice concerning the monetary default<sup>1</sup> and a notice under the Consumer Credit Code if the purpose of the loan is for domestic or household purposes.<sup>2</sup>

Each of these notices provides a mortgagor further time to remedy any monetary default by repaying the sum total of the missed repayments (together with the cost for the notice) to the financial institution within 31 days.

If a mortgagor fails to repay the amount contained in the notice within the prescribed time, the financial institution may commence proceedings to obtain an order from the Supreme Court for the outstanding debt and for possession of the property.

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1 Section 57(2)(b) of the *Real Property Act 1900*

2 Section 80 of the *Consumer Credit Code*

## 9.4 Commencing proceedings

Proceedings are commenced by way of statement of claim in the Supreme Court in accordance with UCPR 6.3 and the form of the statement of claim must comply with UCPR 14.15.

A plaintiff may wish to utilise the short form statement of claim set out in Practice Note 6.

The short form statement of claim referred to in the Practice Note was drafted by the possession list user group in consultation with various consumer user groups in order to facilitate a greater understanding by borrowers/mortgagors of the nature of the claim and the practical consequences. At the time of writing, the short form statement of claim is not a prescribed form or compulsory.

When filing a statement of claim in the possession list, the Court does not provide the plaintiff with a return date. The first return date is given if and when a defendant files a defence and or motion within the proceedings.

Practice Note 6 also suggests the use of a cover sheet to a statement of claim. The cover sheet translates important information into several different languages and may be used with both the short form and conventional statement of claim. If a plaintiff wishes to attach a cover sheet, it should be attached after filing but before serving the statement of claim.

## 9.5 Service

The statement of claim must be served personally on each defendant to the proceeding,<sup>3</sup> unless orders for substituted service has been obtained.<sup>4</sup> The occupiers of the property must be served with the statement of claim together with a notice on the occupiers.<sup>5</sup>

## 9.6 Default judgment

If the defendant does not file a defence within 28 days of the date of service of the statement of claim, the plaintiff may apply for default judgment.

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3 See Rule 10.20 of the *Uniform Civil Procedure Rules 2005* (NSW)

4 See Rule 10.15 of the *Uniform Civil Procedure Rules 2005* (NSW)

5 See Form 5 and Rule 6.8 of the *Uniform Civil Procedure Rules 2005* (NSW)

An application for default judgment must be by notice of motion. The notice of motion must be filed with the original affidavit of service for each of the defendant/s and occupier. If a plaintiff wishes to enforce default judgment immediately, a notice of motion for a writ of possession (Form 59) together with a writ of possession (Form 60) may be filed with the default judgment application.

Normally a motion for default judgment will be dealt with in the absence of the parties.

## 9.7 Defences

If a defence is filed in proceedings, the Court will forward a notice of listing advising the parties of the date, time and venue of the first status conference.

## 9.8 Summary judgment

If a defence does not appear to have any merit, the plaintiff may file an application for summary judgment,<sup>6</sup> or seek orders striking out the defendant's notice of grounds of defence.<sup>7</sup> This application is brought by way of motion and will be allocated a return date, which usually falls on a Monday.

The Court usually expects that the motion will be heard at the first return date, however, if the parties are not prepared or have reached an amicable solution an adjournment may be sought.

When the application is ready to proceed, the matter is referred by the Registrar to the Associate Justice for the hearing of the application. Referrals are usually dealt with at the start of the possession list.

## 9.9 Stay applications

After a writ of possession has been issued by the Supreme Court, the Sheriff's office issues a notice known as 'Notice to Vacate' to any occupants at the subject property. A Notice to Vacate indicates to any occupiers of the subject property the date and time the Sheriff will attend to take possession of the property.

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6 Rule 13.1 of the *Uniform Civil Procedure Rules 2005* (NSW)

7 Rule 14.28 of the *Uniform Civil Procedure Rules 2005* (NSW)

A defendant may, prior to the scheduled eviction date contained in the notice to vacate, file an *ex parte* application with the Duty Registrar seeking a stay of the eviction. The Duty Registrar often will stay the eviction for up to 7 working days to relist the matter before the Registrar so that further submissions may be heard from both parties.

There are a number of factors that the Court may take into account when deciding whether to grant a stay or whether to further extend the operation of the stay of any writ of possession.<sup>8</sup>

If you are opposing an application to stay the execution of a writ of possession or opposing any extension of the operation of the stay on the execution of a writ of possession, the Court will usually consider:

- (a) the ground of any application that is filed; and
- (b) whether there would be any prejudice to the opposing party if the stay were granted.

## 9.10 Post execution

Once the Sheriff executes the writ of possession and takes possession of the subject property, the defendant may file an application to stay a writ of possession. However, such an application is rarely successful as judgment has been enforced. Unless there is a defect or irregularity to the plaintiff's judgment allowing a defendant to challenge a plaintiff's judgment, the plaintiff usually proceeds with a mortgagee sale. The defendant, at this stage, may wish to further negotiate with the plaintiff to ensure the best results for the sale of the property.

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8 See *GE Personal Finance v Smith* [2006] NSWSC 889

## 10. PROCEEDINGS IN THE SUPREME COURT COMMERCIAL LIST AND TECHNOLOGY AND CONSTRUCTION LIST

*Thomas Storer and Joanne Chaina*

### 10.1 Overview

The Commercial List and the Technology and Construction List (‘the Lists’) are specialist lists jointly administered in the Equity Division of the Supreme Court of New South Wales. The Lists operate as a “fast track”, with “cases listed for hearing as quickly as possibly taking into account the time reasonably required for the completion of the interlocutory activities”.<sup>1</sup>

The Commercial List deals with cases arising out of commercial transactions or in which there is an issue that has importance in trade or commerce.<sup>2</sup>

The Technology and Construction List deals with cases generally arising out of commercial transactions involving technology or building or engineering contracts or work.<sup>3</sup>

These Lists have developed a unique culture all of their own. The list judges expect that those with responsibility for the conduct of the proceedings attend, or are closely involved in, court appearances. A very high degree of frankness, reasonableness, courtesy and brevity is expected of practitioners, with a close attention to the need to assist the court in achieving the objects of efficient case management. Thorough preparation is important for each court appearance. In a very high proportion of matters in the Lists, counsel (and even Senior Counsel) will attend each court appearance, even for directions hearings.

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1 The Hon. Justice P. A. Bergin, *Presentation of Commercial Cases in the Supreme Court of New South Wales*, Commercial Litigation 2005, LexisNexis Conference, 26 October 2005

2 Rule 45.6 of the *Uniform Civil Procedure Rules 2005* (NSW)

3 Rule 45.7 of the *Uniform Civil Procedure Rules 2005* (NSW)

## 10.2 Role of the Lists

Commencing proceedings in the Lists offers the advantages of expedition, expertise and efficiency. In *Rexam Australia Pty Limited v Optimum Metallising Pty Limited*,<sup>4</sup> Einstein J said,

The Commercial List proceedings have comprised the regular invoking by parties to a commercial contract of the jurisdiction of the Commercial List which operates upon the basis of a speedy determination of commercial proceedings in the interests of the commercial community and of all parties to commercial contracts. Speed is very often of the essence in these proceedings and the Commercial List endeavours to case manage and determine proceedings in its list with the expedition necessary, but always consistent with the interests of justice, in order to ensure that no party to a commercial contract will, if this can be avoided, suffer by dint of delay in the fixing of a final hearing and in the production of a relatively speedy judgment.

In *Anpor Holdings Pty Ltd v Swaab*,<sup>5</sup> Bergin J said,

The work of the Court is administered through specialist lists and those cases that do not fall into specialist lists are dealt with in the general lists of the trial Divisions. Trial judges are assigned to specialist lists and as they continue to hear cases in the list it is expected that their expertise in the particular fields of substantive law and procedure in respect of the matters in the list will increase, with the consequence that the lists operate efficiently and effectively with cost benefits to the parties.

## 10.3 Practice and procedure

Practice Note SC Eq 3 (**‘Practice Note’**) applies to proceedings in the Lists. Where a party considers that compliance with the Practice Note will be impossible or will not be conducive to the just, quick and cheap resolution of the proceedings, it may apply to be relieved from compliance on the basis that an alternative proposed regime would be more conducive to such resolution. The most recent version of the Practice Note was issued on 10 December 2008, with effect from 1 January 2009.

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4 *Rexam Australia Pty Limited v Optimum Metallising Pty Limited* [2002] NSWSC 916 at [29]

5 *Anpor Holdings Pty Ltd v Swaab* [2008] NSWSC 208 at [5]



You should read the Practice Note before commencing proceedings in or appearing in these lists.

## 10.4 Commencement and pleadings

Proceedings in the Lists (including cross-claims) are commenced by Summons. The Lists do not operate on the basis of strict pleadings. Instead, the plaintiff files a Commercial List Statement or Technology and Construction List Statement with its Summons.<sup>6</sup> The defendant files and serves a List Response in similar form. A party may also move by Notice of Motion, accompanied by a List Statement or Response, to have proceedings entered into either List.

The Court subscribes to a “cards on the table” approach to litigation<sup>7</sup> and seeks to identify the real issues in dispute at an early stage in the proceedings. The List Statement and Response should set out the nature of the dispute, the issues that are likely to arise, questions appropriate for mediation and/or reference, and the party’s contentions, admissions and denials, in a manner that avoids formality.

The same applies to List Cross-Claim Statements and Responses. The Court may make orders or give directions relating to the filing of List Statements and Responses, the filing of a statement of agreed issues, and the provision of further particulars. Counsel should be briefed early in the proceedings to avoid late applications to amend pleadings, consequential adjournments and delay.<sup>8</sup>

### 10.4.1 Appearing in the Lists

The Lists are administered on Friday of each week. The Lists close at 12 noon Thursday and any application to add or remove a matter must be made in writing to the List Judge’s Associate prior to this time.

Presently, administration of the Lists is broken down into the following times:

**9.00 am** – Directions or motions list, depending on how busy the list is for that day.

**9.15am** – Motions List.

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6 See Annexure 1 to the Practice Note

7 *Nowlan v Marson Transport Pty Ltd* (2001) 53 NSWLR 116 at pars [26] and [31] per Heydon JA; at 131 per Young CJ in Eq

8 Justice Bergin, above n 1

**9.45am** – Directions, Commercial List (sometimes listing matters at 10.15, 10.45. etc. so that they are ‘not before’ that time, but you should turn up at least 10 minutes early anyway).

**12.00pm** – Directions, Technology and Construction List.

These commencement times vary occasionally and you should always check the daily Court Lists prior to attending Court.

## 10.5 Motions List

During the Motions List, motions for interlocutory argument are “called through” for the purpose of ascertaining the length of the hearing and allocating a time for hearing of the motion on that or some other day. It is usual for motions to be allocated a hearing time before the List Judge or another judge on that Friday (and sometimes that morning). You should be prepared to tell the List Judge if a matter is ready to proceed and give an estimate of the hearing time for the motion, perhaps with a brief description. The Judge generally does not wish to hear argument while calling through the List. Note that as a general rule, applications to strike out or for summary judgment are not entertained in the Commercial List.

## 10.6 Directions List

Prior to directions hearings, the Court expects opposing lawyers to have communicated with a view to agreeing on the proposed directions and preparing short minutes recording those directions to be handed up at the hearing. The List operates a consensual timetabling regime that aims to reduce costs by eliminating the need for numerous pre-trial directions hearings. You should agree with the other side upon a pre-trial timetable for the preparation of any further points of claim, defence or pleadings and the filing of evidence without the intervention of the Court. It is only in cases where there is a valid reason why agreement is unable to be reached that the List Judge will impose a timetable on the parties. If there is any slippage in the timetable, further agreement should be reached, again without the need for intervention by the Court. The Court also expects lawyers appearing in the Lists to have carefully reviewed the case for suitability for mediation, reference or use of a Court Appointed Expert or concurrent evidence process.

Proceedings are fixed for trial during the directions hearing, at which time the parties should be in a position to provide the Court with a

realistic estimate of the time required for trial and whether there is to be an application for a “stopwatch hearing” (see below). Proceedings may be listed for hearing prior to the completion of interlocutory steps. At this stage, the Court will normally direct that the *Usual Order for Hearing applies*, with or without modification. The Usual Order for Hearing is a pre-trial procedure that deals with time limits and other matters relating to the production of joint expert reports, service of affidavits and witness statements, preparation of the “Court Book”, and the filing of evidence with the Court.<sup>9</sup>

## 10.7 Representation and etiquette

The Practice Note provides that a party should be represented at a directions hearing by a barrister or solicitor familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.

Although things move quickly on a List day, it is important to maintain appropriate etiquette when appearing before the List Judge. Examples of common slips include responding with “okay” instead of “may it please the Court” and leaving the bar table unattended unless the judge says “Don’t wait”.

## 10.8 Other orders

The List Judge makes consent orders in Chambers on days other than Friday. You should apply in writing to the List Judge’s Associate when seeking such orders. The orders should include vacation of dates for directions or hearing of motions, as appropriate. Where proceedings settle, it is necessary for the List Judge to make orders finalising the litigation. Consent orders to this effect may be made in Chambers.

Typically, if consent orders can be agreed before Friday’s directions, the orders should be sent to the associate before 12 noon on Thursday so that orders can be made and the matter removed from the list.<sup>10</sup>

Parties may seek *ex parte* or urgent orders or directions prior to or in the course of proceedings, by approaching the Commercial List Duty Judge. The procedure is to telephone the List Judge’s Associate, who will advise you of the Judge to whom application should be made. The commercial judges are rostered and are on call at all times throughout the year.

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9 See Annexure 3 to the Practice Note

10 Paragraph 23 of the Practice Note

During the Law Vacation in December and January the Vacation Judge hears such applications.

Parties have general liberty to make an application in the proceedings and can have proceedings listed at an earlier directions hearing. This should be done by making prior arrangement with or giving appropriate notice to the other parties and faxing the List Judge's Associate. The Associate will advise the date for listing.

## 10.9 Discovery

The Commercial List endorses a flexible approach to discovery. Discovery is made electronically, unless otherwise ordered or agreed between the parties. You must advise the other side at an early stage of the potentially discoverable electronically stored information and meet to agree upon practical and legal issues such as formatting and privilege.

At any interlocutory hearing in relation to discovery, the Court will make orders having regard to the overriding purpose of the just, quick and cheap resolution of the dispute, and, for the purposes of ensuring the most cost efficient method is adopted. The Court may also limit the amount of costs recoverable for discovery. At that hearing, the Court expects that you will have ascertained the probable extent of discoverable documents, discussed any issues with their opponent and considered whether the burden or cost of discovering a particular document or class of documents is justified having regard to its importance in the proceedings.

The Court also expects both sides to have considered preparing a Joint Memorandum identifying areas of disagreement and respective best estimate of costs, as well as other practical matters such as formatting and software requirements.

## 10.10 Evidence

Evidence is not filed with the Court as case preparation occurs. Instead, evidence is provided in accordance with the Usual Order for Hearing. The Court may make orders and give directions in relation to the service and filing of affidavits and other documents. Any document referred to in a statement or affidavit is to be placed into the Court Book in chronological order. This Court Book is established in electronic form unless the Court orders or the parties agree otherwise.

## 10.11 Stopwatch hearings

A party to proceedings in the Lists may apply to have a “stopwatch hearing”. This is a method of trial whereby the Court makes orders in respect of the amount of time each party is permitted to utilise in the trial. Blocks of time will be allocated to each aspect of the hearing. The stopwatch method is also available in reference hearings.

## 10.12 Alternative dispute resolution

The Supreme Court utilises mechanisms other than trial for the resolution of commercial disputes. These include mediation and/or referral of the whole or part of the proceedings. The Practice Note makes clear that mediation is an integral part of the commercial litigation process. Each party must inform the Court whether they have attempted mediation prior to commencing proceedings and whether they are willing to proceed to mediation or further mediation. The Court may refer any proceedings for mediation with or without the parties' consent and the parties are required to participate in that mediation in good faith. The Court is empowered to make orders to give effect to any agreement or arrangements arising from the mediation.

As an alternative to private mediators, the Supreme Court provides a mediation service known as “court-annexed mediation”. Registrars or other officers of the Court, who are trained mediators, mediate disputes referred to them by the Court. There is no charge for the mediator or the use of the room (usually held at the King Street complex). Sessions are closed to the public.

The Court expects lawyers appearing in the Lists to review their case for suitability for reference of some or all of the issues. Reference is a process whereby discrete issues in the proceedings are referred to a “referee” for expert determination. The process is supervised by the Court and results in the provision of a referee's report, which must be adopted by the Court to be effective. Referees may be retired judges or experts (for example, engineers) who are asked to determine technical matters in the proceedings.

The Practice Note provides for List Statements to set out the questions (if any) that are appropriate to be referred to a referee. It is also expected that parties will consider questions for referral throughout the proceedings. Where issues are referred, the Court expects parties to have made contact with the proposed referee to ensure that he or she will be in

a position to provide a report by a specific date. The Usual Order for Reference is Annexure 2 to the Practice Note.

### 10.13 Costs

Parties to proceedings in the Commercial List may generally proceed to costs assessment forthwith.<sup>11</sup> The Practice Note provides that the cost of unnecessary photocopying and assembly is unacceptable and excessive documents may attract adverse cost orders.<sup>12</sup>

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<sup>11</sup> Paragraph 57 of the Practice Note

<sup>12</sup> Paragraph 58 of the Practice Note

## 11. CONSTITUTIONAL LITIGATION

### *Danielle Gatehouse and Rachel Mansted*

This section and the following section relating to proceedings in the High Court are relevant primarily to those matters which are obviously constitutional.

#### 11.1 Identifying a constitutional matter

There are two broad categories of constitutional matters:

- (a) The obviously constitutional. For example, a challenge to the operation of a particular Act clearly involves constitutional questions; and
- (b) Where a matter which is not of itself constitutional gives rise to constitutional questions. These matters are often more difficult to conduct as constitutional questions may arise at any stage of legal proceedings.<sup>1</sup> For example, the High Court decision in *R v Hughes*,<sup>2</sup> began as a relatively simple prosecution in the District Court of Western Australia for offences against the Corporations Law.<sup>3</sup>

The challenge is to identify the constitutional issue, either before the case commences or during proceedings. There is no criteria for forensically identifying a constitutional question. As Stephen Lloyd of Counsel emphasised, you must be aware of basic principles, and alive to the possibility that a seemingly innocuous matter could contain a constitutional issue.

When considering whether a matter raises constitutional questions, the following should be kept in mind:

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- 1 See *Felton v Mulligan* (1971) 124 CLR 367, 373 (Barwick CJ); *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 262 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ)
  - 2 See *R v Hughes* (2000) 202 CLR 535, [4] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)
  - 3 *Corporations (Western Australia) Act 1990* (WA). This "simple prosecution" was removed from the District Court to the High Court, as a result of a motion to quash the indictment on the constitutional grounds (*inter alia*) that the Commonwealth Director of Public Prosecutions could not validly prosecute an offence against the laws of Western Australia.

- (a) Is an Act protecting a particular State industry against inter-State competition (for the purposes of section 92 of the Constitution<sup>4</sup>)?
- (b) Is there an inconsistency between a State and Commonwealth legislative provisions (for the purposes of section 109 of the Constitution<sup>5</sup>)?
- (c) Is a State Court exercising a power or function under Federal law?<sup>6</sup>
- (d) Is a non-judicial body vested with the judicial power of the Commonwealth (possible conflict with Chapter III of the Constitution)?<sup>7</sup>
- (e) Has the Commonwealth acquired property (of any kind), and have ‘just terms’ been provided (for the purposes of section 51(xxxi) of the Constitution<sup>8</sup>)?

You should be aware of potential constitutional issues arising from the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and the *Human Rights Act 2004* (ACT).

## 11.2 General procedural considerations

Having identified the existence of a constitutional question in a given case, you should consider the procedural issues unique to constitutional litigation.

### 11.2.1 Section 78B Notice

The Attorneys-General of the Commonwealth, the States and internal Territories are granted an express right of intervention in proceedings “that relate to a matter arising under the Constitution or involving its interpretation.”<sup>9</sup> The Commonwealth Attorney-General exercises this

4 For a recent example, see *Betfair Pty Limited v Western Australia* [2008] HCA 11

5 For a recent example, see *Deva v University of Western Sydney* [2008] NSWCA 137

6 For a recent example, see *O’Donoghue v Ireland*; *Zentai v Republic of Hungary*; *Williams v United States of America* [2008] HCA 14; this may also raise considerations of the type discussed in *Kable v Director of Public Prosecutions* (NSW) (1995) 189 CLR 51

7 For a recent example, see *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2

8 For a recent example, see *Telstra Corporation Limited v The Commonwealth* [2008] HCA 7

9 Section 78A of the *Judiciary Act 1903* (Cth)



right more frequently than other Attorneys-General.<sup>10</sup> Section 78B of the *Judiciary Act 1903* (Cth) requires parties to a matter involving a constitutional question to give notices to the State, Territory and Commonwealth Attorneys-General, specifying the nature of that question a reasonable time before the matter is heard. The particulars of a section 78B notice are set out in Part 5 of the *High Court Rules*.<sup>11</sup> The Court is obliged not to proceed in the cause until satisfied that parties have complied with the requirements of section 78B.

The section 78B notice is often overlooked in matters which seem to be non-constitutional, but which raise constitutional issues. For example, a question in litigation under the *Trade Practices Act 1974* (Cth) as to whether or not a corporation is a “trading and financial corporation” is in fact a constitutional issue. Notwithstanding that the State and Commonwealth Attorneys-General would likely not intervene, a section 78B notice should nevertheless be prepared.

### 11.2.2 Jurisdictional choice

(a) Original Jurisdiction – Federal Court and High Court

Constitutional proceedings can be instituted in either the Federal Court<sup>12</sup> or the High Court.<sup>13</sup>

(b) Constitutional Matters in Other Courts

Where a constitutional question is raised during the course of an otherwise “non-constitutional” matter, parties will have to decide whether to remove the matter to a different court or to continue in the court in which proceedings were commenced.

Constitutional questions cannot be raised in administrative bodies such as the Administrative Appeals Tribunal. A constitutional question arising in a matter before an administrative body must be removed to

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10 See H. Burmester, “Interveners and Amici Curiae” in T. Blackshield, G. Williams and M. Coper (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001), p.357

11 (Cth) *High Court Rules* (2004), Pt 5, Reg 5.01-5.03

12 Section 39B *Judiciary Act 1903* (Cth)

13 Section 30(a) *Judiciary Act 1903* (Cth) and sections 75 and 76 of the *Constitution*

a Chapter III Court.<sup>14</sup> State Courts are competent to hear constitutional questions.<sup>15</sup>

### 11.2.3 Removal to the High Court

Parties may make an application to the High Court to have a matter which was commenced in a State or Federal Court removed to the High Court.<sup>16</sup> Parties should file an application for removal in accordance with Part 26 of the *High Court Rules*.<sup>17</sup>

*R v Hughes*<sup>18</sup> is an example of removal from a State District Court to the High Court, though the power is rarely exercised. The broader the implications of the constitutional matter in question, the more likely it will be removed to a higher court.<sup>19</sup>

## 11.3 Proceedings in the Federal Court

This section and the following section relating to proceedings in the High Court are relevant primarily to those matters which are obviously constitutional.

### 11.3.1 Jurisdiction

The Federal Court has jurisdiction over “any matter ... arising under the Constitution, or involving its interpretation.”<sup>20</sup> The word “matter” is a term of art, and has been defined to mean a controversy as to “some immediate right, duty or liability to be established by the determination of the Court.”<sup>21</sup> Section 32(1) of the *Federal Court of Australia Act 1976* (Cth)

14 *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239, 241 (Brennan P); see also *Attorney General v 2UE Sydney Pty Ltd and Ors* [2006] NSWCA 349, [80] (Spigelman CJ).

15 Section 39(2) of the *Judiciary Act 1903* (Cth), *Attorney General v 2UE Sydney Pty Ltd and Ors* [2006] NSWCA 349, [50] (Spigelman CJ) and *Deva v University of Western Sydney* [2008] NSWCA 137

16 Section 40 *Judiciary Act 1903* (Cth)

17 (Cth) *High Court Rules* 2004, Reg 20.01.2

18 See *R v Hughes* (2000) 202 CLR 535, [4] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)

19 See A. Mason, “Judiciary Act” in T. Blackshield, G. Williams and M. Coper (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001), p.380.

20 *Judiciary Act 1903* (Cth), s 39B(1A)(b)

21 For discussion, see *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, [85] (French J) (Beaumont and Finkelstein JJ agreeing)

also provides for the Court's "accrued" jurisdiction, that is, jurisdiction on matters which would not otherwise be within the jurisdiction of the Federal Court, but are associated with matters in which the jurisdiction of the Court is invoked.<sup>22</sup>

### 11.3.2 Commencing proceedings

Constitutional proceedings in the Federal Court are commenced, as with any Federal Court proceedings, by either:

- (a) an application accompanied by an affidavit; or
- (b) an application accompanied by a statement of claim.<sup>23</sup>

A statement of claim is generally preferred, due to the complexity of issues raised in constitutional matters.

### 11.3.3 Referral to the Full Court

Usually a matter in the Federal Court will be heard by a single judge. If a matter is of sufficient importance, particularly in the case of urgent applications, then it may be removed to the Full Court of the Federal Court by:

- (a) direction of the Chief Justice of the Federal Court;<sup>24</sup> or
- (b) a single Judge reserving a question of law or stating a case under section 26(1) of the *Federal Court of Australia Act 1976* (Cth).

This procedure is similar to that utilised by the High Court (see below).

## 11.4 Proceedings in the High Court

### 11.4.1 Commencing proceedings

Other than by removal under section 40 of the *Judiciary Act 1903* (Cth) (see above), proceedings in the High Court can be brought in two ways, depending on the type of relief sought.<sup>25</sup>

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22 For discussion, see *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, [85] (French J) (Beaumont and Finkelstein JJ agreeing)

23 (Cth) *Federal Court Rules* O 4 r 1

24 Section 20(1A) *Federal Court of Australia Act 1976* (Cth). For a recent example of this, see *Evans v State of New South Wales* [2008] FCAFC 130, [15]

25 (Cth) *High Court Rules* (2004) Reg 20.01

- (1) Where a constitutional or prerogative writ<sup>26</sup> is sought, proceedings are commenced by an application for an order to show cause why the writ should not be issued.<sup>27</sup> This procedure has replaced the old order nisi.

The Judge hearing the application will then either order that the matter be remitted (see below), refer the order to show cause to the Full Court of the High Court, or require that the application be made by notice of motion to the Full Court (see below). An appeal from the decision of the Judge hearing the application may be made with leave.<sup>28</sup>

- (2) In other constitutional cases, proceedings are commenced by the issue of a writ of summons and statement of claim in accordance with Part 27 of the *High Court Rules*.<sup>29</sup>

This is generally pursued where the validity of legislation is challenged and declaratory or injunctive relief is sought.

Occasionally it will be necessary to plead in both ways. In the recent case of *Telstra v Commonwealth*,<sup>30</sup> Telstra commenced proceedings by an application for an order to show cause, seeking prohibition and declaratory relief, but subsequently filed a statement of claim.

#### 11.4.2 Remitter

If a matter proceeds by writ and statement of claim, then generally speaking the court should not be required to engage in a significant fact finding exercise. If facts are in dispute, a matter will usually be remitted to the Federal Court or to a State or Territory Supreme Court and will be governed by the Rules of that Court.<sup>31</sup>

A Justice of the High Court may exercise his or her discretion to remit an entire matter, or parts of a matter.<sup>32</sup> One notable example of this is *Mabo*

26 The writs provided for in s 75(v) (mandamus and prohibition) are referred to as 'constitutional writs': *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92-93 (Gaudron and Gummow JJ); these writs, together with the prerogative writs of certiorari, habeas corpus and quo warranto, are provided for in (Cth) *High Court Rules* 2004, Reg 20.01

27 (Cth) *High Court Rules* 2004, Pt 25, rr 20.01.1

28 Section 34 of the *Judiciary Act* 1903 (Cth)

29 See (Cth) *High Court Rules* 2004, Reg 20.01.4

30 See *Telstra Corporation Limited v The Commonwealth* [2008] HCA 7, [3] (the Court)

31 See (Cth) *High Court Rules* 2004, Reg 1.05

32 Sections 42 or 44 of the *Judiciary Act* 1903 (Cth)

*v Queensland (No 2)*,<sup>33</sup> where significant issues of fact were remitted for determination by Moynihan J of the Supreme Court of Queensland.

In deciding whether to remit a matter, the Court will consider the following factors:

- (a) the importance of the question;
- (b) the degree to which the primary facts are disputed; and
- (c) the presence of any complicating non-constitutional issues.

The High Court is reluctant to remit factual questions to a lower Court.

### 11.4.3 Referral to the Full Court of the High Court

Similar to the procedure for referring a matter to the Full Court of the Federal Court (see above), there are two common ways by which a matter can be brought before the Full Court of the High Court.

- (a) A single Justice of the High Court (in Court or in Chambers) may state a case for consideration for the Full Court. An example of a “case stated” is *XYZ v Commonwealth*.<sup>34</sup> The limitation of a “case stated” is that a Court is unable to draw factual inferences, but must rely exclusively on the record.<sup>35</sup>
- (b) A single Justice of the High Court (in Court or in Chambers) may reserve a question of law for the consideration of the Full Court. This is a “special case”.<sup>36</sup> An example of a “questions reserved” matter is *Betfair v WA*,<sup>37</sup> where the parties to the litigation agreed on the structure of the industry after the litigation had commenced, and then tendered that evidence to the Court. The avenue of “questions reserved” provides flexibility, as it allows the parties to determine the shape (and take any blame for problems with) the proceedings. In such cases, the Court is able to draw inferences of fact or law from the facts stated and documents identified.<sup>38</sup>

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33 See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, [109]-[110] (Brennan J)

34 *XYZ v Commonwealth* [2006] HCA 25

35 See *Johanson v Dixon* (1978) 143 CLR 376, 382 (Mason J)

36 See (Cth) *High Court Rules* 2004, Reg 27.08

37 *Betfair Pty Limited v Western Australia* [2008] HCA 11

38 See (Cth) *High Court Rules* 2004, Reg. 27.08.5

The individual High Court Judge determines the shape of proceedings.<sup>39</sup> Despite this, “it is primarily the parties who agree on the facts that should be put before the Court.”<sup>40</sup>

The “demurrer” is another, less common way in which a matter may be pleaded before the Full Court of the High Court. A “demurrer” is an old form of pleading open to a party defending proceedings.<sup>41</sup> The demurrer is only useful where the issue to be determined is a pure point of law, with no disputed facts which might affect the validity of the Act in question.<sup>42</sup> This is not to say that no additional issues of fact can be adduced. For example, although the Commonwealth pleaded by way of demurrer in *WorkChoices*, this did not prevent the Court from discussing the history of the relevant constitutional provisions and various legislative materials.<sup>43</sup>

## 11.5 Other considerations

### 11.5.1 Constitutional facts

In ascertaining the validity of legislation, a court will need to satisfy itself that the “constitutional facts” bear out the conclusion that the legislation falls under a relevant constitutional head of power. The question of whether something may be taken into account by the Court as a “constitutional fact” is a contentious one. It is clear that, as for judicial notice, the Court may have regard to matters of general public knowledge. As such, “constitutional facts” do not necessarily require evidence. For example, in *Thomas v Mowbray*,<sup>44</sup> the court was concerned with whether or not certain anti-terrorism legislation fell within the defence power under the Constitution. The court considered whether the existence of a “terrorist threat” was a constitutional fact that could be taken into account.

Callinan J’s definition of constitutional facts in that case may be helpful:

39 Section 18 of the *Judiciary Act* 1903 (Cth)

40 A. Robertson, “Procedure” in T. Blackshield, G. Williams and M. Coper (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001), p.564

41 See (Cth) *High Court Rules* 2004, Reg. 27.07

42 See *New South Wales v Commonwealth* [2006] HCA 52, [4] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ)

43 See, for example, *New South Wales v Commonwealth* [2006] HCA 52, [209] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ)

44 *Thomas v Mowbray* [2007] HCA 33 (2 August 2007). (Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

constitutional facts in cases of contested constitutional powers should be taken to be facts justifying, or calling for, the exercise of the relevant power, and as to which its exercise is reasonably capable of applying. This means they must be proved in the same way as other facts are proved, or be sufficiently notorious to be within judicial notice, or ascertainable by reference to indisputably reputable and broadly accepted historical writings, or within a special category which I would describe as “official facts”, being, for example, official published statistics, scrupulously collected and compiled, information contained in parliamentary reports, explanatory memoranda, second reading speeches, reports and findings of Commissions of Inquiry, and, in exceptional circumstances, materials generated by organs of the Executive.<sup>45</sup>

It seems that constitutional facts are slightly more flexible in scope than traditional judicial notice. However, it would be prudent for parties to plead or agree to the facts relevant to the constitutionality of a particular item of legislation if possible, rather than relying on constitutional facts.

### 11.5.2 Policy and practical considerations

The role of policy in the High Court has recently been subject to much discussion. It is fair to say, however, that “lurking beneath the surface of the arguments presented”<sup>46</sup> in constitutional matters will often be competing policy considerations and considerations of a practical nature. This is especially so where the validity of legislation is concerned. You should be aware that, in constitutional matters, your arguments can potentially have broader policy ramifications than in non-constitutional cases.

### 11.5.3 Presumptions in constitutional litigation

In constitutional litigation, there is a presumption in favour of the constitutionality of statutes.<sup>47</sup> The Court will, if possible, read a statute so as not to engage constitutional principles. Recently, the Full Court of the Federal Court said in *Evans v State of New South Wales*:<sup>48</sup>

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45 *Thomas v Mowbray* [2007] HCA 33 (2 August 2007) [526] (Callinan J)

46 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 513 [34] (Mason J)

47 See *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 180 (Isaacs J); *Attorney-General (Victoria) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J); *Chung Kim Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1, 14 (Mason CJ)

48 *Evans v State of New South Wales* [2008] FCAFC 130, [40] (the Court)

If on its proper construction a statute does not offend against any constitutional limitation or prohibition it is not ordinarily appropriate for the Court to hypothesise a different construction and then test its constitutionality. If a regulation is found to be invalid as not authorised by the statute under which it is said to be made, then it is not for the Court to hypothesise validity under the statute so that it may test for validity under the Constitution.

#### 11.5.4 Practice and procedure

In addition to the Rules of the Court, you should identify and familiarise yourself with the High Court's practice directions, currently available under the 'Filing Documents' section of the High Court website at <http://www.highcourt.gov.au/>.







Part 3  
Commencing  
Proceedings in  
New South Wales





## 12. LIMITATION PERIODS

*Michael Denahy, Juliet Eckford and Robert Tang*

### 12.1 Introduction

Limitation periods are time limits within which a plaintiff must commence civil proceedings. The base time limits may be extended or suspended in various circumstances.

In New South Wales, the primary legislation governing limitation periods is the *Limitation Act 1969* (NSW) (‘the **Limitation Act**’). There is equivalent legislation in each State and Territory.

### 12.2 Why limitation periods are important

The general rule is that a plaintiff who fails to bring an action within the appropriate limitation period prescribed by the Limitation Act is prohibited (or “statute barred”) from bringing that action. The plaintiff’s cause of action is also extinguished.

Similar consequences will generally flow if a plaintiff fails to bring an action within the appropriate limitation period prescribed by other legislation. In those circumstances, however, the effect of the limitation period is generally to bar the remedy rather than extinguish the cause of action.<sup>1</sup>

One of the first things to consider when taking instructions from a client is to determine the applicable limitation period and the date on which it expires. If acting for the plaintiff, the originating process should be filed before the limitation period expires. Failure to do so may render you or your firm professionally negligent. If acting for the defendant, a limitation period operates as a defence to a cause of action. Therefore, it should be pleaded at the defendant’s earliest opportunity.<sup>2</sup>

For conflict of laws purposes, it is important to recognise that limitation periods are not merely procedural but are a part of the substantive law.<sup>3</sup>

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1 See for example, section 75AO of the *Trade Practices Act 1974* (Cth)

2 Rule 14.14 of the *Uniform Civil Procedure Rules 2005* (NSW)

3 *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503; Section 5 of the *Choice of Law (Limitations Period) Act 1993*; Section 78 of the *Limitation Act 1969* (NSW)

## 12.3 Policy underlying limitation periods

An important consideration in the enactment of limitation periods was that delaying the commencement of a civil proceeding could lead to a deterioration in the quality of justice. This is because over time, memories fade, documents may be lost or destroyed and witnesses die.

This is not the only consideration however. In *Brisbane South Regional Health Authority v Taylor*<sup>4</sup> four broad rationales were identified for the enactment of limitation periods:

- (a) as time goes by, relevant evidence is likely to be lost;
- (b) it is oppressive, even “cruel”, to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed;
- (c) people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them; and
- (d) the public interest requires that disputes be settled as quickly as possible.

## 12.4 Periods of limitation

Limitation periods vary according to the particular cause of action.

For the relevant limitation period, it is advisable to refer to the Limitation Act and any other applicable legislation, particularly where the cause of action accrues under that specific legislation.

In New South Wales, actions based on contract (including quasi-contractual actions) or tort are subject to a limitation period of 6 years,<sup>5</sup> however there are exceptions. For example, actions for wrongful death are subject to a three-year time limit from the date of the death. Special rules apply to personal injury actions (as dealt with below).

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4 *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 541 McHugh J at 552-553

5 See section 14 of the *Limitation Act 1969* (NSW)

## 12.5 Starting time of a limitation period

A limitation period runs from the date that the cause of action accrues. The general rule, which in some cases may be modified by statute, is that a cause of action accrues at the time when:

- (a) the necessary facts occur, that is when all of the elements to a cause of action exist, even if a party is not aware of all the elements;<sup>6</sup> and
- (b) there is in existence a competent plaintiff who can sue and a competent defendant who can be sued.<sup>7</sup>

Common examples of when a cause of action accrues are:

- (a) in contract – when the contract is breached;
- (b) for torts that are actionable without proof of damage (e.g. assault, battery, false imprisonment, trespass to land and goods) – when the wrongful act is committed; and
- (c) for torts that are actionable only on proof of damage (e.g. negligence) – when the loss or damage is suffered.

Special rules apply to certain actions in contract and tort (including actions for personal injury). You should consult the Limitation Act or relevant statutes and case law for specific guidance.

## 12.6 Personal injury matters

The limitation period for causes of action for personal injury which accrued before 1 September 1990 is six years. For causes of action for personal injury which accrued between 1 September 1990 and 6 December 2002, the limitation period is three years.

After 6 December 2002, the period runs for three years from the date of discoverability (“the post-discoverability limitation period”)<sup>8</sup> or 12 years from the date of the act or omission which allegedly resulted in

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6 See *Wardley Australia Limited v The State of Western Australia* [1992] HCA 55; (1992) 175 CLR 514 and *Cigna Insurance Asia Pacific Ltd v Packer* [2000] WASCA 415; (2000) WAR 159

7 See *Thomson v Lord Clanmorris* [1900] 1 Ch 718 at 728-729

8 See *Baker-Morrison v State of NSW* (2009) NSWCA 35

the injury or death (“the long-stop limitation period”), whichever period is shorter.<sup>9</sup>

## 12.7 Suspending the limitation period

Generally, once the limitation period begins to run, it cannot be suspended or stopped.

However, there are some exceptions. Suffering from a disability that renders a plaintiff incapable of, or substantially impeded in, managing their affairs may stop time from running under the limitation period until the disability ceases. Similarly, a limitation period which runs in relation to a cause action based on a fraud perpetrated upon a person or a mistake affecting that person which remains secret, will not begin to run until the person discovers (or should have discovered) the fraud/mistake.<sup>10</sup>

If you are confronted with a client whose limitation period has expired, refer to the legislation to verify if it provides for a suspension of, or extension to, the limitation period.

## 12.8 Extending time

In certain circumstances, limitation periods can be extended.

Whether or not a limitation period can be retrospectively extended after it has expired is generally a matter of statutory interpretation. Some limitation statutes contain provisions prescribing circumstances in which a limitation period that has expired can be retrospectively extended. However, not all limitation statutes contain such provisions.

In personal injury matters, the Court cannot extend the limitation period where the cause of action arose after 6 December 2002.

The Limitation Act also provides for the court-ordered extension of the long-stop limitation period in certain circumstances.<sup>11</sup>

Where legislation contemplates the extension of time, discretion is usually conferred on the Court to determine whether or not the limitation period should be extended. In determining whether to grant an

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9 Section 50C of the *Limitation Act 1969* (NSW)

10 See generally Part 3 Division 2 of the *Limitation Act 1969* (NSW)

11 Sections 62A and 62B of the *Limitation Act 1969* (NSW)

application for an extension of time, the underlying principle governing the discretion relates to the fairness of the trial.<sup>12</sup>

In *Gretton v The Commonwealth*<sup>13</sup>, McDougall J considered s 60G of the Limitation Act which sets out the statutory test for granting an extension of the limitation period in respect of a cause of action founded on negligence, nuisance or breach of duty, for damages for personal injury. The principles identified in *Gretton* which have been considered by the Courts when exercising the discretion to extend a limitation period are:

- (a) an application for extension should be refused if to grant it would cause significant prejudice to the defendant;
- (b) however, it is not the case that, absent a finding of significant prejudice, the Court must grant an extension;
- (c) the discretion conferred is one to grant, not to refuse, an extension, and the plaintiff bears the onus of satisfying the Court that an extension should be granted; and
- (d) an application for extension of time is not a trial, or a dress rehearsal for a trial, and requires proof only of a serious question to be tried as to the ingredients of the asserted cause of action.

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12 See *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 541; *Holt v Wynter* [2000] NSWCA 143; (2000) 49 NSWLR 128

13 *Gretton v The Commonwealth* [2005] NSWSC 437 McDougall J at [11]



## 13. STATEMENTS OF CLAIM AND SUMMONSES

*Sharna Clemmett, Laith Hijazin and Alanna Van Der Veen*

The aim of a well drafted statement of claim is to present to the appropriate court the alleged facts, damages and orders sought to remedy the actual damage suffered by your client.

### 13.1 Supreme Court, District Court and Local Court

Under the *Uniform Civil Procedure Rules 2005* (NSW) ('the UCPR'), proceedings are usually commenced by statement of claim or summons. There are exceptions to this, which are outlined below. A statement of claim or summons must be drafted using the prescribed form, which can be found on the UCPR website.<sup>1</sup>

#### 13.1.1 The difference between a summons and a statement of claim

A summons only sets out the relief sought, whereas a statement of claim sets out or "pleads" the material facts forming the basis of the relief sought, as well as the relief.

There are some types of matters where the issues can readily be identified from a summons and supporting affidavit. In other matters, the requirements of procedural fairness, as well as the need for the real issues to be elucidated, dictate the use of a statement of claim.

#### 13.1.2 When to use a statement of claim as opposed to a summons

As a general rule, any proceedings involving a likely extensive contest as to facts (including terms of an agreement and their breach) should be commenced by way of statement of claim.

UCPR 6.3 provides that a statement of claim should be used for claims seeking relief:

- (a) for debts and other liquidated claims;
- (b) for an alleged tort;
- (c) for an alleged fraud;

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<sup>1</sup> See <[http://www.lawlink.nsw.gov.au/lawlink/spu/ll\\_ucpr.nsf/pages/ucpr\\_forms](http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_forms)>

- (d) for damages for breach of duty, where the damages claimed include damages in respect of someone's death, personal injuries or damage to any property;
- (e) in relation to trusts, other than express trusts wholly in writing;
- (f) for possession of land;
- (g) under the *Property (Relationships) Act 1984*; or
- (h) in relation to the publication of defamatory matter.

UCPR 6.4 sets out the circumstances where proceedings must be initiated by a summons. For example, a summons should be used for:

- (a) proceedings where there is no defendant;
- (b) proceedings on appeal or application for leave to appeal (other than proceedings assigned to the Court of Appeal);
- (c) proceedings for preliminary discovery or inspection made under Part 5 of the UCPR; or
- (d) proceedings in relation to a stated case.

### 13.1.3 Proceedings commenced otherwise than by a statement of claim or summons

In the Commercial List and the Technology and Construction List of the Supreme Court (Equity Division), proceedings are commenced by summons. The summons must be accompanied by what is known as a "list statement". As practice notes are revised from time to time, you should check <<http://www.lawlink.nsw.gov.au>> for the latest practice note relevant to pleadings in NSW courts.

### 13.1.4 Proceedings that are wrongly commenced by statement of claim or summons

Proceedings wrongly commenced by a statement of claim are still taken to have been commenced on the date that the statement of claim was filed, but the court may order that the proceedings continue as if they had been commenced by summons, and as if any pleadings filed in the proceedings had been filed as affidavits.

Proceedings wrongly commenced by summons are still taken to have been commenced on the date that the summons was filed, but the court may order that the proceedings continue on pleadings. A common situation is that proceedings which are appropriate for pleadings are commenced by summons because of the urgent need to approach the

court and seek interim relief. When the urgent application has been dealt with, it is usual for the court to order (whether by its own motion or on the application of one or more of the parties) that the matter proceed on pleadings.

## 13.2 Further requirements in the District Court

Practice Note DC (Civil) No. 1 requires the following which are relevant to pleadings and commencing proceedings in the District Court for unliquidated claims:

- (a) The plaintiff's preparation for trial must be well advanced before filing the statement of claim.<sup>2</sup>
- (b) On serving the statement of claim, the plaintiff also must serve on the defendant:
  - (i) proposed consent orders for the preparation of the case;<sup>3</sup>
  - (ii) notification of the date and time of the pre-trial conference (which will be provided on filing of the statement of claim *except in defamation cases, child care appeals and Family Provision cases in Newcastle*).<sup>4</sup>
- (c) Any particulars of the claim that are required should have been requested and supplied by the time of the pre-trial conference.<sup>5</sup>

## 13.3 Federal Court

In the Federal Court, proceedings are usually commenced by application, which is similar to a summons, supported by either an affidavit or statement of claim. Either way, the nature of the case and the material facts on which it is based must be set out.

A statement of claim must be filed when the claim alleges fraud, misrepresentation, breach of trust, willful default or undue influence.

As with the State courts, the Federal Court may order that proceedings which have not been commenced by a statement of claim are to continue on pleadings.

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2 Paragraph 2.1 of Practice Note DC (Civil) No. 1

3 Paragraph 3.1 of Practice Note DC (Civil) No. 1

4 Paragraph 5.1 of Practice Note DC (Civil) No. 1

5 Paragraph 3.3 of Practice Note DC (Civil) No. 1

## 13.4 Drafting a statement of claim – practical considerations

In addition to this chapter, you should read Chapter 16 of this Guide.

### 13.4.1 Why a well-drafted statement of claim is essential

A statement of claim must be well drafted, supported by evidence and clearly set out the relief sought and claimed. A well drafted statement of claim may in some circumstance place the opposing side in a situation where it is forced to consider an out of court settlement, avoiding the legal costs to your client of litigating the matter. A young lawyer practicing in civil litigation must always consider the possibility their claim may fail and a verdict and costs may be awarded in favour of the defendant when initiating a claim.

The statement of claim must address the alleged factual surroundings of your client's claim for damages, including detailed particulars you wish to rely on. It is essential to have a clear understanding of your client's claim and the appropriate relief sought in order to properly prepare the statement of claim. The form of the statement of claim must comply with the UCPR to avoid being struck out by the court.

The statement of claim should be presented so as to assist counsel briefed in the matter to successfully argue the matters pleaded. It is quite distressing for counsel to be in front of the judge and other lawyers and be told that the statement of claim does not make sense, or is poorly drafted. In any event, you should consider having counsel settle the draft statement of claim before it is filed and served on the opposing party. A successfully drafted statement of claim will avoid the need to spend further time re-drafting the document and seeking leave for the statement of claim to be amended.

If the pleadings do not raise all of the bases on which your client's claim is to proceed, leave to amend the pleadings should be sought as soon as that becomes apparent. It is critical to seek leave promptly.<sup>6</sup> The court is bound to make findings on the matters pleaded. If it is clear that both parties proceeded on a particular basis, then it is more likely that the court will give leave to amend to cover that basis later in the proceedings.

The courts welcome the use of plain English drafting in pleadings.

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<sup>6</sup> See *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27

### 13.4.2 Drafting your statement of claim – practical considerations

The following should guide you when drafting a statement of claim:

- (a) a statement of claim must specifically state the relief claimed by the plaintiff;
- (b) an order for interest up to judgment must be specifically claimed;
- (c) an order for aggravated or extemporary damages must be specifically claimed;
- (d) where several matters are pleaded, each matter should be in a separate paragraph, and the paragraphs should be numbered consecutively;
- (e) pleadings must only include material facts, and not the evidence by which such facts are to be proved;
- (f) pleadings should be as brief as the nature of the case allows;
- (g) where a pleading refers to spoken words or a document, the effect of the words or the document is to be pleaded, and not the actual words or document; and
- (h) conditions precedent to the commencement of litigation (such as waiting 30 days before commencing proceedings for recovery of legal fees) are assumed to be met and therefore do not need to be specifically pleaded.

See Part 14, Division 3 of the UCPR for further details.

### 13.4.3 Short form of pleadings

A plaintiff may use a short form of pleading in a common money claim.

The common money claims are:

- (a) goods sold and delivered by the plaintiff to the defendant;
- (b) goods bargained and sold by the plaintiff to the defendant;
- (c) work done and materials provided by the plaintiff to the defendant at the defendant's request;
- (d) money lent by the plaintiff to the defendant;
- (e) money paid by the plaintiff for the defendant at the defendant's request;
- (f) money had and received by the defendant for the plaintiff's use;

- (g) interest on money due from the defendant to the plaintiff and forborne at interest by the plaintiff at the defendant's request; and
- (h) money found to be due from the defendant to the plaintiff on accounts stated between them.

A defendant served with a statement of claim that is pleaded in short form may file a Notice to Plead Facts, requiring the plaintiff to plead its case in full.<sup>7</sup> The Notice to Plead Facts must be filed within the time limit for filing the defence, and the plaintiff then has 28 days to file an amended statement of claim. The time limit for filing the defence is then extended until 14 days after the filing of the amended statement of claim.<sup>8</sup>

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7 Rule 14.14(2) of the *Uniform Civil Procedure Rules 2005* (NSW)

8 Rule 14.14(4) of the *Uniform Civil Procedure Rules 2005* (NSW)

## 14. URGENT APPLICATIONS TO THE DUTY JUDGE

*Leonie Beyers, Nicole Cerisola, Sine Dellit and Brenda Tronson*

### 14.1 Introduction

This chapter refers to the practice in the Supreme Court of New South Wales.

Urgent relief from a Duty Judge is sought for a variety of reasons. Common examples of Duty Judge applications are:

- (a) the appointment of a provisional liquidator;
- (b) appointment of a receiver; and
- (c) interim preservation orders.

Often the substantive proceedings are commenced at the same time as the application is made.

### 14.2 Preparing an application to the Duty Judge

You should consider whether these questions apply to your matter when preparing to brief counsel and before approaching the Duty Judge:

- (a) **What orders do you want the Duty Judge to make?** Set these out in the summons and/or the notice of motion or, in corporations matters, the originating process or interlocutory process. If proceedings are being commenced with interlocutory orders against other parties (i.e. a defendant or the defendants), do **not** prepare a separate notice of motion but include those interlocutory orders in the summons. You should also prepare some short minutes of order if you have time. In drafting these documents you will need to take into account your answers to the other questions in this list.
- (b) **Do you have or need leave?** Some steps require leave of the Court. In every case, leave must be sought to file in Court the documents starting the process (summons, notice of motion, affidavit etc).
- (c) **When do you want the orders made?** It may be that only some of the orders are to be made in the initial application before the

Duty Judge. An example is short service or substituted service of the originating process or notice of motion, or an *ex parte* order. The short minutes should record only the orders to be made on the day.

- (d) **What is an appropriate timeframe?** How much time is needed for short service? When should the matter be relisted before the Court? When should an interim injunction expire? The Court will be keen to bring the matter back within a short period of time, especially where *ex parte* relief is granted.
- (e) **What is the legal and factual basis of the claim for final relief?** It may assist the Duty Judge if the order in the claim for relief and/or notice of motion is framed, if applicable, as being “an order under [provision and Act] that...”
- (f) **What is the legal and factual basis of the interlocutory relief** which you seek and how does it relate to the claim for final relief?
- (g) **How urgent is this matter?** Why? Where is that urgency demonstrated in the evidence?
- (h) **Is there a sound reason to proceed *ex parte* at this stage?** If so, what is it? If not, have you notified the defendant/s and given them a chance to attend? (Only in the most extreme cases should an application be made without notice to the defendant.)
- (i) If proceedings have not yet been commenced, **have you prepared the appropriate originating process** in relation to final relief as well as the appropriate notice of motion/interlocutory process in relation to the interlocutory relief?
- (j) **Does your affidavit material make out a case for:**
  - (i) the final relief sought in the proceedings;
  - (ii) the interlocutory relief being sought;
  - (iii) the urgency with which it is being sought; and
  - (iv) the basis on which the balance of convenience favours the grant of the relief?
- (k) In the case of an injunction or interim preservation application, **has your client (the plaintiff) given instructions to give an undertaking as to damages?** Have the potential consequences of such an undertaking been explained to your client first? Do they understand what it means? Do you have something in writing?



- (l) **Do you have a cheque for the appropriate filing fee** for the originating process and/or interlocutory process?
- (m) **In which Court and division** can the proceedings (and therefore the application) be filed? Because of their nature, most applications are made in the Supreme Court Equity Division.
- (n) **Which Duty Judge?** For example, in the Supreme Court, *Corporations Act 2001* matters should be before the Corporations List Judge, and equity matters before the Equity Duty Judge. There is also a common law Duty Judge for urgent common law matters in the Supreme Court. In the Federal Court there is also a Corporations List Judge to hear *Corporations Act 2001* matters.
- (o) **What do the relevant rules of Court say?** (For example, those relating to abridgement of time or dispensing with the need for service.) In corporations matters, are there any relevant provisions in the *Corporations Rules*?
- (p) **What, if anything, do the Division/List Practice Note(s) say** about the practice relating to Duty Judges?<sup>1</sup> There are also guidelines for specific types of orders, such as search orders<sup>2</sup> and freezing orders<sup>3</sup> which differ between Courts.<sup>4</sup>

### 14.3 In court

Once you have answered the above questions you may be able to approach the Duty Judge. So what do you do and what should you expect?

- (a) Find out from the day's list who is the relevant Duty Judge and where s/he is sitting. See <<http://www.lawlink.nsw.gov.au>> for daily court lists in various NSW courts and <<http://www.fedcourt.gov.au/>> for daily court lists in the Federal Court.
- (b) Unless there is a good reason to proceed *ex parte* (e.g. where there is a fear that a bank account will be emptied if the defendant gets

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1 For example, in the Supreme Court see Practice Note SC Eq 4 in relation to the Corporations List and Practice Note SC Eq 3 in relation to the Commercial List

2 See Practice Note Gen 13

3 See Practice Note Gen 14

4 In the Federal Court see Administrative Notice NSW 1 – Duty Judge Arrangements and Practice Notes CM 9 – Freezing Orders aka 'Mareva Orders', CM 11 – Search Orders aka 'Anton Piller Orders', and CM 14 – Usual Undertaking as to Damages

wind of the application before an order is made), the other party should be notified of the application.

- (c) Subject to the practice of the different divisions and lists, and also to the degree of urgency, you should normally contact the Associate to the Duty Judge and arrange a suitable time. The Associate may want to know what the matter is about and what the urgency is. If you have not already done this, or the matter is expected to be short (e.g. an application for short and/or substituted service) then simply turn up. When you arrive at court a form can be filled out giving relevant information.
- (d) If there are already proceedings on foot, call the registry and arrange for the file to be taken to the court.
- (e) Check that you have the necessary documents. Normally, there will be an originating process which, in the Equity Division, is almost always a summons or in the Corporations List, an originating process; the interlocutory process (e.g. the notice of motion or, in the Corporations List, interlocutory process) and short minutes of the orders and directions which you will be seeking to have made on the day, along with supporting affidavits (see above).
- (f) Let the Court Officer know when you arrive.
- (g) The matter then proceeds much like any other motion. If the Duty Judge is in the middle of hearing a matter, and your application is short, do not be surprised if the other matter is interrupted to deal with yours, especially if it is immediately before or after an adjournment.

Often orders are made on an interim basis only and the application is stood over for a day or two for full argument with directions made for the service of documents and the like. This is usually to give the defendant a chance to prepare its opposition to the application.

Often it will be necessary to have a minute of the order issued urgently by the registry. In that event you will need to get the orders, as made, engrossed, and ensure that the registry is open (and will be kept open until the orders have been sealed). Note that if you keep the registry open beyond closing hours it becomes “user pays”. Where an originating process and/or a notice of motion are to be filed in Court, you should be prepared to give an undertaking to the Duty Judge that you will pay the filing fees. As with the undertaking for damages, this can be noted on any notice of motion and short minutes before the orders are set out.

If the application is contested, you may have to be prepared for several Court attendances, many hours in counsel's chambers, waiting in Court, preparing affidavits and correspondence and a fax machine in constant motion. Take this into consideration when giving an estimate of fees and disbursements to a client prior to an urgent application and also when obtaining money on account.

### 14.4 Further reading

For those appearing before the Duty Judge in the Equity Division, or otherwise, it is strongly recommended you read the paper presented on 14 August 2008 to the NSW Bar Association by Justice Brereton entitled "*Practice and Procedure Before the Duty Judge in Equity*".<sup>5</sup>

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5 <[http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speeches](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches)>

## 15. MOTIONS

*Leonie Beyers, Nicole Cerisola, Claire Prenter and Jacqueline Rennie*

### 15.1 Introduction

Interlocutory applications in civil proceedings are made by motion with notice to the other parties affected by the orders sought in the “notice of motion”. Rules 18.1 to 18.3 of the *Uniform Civil Procedure Rules 2005* (NSW) outlines the procedure for Motions generally, prescribes the formal contents of the notice and requires parties to be referred to by their ordinary description in the pleadings, that is, plaintiff/cross-defendant as the case may be.

A notice of motion is usually supported by affidavit evidence and such applications can be made for a seemingly unlimited number of reasons, including seeking directions, clarifying matters in dispute, facilitating proof, minimising surprise, reducing hearing time and costs, and gaining tactical advantages.

### 15.2 Consent

Before making an application, you may ask the opposing party whether they will consent to the proposed orders sought without the need for a formal application. A party who moves the Court unnecessarily, without previously seeking consent of the other party, leaves themselves open to suffer the burden of a costs order, even if they are successful.<sup>1</sup>

### 15.3 Form

A notice of motion must be the approved form.<sup>2</sup> Your notice of motion should:

- (a) state the date and time when, and the place where, the motion is to be listed;
- (b) where the Court has made an order varying the usual service requirement, bear a note of the order made;

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1 *Moore v Gannon* (1915) 32 WN (NSW) 60; *Glandon Pty Ltd v Strata Consolidated Pty Ltd* CA(NSW), Kirby P, 575 of 1988, 29 December 1988, unreported BC8802270

2 Currently Form 20: Notice of Motion

- (c) state concisely the nature of the order which is sought;
- (d) state concisely the grounds on which the order is sought or refer to the affidavit in which those grounds are contained;
- (e) name (or, if a party to the action, identify) the applicant and each respondent; and
- (f) where the applicant does not already have an address for service in the action, state an address for service.

In the District Court, notices of motion will be given a hearing date in the general motions list on a Friday at the time of filing unless they are endorsed "Long Motion".<sup>3</sup>

Notices of motion which are anticipated to require more than 2 hours for hearing should be described as a "Long Motion" in the heading of the document. Long motions will receive a call-over date for the purpose of allocating a hearing date. Long motions must be served in sufficient time to enable all parties to be represented at the call-over with instructions as to the likely hearing time for the application and with instructions to complete a timetable.<sup>4</sup>

*As practice notes are revised from time to time, you should check the relevant court website for the latest practice note relevant to notices of motion.*

## 15.4 Court

Please note that there are specific directions for each of the divisions in the Supreme Court in relation to motions, for example:

- (a) Motions are listed at 9.15 am and are called through for the purpose of ascertaining the length of the hearing and allocating a time for hearing on that or some other day. Directions in the Commercial List commence at 9.45am and directions in the Technology and Construction List commence at 12 noon (however subject to change without notice).<sup>5</sup> See Chapter 10 of this Guide.
- (b) Practice Note Sc Eq 4 sets out the procedure on motions in the Corporations List (clauses 27 to 31). All claims for relief properly brought forward in a proceeding already on foot, to which the

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<sup>3</sup> See clause 1 of District Court Practice Note 9

<sup>4</sup> See clause 4 of District Court Practice Note 9

<sup>5</sup> See clauses 21 through 26 of Supreme Court Practice Note SC Eq 3 sets out the procedure on motions in the Commercial List and Technology and Construction List

Rules apply, are required to be made by interlocutory process. See Chapter 6 of this Guide.

## 15.5 Filing

At the time of filing, a return date for the motion will be set by the registry. The matter will be listed before a Judge or Registrar to hear the application. If the matter is urgent, you may apply to have the matter before the hearing date set by the registry.

The motion should be heard on the first return date unless you need more time to put on evidence or seek further instructions to settle the dispute. If so, you should seek an adjournment of the hearing of the motion until a later time when you are ready. If you are the applicant, you can ask for more time, but as the respondent, you may not be granted further time depending on the urgency of the application.

If you seek an adjournment of the hearing, be prepared to fix the matter for hearing on another date. Make sure you have counsel's available dates. Depending on the Court and the division, the motions list runs on different days. Motions are usually in the Registrar's list who can make the order if there is consent, or who can refer the matter to a Duty Judge or the Associate Justices' List, as necessary.

## 15.6 Service

The notice of motion must be filed and served on each person affected by the proposed order.<sup>6</sup>

One very important aspect of motions practice is the fact that the only way to prove service is to prepare an affidavit of service whenever there is a possibility the other party will not attend. A letter is inadequate and many motions are adjourned because a party are unable to prove service.

If you are serving a notice of motion on a party who is not currently a party to the proceedings, the notice of motion must be personally served, and the usual requirements for service apply.<sup>7</sup>

However, you may move the Court for an order without previously filing or serving a motion where:

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6 See Rule 18.2 of the *Uniform Civil Procedure Rules 2005* (NSW)

7 See Part 10 of the *Uniform Civil Procedure Rules 2005* (NSW)

- (a) the preparation of the motion, or the filing or serving, would cause undue delay or other mischief to the applicant;
- (b) each respondent consents to the order;
- (c) under the Rules of the Court, notice is not required; or
- (d) the Court dispenses with such requirements.

A notice of motion must be served at least 3 days prior to the first return date.<sup>8</sup> If the matter is urgent, or you have consent, you can apply to have an abridgement of time for service. If such an abridgement is granted then the Form 20 must be stamped accordingly.

You may apply for an abridgement of time prospectively from a Judge when the notice of motion is filed or alternatively you may include a request for an order in the motion itself. An abridgement application is typically made before the Duty Registrar when you file the notice of motion in the registry. You should have with you the application and a supporting affidavit which deals with the following issues:

- (a) notifying the other parties of the application and serving them with unsealed copies;
- (b) the reason/s for the need for abridgement; and
- (c) the order/s being sought.

If these requirements are not met, the application will likely be rejected.

### 15.7 Return date

The motions list in the Supreme Court start at different times, usually between 9.00am and 9.45am depending on the division. Matters that can be dealt with by consent are dealt with first, regardless of whether the orders are substantive or for adjournment. Each division of the Supreme Court and the District Court, has its own procedure for dealing with a particular list, but usually if the matter is by consent then Short Minutes of Order are handed to the Court Officer and the Registrar deals with the matters in the order received.

It is important to be familiar with the rules and legislation relating to the powers of judicial officers in relation to orders being sought in a motion.

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<sup>8</sup> Rule 18.4 of the *Uniform Civil Procedure Rules 2005* (NSW)

On the return date, parties in contested matters will need to indicate to the Court the estimated length of hearing of the motion and wait until a Judge becomes available to hear the motion.

In the Supreme Court, sometimes a motion can be dealt with by the Associate Justice. It is useful to seek a “not before” marking, that is, notification that a matter will not be heard before a certain time. This can prevent having to spend hours waiting in the Court for a matter to be heard. Matters ready to proceed will usually be dealt with in order of time estimate with shortest matters first.

In the District Court, the general motions list is called over by an Assistant Registrar but most matters are referred to the Judicial Registrar for hearing. The powers of the Judicial Registrar and the Registrar (exercised in Court by the assistant registrars) are different. With one exception, the Judicial Registrar of the District Court has the powers of the Court but the registrar has the only powers delegated by the Chief Judge.

The powers of the Registrars are set out at Section 13 of the *Civil Procedure Act* as well as the following legislation:<sup>9</sup>

- (a) *Supreme Court Rules* - Delegation to Registrars under section 13 of the CPA 2005;
- (b) Section 18FB of the *District Court Act*; and
- (c) Part 43A Rule 1 of the *District Court Rules*.

The Court has the power to make directions for the hearing of the motion, including determination of the motion in the absence of a party who has been served with a notice in accordance with the rules of the Court.<sup>10</sup>

Generally, the applicant will commence by telling the Court what the application is about and how it was made (e.g. “This is an application by the plaintiff applicant for an order that...”). The applicant usually outlines what the salient features of the application are, and then reads (hands up) any affidavit in support.

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9 See the Lawlink website for further information on the power of the Registrar in the District Court at: <[http://www.lawlink.nsw.gov.au/lawlink/district\\_court/ll\\_districtcourt.nsf/vwFiles/Delegated\\_Powers\\_of\\_Registrars.doc/\\$file/Delegated\\_Powers\\_of\\_Registrars.doc](http://www.lawlink.nsw.gov.au/lawlink/district_court/ll_districtcourt.nsf/vwFiles/Delegated_Powers_of_Registrars.doc/$file/Delegated_Powers_of_Registrars.doc)>

10 Rules 18.6 through to 18.9 of the *Uniform Civil Procedure Rules* 2005 (NSW)



The respondent must indicate any objection to the applicant's affidavit before it is read. The respondent also has the opportunity to cross-examine any of the applicant's deponents if the respondent has given reasonable notice to the applicant that the deponent is required to attend for cross examination. Usually in interlocutory applications, cross examination is not allowed except by leave of the Court. Furthermore, the strict rules of evidence, such as the hearsay rule, do not always apply.

If proper notice is provided and the witness fails to attend, the affidavit can only be read at the Court's discretion. The respondent then reads any affidavits which they rely upon. Finally, the applicant and respondent address the Court in turn. Given the congested motions list, you should be as concise as possible.

## 16. DRAFTING PLEADINGS

*Sharna Clemmett, Robert Ishak, Joshua Knackstredt and Laura Rush*

### 16.1 Introduction

The primary function of pleadings is to:

- (a) state the facts the parties intend to allege at the hearing to allow the other party a fair opportunity to meet the claim(s); and
- (b) define the issues in the litigation, enabling the relevance and admissibility of evidence to be determined.

Generally speaking, the first pleading is known as the plaintiff's statement of claim. The statement of claim alleges the material facts in summary form and specifies the relief or remedy claimed.<sup>1</sup> Once served with the statement of claim, the defendant must plead their defence. A reasonable cause of action must appear from the pleadings, otherwise the opposing party may apply for the pleading to be struck out.<sup>2</sup>

In New South Wales courts, rules relating to the structure of pleadings are contained in Parts 14 and 15 of the *Uniform Rules of Civil Procedure* 2005 (NSW) ('the **UCPR**').

In Federal Court proceedings, Order 11 of the *Federal Court Rules* sets out the requirements in relation to pleadings.

You should consult these closely before you start drafting a statement of claim, defence, cross-claim or reply.

### 16.2 Preparing the statement of claim

In drafting the pleadings in the statement of claim, you should consider the following:

- (a) the legal source of the claim and the party's standing to bring the claim;
- (b) cause(s) of action;
- (c) elements of the cause(s) of action;

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1 Rule 6.12 of the *Uniform Civil Procedure Rules* 2005 (NSW)

2 Rule 14.28(1)(a) of the *Uniform Civil Procedure Rules* 2005 (NSW)

- (d) facts; and
- (e) evidence.

These form a basic litigation model.

The legal source is your client's basic legal right, (based either in statute or on common law), which gives your client a cause of action. Standing is the entitlement of your client to bring that particular action and claim relief. Many statutes set out the classes of people who are entitled to claim statutory relief although standing is also determined by common law principles.

A useful technique is to write down all the elements of the cause of action or defence, and then systematically and precisely set out the material facts needed to prove each element. Use the active, rather than passive, voice and try to set out the details of "who", "when" and "what" for each fact. The pleading must satisfy all the elements of the cause of action by showing that there are sufficient facts to make out the elements of the case.

In order to demonstrate at trial that the facts exist, evidence must be gathered, which is usually set out in an affidavit. This highlights the distinction between pleadings and evidence.

The purpose of pleadings is to set out, in written summary form, the material facts upon which the client intends to rely in support or defence of a claim. The pleading should not contain the evidence by which those facts are to be proved.

Evidence is to be provided by way of a party's affidavit(s), not their pleading.

### 16.3 Particulars

The general rule is that:

a pleading must give such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet<sup>3</sup>

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3 Rule 15.1(1) of the *Uniform Civil Procedure Rules* 2005 (NSW) and see Order 12 of the *Federal Court Rules*

Particulars serve two functions: (a) defining the pleadings, and (b) narrowing the scope of the issues in dispute.

### 16.3.1 Defining the pleadings

This includes identifying, for example, whether an agreement or a representation was in writing or oral, whether the terms of a contract were express or implied (and if so, by law or in fact) and the like. A well prepared pleading will demand the party pleading has first obtained as full a picture of the facts as possible, including identifying the necessary documentary evidence and taking statements from a party's witnesses. Once you have this, providing particulars of all of the allegations will, without committing you to the precise evidence, demonstrate the strength of your case while also being a discipline for ensuring you have thought through not only your case but how it is to be proved.

### 16.3.2 Narrowing the scope of the issues in dispute

Particulars are not pleadings. You do not plead a defence or reply to particulars, but they do make clear what the case is that is being put.

You must give particulars of certain matters, such as allegations of fraud, conditions of the kind (disorder or disability, malice or fraudulent intention, but not knowledge), negligence and breach of statutory duty, and claims for out of pocket expenses, and aggravated and exemplary damages. Particulars may be provided either in the body of the pleading or in a separate document referred to in the pleadings.<sup>4</sup> In the District Court, any particulars required should have been requested and provided by the time of the pre-trial conference.<sup>5</sup>

In personal injury proceedings, particulars as well as certain documents recording medical treatment, insurance payouts, wages and income and the like must also be provided.<sup>6</sup> Detailed particulars must be given in defamation claims and defences.<sup>7</sup>

Be aware that, if you plead or particularise documents, the other party is entitled to serve a notice to produce for production of the documents or things referred to in the pleadings. If you are concerned about a defendant's intention to delay proceedings, serving documents with

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4 Rule 15.9 of the *Uniform Civil Procedure Rules 2005* (NSW)

5 Paragraph 3.3, Practice Note DC (Civil) No.1

6 See Part 15, Division 2 of the *Uniform Civil Procedure Rules 2005* (NSW)

7 See Part 15, Division 4 of the *Uniform Civil Procedure Rules 2005* (NSW)

good particulars in the pleadings will help prevent or minimise the scope for the other party to engage in delay tactics.

## 16.4 Preparing the defence

Several types of pleas are available to the defendant. These may be adopted together or in part. The main pleas are:

- (a) admissions;
- (b) non-admissions; and
- (c) denials of all or some of the plaintiff's allegations.

Sometimes you will include two or even all three of these pleas in a single pleading. For example, if the plaintiff alleges:

4. At all material times, the plaintiff [a travelling salesman] carried out the work in accordance with the terms and conditions of employment,

the defendant company may plead:

1. In answer to paragraph 4 of the Statement of Claim, the defendant:
  - (a) admits that at all material times the plaintiff was employed by the defendant between 9am and 5pm Mondays to Fridays each week with a lunch hour between 1 and 2pm;
  - (b) admits that the plaintiff performed the work in accordance with the terms and conditions of employment at material all times up until 30 April 2006 and during the days of Monday to Thursday in May 2006;
  - (c) denies that on Fridays in May 2006 between the hours of 9am and 1pm the plaintiff performed the work in accordance with the terms and conditions of employment; and
  - (d) otherwise does not admit the paragraph.

The reason for the denial in (c) may be that the employee was discovered moonlighting for another company on Friday mornings. The reason for the non-admission in (d) is that, while the defendant does not know the plaintiff was working for the other competitor in the afternoons, it suspects as much, or that the plaintiff was slacking off, such as because sales were down 20% for the month – the equivalent of a full day's work, and has decided that a non-admission is appropriate. The plaintiff can then be required to prove he or she did the work on Friday afternoons as well as Friday mornings.

Other pleas may:

- (a) challenge the sufficiency of the plaintiff's claim;
- (b) allege special matters or facts that defeat the claim; or
- (c) raise a set-off and counter-claim.

Every fact alleged in a statement of claim should be expressly answered in the defence, otherwise it may be construed as an admission. A party may plead inconsistent and alternative versions of a claim or defence. So a defendant may, in their pleading, deny a contract with the plaintiff and, in the same proceedings, counter-claim for damages for a breach of the same contract that is originally denied.

In the District Court, the Court expects that, in most cases, the defendant should have filed and served any defence by the time of the pre-trial conference.<sup>8</sup>

## 16.5 Cross-claims

A cross-claim is the pleading by which a defendant makes an allegation against the plaintiff or against a third party. While the prescribed form is slightly different to a statement of claim, the approach to pleading a cross-claim is largely the same as a statement of claim. When drafting a cross-claim, it is common to repeat (without admission) certain paragraphs of the statement of claim ensure there is no repetition.

In the District Court, the Court expects that, in most cases, the defendant should have filed and served any cross claim by the time of the pre-trial conference.<sup>9</sup>

## 16.6 The reply

UCPR 14.4 provides that:

- (a) in proceedings in the Supreme Court or the District Court, a plaintiff may file a reply to a defence;
- (b) in proceedings in a Local Court, a plaintiff may file a reply to a defence only by leave of the Court; and
- (c) the time limited for the plaintiff to file a reply is 14 days after service of the defence on the plaintiff.

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8 Paragraph 3.3, Practice Note DC (Civil) No.1

9 Paragraph 3.3, Practice Note DC (Civil) No.1

A reply is typically used when the defendant raises some sort of positive defence of fact (e.g. admitting a contract was agreed, but claiming it was terminated before the breach occurred) or law (e.g. limitation period), in a way that does not amount to a cross-claim for relief against the plaintiff to which a defence will in due course be filed.

### 16.7 *The Legal Profession Act 2004 (NSW)*

Section 347 of the *Legal Profession Act 2004* requires that a law firm cannot file court documentation on a claim or defence to a claim for damages unless a principal of the practice (or a lawyer responsible for the provision of the legal service concerned) certifies that there are reasonable grounds for believing, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success. You should ensure that you are satisfied that your client has reasonable prospects of success before certifying a claim or defence. Failure to comply with section 347 may be grounds for a finding of unsatisfactory professional conduct or professional misconduct against you.

In practice a document, known as a “section 347 certificate”, is attached to the relevant pleading. The certificate must be signed by a lawyer before the pleading is filed. At the point of signing the pleading, the solicitor must have a reasonable basis for making each allegation (i.e. being able to prove it on the information they have to hand).

### 16.8 Precedents

When drafting pleadings, most solicitors make use of pleading precedents. Young CJ in Eq. (as his Honour then was) that precedents are for the guidance of wise people and for the obedience of fools. A precedent will rarely cover every situation – do not follow a precedent blindly. Instead build on a precedent to suit your purpose. When drafting a pleading, you should be mindful of Abraham Lincoln, who said “in law, it is good policy to never plead what you need not, lest you oblige yourself to prove what you cannot”.

A good source of pleading precedents can be found in *Court Forms, Precedents & Pleadings* (LexisNexis looseleaf service); *Bullen, Leake's & Jacob's Precedents of Pleadings* (many editions) and *Equity Practice and Precedents* by Wood, Finnane and Newton.



Part 4  
Interstate and  
International  
Civil Litigation







## 17. INTERSTATE AND INTERNATIONAL PROCEEDINGS

*Justin Hogan-Doran*

### 17.1 Overview

This topic is complex and requires a good understanding of conflict of laws rules affecting jurisdiction of courts. Further reading is essential and you should give serious consideration to seeking the advice of an experienced lawyer in this field. Set out below are some basic rules and procedures for commencing proceedings interstate and overseas, and the transfer of proceedings interstate and abroad. Issues not considered in this chapter include the use of anti-suit injunctions, the impact of international commercial arbitration agreements, choice of law issues affecting jurisdiction, and gathering evidence abroad.

### 17.2 Commencing and maintaining proceedings against interstate defendants

The core legislation relating to interstate litigation is the *Service and Execution of Process Act 1992* (Cth) ('SEPA').

Part 2 of the SEPA applies to all civil proceedings in a court. The effect of the SEPA is to extend the territorial jurisdiction of the Supreme, District and Local Courts to the territorial boundaries of the Commonwealth by permitting service of initiating process in other States and Territories.<sup>1</sup> The originating process must be served with an accompanying form.<sup>2</sup> This is an easily overlooked requirement of interstate proceedings. Once service has been effected, an appearance must be filed within the longer period of either 21 days or the period set down for entering an appearance according to the rules of the Court of issue.<sup>3</sup>

Part 3 of the SEPA contains provisions enabling and regulating interstate service of subpoenas. A notice in accordance with Form 2 of the Regulations should be used.

Part 4 of the SEPA is similar in effect to Part 2, but enables service of initiating process of tribunals, such as the Consumer, Trader and

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1 Section 15 of the *Service and Execution of Process Act 1992* (Cth)

2 Form 1 of Schedule 1 to the *Service and Execution of Process Regulations 1993*

3 Section 17(1),(1A) of the *Service and Execution of Process Act 1992* (Cth)

Tenancy Tribunal. There is no provision for transfer between tribunals or between a tribunal and another State or Territory's courts. However, the relevant provisions of Part 4 only applies to classes of proceedings that concern:<sup>4</sup>

- (a) real property within the State in which the tribunal is established; or
- (b) a contract, wherever made, for the supply of goods or the provision of services of any kind (including financial services) within that State; or
- (c) an act or omission within that State; or
- (d) the carrying on of a profession, trade or occupation within that State; or
- (e) a pension or benefit under a law of that State; or
- (f) the validity of an act or transaction under a law of that State.

A notice in accordance with Form 4 of the Regulations is to be used with service of the initiating process.

### 17.2.1 Transferring proceedings between States

Any party may make an application to transfer proceedings at any time. The question of where the proceedings should be continued depends on the application of criteria under the applicable legislation.

In the Supreme Court of New South Wales or the Federal Court, Sydney Registry, an application to transfer is made under section 5 of the Uniform Cross-Vesting Legislation.<sup>5</sup> Parties usually seek that a proceeding be transferred from one State Supreme Court to another if "it is otherwise in the interests of justice that the relevant proceeding be determined by the other [State's] courts".<sup>6</sup> This broad test is similar to the 'natural forum' test used by English Courts to determine international transfer of jurisdiction questions.

In the District or Local Court of New South Wales, you should look at the criteria set out in section 20(4) of the SEPA. The test is whether the other State or Territory's court is "the appropriate court for the proceeding".<sup>7</sup> This is similar to the English 'natural forum' approach. However, the

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4 Section 48 of the *Service and Execution of Process Act 1992* (Cth)

5 In New South Wales this is the *Jurisdiction of Courts (Cross-Vesting) Act 1987*

6 Section 5(3)(b)(iii) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987*

7 Section 20(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987*

court is able to take into account the financial circumstances of the parties. An important factor is the location of witnesses. Documents may be moved around, but it is more expensive to have witnesses, and especially inconvenient to non-party (strangers) witnesses who would have to take time out of their work and lives to travel to give relevant evidence.

## 17.3 Commencing and maintaining proceedings against international defendants

### 17.3.1 Commencing proceedings against a foreign defendant

The jurisdiction of the Australian court (State or Federal) depends on there being a connecting factor between Australia and the defendant. You need to satisfy yourself, and be able to prove, that at least one of the connecting factors listed in Schedule 6 of the *Uniform Civil Procedure Rules 2005* ('UCPR') or Order 8, rule 2A of the Federal Court Rules applies to your client's cause of action. In civil litigation, the most common will be:

- (a) for contractual disputes, that the contract was made in NSW, made by or through an agent (of the foreign party) resident in Australia, governed by NSW law, or breached in NSW;
- (b) for tort claims, that the tort was committed in NSW or the damage was wholly or partly suffered in NSW; and
- (c) for statutory actions, where the proceedings are in relation to the construction, effect or enforcement of an Act, regulations or any other instrument having, or purporting to have, effect under an Act. Breach in Australia of an Act is enough in the Federal Court, and any 'cause of action arising in' the State will suffice in NSW. You should ensure that any territorial limits under the Act are complied with.<sup>8</sup>

You should consider the factors and consult further legal resources to determine which head of jurisdiction applies. In seeking leave (to serve outside of the jurisdiction or to proceed), evidence will be required in affidavit form to prove that the head of jurisdiction is satisfied.

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8 For example see section 5 of the *Trade Practices Act 1974* (Cth)

### 17.3.2 How can I commence proceedings against a foreign defendant?

Proceedings can only be commenced against foreign (ex-Australia) defendants in the Supreme Court of New South Wales or in the Federal Court.

In the Supreme Court of NSW, you do not need leave of the court to serve a foreign defendant. However, if the foreign defendant does not enter an appearance, you will need leave to continue. Leave is sought by notice of motion.<sup>9</sup>

In the Federal Court, you need to seek leave from a judge to serve the originating process outside of Australia. Leave can be granted after service.<sup>10</sup> When seeking leave, you need to be able to prove that you have a prima facie case.

In the Supreme Court of NSW, the initiating process must be served with a notice document in the form of Form 13A of the Prescribed Forms.

### 17.3.3 Can the proceedings then be transferred abroad?

A foreign defendant can apply to stay the local proceedings in favour of existing or future proceedings in another country. Under both State and Federal Rules of Court, the test is whether or not Australia (or the State in question) is a 'clearly inappropriate forum' to hear the dispute and determine the issues in dispute. This is a more difficult test to satisfy than for interstate transfers.

As with interstate transfers, there are many factors involved. These include:

- (a) the connection between the forum and the subject matter of the action or the parties;
- (b) any legitimate substantial juridical advantage to the plaintiff (such as a favourable limitation provision or assets in the jurisdiction to enforce against);
- (c) the availability of the other forum and the adequacy of its relief and the substantive law to be applied according to choice of law rules;
- (d) any agreement between the parties giving exclusive jurisdiction in favour of one court or another.

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9 Rule 11.4 of the *Uniform Civil Procedure Rules 2005* (NSW)

10 Order 8 of the *Federal Court Rules*

## 17.4 Tactical and client service issues

International and interstate jurisdiction disputes can be important to the outcome of any trial. Who starts first can be important. If there is any risk that the possible defendant will commence proceedings in a jurisdiction of his or her choosing, you should NOT send a letter of demand warning of impending proceedings. If your client may potentially be a defendant, consider commencing proceedings locally to obtain a declaration of no liability (a 'negative declaration' proceeding).

When preparing agreements, you should ensure that a choice of jurisdiction and choice of law clauses are included. These clauses should identify:

- (a) the jurisdiction preferred;
- (b) whether the choice is exclusive or non-exclusive;
- (c) the choice of law for the agreement; and
- (d) possibly provide for an indemnity for breach of that clause.





Part 5  
Judgment Before  
Trial







## 18. JUDGMENT BEFORE TRIAL

### *Stuart Brady and Tannie Kwong*

For the purposes of this chapter, Statement of Claim also includes Statement of Cross Claim, and the Plaintiff and Defendant also includes the Cross-Claimant and Cross-Defendant respectively.

### 18.1 Introduction

After a plaintiff has commenced proceedings, if the defendant does not contest the matter, such as by entering a defence, the plaintiff can obtain judgment in its favour without having to go to trial.

The *Civil Procedure Act* 2005 (‘the CPA’) changed this area of practice for the better. Gone are the technicalities of different originating process and other documents, gone are the different regimes of obtaining judgment that varied with the nature of relief sought and gone are the many different court forms.

This chapter considers the current regime from the perspective of the former regime in order to explain the history of this area and also to provide a vocabulary to understand judgments from cases that use now obsolete language. The five topics to be considered are:

- (a) default judgment;
- (b) orders for judgment;
- (c) summary judgment and summary dismissal;
- (d) strike out; and
- (e) liquidated and unliquidated damages.

There are two main classes of actions when discussing judgment before trial:

- (a) undefended matters; and
- (b) matters that are defended in form but not in substance.

Matters that are completely undefended lead to applications for default judgment and orders for judgment. Matters that are undefended in substance lead to applications for summary judgment and strike out.

## 18.2 Default judgment

Before the CPA default judgment was confined to claims for liquidated damages. "Default judgment" is now an all-encompassing term for all cases, whether or not damages are liquidated or unliquidated, and whether or not the relief sought is damages or something else. Traditionally, the term was derived from a default in procedure by the defendant. Today, the nature of the default has been broadened to situations where:<sup>1</sup>

- (a) no defence is filed within the prescribed time;
- (b) a defence that is required to be verified is filed within the prescribed time, but is not verified;
- (c) a defence is filed within time (and verified if needs be), but is subsequently struck out.

However, there are exceptions for some situations where a defendant would otherwise be considered to be in default.<sup>2</sup>

To apply for default judgment, you should prepare one of the approved forms of notice of motion.<sup>3</sup> Where the plaintiff has a 'mixed claim' (e.g. a claim for both liquidated and unliquidated damages), complete more than one form and file them separately at the registry.<sup>4</sup>

The approved forms incorporate both a notice of motion and a supporting affidavit. To obtain default judgment, you should:

- (a) Check the statement of claim and ensure that it falls within one of the categories set out in Rule 16 of the *Uniform Civil Procedure Rules 2005* ('the **UCPR**):
  - (i) a claim for possession of land;<sup>5</sup>
  - (ii) a claim for detention of goods;<sup>6</sup>
  - (iii) a debt or liquidated claim;<sup>7</sup>
  - (iv) a claim for unliquidated damages;<sup>8</sup> or

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1 Rule 16 of the *Uniform Civil Procedure Rules 2005* (NSW)

2 Rule 16.2(2) of the *Uniform Civil Procedure Rules 2005* (NSW)

3 Forms 36, 37, 38 or 39

4 Rule 16.8 of the *Uniform Civil Procedure Rules 2005* (NSW)

5 Rule 16.4 of the *Uniform Civil Procedure Rules 2005* (NSW)

6 Rule 16.5 of the *Uniform Civil Procedure Rules 2005* (NSW)

7 Rule 16.6 of the *Uniform Civil Procedure Rules 2005* (NSW)

8 Rule 16.7 of the *Uniform Civil Procedure Rules 2005* (NSW)

- (v) a mixed claim, being two or more of the above claims, but not including any other type of claim.<sup>9</sup>
- (b) Check that the originating process is a statement of claim and not a summons.
- (c) Attach an affidavit of service to your motion for default judgment to establish service of the statement of claim. An affidavit of service is sworn by the person who served the statement of claim (usually a process server). The affidavit contains facts that enable a court to conclude that service was effected.
- (d) You should always check an affidavit of service received from a process server. Errors can occur in these documents which can cause delays and impact your ability to obtain default judgment.
- (e) If the statement of claim is served by the court by post, such as in the Local Court, you do not need to attach an affidavit of service to the motion for default judgment; simply state on your affidavit the date that the statement of claim was served.
- (f) Call the court registry to confirm that the defendant is in procedural default before making your application for default judgment. The Court will confirm this after you have applied for default judgment.
- (g) Demonstrate that the claim remains unsatisfied. Traditionally, this was achieved by completing an affidavit of debt. The affidavit was usually sworn by the plaintiff or the plaintiff's solicitor and deposes to:
  - (i) the amount of the original claim; less
  - (ii) any payments made since proceedings were commenced; plus
  - (iii) interest, plus costs and disbursements.
- (f) The affidavit of debt used to be filed as a separate document, but has now been incorporated into the approved forms of notice of motion.
- (g) The court rules do not state whether simple or compound interest should be used. You should follow the court's lead in using simple interest (unless your client's claim contains an alternative, such as an agreed interest clause).<sup>10</sup>

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<sup>9</sup> Rule 16.8 of the *Uniform Civil Procedure Rules 2005* (NSW)

<sup>10</sup> The current rate of interest is available here: <<http://www.legislation.nsw.gov.au/fragview/inforce/subordleg+418+2005+sch.5+0+N>>

There is no requirement that the notice of motion for default judgment be served on the other parties to the proceeding. The motion should be filed with the court. Check with the court registry whether you are required to prepare a request for a certificate of judgment and pay any fee. If so, this should be sent together with your notice of motion to minimise any delay in receiving your judgment.

Unless the claim is unliquidated, the motion will be considered in chambers and no appearance will be required. You will be notified in writing of the outcome. A reason will be provided if the application is refused.

Once default judgment has been entered, you should consider enforcement proceedings such as filing a notice of motion for the writ of levy of property, filing an application to have the defendant's wages garnished, or filing an application for bankruptcy or liquidation.

### 18.3 Order for judgment

Since default judgment is now an all encompassing term for all cases, whether or not damages are liquidated or unliquidated, and whether or not the relief sought is damages or something else, orders for judgment are obsolete.

Prior to the commencement of the *Civil Procedure Act 2005* (NSW), orders for judgment were sought before trial in cases where matters were completely undefended, in which the Plaintiff claimed unliquidated damages. They were most common in undefended claims for personal injury.

### 18.4 Setting aside default judgment

One of the most common applications, particularly in the Local Court, is an application to set aside a default judgment. How a defendant can vary or set aside default judgment is described by the rules of the particular court. However, the procedure is virtually identical in all courts.

A defendant files a notice of motion seeking that judgment be set aside together with an affidavit in support of the motion. The affidavit in support deposes to evidence which, if accepted, would give rise to the court's power to set aside its judgment. The source of a court's power to do so is found in the statutes and rules of the respective court.

The remainder of this section will consider courts whose procedure is governed by UCPR 36.16(2).<sup>11</sup>

When considering whether to set aside a default judgment, the Court considers:

- (a) if the defendant has a prima facie defence. If not, then the motion is dismissed. If the defendant satisfies the court that prima facie judgment should be set aside, then, the Court considers:
- (b) the impact on the plaintiff, if any, of setting aside judgment. Setting aside a judgment may substantially prejudice a plaintiff – if so, the defendant’s notice of motion may be dismissed.

A defendant who wishes to set aside a judgment should persuade the court that:

- (a) there is a reasonable explanation for the default in procedure; and
- (b) the defendant has a valid defence on the merits.

A reasonable explanation may be that the statement of claim was served by post and the defendant never received it. Or, the defendant may have received the statement of claim and sought legal advice, leaving the matter in the hands of a solicitor who failed to file a defence in time. In practice, it is often easy to satisfy the court that the defendant has a reasonable explanation for the default. The courts are hesitant to deny defendants the opportunity of a full hearing of their case at trial.

However, a court may set aside default judgment even when there is no apparently reasonable explanation.

To demonstrate a bona fide defence on the merits, a defendant should depose to facts which, if accepted at trial, would constitute a defence to the claim. For example, if a plaintiff brings a claim for damages to his motor vehicle, alleging that while he was driving his motor vehicle, the defendant was driving another motor vehicle in a negligent manner and caused a collision between the vehicles resulting in damage, the defendant may assert that he was not the driver of the alleged vehicle. If accepted, the defendant could not be liable to the plaintiff.

However, a mere denial or assertion that the defendant is not indebted to the plaintiff is insufficient. A defendant must depose to facts which give rise to a legal defence.<sup>12</sup>

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11 See also Rules 36.15 and 36.16 of the *Uniform Civil Procedure Rules 2005* (NSW)

12 See *Tunnecliffe v Besnard* (1938) 55 WN (NSW) 58

You should check that you are using the current version of the court forms.<sup>13</sup> By not using the correct court forms you may be omitting important information and, in the case of a plaintiff, the Registrar may set aside default judgment without costs.

The responding party will often ask for costs for their appearance at the motion hearing, regardless of whether the motion to set aside was successful or not successful.

An excellent summary of the law relating to the setting aside of default judgments can be found in *Adams v Kennick Trading (International) Ltd* (1986) 4 NSWLR 503.

## 18.5 Summary judgment and strike out

### 18.5.1 Introduction

Summary judgment and strike out are concerned with judgment before trial in cases where matters appear at first glance to be defended or prosecuted, but in fact are not. That is they are defended or prosecuted in form but not substance. Perhaps paperwork has been filed with the court, but for one reason or another, that paperwork does not constitute a proper defence or cause of action. Plaintiffs often raises these issues at the first pre-hearing opportunity, such as at callovers and pre-trial reviews.

A defence or claim may be at risk of being struck out if:

- (a) the defence or claim is poorly expressed. As a result of poor drafting or irrelevant subject matter it may be impossible to determine what legal defence or cause of action the paperwork is attempting to articulate; or
- (b) the defence or claim may express a very clear reason why the defendant asserts it is not liable to the plaintiff or the plaintiff asserts the defendant is liable to it, but this reason may not constitute a legal defence or cause of action.

Examples of poorly expressed pleadings failing to constitute a legal defence or cause of action almost always accompany unrepresented litigants.

The classic example of a defence clearly expressed but of no legal effect is the so-called "sausage defence". This defence became notorious in debt

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13 See <[http://www.lawlink.nsw.gov.au/lawlink/spu/ll\\_ucpr.nsf/pages/ucpr\\_forms](http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_forms)>

recovery proceedings. When a defendant was served with a statement of claim in debt recovery proceedings, the defendant filed a defence that stated, “the plaintiff is a sausage”. The reason for doing this was that the plaintiff was denied the opportunity of entering default judgment because a defence had been entered. Also, time was taken up by the Court in processing the defence. This effectively provided defendants (who were debtors) with more time to pay the debt to plaintiffs (the creditors). The rules were amended to prohibit the sausage defence and any similar defence.

In practice, applications for summary judgment and strike out are considered together and are often alternatives to one another. Experience teaches you when one will be preferred over the other. Typically, unrepresented litigants will be granted a great deal of leniency where a legal defence or claim is poorly expressed. A court will typically search through the document and attempt to determine whether or not there is any conceivable legal defence or claim. The court may also:

- (a) interrogate the unrepresented litigant when considering whether or not to grant an application for summary judgment or strike out; or
- (b) adjourn proceedings to enable the defendant to file a proper and/or an amended defence.

### 18.5.2 Summary judgment and summary dismissal

Summary judgment is the handing down of a final judgment by the court, where no purpose would be served by proceeding to trial.

An application for summary judgment will only be successful:

- (a) for the plaintiff when, even if evidence was admitted to prove all the assertions alleged in the defence, the plaintiff would be successful; and
- (b) for a defendant when, even if evidence was admitted to prove all the assertions alleged in the statement of claim, the defendant would be successful (also called summary dismissal).

This section will consider each of these forms of summary judgment as if they were the same although there are several necessary distinctions between them in the rules.

The procedure to obtain summary judgment is contained in the rules of the relevant court and is virtually identical in all courts.



The procedure is as follows:

- (a) the plaintiff files a notice of motion seeking summary judgment. The motion may be accompanied with an affidavit in support (depending on the basis upon which summary judgment is sought). An affidavit in support of an application for summary judgment may contain little more than annexed correspondence passing between the parties discussing the faults of the defence.
- (b) A party seeking summary judgment or summary dismissal must meet the following test:

...the Plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action - if that be the ground on which the Court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense.' At times the test has been put as high as saying that the case must be so plain and obvious that the Court can say at once that the Statement of Claim, even if proved, cannot succeed; or 'so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument'; 'so to speak apparent at a glance'.<sup>14</sup>

This dicta has been applied by the Court of Appeal in *Rajski v Powell*<sup>15</sup> where Kirby J held that a claim should not be summarily dismissed unless:

...the relief [of summary dismissal] sought is conserved to clear cases where the claim made is 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; or where 'manifestly to allow them to stand would involve useless expense'.

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14 *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125 at 129

15 *Rajski v Powell* [1987] 11 NSWLR 522 at 524 per Kirby P

Summary judgment is a final judgment of the court and can only be set aside if the unsuccessful defendant can find some way of attacking a final judgment of the Court. This will usually be confined to an appeal.

### 18.5.3 Strike out

Summary judgment is concerned with the trial being a waste of time because there is no legal defence or cause of action. In contrast, strike out is concerned with ensuring that time is not wasted at a trial because the legal defence or claim relied upon is unclear. A plaintiff's application to strike out a defence is, in substance, a formal assertion by the plaintiff that the defence has been pleaded in an unsatisfactory way. Any part of a pleading may be sought to be struck out at any time in the proceedings.

The rules of each court set out requirements for pleadings. An application to strike out pleadings should be made with careful consideration of the rules of pleading for that court. However, it is possible that a defence may comply with the pleading rules of the court, yet still be liable to be struck out because the defence is unsatisfactory.<sup>16</sup>

The procedure of striking out a defence is the same as obtaining summary judgment. A plaintiff files a notice of motion supported by an affidavit. The affidavit may do nothing more than annex correspondence passing between the parties. Correspondence passing between the parties before the filing of the motion is very important on the question of costs. Often pleadings are drafted in a hurry, and there may not have been an opportunity to plead to as high a standard as would be possible had more time been available. This is readily recognised by the courts. In such a case, the proper procedure to adopt is for the plaintiff to write to the defendant, expressing the plaintiff's view that the pleading is unsatisfactory, and affording the defendant an opportunity to file an amended pleading. Very often, if a plaintiff follows this procedure, the defendant will file an amended pleading that is satisfactory.

In such circumstances, there should be no motion seeking to strike out. Only if the defendant fails to meaningfully respond to the plaintiff's correspondence should the plaintiff bring an application to strike out the defence. If the plaintiff fails to communicate with the defendant before filing the motion, then the plaintiff runs a risk of an adverse costs order.

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16 Rule 14.28 of the *Uniform Civil Procedure Rules 2005* (NSW)

## 18.6 Liquidated and unliquidated damages

Both liquidated and unliquidated damages are types of damages. The difference between them is the way in which the quantum of damages is calculated.

Butterworths' *Australian Legal Dictionary* 1997 defines "liquidated damages" as:

Damages sought or awarded to a plaintiff, the amount being a sum fixed by the parties to a contract as a genuine pre-estimate of the plaintiff's loss in the event of the defendant's breach or ascertainable by a simple calculation or fixed by any scale of charges or other positive data.

The same dictionary defines "unliquidated damages" as:

Damages for a loss whose existence is certain, but whose work in damages can of its nature only be estimated, not calculated exactly. The common law describes some causes of action as sounding in liquidated damages, and treats all others as unliquidated. The modern criterion is that if the common law has not classified the cause of action as sounding in liquidated damages, damages are unliquidated unless they can be calculated by reference to a scale of charges or other positive data.

These definitions of liquidated and unliquidated damages hide a complex web of decisions in particular cases. The task of determining the principles to be applied to a particular set of facts to decide whether or not a claim for damages is liquidated or unliquidated is very complex.

There are a large number of settled classes of claims which the courts have classified as either liquidated or unliquidated. All the common types of claims have been classified. Whether or not a particular claim is either liquidated or unliquidated almost never arises for consideration. The only consideration in the last 12 years that the authors are aware of is one issue that arose in claims for demurrage.<sup>17</sup>

When determining whether or not a claim for damages is liquidated or unliquidated, you should ask:

if the matter went to trial, could the court accept a precise figure submitted by the plaintiff or must the court determine the precise figure itself?

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17 *Anthanasopoulos v Moseley* (2001) 52 NSWLR 262

If a precise figure can be accepted, then the claim is likely to be a liquidated claim. If a precise figure cannot be accepted, then the claim is likely to be an unliquidated claim.

An example of a liquidated claim is a claim for damages for goods to be purchased and delivered, but not paid for. In such a case, any contract between the parties will have specified a price. If no money has been paid by the defendant, then the quantum of damages is the contract price.

An example of an unliquidated claim is a claim for personal injuries and, in particular, a claim for general damages. A plaintiff may have a shortened life expectancy or may have lost the ability to play with his or her children. A precise dollar figure cannot be determined for these two losses. In either case, a court is required to determine an appropriate sum. The best that a plaintiff can do is make a submission as to the range in which an appropriate sum falls.

Motor vehicle accidents are a statutory exception to the traditional classes of liquidated and unliquidated damages. When damage results from a car accident there are two methods for determining the plaintiff's entitlement to damages. Both those methods require a determination of what is fair and reasonable. That determination is usually made after receipt of expert evidence. However, UCPR 14.13 effectively deems such claims to be liquidated claims. This enables a plaintiff claiming damages for, say, the costs of repairs to his motor vehicle, to obtain default judgment. This removes the need to call expert evidence establishing that the cost of repairs was fair and reasonable. This exception is likely a practical measure aimed at reducing the court's workload.

For example, liquidated damages in motor vehicle collisions would include the cost of repairs, the pre-accident value of a total loss vehicle, towing costs. Unliquidated damages may include demurrage, such as cost for a replacement hire-car for the time the plaintiff's vehicle is off the road.





Part 6  
Mediation





## 19. MEDIATION AND NEGOTIATION

*Michael Bacina, Sharna Clemmett, Karen Dunham, Rachel Mansted and Laura Rush*

### 19.1 Introduction

Mediation is a form of dispute resolution in which a neutral third party attempts to assist the parties to resolve their dispute through negotiation. Unlike arbitration or adjudication (by a judge), the mediator has no power to determine the dispute for the parties. Unlike many conciliation processes, the mediator does not give advice to the parties. The mediator's role is purely facilitative.

Mediation is thus the least intrusive form of third party involvement to resolve a dispute, offering a quick and inexpensive way to confidentially resolve a dispute to satisfy the parties' real interests. The informality of mediation allows parties to control the dispute resolution process and explore creative solutions to satisfy their interests. Mediation improves settlement rates, whether the mediation is undertaken on a voluntary or compulsory basis. Even an 'unsuccessful' mediation can reduce the scope of issues in dispute and increase settlement prospects.<sup>1</sup>

### 19.2 Reasons for and benefits of mediation

#### 19.2.1 Benefits of mediation

The acknowledged potential benefits of mediation include:

- (a) cost and time savings;
- (b) privacy and confidentiality;
- (c) the ability of the parties to maintain on-going relationships; and
- (d) availability of creative dispute resolution options beyond that which Courts can or will order.

While mediation is not appropriate for all disputes, it can provide a resolution to a dispute that has real satisfaction for the parties, rather than having a determination of the dispute imposed on the parties through the court system. An imposed determination can leave the effects of the dispute lingering and allow further disputes to arise.

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1 Allan J Stitt, *Mediation: A Practical Guide*, (Cavendish Publishing, 2004), p.8



### 19.2.2 When is mediation appropriate?

In many lists of the Supreme or District Court, a practitioner is expected to have considered whether mediation is appropriate before attending any status conference or directions hearing.<sup>2</sup> Mediation may be particularly appropriate in situations where the parties:

- (a) have an otherwise good business relationship, which they seek to preserve;
- (b) want control over the dispute resolution process;
- (c) seek to minimise costs and lost productivity as a result of employee and management involvement in the litigation; or
- (d) want to preserve confidentiality in relation to the subject matter of the dispute.

### 19.2.3 Court ordered mediation

Mediation is usually voluntary, but can be court ordered in which case the Court by its orders, rules or Practice Notes may regulate the conduct of the mediation.<sup>3</sup> Under court ordered mediation, the mediator does not need to be accredited,<sup>4</sup> may make orders or directions,<sup>5</sup> and is granted the same protection from liability as a judicial officer.<sup>6</sup>

## 19.3 Finding a mediator and location for a mediation

The Australian Commercial Disputes Centre<sup>7</sup>, the Institute of Arbitrators and Mediators of Australia (IAMA)<sup>8</sup> and LEADR<sup>9</sup> can provide you with

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2 See for example Practice Note SC CL 1, clause 23 for all Common Law Division matters; Practice Note SC Eq 1, clause 5, for all Equity Division matters; Practice Note SC Eq 3, clauses 22 and 59-61, for technology and construction lists matters; Practice Note DC (Civil) 1 (7 September 2009), clauses 8.4, 9.2, for proceedings in the General List of the District Court

3 See Part 4 of the *Civil Procedure Act* 2005 (NSW); UCPR Part 20, Division 1; Practice Note SC Gen 6 'Mediation' in the Supreme Court and clauses 5.9, 8.3, 9.2 of Practice Note DC (Civil) 1 (7 September 2009) in the District Court (which applies only to court approval of settlements as required by Sections 75-76 of the *Civil Procedure Act*)

4 See Section 26(2) of the *Civil Procedure Act* 2005 (NSW)

5 See Section 32 of the *Civil Procedure Act* 2005 (NSW)

6 See Section 33 of the *Civil Procedure Act* 2005 (NSW)

7 See <<https://www.acdcltd.com.au/>>

8 See <<http://www.iama.org.au/>>

9 See <<http://www.leadr.com.au/hiremediationrooms.htm>>

referrals to specialist mediators and also hire out rooms specifically equipped for mediations.

You should seek as much information as you can find about a particular mediator's strengths and weaknesses, and whether their style of conducting mediations helps or hurts your client. For example, if your client is easily cowed, an interventionist mediator may not assist. If your opponent has significant legal or evidentiary problems, a mediator with a judicial background may influence matters in your client's favour.

Generally, a mediation venue should:

- (a) be 'neutral territory' – not the offices of any of the parties, but it may be of their lawyers;
- (b) provide separate rooms to allow each party to break for private discussion throughout the mediation;
- (c) provide a private, semi-formal, and comfortable environment;
- (d) have equipment (e.g. whiteboards) to facilitate the generation of creative dispute resolution options;
- (e) provide sufficient scope for the mediator to decide how to set up the room.

## 19.4 The mediation agreement

Your client will be required to sign a mediation agreement with the mediator.<sup>10</sup> The mediation agreement sets out the obligations of the parties to the mediator, including releases in respect of the mediator's actions and terms for payment of the mediator's fees, which are usually paid in advance but may be subject to an order of the court.<sup>11</sup>

## 19.5 Confidentiality

The confidentiality of communications made during mediation is protected by confidentiality provisions in the mediation agreement,

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<sup>10</sup> A sample Mediation Agreement is at Schedule 1 to the *Guidelines for Commercial Mediation* available from the Australian Commercial Dispute Centre – <https://www.acdcltd.com.au/> accessed 6 January 2009

<sup>11</sup> See section 28(b) of the *Civil Procedure Act* 2005 (NSW)

as well as legislative and common-law exclusions on communications made during an attempt to settle a matter.<sup>12</sup>

Confidentiality over communications can be lost in many ways, including:

- (a) when a party waives their right to confidentiality,<sup>13</sup>
- (b) if the 'without prejudice' status of the communications are not bona fide,<sup>14</sup>
- (c) if allegations of serious misconduct are raised against the mediator,<sup>15</sup>
- (d) when the commission of a crime is disclosed in the mediation,<sup>16</sup>
- (e) if a person is cross-examined at trial and their sworn evidence conflicts with representations made during a mediation,
- (f) if there is a dispute as to whether an agreement was reached at a mediation,<sup>17</sup> and
- (g) on questions of costs at a subsequent hearing.<sup>18</sup>

Unlike 'without prejudice' communications (which may or may not be privileged depending on their content), typically any and all statements of fact or opinion made in a mediation are confidential and cannot be disclosed to third parties or used in evidence. The effectiveness of confidentiality may be lost however if the other side learns of a fact during mediation, then seeks to prove that fact at a later date, using evidence unrelated to the mediation.

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12 See section 131 of the *Evidence Act 1995* (NSW); and sections 29-31 of the *Civil Procedure Act 2005* (NSW) and see *Sharjade Pty Ltd v RAAF (Landings) Ex-Servicemen Charitable fund Pty Ltd* [2008] NSWSC 1347; *Lukies v Ripley* [No. 2] (1994) 35 NSWLR 283 per Young J and *AWA Ltd v Daniels*, NSW SC, No 50271/1991, Rolfe J, 18 March 1992, unreported

13 When one party waives their right to confidentiality, this does not affect the other parties to the mediation, who will still enjoy the protection of confidentiality regarding matters they have disclosed

14 See *Unilever Plc v The Procter & Gamble Co* [1999] 2 All ER 691

15 See *Commonwealth Development Bank of Australia Pty Ltd v Claude George Rene Cassegrein; Gerald Cassegrein and Co Pty Ltd v Commonwealth Development Bank of Australia Pty Ltd* [2002] NSWSC 1313 per Einstein J at [12]-[13]

16 See for example Sections 23 and 27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW)

17 See *WG Green & Co (1984) Pty Ltd v Wilden Pty Ltd* (unreported, WA Sup Ct, 24 April 1997)

18 See section 131(2)(h) of the *Evidence Act 1995* (NSW)

## 19.6 Mediation in practice

### 19.6.1 Preliminary conference

The mediator may hold a preliminary conference, at which the parties agree on procedural matters (such as the date and venue for mediation, an appropriate timetable including service of position papers, and the mediator's terms including fees and payment).

The mediator will usually confirm the name and position of the parties' respective representatives participating in the mediation and, in particular, confirm who has authority to settle the dispute on behalf of a party. A person with authority to settle should, where possible, be present at the mediation.

### 19.6.2 Position Papers

Often parties will prepare and exchange position papers, which may include a brief of documents to which the papers refer, especially to assist the mediator to understand the positions.

This is an opportunity to explain to the other side the strengths of your client's case and why your client is likely to win if the matter goes to hearing. You can also explore incentives for settlement that are not strictly related to prospects of success, such as the consequences of having the other side's affairs aired in cross-examination or the advantages of preserving an ongoing business relationship.

### 19.6.3 At the mediation

You could expect to see some or all of the following during a mediation:

- (a) The mediator may start the mediation by introducing themselves, setting the ground rules for the mediation, confirming that the parties have read and signed the mediation agreement, explaining the mediation process, confirming that those present have authority to enter into a binding agreement to settle the dispute,<sup>19</sup> and inviting counsel for each side to make an opening statement.
- (b) After the opening statements, the mediator may invite the parties to clarify and explore the issues in dispute. This is the time to ask open-ended clarifying questioning, and for interests to be explored.

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<sup>19</sup> See Rule 20.6 of the *Uniform Civil Procedure Rules 2005* (NSW)

- (c) Once the parties have identified and clarified issues and interests, shared and differing interests can be separated and each party's best and worst alternatives may be explored.
- (d) Creative options for mutual gain may then be brainstormed and recorded in a criticism free environment. An objective criteria acceptable to both parties may be used to assess which options best meet each party's interests.
- (e) If a negotiated agreement is reached, it will be recorded by counsel for each side.

A caucus meeting may be called at any time during the above. A caucus is a private and confidential meeting that is usually between the mediator, one party and their counsel.

## 19.7 The role of the mediator

The mediator is an independent, trusted and unbiased conflict-manager, whose role is to encourage meaningful dialogue, promote creative problem-solving and guide the parties through the mediation process. Your mediator should be non-judgmental and show empathy towards participants.<sup>20</sup>

## 19.8 Your role in the mediation

Before the mediation, you may be required to educate your client about the mediation process, including the limitations of confidentiality which apply to the mediation process.<sup>21</sup> You should advise your client of the strengths and weakness of their legal case, and prepare a tabbed and indexed mediation brief as directed by the court.<sup>22</sup>

During the mediation, you may be required to:

- (a) take notes to record the proceedings,
- (b) provide legal advice to your client;
- (c) ensure the mediator is acting in the interests of the parties;<sup>23</sup>

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20 Sir Laurence Street, *Mediation – A Practical Outline* (undated) at p.5

21 See section 30 of the *Civil Procedure Act 2005* (NSW)

22 See Rule 20.2 of the *Uniform Civil Procedure Rules 2005* (NSW)

23 Conflict between the mediator and parties is likely to arise in some form or another – see Freddie Strausser and Paul Randolph, *Mediation – A Psychological Insight into Conflict Resolution* (2004) at p.16

- (d) check options and offers against your client's interests and alternatives; and
- (e) record any agreement reached by the parties.

After the mediation, you may be involved in enforcing any agreement reached at mediation and in considering how any outstanding issues may be resolved.

## 19.9 Reaching agreement

### 19.9.1 Required elements of the agreement

The agreement must:

- (a) include all the necessary elements of a contract: offer; acceptance; consideration (unless the document is by way of deed); and intention to create a legal obligation;
- (b) identify any conditions precedent which must be met before parties will be obliged to perform obligations under the agreement;
- (c) be enforceable in light of applicable legislation;<sup>24</sup> and
- (d) clearly identify the obligations of each party.

If possible, the agreement should:

- (a) identify the consequences of breach of the agreement and set out the rights and remedies of a party in the event the other party breaches the agreement;<sup>25</sup>
- (b) include a partial or full release of liability as required;
- (c) acknowledge and warrant that each party has taken independent legal advice and entered the agreement of their own free will to avoid allegations of duress, coercion and unconscionable conduct;<sup>26</sup>
- (d) warrant that each party has the power to enter into the agreement;

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24 Such as applicable planning laws if a Council is involved, for example see *Williams v Warringah Council & Anor* [2002] NSWLEC 36 per Lloyd J at [8]

25 Such as the interest rate to apply in the event of breach, an indemnity by one party for the other party's legal costs incurred in the enforcement of the deed on an indemnity basis and any other costs and losses incurred as a result of the breach of the agreement

26 See generally *Pittorino v Meynert (as Executrix of the Wills of Guiseppa Pittorino (Dec) and Guiseppa Pittorino (Dec)) & Ors* [2002] WASC 76 per Scott J at [118]-[120]

- (e) contain further assurances that each party will do all things necessary for the operation of the agreement;
- (f) identify that the agreement is the entire understanding of the parties, made without reliance on representations that are not recorded in the agreement; and
- (g) address which party is liability for stamp duty or tax which may be found to be applicable to the agreement.

### 19.9.2 Form of agreements

The form of any agreement reached at mediation will depend on the circumstances of the matter, but could include:

- (a) if litigation is underway, consent orders or a notice of discontinuance signed by the party's lawyers;
- (b) a deed of settlement to be approved by the court if required;<sup>27</sup>
- (c) a written undertaking; or
- (d) an agreement or 'heads of agreement' setting out the key points agreed, with further negotiations to follow.

A judgment or deed will generally provide better protection for your client than an agreement or 'heads of agreement'.<sup>28</sup>

## 19.10 Practice Notes

In the Supreme Court, you should read Practice Note SC Gen 6 – Mediation for practice in that Court.

In the District Court, you should read Practice Note DC (Civil) No.1 – Case Management in the General List.

In the Federal Court of Australia, you should read Practice Notes CM 1 – Case Management and the Individual Docket System and Practice Note CM 8 – Fast Track.

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<sup>27</sup> See Sections 75-76 of the *Civil Procedure Act* 2005 for persons under legal incapacity and Practice Note 7 (Revised May 2009) in the District Court (proceedings commenced in Sydney registry only)

<sup>28</sup> However, it is not always possible to execute a deed, for example if one party is a company and no directors are present

## 20. PRINCIPLED NEGOTIATION

### *Michael Bacina*

This chapter aims to improve your negotiation skills by introducing principled negotiation and identifying practical ways to help you overcome common negotiating tactics.

### 20.1 Negotiating on behalf of clients

There are many circumstances in which you may be called upon to negotiate on behalf of your clients in a litigation context. This ranges from agreeing consent orders for the timetabling of matters through to negotiating a final resolution of the dispute between the parties.

In any and all circumstances, you should be clear as to:

- (a) the options and outcomes available to your client, the probability of achieving them, and the relative value to your client of trading off one option for another;
- (b) what your client or any supervising practitioner has instructed you to do in those circumstances;
- (c) what are the limits of the discretion given to you by your client; and
- (d) what authority you have by virtue of your role and function as your client's solicitors to agree matters on behalf of your client.

In assessing the concepts that follow, take care to draw a distinction between dealing with other lawyers and their clients or even self-represented parties. Note your ethical obligation not to contact another lawyer's client directly without going through their lawyer.

### 20.2 Principled negotiation

Principled negotiation is a synthesis between 'Soft' and 'Hard' negotiation styles that focuses on creative joint-problem solving and cooperation.<sup>1</sup> This approach gives an opportunity to permanently resolve disputes by finding innovative options for mutual gain, while

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1 Rasmus Tenbergen, 'Principled Negotiation and the Negotiator's Dilemma – is the "Getting to Yes" approach too soft?' paper presented at the *Inter-disciplinary Seminar on Negotiation, Harvard University* (May 2001), p.2



requiring legitimate independent criteria to support decision making, thus protecting participants from entering bad agreements.

The seven elements analysis outlined below forms the core of principled negotiation:<sup>2</sup>

### 20.2.1 Relationships

Relationships are the links between the parties and other third parties who are affected by the dispute. Critically assessing how each party's relationships are affected helps identify the interests of each party and assists in analysing proposals and alternatives. Relationships are a source of power and opportunity in a negotiation.

### 20.2.2 Interests

A party's interests are the motivating force behind the position that the party chooses to adopt and the outcome that they seek. Interests are what really matter and will be influenced by your client's background, culture and experience of the dispute.<sup>3</sup>

### 20.2.3 Options

Options are potential solutions to a dispute which usually require the consent of the other party to be implemented. Creative options can illuminate optimal solutions, where a change can benefit one party without leaving the other side worse off.<sup>4</sup>

Options should not be subject to criticism or assessment while being brainstormed.<sup>5</sup>

### 20.2.4 Alternatives

Your client's Best Alternative to a Negotiated Agreement (BATNA) is a source of legitimate power in a negotiation. It is the unilateral course of action that your client may take to satisfy their interests if they walk

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2 Roger Fisher, William Ury, *Getting To Yes: Negotiating Agreement Without Giving In*, (1991) ('**Fisher and Ury**') and William Ury, *Getting Past No: Negotiating Your Way From Confrontation To Cooperation* (2<sup>nd</sup> ed, 1993) ('**Ury**')

3 Silbery and Merry, 'What do Plaintiff's want?' (1984, 9 *Justice System Journal* 151), cited in Julie Macfarlane, *Dispute Resolution: readings and case studies*, (2003), p.43-44

4 David Churchman, *Negotiation: process, tactics, theory* (1995) p.36

5 Fisher and Ury pp.57-58

away from a negotiation. This of course includes continuing with litigation.

As litigated disputes become subjected to increasing levels of compulsory alternative dispute resolution, you should be constantly working with your client to improve their BATNA.<sup>6</sup>

### 20.2.5 Legitimacy

Objective criteria enable your client to measure and justify the value of proposals and options,<sup>7</sup> enabling you to be more assertive in the negotiation. Gaining agreement on objective criteria to be applied to an issue is often easier than agreeing on the resolution to that issue, particularly if the dispute is technical or requires expert assessment.

Where interests are opposed, legitimate criteria can enable both sides to resolve the issue while saving face to their constituents or superiors.<sup>8</sup>

### 20.2.6 Commitment

Consider how any agreement will be recorded and fulfilled. In litigated matters, clear instructions and authority from your client will be needed as a precursor to recording commitment.

Other documents such as consent to judgment or a deed of settlement may record the agreement, and the court process will provide enforcement options.

### 20.2.7 Communication

Thinking about your communication strategy, including how the dispute is framed, is critical. Litigated disputes are often framed in a very legalistic and combative way. However, reframing the dispute to focus on the real interests of your client and the interests of the other side can change how the dispute is seen by the other side.<sup>9</sup>

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6 Fisher and Ury, pp.102-104

7 Fisher and Ury, p.83

8 Particularly if the party has limited real authority due to their position and will have to 'sell' the outcome to their superiors, see John Wade, 'Bargaining in the shadow of the tribe and limited authority to settle' (2003) 15 *Bond Law Review* 123 at 128

9 See Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (2000) pp.132, 138

If emotions are not an issue, it can be effective to have your client tell their story directly to the client on the other side. Discussions direct between two clients can lead to 'in principle' agreement, with more difficult details addressed later.

### 20.2.8 Prepare, prepare, prepare

The purpose of preparation is to ensure you know yourself; know your client, know your matter; know the other side and understand the customs and courtesies for the negotiation. Prepare as if for a hearing, and ensure you:<sup>10</sup>

- (a) understand the facts and law of the matter;<sup>11</sup>
- (b) conduct a thorough, informed and logical analysis of the risks and rewards to your client's interests if a negotiated settlement is achieved or is not achieved;
- (c) prepare a short memorandum for reference during the negotiation which applies the seven elements to your dispute;
- (d) obtain clear instructions from your client and advise your client on the protections and limits of confidentiality applicable to settlement discussions;<sup>12</sup>
- (e) prepare draft agreements or consent orders to record the outcomes from the negotiation that you feel are realistic and possible;<sup>13</sup> and
- (f) plan realistically for how much can be covered during the negotiation.

Rushing will prevent trust developing and may result in missed opportunities, an inadequate agreement and/or unfavourable inferences being drawn by the other side.

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10 Gerald Williams, 'Style and Effectiveness in Negotiations' in Lavina Hall (ed), *Negotiation Strategies for Mutual Gain: The Basic Seminar of the Program on Negotiation at Harvard Law School* (1993), p.159

11 For a process on this see J M Smail, 'Practice Paper BCL10: Negotiations, Mediations and Settlements in Litigious Matters', *College of Law Practice Papers* (2003)

12 See section 131 of the *Evidence Act 1995* (NSW); sections 29-31 of the *Civil Procedure Act 2005* (NSW) and see *Sharjade Pty Ltd v RAAF (Landings) Ex-Servicemen Charitable fund Pty Ltd* [2008] NSWSC 1347 and chapter 19 for more on the limits of confidentiality which may apply

13 For example, you may prepare documents for discontinuance of proceedings, consent to judgment or a deed of settlement

### 20.2.9 Ground rules for an effective negotiation

The following are a useful set of ground rules to help guide your approach in a principled negotiation:<sup>14</sup>

- (a) test assumptions and inferences;
- (b) share relevant information unless it is in your client's interests not to disclose a fact;
- (c) use specific examples and agree on what important words mean;
- (d) explain your reasoning and intent clearly;
- (e) focus on interests, not positions;
- (f) combine advocacy with inquiry;
- (g) jointly design next steps and ways to test disagreements; and
- (h) discuss 'undiscussable' issues.

### 20.2.10 Building trust

Always treat the other side with courtesy and respect, no matter how you are treated, and consider using the following techniques to build trust:

- (a) frame the dispute in an honest and clear way that includes your client's interests and avoids confusing language;
- (b) if there is fault on your side, consider opening with a disarming, genuine and well-crafted apology;
- (c) incorporate elements of the other side's communication style and body language into your approach;<sup>15</sup>
- (d) listen actively and patiently while the other side speaks, nod your head, maintain eye contact, and focus on the other person;
- (e) use open-ended questions to summarise, clarify, confirm and show that you understand what the other side is saying and to uncover hidden information;
- (f) ensure your non-verbal behaviour matches your message, and avoid fidgeting, tapping a pen or slumping in your chair;

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14 Roger Schwarz, *The Skilled Facilitator: A Comprehensive Resource for Consultants, Facilitators, Managers, Trainers and Coaches*, (Revised ed, Jossey-Bass, 2002), p.97 ('Schwarz')

15 David Churchman, *Negotiation: process, tactics, theory* (1995) p.29

- (g) acknowledge the other side's points and the emotions they are feeling<sup>16</sup> but without conceding their validity except where to do so will advance the interests of your client;
- (h) use 'if' statements to link potential concessions or proposals. For example, you may say 'if you can accept this, we can accept that';
- (i) start dealing step-by-step with non-contentious issues to build trust and consensus. Wherever possible, frame your questions to elicit a 'yes' response, and use 'yes' as much as possible in your responses. Consider replacing the insidious 'yes....but' structuring of replies with an approach that uses 'yes.... and' to reframe the reply;<sup>17</sup>
- (j) if a step-by-step approach is unsuccessful, highlight that nothing needs to be agreed on until the very end, so that the other side can consider the final agreement on its merits without feeling like they have made concessions in order to make the process work.<sup>18</sup>

If you are having difficulty building trust, focus your efforts on listening and empathising with the other side. Allowing the other side to feel heard and understood is a key method to identify their problems, interests and concerns, and removing their blocks to listening to your client's interests and views.<sup>19</sup>

### 20.2.11 Watch out for inferences

During any communication, we draw inferences based on incomplete information. Inferences are frequently wrong and can cause a breakdown in communication, wasting opportunities to resolve the dispute. When you feel an inference rising, analyse the behaviour of the other side:<sup>20</sup>

- (a) observe their behaviour, focus on their words, circumstances and body language, and anything you may overlook because of your view of the other side;
- (b) infer meaning to what has been said, but recognise you are drawing an inference;

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16 Ury, p.59

17 Ury, pp.69-70, 130

18 Ury, pp.69-70, 131

19 Ury, pp.55-57

20 Schwarz, p.104

- (c) decide how to react, for example, you might want to ignore a barbed inference and refocus the dialogue on the interests at hand;
- (d) describe the behaviour, 'I see you've raised your voice and are speaking very quickly...';
- (e) consider sharing your inference and test different views, such as by saying: 'from the way your client keeps looking out the window, I'm drawing an inference that they are not interested in the current proposal being made by my client, am I correct in drawing this inference?';
- (f) By naming and sharing your inference, the other side is given a chance to clarify, confirm or withdraw the message that they may have inadvertently communicated. This can break the action-reaction cycle of miscommunication and keep the negotiation on track.
- (g) in advising your clients, draw clear distinctions between what you know and what you infer (or speculate).

### 20.2.12 Self-control

The most effective negotiators have high levels of self-control.<sup>21</sup> Faced with an attack or emotionally charged situation, this self-control helps prevent defensive, retaliatory, conceding or flight behaviour.

While emotions are a part of decision making,<sup>22</sup> they can fuel an action-reaction cycle that moves the dispute from issues that can be resolved to matters of intractable moral principle. This destroys trust and understanding built during the negotiation.

When you encounter highly aggressive behaviour, your emotional response must not overwhelm your decision making ability. You should break the action-reaction cycle and present yourself as a stronger negotiator, focusing your response on the parties' interests.<sup>23</sup>

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21 Gerald Williams, 'Style and Effectiveness in Negotiations' in Lavina Hall (ed), *Negotiation Strategies for Mutual Gain: The Basic Seminar of the Program on Negotiation at Harvard Law School* (1993), p.158

22 Schwarz, pp.246-248

23 Ury, p.38

### 20.2.13 Taking a break

Taking a break helps you achieve temporary emotional and mental detachment so that your emotions will subside, you will not react to provocation and in doing so, will prevent the situation from escalating.

There are at least three broad kinds of breaks you might take:<sup>24</sup>

- (a) The 'quick trip'. Take a moment to think. Close your eyes and visualise being somewhere else, either in a relaxing location, or viewing the dispute on a stage below you. Snap yourself back to the negotiation and refocus on the issue at hand. This short trip is best used when time is of the essence;
- (b) The 'beam me up Scotty' trip. A break-out meeting to confer with your client, or even a bathroom or coffee break enables you to get away from the table and temporarily out of a heated situation to consider in a different environment your response;
- (c) The 'get me out of here' trip. If the negotiation is falling apart, you may need to politely adjourn the negotiation to another time and leave. This will give you time to really consider what went wrong, and how to modify your approach for the next negotiation.

## 20.3 Dealing with difficult people

If you are dealing with a difficult person, try the following analysis:

- (a) assess the situation – you may need to get some distance, perhaps by using a balcony technique, to get perspective if you are getting frustrated. Do not draw any inferences other than is absolutely necessary;
- (b) stop wishing that the person would change their behaviour because they won't, but you can change your approach to get results;
- (c) develop your own plan to deal with the behaviour;
- (d) implement the plan; and
- (e) assess whether the situation has changed and perhaps try a different approach.

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24 Dr Josh Weiss, 'Controlling your emotions – part 2', *Negotiating Tip of the Week Podcast*, (18 September 2009) <<http://www.negotiationtip.com/?p=142>> (accessed 29 January 2010)

An aggressive, 'hard' negotiator may present you with hostility, extreme demands, positional behaviour and rejection out-of-hand of a principled approach. These negotiators have often learned how to get emotional responses, by bullying and wearing down their opponents to get what they want. Some ways to address this problem are to use a balcony trip to keep your emotions and frustrations in check and to politely call them on their tactics.<sup>25</sup>

## 20.4 Ending a negotiation without agreement

If an agreement is not reached, try to close the negotiation in a way that cultivates the relationship with the other side as if you had reached an agreement. Be friendly and courteous. Your professional reputation is built on your interaction with your colleagues.

Expect disappointment. The choice will be viewed as a failure of the negotiation, particularly if the clients decide their BATNA is superior to the offer on the table. To cushion the disappointment, identify/ask:

- (a) the reasons why the BATNA meets that client's interests better than the options and offers developed in the negotiation; and
- (b) what must change in the options and offers to be acceptable to that client.

## 20.5 Ending a negotiation with agreement

You should take notes throughout the negotiation, both to record the details of the negotiation, your client's instructions and authority to settle, and to record how any agreement was reached. Notes may assist if there is a future dispute over what was agreed.<sup>26</sup>

McDougall J identifies four kinds of agreement which can be reached between parties in a negotiation:<sup>27</sup>

- (a) the parties have agreed on the terms of their agreement and intend to be bound to perform those terms, but wish to restate the terms in a fuller or more precise way. This could be a 'heads of agreement' document with a more complete agreement to follow;

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25 Ury, p.41-42

26 See *Vero Insurance v Tran* [2008] NSWSC 363 per Hamilton J at [14]

27 See *Capitol Theatre Management v Council of the City of Sydney* [2005] NSWSC 5 per McDougall J at [26]. While this was in the context of mediation, the analysis is still relevant.



- (b) the parties are content to be bound immediately and exclusively by the terms that they have agreed. However, the parties expect to make a further contract which will substitute for the current agreement and which will contain additional terms;
- (c) the parties have reached complete agreement on the terms of their agreement, and do not intend to change what is agreed but the performance of one or more of the terms is conditional on the execution of a formal document. This could be an agreement 'subject to execution of a deed'; or
- (d) the parties do not intend to make a concluded bargain unless and until they execute a formal contract.

A binding contract exists in the first three categories. In the first and second categories, the parties are required to perform their obligations recorded in the agreement. In the third category, parties must draft the formal document together, and then perform their obligations. In the fourth category, the parties are not bound to perform unless and until they bring into existence the formal contract.<sup>28</sup>

In the event of a dispute over whether an agreement has been reached, the court will look to evidence of an agreement in writing, then the objective intention of the parties, as understood in the light of surrounding circumstances.<sup>29</sup>

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28 *Capitol Theatre Management v Council of the City of Sydney* [2005] NSWSC 5 per McDougall J at [27]

29 *Capitol Theatre Management v Council of the City of Sydney* [2005] NSWSC 5 per McDougall J at [28]



Part 7  
Common Litigious  
Tasks





## 21. DIRECTIONS HEARINGS AND MOTIONS

*Roxana Carrion, Nicole Cerisola, Kirti Patel and  
Brenda Tronson*

### 21.1 Directions hearing

#### 21.1.1 What is a directions hearing?

A directions hearing is usually before a Registrar or Judge. Directions hearings address procedural matters for proceedings, to manage and direct the proceedings.

Directions hearings usually take place at regular intervals throughout the conduct of a matter.

#### 21.1.2 What is the purpose of a directions hearing?

During almost all proceedings, orders are required to address preliminary matters, before setting the matter down for a final hearing. Directions hearings are held with a view to achieving:

the just, quick and cheap resolution of the real issues in the proceedings<sup>1</sup>

The Court may make directions within a wide range of power to move proceedings towards a final hearing or resolution:

The Court may, at any time and from time to time, give such directions and make such orders for the conduct of any proceedings as appear convenient (whether or not inconsistent with these rules or any other rules of court) for the just, quick and cheap disposal of the proceedings.<sup>2</sup>

These powers allow the Court to adopt and make specific orders in an attempt to reduce the time and cost of trials, especially in long and complex cases, where this can be achieved in a matter that is consistent with the requirements of justice.

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1 Division 1, Part 6 of the *Civil Procedure Act* 2005 (NSW)

2 Rule 2.1 of the *Uniform Civil Procedure Rules* 2005 (NSW)

### 21.1.3 What type of directions and orders will the Court make at a Directions hearing?

Each jurisdiction has relevant Court Rules and legislation which provide a framework for the making of case management orders and directions.

In NSW, examples of the type of directions and orders which may be made at a directions hearing include:<sup>3</sup>

- (a) filing of pleadings;
- (b) defining of issues, including requiring the parties, or their lawyers, to exchange memoranda in order to clarify questions;
- (c) provision of any essential particulars;
- (d) filing of "Scott Schedules" (in construction matters);
- (e) making of admissions;
- (f) filing of lists of documents, either generally or with respect to specific matters;
- (g) delivery or exchange of experts' reports and the holding of conferences with experts;
- (h) provision of copies of documents, including their provision in electronic form;
- (i) administration and answering of interrogatories, either generally or with respect to specific matters;
- (j) service and filing of affidavits, witness statements or other documents to be relied on;
- (k) giving of evidence at any hearing, including the method of giving evidence (i.e. whether oral, by affidavit / witness statement, or both).
- (l) use of telephone, video conferencing facilities or other equipment or technology;
- (m) provision of evidence in support of an application for an adjournment or amendment;
- (n) ordering of a timetable with respect to any matters to be dealt with, including a timetable for the conduct of any hearing; and
- (o) filing of written submissions.

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3 See Rule 2.3 of the *Uniform Civil Procedure Rules 2005* (NSW)

The orders made at a directions hearing will depend on why the matter is listed. For example, if it is the first time the matter has been listed for a directions hearing, the Court may consider orders such as:

- (a) provision of further and better particulars of a claim;
- (b) filing of defences and cross claims;
- (c) exchange of lists of documents for discovery;
- (d) administering and answering of interrogatories;
- (e) filing and/or service of witness statements and affidavits; and
- (f) exchange of experts' reports.

#### 21.1.4 When will a matter be listed for directions hearing?

A directions hearing is usually allocated by the Court through its own case management procedure. At each directions hearing, the date of the next hearing will usually be appointed.

The Court's procedure on listing matters for directions varies between Courts and between divisions and specialist lists. You should review the most recent Practice Note applicable in your Court before preparing for a directions hearing.<sup>4</sup>

In some courts, a matter may be listed for a directions hearing on the application by a party to the proceedings.

However, in the District Court, the parties cannot list matters for directions except in the rare case where an order granting "liberty to apply" has been made. Orders of the court must be complied with and you should have properly formulated those orders before asking for them.

#### 21.1.5 Supreme Court of New South Wales

In the Supreme Court, there are specific Practice Notes relating to the different divisions and lists.

In the Common Law Division of the Court, there are Practice Notes specific to case management of the:

- (a) General List;
- (b) Administrative Law List;
- (c) Defamation List;
- (d) General Case Management List;

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<sup>4</sup> See <<http://www.lawlink.nsw.gov.au/>> for NSW Court Practice Notes

- (e) Possession List; and
- (f) Professional Negligence List.

The Equity Division of the Court has specific Practice Notes relating to the case management of the:

- (a) General List,
- (b) Admiralty List;
- (c) Commercial List and Technology & Construction List; and
- (d) Corporations List.

Practice Notes relating to each List can be found at the Supreme Court website.<sup>5</sup>

Practice Notes provide specific directives as to how a directions hearing will be run, the kind of matters parties are expected to raise and the type of orders that the Court is likely to make for the particular Division and List.

For example, matters in the Common Law General Case Management List will generally be managed by way of directions hearing conducted by a Judge or Registrar. The first directions hearing will be scheduled approximately three months after proceedings are entered in the List. In some circumstances, the directions hearing may be held by way of a telephone conference call.<sup>6</sup>

### 21.1.6 District Court

Practice Notes are issued in the District Court for the General, Commercial and Construction Lists, and are available from the District Court website.<sup>7</sup> The most important District Court Practice Note is Practice Note 1.

The Practice Notes provide for the period of time that is to elapse between:

- (a) the filing of a Statement of Claim;
- (b) listing of a matter for Pre Trial Conference; and

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5 <[http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_procedures](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_procedures)>

6 See Supreme Court Practice Note No.SC CL 5.

7 <[http://www.lawlink.nsw.gov.au/lawlink/district\\_court/ll\\_districtcourt.nsf/pages/dc\\_practice\\_notes](http://www.lawlink.nsw.gov.au/lawlink/district_court/ll_districtcourt.nsf/pages/dc_practice_notes)>

- (c) listing of a matter for Status Conference, at which a hearing date is usually allocated.

The court can refer a matter at any stage to a directions hearing before the list Judge or the Judicial Registrar, including for “show cause” direction hearings.

Where there has been non-compliance with Court orders, the Court may refer a matter to a “show cause” hearing. In such a case, the Court requires the:

- (a) plaintiff to show cause why the action should not be dismissed for want of prosecution; and/or
- (b) defendant to show cause why the defence should not be struck out and/or any cross claims dismissed for want of prosecution.

A party ordered to show cause should expect to pay the costs of the “show cause” hearing.

### 21.1.7 Federal Court

The Federal Court uses an “Individual Docket System” as the basis for its case management of matters.

Under this system, each case commenced in the Federal Court is randomly allocated to a Judge who is responsible for managing the case until the matter is completed. The allocated Judge makes orders to assist the case to proceed to hearing and monitors compliance with those orders.

You should consider the Case Management Practice Notes of the Federal Court, particularly Practice Note CM1. These Practice Notes make clear the considerations which are likely to be taken into account at directions hearings.

### 21.1.8 Preparing for a directions hearing

#### *(a) Understand the nature of the dispute*

Be well prepared and understand the nature of the dispute as well as the parties involved.

At each directions hearing, the Court expects that a solicitor will attend who has full knowledge of the proceedings and sufficient instructions to enable the Court to make all appropriate orders and directions.



Often junior solicitors may be given a file at the last minute with little explanation.

It is important that you be well acquainted with the matter and in a position to inform the Judge or Registrar of the nature of the dispute. Ensure that you are fully briefed and instructed before you attend Court. There is nothing more embarrassing than attending Court on a matter that you are unfamiliar with and not being able to answer the Court's questions. The courts are becoming increasingly intolerant of this behaviour.

Take a mobile phone with you to obtain urgent instructions from your client or supervising partner.

*(b) Seek instructions*

Seek instructions from your client as to the nature of the orders you plan to seek at the directions hearing.

In order to do this, you will need to consider what orders your client may want to seek and what orders the other parties to the proceedings may seek involving your client. The type of orders your client may require will depend on who you act for (i.e. whether your client is the plaintiff, defendant, cross-defendant, etc) and the stage of the proceedings.

You will also need to consider the time it will take your client to comply with any orders involving them. It is common for the Court to ask solicitors for estimates of the time needed for a party to comply with an order.

*(c) Communicate with the other parties*

Communicate with the solicitors of the other parties before the Directions hearing.

Discuss your proposed timing, completion of the required steps and the orders to be sought at the directions hearing with your opponent before the hearing. Try to agree to the extent possible on a timetable, or to define and limit the areas of dispute to be resolved by the Court.

Be realistic about the time needed for particular steps, bearing in mind the length and complexity of the matter and any particular difficulties, such as the need to obtain affidavits from interstate witnesses. If you are unrealistic, you will have to come back to the Court on more than one occasion in order to explain the breach of timetable directions. Courts will not hesitate to impose cost penalties on parties when there has been delay.

#### *(d) Prepare draft Consent Orders*

Provide draft Consent Orders to the solicitors of all parties and try to reach agreement as to the orders and the timing of those proposed orders.

In some Courts, where the parties have come to an agreement as to the form or nature of the orders, Consent Orders signed by the parties can be submitted to the Judge (through their associate) or given to the Registrar prior to the directions hearing. The Judge or Registrar can then make the orders in chambers. Where this procedure is allowed, the parties are then excused from attending the directions hearing.

In other Courts, the Consent Orders can be signed, taken to Court and provided to the Registrar or Judge.

## 21.2 Before Court

On the afternoon before, or the morning of, your directions hearing, you should consult the Court list to confirm:

- (a) the Courtroom number;
- (b) the time your matter is listed and the number in the list; and
- (c) the name of the Registrar or Judge the matter is listed before.

Aim to arrive at Court at least 10 minutes before the scheduled start time for your list.

For daily court lists in NSW courts, you can visit the Lawlink website <<http://www.lawlink.nsw.gov.au/>> and for the Federal Court you can visit its website <<http://www.fedcourt.gov.au/>>. Alternatively, consult the *Sydney Morning Herald* legal notices.

Ensure you have sufficient copies of any documents, including any signed Consent Orders, which you intend to hand up to the Registrar or Judge.

If an order or direction is sought, whether by consent or not, you should check to see that the judicial officer or registrar before whom you are appearing has the power to make the orders. Typically, judges have all necessary powers. A Registrar typically will have power to make any consent orders, but not in every situation. Consult the delegations to Associate Judges, Judicial Registrars and/or Registrars in the court in which you are appearing. See Chapter 15, section 15.7 (above).

### 21.2.1 Note your appearance

On arrival at the Court you should record your name and the party for whom you appear on the appearance sheet which is normally located on the bar table or on a table to the side of the Court room.

### 21.2.2 Be aware of where your matter is on the list

Often, in a registrar's list, the registrar will first ask for any "matters for referral". These are matters, whatever their number in the list, that will be given priority because the issue between the parties must be resolved by someone other than a registrar (who may not have the power to make the order, even by consent).

In some courts, the Registrar or Judge may then ask for matters that can be dealt with by consent to be mentioned first as these matters may be disposed of quickly. This means that, regardless of what number you are in the list, you may proceed first and mention the matter before the Registrar or Judge.

Sometimes, a judge will 'call through the list' just to get a brief idea of how long a matter will take to resolve. The judge may then decide the order in which to deal with matters so that matters that can be dealt with quickly are dealt with first. You need to be prepared to indicate what is in issue and how long it may take to argue.

If a matter is dealt with by consent, you may hand up short minutes of order or ask for the matter to be adjourned to a date agreed to by the parties. In either case, you will need to mention your appearance and that of the other party if you have their consent. The Registrar will then proceed to call through the list numerically.

### 21.2.3 Attempt to find the solicitors for the other parties

It is always a good idea to find the solicitors for the other parties, especially if you need to discuss or attempt to reach agreement as to proposed orders. Often, you may not have previously met the other solicitor. If this is the case, check the appearance sheet to determine if he or she has recorded their name and walk through the public area of the court, discreetly calling out the name of that person. Be quiet so as not to interrupt the Court.

### 21.2.4 When your matter is called

You must announce your appearance to the Court. The plaintiff will usually proceed first. It is inappropriate to say “Good morning Registrar, Your Honour etc” unless the judicial officer offers an informal greeting first. Your opposition is referred to as “my learned friend” if a barrister, or “my friend” if a solicitor. Litigants in person are addressed formally (e.g. Mr. Brown).

Always consider whether you should spell your name or the name of any party when announcing your appearance in Court, as this will allow the Judge’s associate to record the appearances and parties accurately. Speak clearly and concisely. If you have not had an opportunity to talk to the other side before the directions hearing you may need to seek to have the matter stood down in the list. If this is the case, you should say, “Your Honour, I have not had an opportunity to speak to my learned friend, might the matter be stood in the list”. The Judge or Registrar will usually grant such a request. Even if you have been unable to speak with your opponent before the directions hearing, ensure that you have prepared some draft Consent Orders or alternatively a blank piece of paper with the relevant Court heading in order that you can record any agreement made at that time and present that document to the Court.

If you have a proposed timetable hand it up to the Judge or Registrar. Usually he or she will read through the timetable and agree to its terms or make amendments. This is the time you will most likely be asked questions about the progress of the matter. Should the Judge or Registrar ask you a question to which you do not know the answer, advise the Court that you will need to obtain instructions and have the matter stood down in the list while you make enquiries.

Once the Judge or Registrar has decided on the appropriate timetable, orders will be made. At the conclusion of the directions hearing or mention, make sure you have a copy of the orders made and that all the dates are correct. Do not be shy to ask the Court or your opponent to confirm any of the orders if you are uncertain. If you completely miss an order, you may contact the Registry later in the day and ask for the orders that have been made on the file.

You should not leave the bar table empty unless you have been excused. You should wait until another lawyer approaches the bar table for the next matter, even if your opponent does not. If you must leave urgently, you should say “Your Honour/Registrar, might I be excused?”.

## 21.3 Motions

### 21.3.1 What is a motion?

See Chapter 15 'Motions' for more information.

A motion is an interlocutory application seeking a specific order or ruling.

A party must set out the nature of the interlocutory application in a notice of motion including the order and/or declarations sought in the application.<sup>8</sup>

If you are seeking specific orders from the Court and do not have an impending directions hearing, you should seek an interlocutory hearing by filing a notice of motion and affidavit in support of the motion.

The motion and affidavit must be served on all other parties that may be affected by the motion (this may include parties that are not parties to the proceedings). During the proceedings, if you seek specific orders that are not included in the formal pleadings or particulars, then again you will have to put on a motion and supporting affidavit.

Once a notice of motion is filed, the Court registry will allocate a hearing date for the motion, usually at least five clear days after it was filed. The matter will be listed before a Judge or Registrar to hear the application and depending on how urgent the matter is, it may be heard on the same day. So be prepared to run the motion on the first return date unless you need more time to put on evidence. If you need more time, you will have to seek an adjournment of the hearing. If you seek an adjournment of the hearing, be prepared to fix the matter for hearing on another date and have counsel's available dates ready.

If the motions are urgent, they are usually referred to the Duty Judge on any day of the week, but if it can wait until the Registrar's list on Fridays, the motion can be referred to either the Associate Justices List or the Duty Judge, again depending on how urgent the application is and what orders are sought.

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8 See Rule 18.1 of the *Uniform Civil Procedure Rules* 2005 (NSW)

## 22. SHOW CAUSE HEARINGS

*Wendy Bure, Nicole Cerisola, Noelle Tin and  
Brenda Tronson*

The show cause procedure is used to enforce the requirement that matters progress in a timely, cost efficient manner.<sup>1</sup>

### 22.1 What is a show cause hearing?

A show cause hearing is the reading of evidence and the hearing by the Court of submissions as to why:

- (a) a statement of claim or cross-claim should not be dismissed; or
- (b) why a defence should not be struck out.

If a party is served with a notice of dismissal and wishes to pursue the proceedings, the party is required to inform the Court, in writing, that it wishes to show cause. The Court may make costs orders against lawyers personally who are in breach of Court orders or directions, including Practice Notes of the Court and the Uniform Civil Procedure Rules 2005 (NSW) (UCPR). These costs orders may be made to be “payable forthwith”.

### 22.2 Circumstances in which proceedings may be dismissed

The Court, of its own motion, may:<sup>2</sup>

- (a) dismiss proceedings for want of due despatch; or
- (b) strike out a defence, in whole or in part, if a defendant does not conduct the defence with due despatch.

If proceedings are dismissed, the order does not prevent the plaintiff from:

- (a) commencing further proceedings; or

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1 Section 56(2) of the *Civil Procedure Act* 2005 (NSW); *Dennis v ABC* [2008] NSWCA 37; section 61(3) of the *Civil Procedure Act* 2005 (NSW) and Rule 12.7 of the *Uniform Civil Procedure Rules* 2005 (NSW)

2 See Rule 12.7 of the *Uniform Civil Procedure Rules* 2005 (NSW)

- (b) seeking leave to commence further proceedings, if leave is required.

In addition, the Supreme Court may, of its own motion, dismiss proceedings if it appears from the Court's records that, for over five months, no party to the proceedings has taken any steps in the proceedings.<sup>3</sup>

The District Court and the Local Court may, of the Court's own motion, dismiss proceedings commenced by statement of claim if no defence/cross-claim, default judgment or application is filed in the proceedings within 9 months from the date the statement of claim is filed.<sup>4</sup>

Unlike the Supreme Court, the Local Court and the District Court may dismiss proceedings without notice to the plaintiff or any other party.<sup>5</sup> However, proceedings are rarely dismissed without notice.

### 22.3 Show cause hearing procedure at the District Court

In the District Court, a matter will be set down for a show cause hearing before the Judicial Registrar or Civil List Judge where one or more of the parties are in breach of a timetable, direction, other Court order or Court rule.<sup>6</sup>

The party in default must file and serve an affidavit explaining why the default occurred five days prior to the show cause hearing. The solicitor for a plaintiff in default must:

- (a) show cause as to why the action should not be dismissed; and
- (b) satisfy the Court that the action was not commenced in contravention of any practice notes and/or the UCPR.

Similarly, the solicitor for a defendant in default must show cause as to why the defence and/or cross claim should not be struck out for failure to comply.

It may be necessary to annex medical evidence to the affidavit to explain the breach (e.g. a witness or solicitor was sick). The affidavit should also demonstrate as far as possible that, despite the default, the defaulting

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3 Rule 12.8 of the *Uniform Civil Procedure Rules 2005* (NSW)

4 Rule 12.9 of the *Uniform Civil Procedure Rules 2005* (NSW)

5 Rule 12.9(3) of the *Uniform Civil Procedure Rules 2005* (NSW)

6 See District Court Practice Note 1

party is organised and ready to progress the matter. A party ordered to show cause should expect to pay the costs of the show cause hearing.

Prior to the show cause hearing, you should ensure that everything that is required of your client under the rules or a timetable is done or ready to be done quickly. This should be clearly addressed in the affidavit. A new timetable should be prepared and, if possible, the consent of the other parties should be obtained. If you are briefing counsel and the matter is ready to be set down for hearing, make sure you are aware of counsel's available dates.

At the show cause hearing, the Court will read the affidavits regarding the default and hear submissions. The Court may also require a solicitor to submit reasons why a personal cost order should not be made against the solicitor and/or why they should not be liable to reimburse their client for those costs. This issue be dealt with as far as possible in the affidavit. Where the Court seems minded to make a cost order against a solicitor you may ask for the opportunity to prepare written submissions on this issue. However, it is better to be prepared at the outset for this.

In the event that the party in default is successful in establishing that the matter should not be struck out, further orders will be made for the progress of the matter.

It is common for matters to be set down for a party to show cause hearing in the District Court. There is usually a good reason for the default. The consequences of a default or contravention of a practice note should not be taken lightly and you should prepare thoroughly for a show cause hearing. Above all, if you are the person attending Court for the show cause hearing, ensure that you review the file and know your case and the history of the proceedings and familiarise yourself with the Practice Notes relevant to the Court list in which the proceedings have been placed.

Where serious or repeated default occurs, the Court may report the lawyer's behaviour to the Law Society of New South Wales.



## 23. DISCOVERY

*Michelle Hernandez, Juliet Eckford,  
Marnie Featherstone and Elias Yamine*

### 23.1 Introduction

This chapter concentrates on the rules applicable to the Supreme and District Courts in NSW. The rules relating to discovery in the Federal Court differ substantially.<sup>1</sup>

The purpose of discovery is for each party to disclose all documents in their possession or control relating to matters in issue. In the Supreme and District Courts, the right of parties to require general discovery was abolished in 1996. A regime was introduced whereby the Court may make orders for the discovery of documents, or samples of documents, within a class or classes specified in the order. This regime has been continued under the *Uniform Civil Procedure Rules 2005 (NSW)* ('UCPR').<sup>2</sup>

Such orders are, in practice, made on the application of one or both parties, and typically (in proceedings where discovery is warranted) the parties are able to agree on appropriate orders for discovery. If orders for discovery cannot be agreed, a notice of motion must be filed setting out the classes or categories of documents that should be discovered. The notice of motion should be supported by an affidavit explaining the relevance of such classes or categories of documents to the proceedings and why discovery ought to be ordered.

When orders for discovery have been made, each party is required to make a list of all documents in their possession, custody or power that fall within the specified classes for discovery. The list is then verified by affidavit. The requirements as to structure and content of the list, and the requirements in relation to the affidavit, are set out in the court rules under UCPR 21.3.

The affidavit must be accompanied by a solicitor's certificate of advice, stating that the solicitor has informed the client of their discovery obligations, and that the solicitor is not personally aware of any documents that are in the client's possession that do not appear in the list of documents.<sup>3</sup>

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1 See Orders 15 and 15A of the *Federal Court Rules*.

2 See Rule 21.2 of the *Uniform Civil Procedure Rules 2005 (NSW)*

3 See Rule 21.4 of the *Uniform Civil Procedure Rules 2005 (NSW)*

Following service of the affidavit and lists of documents, the parties are entitled to inspect each other's discovered documents (or any of them) on request within 21 days of service or at such other times as the Court may specify. The documents must be kept readily accessible and capable of convenient inspection, and facilities for copying the documents must be made available.<sup>4</sup>

With the exception of where the authenticity of a document is disputed in a pleading, the rules provide that if, within 14 days after inspection of a document, no notice is given that authenticity of a document is disputed and a document is described in the list as an original, it is deemed to be an original, or if described as a copy, it is deemed to be a true copy.<sup>5</sup>

## 23.2 Discovery dates

The usual process for discovery is as follows:

- (a) Twenty-eight days after the date discovery is ordered is the last day for parties to serve a list of documents;
- (b) Twenty-one days after service of the list of documents is the last day a party may request inspection; and
- (c) Fourteen days after inspection of the documents is the last day a party may dispute the authenticity of documents.

## 23.3 What are "documents"?

Discovery extends to any document, from letters and accounts to scrap pieces of paper recording information relevant to the matters in issue as specified in the categories for discovery. Documents also include anything from which sounds, images or writings may be reproduced (including tape recordings, microfilm, video tape and soft and hard copy information taken from a computer). The definition also extends to maps, plans, drawings and photographs.

Photocopies of original documents generally need not be discovered if the originals are also discovered, although where a copy contains additional material relevant to a fact in issue – for example, relevant handwritten annotations – then it should be discovered.

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4 See Rule 21.5 of the *Uniform Civil Procedure Rules 2005* (NSW)

5 See Rule 17.5 of the *Uniform Civil Procedure Rules 2005* (NSW)

## 23.4 "Possession, custody or power"

The rules requiring discovery speak of the preparation of a list of documents in the discovering party's "possession". This term is said to extend to documents that are within a party's "possession, custody or power".<sup>6</sup>

"Possession" refers to documents held by a party pursuant to a right to possession.

"Power" refers to an enforceable right to inspect or obtain possession of the document.

The question to be asked is whether the discovering party controls the document. To this end you would need to discover documents held by any agents on your client's behalf (including, of course, documents held by your firm), documents that your client has the right to obtain from another, and documents that your client would be likely to be able to obtain upon request.

## 23.5 Documents no longer in the discovering party's possession

The list of documents should also identify any documents that fall within the discovery categories and were in the discovering party's possession, custody or power at some point in the six month period before commencement of proceedings but have since passed out of the hands of the party. The list should specify in whose possession the documents are now believed to be.<sup>7</sup> The solicitor's certificate of advice must state that the solicitor is not personally aware of any documents that in the last 6 months were in the client's possession, but which do not appear on the list.<sup>8</sup>

## 23.6 Privilege

The fact that a document is privileged does not mean that it does not need to be discovered. If there is a document or group of documents that falls within the orders for discovery, then the document or group of

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6 See *Turner v Davies* [1981] 2 NSWLR 324

7 Rule 21.3 of the *Uniform Civil Procedure Rules 2005* (NSW)

8 Rule 21.4 of the *Uniform Civil Procedure Rules 2005* (NSW)

documents must be identified and the basis of the claim for privileged<sup>9</sup> must be set out in the list of documents.<sup>10</sup>

Privileged documents are not required to be produced for inspection unless the Court orders otherwise.

## 23.7 Continuing obligations

Discovery is a continuing obligation, and you will need to notify the other party if, after the initial list of documents has been served, you become aware of any further discoverable documents or you become aware that a privilege claim is not, or is no longer, maintainable.<sup>11</sup> However, the rules of most courts exclude from discovery documents that have come into existence after the proceedings commenced. These are known as “excluded documents”.<sup>12</sup>

## 23.8 Professional obligations

Discovery brings into play important ethical obligations of solicitors. If you have any doubts as to the adequacy of discovery or the appropriateness of a privilege claim, seek advice from counsel or from a senior lawyer in your firm.

## 23.9 Electronic discovery

On 1 August 2008, the Supreme Court Practice Note SC Gen 7 *Use of Technology* commenced operation. The practice note sets out a protocol for the use of technology in proceedings, including electronic discovery, to improve the efficiency of litigation in general.

As a general rule, the Supreme Court will:

- (a) Require the parties to discover and produce documents electronically where the information is stored electronically; and
- (b) Expect parties to consider the use of technology to discover and inspect documents where there are more than 500 documents that are not stored electronically.

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9 See sections 117-125, 126B (subject to conditions), 126H and 129-131 of the *Evidence Act 1995*

10 Rule 21.4 of the *Uniform Civil Procedure Rules 2005* (NSW)

11 Rule 21.6 of the *Uniform Civil Procedure Rules 2005* (NSW)

12 Rule 21.1 of the *Uniform Civil Procedure Rules 2005* (NSW)

At an early stage, the parties must advise of any discoverable documents that are stored electronically, such as emails, web pages or sound recordings. The parties must agree upon a number of matters relating to any documents that will be discovered electronically which are to be set out in a written protocol. The matters for consideration include the format of the electronic discovery and the categorisation of any privileged information. The Supreme Court suggests that electronic material should be discovered in searchable narrative format particularly where there is a substantial quantity of documents that are stored electronically.

Unlike the current position of the Supreme Court where the use of technology in the discovery process is generally advisory, the Federal Court will usually order electronic discovery where more than 200 documents have been created and stored electronically and electronic discovery will facilitate the quick, inexpensive and efficient resolution of the matter.

On 25 September 2009, Federal Court Practice Note CM6, *Electronic Technology in Litigation*, came into effect. It applies to facilitate the effective use of technology by recommending a framework for electronic discovery. Before the Federal Court will make an order for electronic discovery, the parties are expected to have discussed and agreed upon a discovery plan.

The *Default Document Management Protocol* is required to be used for electronic discovery of between 200 and 5,000 documents. If there are in excess of 5,000 documents to be electronically discovered, the parties are required to agree upon an *Advanced Document Management Protocol* with the assistance of the Federal Court.

This is a changing area of practice and you should consult the Practice Notes closely for guidance.

## 24. SUBPOENAS AND NOTICES TO PRODUCE

*Michael Bacina and Tannie Kwong*

### 24.1 Subpoenas

#### 24.1.1 Introduction

A subpoena is a document requiring attendance or production which is issued to a non-party to the proceedings. If you wish to obtain documents from a party to the proceedings, you should issue a Notice to Produce (see below). In civil litigation there are three types of subpoenas:

- (a) subpoenas to produce a document or thing;
- (b) subpoenas to attend to give evidence; and
- (c) subpoenas to produce a document or thing and to attend and give evidence.

A *subpoena for production* is an order in writing that requires the person named in the subpoena to attend the Court as directed by the order to produce a document or thing for the purpose of evidence. Where the person named is the proper officer of a corporation, the subpoena requires the proper officer to produce the document or thing for the purpose of evidence.

A *subpoena to give evidence* is an order in writing that requires the person named to attend the Court as directed by the order for the purpose of giving evidence.

A *subpoena to give evidence and for production* requires the person to do both.

Rules 33.1-33.3 and 33.13 of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') govern the general form, content and service of subpoenas issued for the purpose of the proceedings. UCPR 33.13 provides a special procedure for obtaining production of documents held by the Court.

You will often hear that "issuing subpoenas is not a fishing expedition". As opposed to discovery, the party issuing a subpoena must be clear as to what they want. Parties cannot ask for "all documents or things in the possession of..." A subpoena for production should be precise and specific enough to avoid this situation.

You should read the practice note of the court including any practice notes affecting subpoenas and notices to produce.<sup>1</sup>

### 24.1.2 Issuing subpoenas

A subpoena is issued by the Court upon the request of the party requiring the subpoena. It is a document issued under seal of the Court. A subpoena cannot be issued on the request of an unrepresented person in the Supreme Court except with the leave of the Court. The accepted practice for the Local, District and Supreme Courts is for the prescribed UCPR form to be completed by the party and filed with the Court. In some Tribunals such as the Consumer, Trader and Tenancy Tribunal (where a subpoena is called a Summons), you will need to draft a letter to the Tribunal setting out the documents sought. The Tribunal will then copy your list of documents into the approved form.

The approved forms of subpoena under the UCPR are Forms 25, 26 and 27. If you do not use the correct form, the Court may not issue the subpoena.<sup>2</sup>

Fees for issuing a subpoena are generally published on the website of the Court.<sup>3</sup>

For matters in the Local Court Small Claims division, you will need the Court's leave to issue a subpoena. It is common to seek leave at the first court date and have a date set for return of subpoena. This is a useful tool to keep your matter moving forward.

### 24.1.3 Service

A subpoena must be served personally on the addressee.<sup>4</sup> The issuing party must also serve a copy of a subpoena to produce on each other active party as soon as practicable after the subpoena has been served on the addressee.<sup>5</sup> Service may be made outside the state, subject to leave or confirmation.<sup>6</sup>

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1 See District Court Practice Note DC(Civil) No. 8 – Early Return Of Subpoenas and Supreme Court Practice Note SC Gen 3 – Photocopy access to documents produced under Subpoena

2 See Rule 33.3 of the *Uniform Civil Procedure Rules* 2005 (NSW)

3 See <<http://www.lawlink.nsw.gov.au/>>

4 See Rule 33.5(1) of the *Uniform Civil Procedure Rules* 2005 (NSW)

5 See Rule 33.5(2) of the *Uniform Civil Procedure Rules* 2005 (NSW)

6 See Rule 33.5(2) of the *Uniform Civil Procedure Rules* 2005 (NSW) and see the requirements of the *Service and Execution of Process Act* 1992 (Cth)

An addressee need not comply with the requirements of a subpoena unless it is served on or before the date specified in the subpoena as the last date for service.<sup>7</sup>

However, an addressee must comply with the requirements of a subpoena even if it has not been served personally on that addressee, if the addressee has, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.<sup>8</sup>

To ensure that documents are produced in a timely manner, you may wish to send a copy of the subpoena to the actual person who can assist. For example, you may serve a subpoena on the Commissioner of Police at the headquarters in Parramatta in relation to a police incident; but informally, you may also wish to send a copy to the Local Area Command also to ensure that documents are produced on time. A friendly telephone call to a potential subpoena recipient can assist greatly. Small businesses will often simply provide the documents requested to you directly rather than face a subpoena. In that event you should provide a full copy of the documents to the other parties in the proceedings.

#### 24.1.4 Conduct money and reasonable expenses of compliance

When a subpoena is served on a person or the proper officer of a corporation, the person named is not required to attend or produce any document or thing under the subpoena unless an amount sufficient to meet the reasonable expenses of the person named is paid or tendered at the time of service, or not later than a reasonable time before that day.<sup>9</sup> This is called “conduct money”.

Most government departments and authorities have regulations and internal policies about the amount to be paid upon service of a subpoena. It is advisable to check with the relevant department or authority prior to the service of the subpoena. While the amount listed by a department or authority may seem excessive, it is often far better value for your client to pay the amount and obtain the documents sooner rather than make an issue over a relatively small sum of money and delay production.

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7 See Rule 33.6(3) of the *Uniform Civil Procedure Rules 2005* (NSW)

8 See Rule 33.6(3) of the *Uniform Civil Procedure Rules 2005* (NSW)

9 See Rule 33.6(1) of the *Uniform Civil Procedure Rules 2005* (NSW)



Conduct money does not attract GST.<sup>10</sup>

The reasonable costs the issuing party must generally pay to the producing party are:<sup>11</sup>

- (a) searching for the subpoena material;
- (b) reviewing the subpoena documents/records; and
- (c) collating and copying the subpoena documents/records.

The addressee of a subpoena should use appropriate labour for the above, such as administrative staff and may only claim actual salary costs plus an allowance for overhead costs.

If the addressee of a subpoena claims the costs of legal advice in respect of the subpoena you should request/provide a copy of the invoice. Where the addressee has in-house counsel, the addressee may claim the salary costs of that in-house counsel incurred in responding to the subpoena, plus an allowance for overheads, unless that in-house counsel could have been charged out.<sup>12</sup>

The calculation of reasonable costs can be contentious. If a dispute arises over the costs of compliance you should remind the other party that the dispute does not excuse compliance if you have provided conduct money. Invite the party to appear before the Court and raise their concerns. The Registrar will usually inform the party to make an application in respect of their costs and make an order for production.

### 24.1.5 Access to subpoenaed material

The Court may give directions in relation to the removal from and return to the Court, and the inspection, copying and disposal of any document or thing that has been produced to the Court in response to a subpoena.<sup>13</sup>

### 24.1.6 Setting aside subpoenas

A Court may, on the motion of any person who has a sufficient interest in the proceedings, set aside a subpoena in part or in whole.<sup>14</sup> Examples

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10 *A New Tax System (Goods and Services Tax) (Exempt Taxes, Fees & Charges) Determination* 2002.

11 See *Foyster v Foyster Holdings* [2003] NSWSC 881

12 See *Deposit & Investment Co Ltd v Peat Marwick Mitchell* (1996) 39 NSWLR 627

13 See Rule 33.8 of the *Uniform Civil Procedure Rules* 2005 (NSW)

14 See Rule 33.4(1) of the *Uniform Civil Procedure Rules* 2005 (NSW)

of this are a subpoena that constitutes a “fishing expedition”. A non-party who is required to produce documents to the Court should not decide which of the documents relate to the action between the parties. If a non-party to the proceedings is not in compliance with a subpoena. You should consider whether a motion for contempt is suitable, or seek an order for costs from the Court for non-compliance.<sup>15</sup>

The use of a subpoena for production should not be a substitute for discovery. Instead, further formal discovery should be relied upon. A Court may set aside a subpoena where production of all documents specified is too onerous a task for the producing party or where the producing party has not been supplied with sufficient funds to meet its reasonable expenses in complying with the subpoena. The Court may also set aside a subpoena where it is considered to be an abuse of process, e.g. where it is not for the bona fide purpose of obtaining evidence relevant to the proceedings.

#### 24.1.7 Compliance and failure to comply with subpoenas

UCPR 33.6, 33.7, 33.11 and 33.12 provide the basis upon which courts regulate the scope of the obligation to comply with a subpoena, the entitlement to the expenses involved in compliance and the sanctions for failure to comply with a subpoena.

On the first return date of the subpoena, if there is no production you may ask for the Registrar to make a formal call for production pursuant to the subpoena and if there is no answer, you may seek an adjournment to make relevant enquiries. If on the next occasion there is no answer to the subpoena, you can ask the Registrar to make another formal call and if there is no answer to that, you are entitled to make an application before a Duty Judge (by way of notice of motion) compelling the party to produce documents pursuant to the subpoena. If there is no appearance, then that party may be in contempt of court.

If documents are produced to the court, the usual practice is for the issuing party to seek one of the following orders:

- (a) if any claims for privilege are being considered, the party who is entitled to claim privilege will often ask for first access to the documents for 7 days (or any other reasonable time period); or
- (b) general access orders for all parties to view and copy the documents.

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15 See Rule 42.3(2) of the *Uniform Civil Procedure Rules 2005* (NSW)

Any interested party may oppose orders for a number of reasons, so be sure you are fully briefed with the facts and circumstances of the matter before you oppose any such order. On occasion confidentiality issues will be raised and the access to the documents may be restricted to the legal representatives of the party only.

### 24.1.8 Inspection, copying, removal, return and disposal of documents and things

UCPR 33.8 to 33.10 sets out the procedure for removal and return, inspection, copying and disposal of documents and things produced under a subpoena. In most cases, you may make a request in writing at the relevant court to inspect the documents. In the Supreme Court, you will need to allow 24 hours after your request for the documents to be made available for inspection. After you have inspected the documents, you may make a request to photocopy certain documents and arrange for an approved copying centre to uplift and copy the documents. However, if you urgently require inspection of the documents, an application can be made to the Duty Registrar to give you access immediately or there may be a court order.

In the Local Court, the registry will allow parties to uplift and remove documents for copying. You need only complete a form, and personally return the documents to the court before the close of business.

Most courts require that lawyers apply for the removal, uplift and/or inspection of documents produced. Be sure not to send a paralegal down to the court as registry staff will most likely refuse access.

When the proceedings are finalised, the subpoenaed documents are either returned to the appropriate party or destroyed in accordance with the UCPR.

## 24.2 Notices to produce

### 24.2.1 Introduction

A notice to produce is a document issued between parties to the proceeding to require documents or things to be produced for inspection. Notices to produce may only be issued to a party to the proceedings.

UCPR 21.10 to 21.13 and UCPR 33.1 to 33.4 sets out the procedure for issuing a notice to produce using UCPR Form 19. There is no fee to file a notice to produce and no requirement for conduct money to be

tendered upon service, however it is good practice to include conduct money when serving a notice to produce on a party to the proceedings.

It is common to issue a notice to produce returnable on the date set by the court for return of any subpoenas as the issuing of a notice to produce does not otherwise engage a return date with the court.

### 24.2.2 Compliance with a notice to produce

A party served with a notice to produce must, within a ‘reasonable time’ (presumed to be 14 days unless the party shows otherwise)<sup>16</sup>, produce for inspection the documents or things referred to in the notice.

For any documents or things listed in the notice to produce which are not produced for inspection, the producing party must serve on the issuing party a notice which states that the document or thing is:

- (a) privileged;
- (b) not in the possession of the party (and the producing party must identify who is in possession of the document or thing); or
- (c) not in the possession of the party and state that the producing party does not know who is in possession of the document or thing.

### 24.2.3 Costs of compliance

The rules applying to the costs of compliance for subpoenas should be considered as generally applying to notices to produce. The producing party is entitled to the salary costs of compliance with the notice, and for out of pocket expenses.<sup>17</sup>

A producing party may apply for an order for a specific amount for the costs of compliance.<sup>18</sup>

### 24.2.4 Failure to comply with a notice to produce

Notices to produce are considered by many to be “without teeth” as a failure to comply is not technically a breach of a court order. This is because a subpoena is explicitly an order of the Court under UCPR 33, but a notice to produce has no comparable reference in the UCPR.

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16 See Rule 21.11(2) of the *Uniform Civil Procedure Rules* 2005 (NSW)

17 *Deposit & Investment Co Ltd v Peat Marwick Mitchell* (1996) 39 NSWLR 627

18 Rule 21.13 of the *Uniform Civil Procedure Rules* 2005 (NSW)

If an addressee fails to comply with a notice to produce, the prevailing practice is to issue a subpoena to that party. However, a subpoena should only be issued to a non-party. The court will often overlook this and require production of the documents.

Despite this, where there is clearly no compliance with the notice, the case of *Pyoja*<sup>19</sup> supports an application to the Registrar at the return of subpoena date for an immediate order under section 68 of the CPA compelling the addressee to comply with the notice. If the producing party breaches this order then further remedies arise, such as bringing a motion for contempt.

You may need to draw the Court's attention to the comments by Palmer J in *Pyoja* at [25] and following which set out the basis by which a Registrar may make such an order. The facts of *Pyoja* relate to an examination of a party, and a Registrar may respond that the case does not appear on point. You should read the case carefully and be ready to address this issue.

If a party has partially complied with the notice, it may be very difficult to make an application based on *Pyoja* as you may be unable to convince the court to find that production has been inadequate.

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19 *Pyoja Pty Ltd v 284 Bronte Road Developments Pty Ltd and Ors* [2006] NSWSC 831



Part 8  
Evidence and  
Trials





## 25. AFFIDAVITS AND WITNESS STATEMENTS

*Jason Geisker, Kirti Patel and Brenda Tronson*

### 25.1 Introduction

This chapter reviews the procedural requirements of affidavit evidence, as well as drafting effective evidence and interviewing witnesses. The drafting of expert statements and the presentation of expert reports is also considered.

### 25.2 Affidavits and statements generally

#### 25.2.1 What is the difference between an affidavit and a witness statement?

Often a newly admitted solicitor will be asked to prepare evidence for a matter without ever being told the difference between an affidavit and a witness statement and when each is required. Affidavits and witness statements both generally follow the same format. In short, an affidavit is sworn evidence (generally sworn either on the bible or other religious text<sup>1</sup> or by giving a non-religious affirmation) while a witness statement is unsworn.

A formal execution clause, known as a jurat, appears at the conclusion of an affidavit. The jurat is where the affidavit is sworn or affirmed and space is provided for the document to be witnessed by a qualified person (usually a solicitor or a Justice of the Peace).

A witness statement does not require a jurat as it is not made on oath or affirmed, however a witness statement will be signed and dated by the person making the statement. An important difference between a witness statement and an affidavit is that before the contents of a statement can become formal evidence as to the truth of a matter, the maker of the statement will have to adopt the statement in the witness box after being formally 'sworn in'.

Once sworn in, the maker of the statement can then attest to the contents of the statement being true and correct to the best of their knowledge

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1 Although a common practice, it is no longer necessary for a religious text to be available when swearing an affidavit in NSW due to amendments to the *Oaths Act* 1900.



and belief. Generally, the contents of the statement will become the 'evidence in chief' of that witness.

A filed affidavit, on the other hand, becomes evidence in the proceedings once it is formally 'read' in Court by counsel seeking to rely upon the affidavit. The maker of the affidavit, known as the deponent, will still need to attend court in most cases as they will usually be required for cross-examination.

If a deponent is required for cross-examination, it is important to ensure that notice is served within a reasonable time. If the deponent does not appear for cross examination in answer to that notice, the affidavit may not be used unless the deponent is deceased or unless the court orders otherwise.<sup>2</sup>

### 25.3 When should an affidavit or witness statement be used?

The rules of the relevant Court will provide guidance on whether an affidavit or a statement should be used. In broad terms, the District Court of NSW and Federal Court of Australia generally use affidavits. Parties in the Supreme Court of NSW also regularly use affidavits. However, the Local Court of NSW often receives statements in civil matters.

If your matter is a case managed matter in the Federal Court of Australia, be aware that there is an increasing trend for an outline of evidence to be ordered prior to the trial and for the evidence to be received *viva voce* at the trial, which means that the witness is required to give oral evidence.

In criminal matters, statements are often served (for example in police briefs) but oral evidence is still led from the witness at hearing, meaning that the witness gives the bulk of the evidence orally (as opposed to the statement being tendered). This form of 'outline statement of evidence' is simply to put the opponent on notice as to the general nature of what the evidence will be. In the Supreme Court of NSW, the practice of the court varies by reference to the list and division of the court. For example, Practice Note SC CL 5 (28), applicable in the Common Law Division, prescribes that a plaintiff is to provide an evidentiary statement to each party to the proceedings.

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2 Rule 35.2(3) of the *Uniform Civil Procedure Rules 2005* (NSW)

Mention should also be made in respect of affidavit evidence used for interlocutory applications, such as motions, directions hearings, show cause hearings and all other arguments before the Court other than the final determination of the matter. Affidavit evidence in interlocutory matters is invariably dealt with by way of affidavits in all courts. The reason affidavits are normally used without cross examination in interlocutory matters is partly because matters of credibility and weight are less common in the context of interlocutory applications and partly because of time and expense. Courts are generally reluctant to allow witnesses to be cross-examined on evidentiary matters that arise in interlocutory proceedings and lawyers should seek to avoid this practice when not absolutely necessary (or else be prepared to explain the necessity to the court).

## 25.4 Format and procedure

When affidavit evidence is prepared in relevant, proper and admissible form, the Court is greatly assisted. Conversely, when an affidavit is poorly drafted, the parties to proceedings can become distracted by procedural skirmishes over the form and admissibility of such evidence, which can sometimes become a significant diversion from the main game and often takes up valuable hearing time.

NSW judges in superior courts have a strict approach to enforcing the rules and form of evidence. Rules of evidence are to be found in legislation. The form of evidence is more a question of practice, in particular the use of direct speech wherever possible and the avoidance of conclusionary statements (e.g. “We agreed that he would go first” and even conclusionary words which appear clear but in fact are difficult to interpret or have different meanings for different people (e.g. fast, slow, tall, angry, crazy, late, early etc.).

### 25.4.1 Compliance with Rules of the Court

As a starting point, it is useful to be familiar with the various ‘fix all’ rules that allow you to seek the discretionary relief of the court from compliance with the exacting requirements of the court rules in regards to format. While it may be heartening to know that, with leave of the court, an affidavit may still be used despite any ‘irregularity’ in its form, it is preferable to avoid having to seek the court’s leave for this purpose.<sup>3</sup>

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<sup>3</sup> See for example, *Uniform Civil Procedure Rules 2005* (NSW) 35.1 and Order 14 rule 5 of the *Federal Court Rules*

The aim of any advocate should be to focus the court's attention on matters of substance rather than form. To achieve this goal it is better to ensure that affidavit evidence complies with the formal requirements of the jurisdiction from the outset. Complying with the rules of the court for matters in the Supreme Court of NSW, District Court of NSW and Local Court of NSW, means compliance with the requirements of Part 35 of the UCPR. Affidavit evidence in the Federal Court of Australia requires compliance with Order 14 of the *Federal Court Rules*. You should be familiar with all of these requirements.

Specifically, there are a number of formal matters common to all forms of affidavit evidence required by the rules across most jurisdictions. Some basic requirements to keep in mind include:

- (a) an affidavit should have a heading containing the deponent's name and the date of the affidavit and should comply with the court format for documents in respect of font size, margins, spacing, party details and filing details;
- (b) the pages of an affidavit should be consecutively numbered, including any annexures;
- (c) if dealing with more than one matter of fact, an affidavit should be divided into numbered paragraphs for each new matter being dealt with;
- (d) the contents of an affidavit should preferably be set out in the chronological order of events;
- (e) the affidavit should be drafted in the first person; and
- (f) where there is any interlineation, deletion or other alteration in the jurat or body of the affidavit the affidavit may not be used unless the deponent initials the alteration and rewrites any words or figures erased.

The deponent and the witness before whom it is sworn must sign an affidavit in full. The witness must also sign each annexure and must identify it in the manner prescribed by the rules of each particular court. As mentioned, a witness statement is not sworn but merely 'signed'. Care should be taken to ensure that an affidavit is 'affirmed' rather than 'sworn' if an affirmation is chosen in preference to a religious oath.

As affidavits and statements are identified by the name of the deponent and the date they are adopted, it is essential that both affidavits and statements be dated. Handwritten changes to a final and unsworn affidavit should be initialled by both the deponent and witness if

made before the affidavit is sworn. However, an affidavit should not be amended or altered in any way once executed. Once executed the original should be kept safely for use by the Court at the hearing if not filed: see UCPR 35.9.

The pages of any affidavit should be consecutively numbered including all annexures and exhibits. Failing to properly paginate an affidavit may seem a minor omission, but can be a great source of frustration and annoyance to judges and lawyers alike. It can also make a witness's task unnecessarily complicated when under oath in the witness box.

An affidavit or statement is easier to read when in chronological order. A simple technique to give an affidavit more impact is to have the affidavit tell a story in a way that is logical and sequential. Statements or affidavits that leave the reader with an impression that the deponent has a well-organised and detailed recollection of events will assist in this process. This also gives the reader a better understanding of the context in which various events happened. Asking a witness to recount events in a chronological manner can also assist them in the process of recalling what actually happened. To assist in this task it can be useful to arrange a bundle of the relevant documents in chronological order and question the witness in order to enable them to recall their story in a chronological, accurate way.

The Federal Court of Australia now requires an index to be incorporated into any affidavit that is more than 30 pages in length inclusive of annexures. An index is another tool to assist the parties and the court to quickly locate material within a longer affidavit: see Order 14 rule 2(1) and Form 20. Although not required by the UCPR, this indexing requirement of the Federal Court should be considered good practice for drafting longer affidavits in all jurisdictions as it assists those reading the affidavit to quickly absorb the evidence and easily find documents annexed to the affidavit. Another preferable practice is the liberal use of headings and sub-headings throughout the affidavit where possible. This is another method of assisting the reader to more effectively absorb the content of the affidavit.

Note that the Federal Court requires all affidavits to be certified by a lawyer with conduct of the matter as complying with the rules, by the completion of a certificate appearing at the conclusion of Form 20: see Order 14 rule 5A generally.

### 25.4.2 Annexures and exhibits

When seeking to rely upon a document within the context of an affidavit, such a document can be incorporated into the affidavit evidence (depending upon the particular jurisdictional rules), by way of annexure or exhibit. Documentary evidence can be a powerful corroborative tool to be incorporated into an affidavit, especially if the document is to be referred to by the deponent. Incorporating documents into a witness's affidavit evidence can also help to give a better picture of the evidence that they are presenting. Documents such as maps, cheque butts, business records, correspondence, invoices, photographs and diagrams can often be a critical part of a deponent's evidence.

Documents and physical items that you wish to attach to an affidavit must be precisely described by the witness within the affidavit. For example, "Annexed and marked "A" to this affidavit is a copy of a facsimile that I signed and caused to be sent to the solicitors for the defendant on or about 21 May 2005". Although some documents speak for themselves, that is to say it is obvious what the document is simply by examination, it is nevertheless important for the deponent to describe the document or item and how they know that it is authentic and connected with the proceedings.<sup>4</sup>

In the Federal Court of Australia, Order 14 rule 4(1) provides that any original documents are to be exhibited to an affidavit rather than annexed. However, this does not mean that annexures cannot be used in the Federal Court, as is made clear by rule 4(3). In NSW, UCPR 35.6(1) expressly provides that a document may be annexed or exhibited to an affidavit.

Annexures should be prepared by using copies of original documents (rather than the originals themselves), and should be certified with confirmation of the details of the annexure, being the name of the deponent, date of the affidavit and an endorsement by the witness of the affidavit.

To prepare an exhibit, an exhibit note is signed by the witness to the affidavit to confirm that the exhibits were before the deponent when the affidavit was sworn or affirmed.<sup>5</sup> Often, lawyers utilise pre-worded stamps for use in preparing these certificates, which are particularly useful if numerous certificates need to be prepared. The certificate should generally say words to the effect that, "This [and the following

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4 See *National Australia Bank v Rusu* (1999) 47 NSWLR 309

5 See *Uniform Civil Procedure Rules* 2005 (NSW) 35.6(2) and Order 14 rule 4(2)

[ ] page[s] is the annexure/exhibit to the affidavit of [insert deponent's name] sworn/affirmed at [place] this [day] of [month], [year]. Witness: [signature of witness], Name: [name of witness] Capacity: [capacity of witness]."

Although affidavits are generally filed with any annexures,<sup>6</sup> exhibits are not filed.<sup>7</sup> The rules provide that the party serving the affidavit must serve copies of exhibits or make them available for inspection by any affected party.<sup>8</sup> As exhibits are kept separately and only tendered to the Court when the affidavit is read, they should be kept in a safe place with the original exhibit note.

As a general rule of thumb, if there is a large amount of material to be incorporated into an affidavit, better practice dictates that the material be exhibited to the affidavit and appropriately indexed so as to be clearly identified, with the use of indexes and tabs if necessary. Previous rules limiting the maximum amount of annexures to 50 pages have been abolished. Compliance with the rules requires the use of initials of the deponent to identify the annexure or exhibit, followed by a consecutive number for each exhibit or annexure. To illustrate, annexures '2' and '3' of the first affidavit of John Mathew Smith dated 23 June 2008 could be marked 'JMS-2' and 'JMS-3' respectively. Additionally, if John Mathew Smith were to swear a further affidavit in the proceedings at a later date, with an annexure attached, the first annexure of the second affidavit would be marked 'JMS-4'.

It is noteworthy that with the introduction of the UCPR in 2005, in an effort to minimise unnecessary photocopying, the practice of annexing filed court documents to affidavits of service was abolished by the introduction of UCPR 35.8(1). It is now sufficient to identify the document served within an affidavit of service without annexing the court document itself.

### 25.4.3 Directions for and service of affidavit evidence

As part of the drive to improve the efficiency of the judicial process, courts increasingly rely upon evidence in the form of affidavits and witness statements being prepared and served by the parties relying on them in advance of any hearing.<sup>9</sup> This procedure helps limit the

6 Subject to *Uniform Civil Procedure Rules* 2005 (NSW) 35.9

7 See *Uniform Civil Procedure Rules* 2005 (NSW) 35.6(5)

8 See *Uniform Civil Procedure Rules* 2005 (NSW) 35.6(6) and Order 14 rule 4(3)

9 See section 69 of the *Civil Procedure Act* 2005 (NSW)

hearing time required and puts the parties and the Court on notice of the evidence that will be relied upon at the hearing. It also provides an opportunity to narrow the scope of the issues in dispute prior to trial. Other parties to the proceeding can then call witnesses to give further oral evidence under cross-examination. Generally, leave of the court will be required before a party who has served an affidavit is permitted to lead further viva voce evidence in chief at the trial. As courts take on a more active case management role, they are requiring the service of affidavit material within specific time frames prior to setting down matters for trial. Unless an affidavit is served, an affected party may not have adequate notice of the evidence that is to be led at the hearing or application and may not be sufficiently prepared as a result. In such circumstances, the Court retains discretion to refuse to allow an affidavit to be read, and may permit the affected party an adjournment to enable it time to consider and respond to the evidence. The costs of that adjournment will usually be borne by the party seeking to rely on the 'late-served' affidavit.

The rules of the various courts provide for the period of service for affidavits and statements, but as a general guide, affidavits must be served a "reasonable time" before the hearing and expert reports must be served 28 days before they are used in Court. In the Federal Court, Order 14 rule 7(1) sets out the general principles that can be applied to this area, providing that 'a party intending to use an affidavit shall serve it on each interested party no later than a reasonable time before the occasion for using it arises'. Order 14 rule 7(2) provides that the court may give directions as to the service of affidavits. Likewise, UCPR 10.2(2) provides that a party who fails to serve an affidavit as required by the rules may not rely upon an affidavit without leave of the Court. It is worth keeping in mind the case management principles discussed in the Full Federal Court decision of *Queensland and South Bank Corporations v J L Holdings Pty Ltd*<sup>10</sup> which discuss the limits of flexibility that the court adopts with respect to case management generally.

## 25.5 Presenting evidence

### 25.5.1 Facts not argument

An affidavit is not a medium for a party or a witness to make submissions, offer unqualified opinions or make observations that are irrelevant to the proceeding. This said, litigants in person often fall into this trap of using their own affidavits as an opportunity to buttress their arguments

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10 [1996] FCA 1847

in the case. For any lawyer preparing an affidavit, the comments of J Edgar Hoover, former head of the FBI, are apt:

We are a fact gathering organization only. We don't clear anybody. We don't condemn anybody.

However, for some less experienced lawyers, the task of preparing an affidavit or witness statement often presents a temptation to incorporate arguments and submissions within the statements they are preparing. Of course, submissions or argumentative material will almost always be objected to and courts will readily uphold such objections. At trial, the primary role of the advocate is to persuade the tribunal of fact in favour of the case they are presenting on their client's behalf. In contrast, when drafting an affidavit prior to trial, you should focus on being a 'fact gatherer' to ensure that the evidence is presented in a well ordered, admissible form, which adheres with court formalities and which is drafted with the facts in issue in mind. In this way, the Court is able to focus immediately on the substantive issues. These contrasting roles of 'fact gathering' and 'advocacy' are worth reflecting on. Properly preparing any matter for trial requires you to understand and balance these duties and roles.

When drafting an affidavit in any proceeding, a good starting point is Part 3.1 of the *Evidence Act* 1995 (NSW). Section 55(1) of that Act provides that evidence 'is relevant in a proceeding if it is evidence that, if accepted, could rationally affect (either directly or indirectly) the assessment of the probability of the existence of a fact in issue'. It is critical for the drafter to consider the relevance of matters to which the affidavit or witness statement relates.

## 25.6 Precision

When considering the 'form' of the evidence, any drafter should focus on the manner in which the evidence is recorded in an affidavit or the manner in which it is presented orally, rather than just the grammatical form or 'format' of the actual document itself. Whether evidence is given orally or by affidavit, it must be provided in admissible form. When preparing an affidavit a good rule of thumb is to remember that a witness can generally only give evidence of what they did, saw, heard, smelt, touched or tasted and, in the case of an expert, their opinion as to certain matters within their own area of expertise.

Objections as to the 'form' of affidavit evidence are commonly dealt with at the outset of a trial. Schedules of objections are often prepared



(usually by counsel) shortly prior to trial in order to save time dealing with objections to affidavits at the commencement of the matter. Although questions of admissibility or form of the evidence will be dealt with at the outset, further assessments as to the reliability and weight of the evidence may still be made by the court later in the course of the hearing. Evidence can be admitted on a limited basis and may sometimes be admitted only as against one party and not others.

A basic rule of thumb is precision. The more precise the drafting, the more likely the evidence will be admissible and therefore persuasive. When interviewing a witness, consider asking "w" questions such as: when did it happen? What action did you take? What did you observe next? Where were you when you observed these things? Be careful to avoid 'why' questions unless the context provides that such evidence would be admissible. Witnesses have a tendency to summarise things that happen in order to communicate efficiently. Consequently, it is important to deliberately set out the detail of events of which a witness is able to give testimony. When interviewing a witness, it is useful to ask the witness to detail events in chronological order rather than the usual summary form in which people speak. This generally requires a witness to pause and consider in far greater detail, matters that would, in normal conversation, never normally be detailed with such reflection. For example, to exaggerate, a witness might describe a car travelling around the corner in very simple terms in ordinary conversation. However, in an affidavit it may take this form:

I stood on the northern curb of Sussex Street facing west. At the time I was having a conversation with my friend Joe. At about 6.29 pm I heard a loud noise which I recognised to be the engine of a car. A few moments later I heard a loud screeching sound, which I recognised as tyres sliding on a road. I looked up and saw a green motor vehicle travelling in a southerly direction, but with its front pointed substantially towards the east. The vehicle moved at a rapid pace around the corner and I noticed that its back wheels were travelling substantially further towards the south than its front wheels. I recognised the vehicle from its shape to be one produced by MG. I observed the vehicle the entire time that it travelled around the corner and observed that its speed was significantly in excess of the speed at which cars usually drive around corners. The screeching sound was consistent with tyres sliding on an asphalt road at high speed, and continued for the entire time that the vehicle travelled around the corner. The vehicle then travelled towards me. As it approached, I observed that its speed was significantly in excess of the speed at which cars usually drive. As the car came closer to me, I observed a badge in the centre of the bonnet of the car that contained the letters

'MG'. I observed that it had a yellow number plate, but I do not recall what the registration number was. The vehicle travelled past me, at which time I lost sight of it and continued with my conversation.

By way of contrast, a statement like "The defendant's hotted-up MG roared around the corner and sped past me like it was in the Grand Prix" would be of little evidentiary weight, as the summarised statement cannot be tested. It contains adjectives, colloquial descriptions, and value-laden verbs, all of which should be avoided in evidence.

It is often said that an affidavit should be drafted in the witness's own 'language', in that the affidavit should not contain words that the witness would not normally use. Otherwise, problems can arise during cross-examination if the witness is asked to explain something about their own affidavit and the witness does not understand the language used by their solicitor. It can be very damaging to credibility if the witness states on oath words to the effect 'Oh, my lawyers just put that in there, I don't know what it means'. However, this does not mean that the witness should not try to be precise about their evidence. It is the role of the lawyer to put the witness's account into admissible and precise form. This means that the affidavit or statement will, in most cases, contain more formal language than the witness would use in conversation. The exception to this is when evidence of a conversation is being given. Such evidence should always be in direct speech if possible, even if the conversations contain vulgarities. If the witness cannot recall the exact words, the usual practice is to describe the conversation as 'using words to the effect of...' or 'using words to the following effect'. A witness who is very unsure about what was said can, and probably should, say 'Although I cannot recall the exact words, the conversation was to the following effect'. This is important as the witness cannot then be made to look less credible by backing away, in cross-examination, from an affidavit in which he or she appears to be claiming a clear, or substantially, clear recollection of the words used.

In order to be consistently precise in drafting evidence, it is necessary to focus on actions, observations and events. A useful formula in drafting evidence is "On [date] I [observed something] [said something] [did something]." Try to keep sentences short and concise. Use neutral language that avoids conveying any opinion as to the event in question. This will help to ensure that the Court receives the necessary detail in an objective and dispassionate form.

### 25.6.1 Relevant admissible facts only/compare with pleadings

As an affidavit is evidence, the *Evidence Act* 1995 applies to the text of an affidavit. The Court will exclude inadmissible evidence from any affidavit if it is objected to, and such excluded evidence cannot be used in support of any argument or application. Therefore, it is important to keep in mind the rules of admissibility when drafting an affidavit.

Less experienced solicitors should seek to ensure that all relevant evidence is put into an affidavit, even if some evidence is ultimately not read or struck out all together. Particularly in circumstances where a draft affidavit will be reviewed by more senior solicitors or by counsel, the inclusion of important but potentially inadmissible evidence (perhaps with some comment about your concerns next to it) will assist those supervising to consider other approaches to that issue or other witnesses that could be called to give that evidence.

A further rule of thumb is to use only relevant facts. There will often be times when a witness wishes to go into great depth about matters that he or she considers fundamental to their evidence (and their own view of the merits of the case). However, it is the solicitor and not the witness that needs to decide what evidence is relevant to the proceedings. Whenever taking instructions for the drafting of an affidavit, a solicitor will invariably receive instructions regarding relevant aspects of the proceedings and irrelevant aspects. Part of a solicitor's role in taking an affidavit is to sift through and exclude any evidence that is not relevant to the facts needing to be established in order to successfully conduct a case.

An affidavit should therefore not simply record all of the evidence that a witness wishes to give in a matter. Often filed affidavits that contain large portions of evidence not relevant to the facts will not be 'read' or at least those irrelevant portions will not be read. When large slabs of affidavit evidence are not relevant to the facts in issue in the proceedings, such as in *Family Provision Act* claims, the Court will often criticise the party for wasting time and costs. Consequently, a solicitor taking an affidavit will often require discipline and tact when dealing with a witness to ensure that the witness is directed to giving affidavit evidence only as to those facts and matters relevant to the proceedings. For example, how a witness feels about a particular situation is seldom of any relevance in civil proceedings. Similarly, a witness's particular bias or personal views and perspective are seldom helpful or admissible. Confining the statement or affidavit to the bland facts within the witness's knowledge

helps to ensure that the witness's personal values and opinions are omitted and presents the evidence in a much more credible way.

When assessing the evidence to be relied upon, it is essential to ensure that sufficient and credible evidence is available in the material to establish every fact or element necessary to prove the case. In relation to a pleaded case, it is useful to go through every allegation in the pleading that has not been admitted to ensure that the affidavit evidence canvasses all of the facts in dispute. Likewise, in the case of interlocutory applications, it is prudent to consider the 'test' or the 'elements' required to be established on the application being made or defended, to ensure that each test or element is satisfied by the affidavit. Many interlocutory applications fail because the evidence does not adequately support the requirements of the relief being sought. With a combination of precise and detailed drafting and a thorough checking of the elements that need to be proven, you can greatly improve the chances of successfully establishing the evidence necessary for the application or proceedings being brought.

### 25.6.2 First person active voice

An important drafting rule is the use of first person active voice. The use of first person is important because the maker of the affidavit or statement can only give evidence about his or her own observations. Witnesses invariably become aware of things through the process of talking to people and making further assumptions which, together with their own experiences and observations, may lead to conclusions of fact that are not supportable in evidentiary terms. Strictly adhering to the 'first person' form helps focus both the drafter and the witness on these tasks. For example the use of a form "I went to the laboratory and collected the green plastic bag labelled exhibit 13472" is preferable to "The exhibit was then collected". Not only does the latter example leave a question mark as to whom it was that collected the exhibit, but it also makes it more likely that the witness will stray into areas of assumption and speculation as to what others may have done rather than telling the story through their own observations. When first drafting an affidavit, a useful 'checking' tool to ensure first person active voice is to be wary of any sentences that do not have the pronoun "I" or "me" in them.

The use of active voice is important because it provides a much more precise and readable description of what happened. It also causes the deponent to focus on their actions and observations and is useful in preventing any accidental straying into inadmissible language.

### 25.6.3 Hearsay

You should be familiar with the hearsay rules set out in Part 3.2 of the *Evidence Act 1995*. The rule against hearsay provides that evidence of a previous representation is not admissible to prove the existence of that representation as a fact.<sup>11</sup> For example, if witness 'A' gave evidence that "At the pub last month, John told me that Fred crashed his car on the weekend," then such a statement could only be admitted as evidence of the fact that a conversation had taken place between witness 'A' and John. It could not be admitted as evidence of Fred having crashed his car on the weekend.

There are a number of exceptions to the hearsay rule. These exceptions are set out in Divisions 2 and 3 of Part 3.2 of the *Evidence Act*. A common and useful exception to the hearsay rule is in connection with the hearing of interlocutory proceedings.<sup>12</sup> A further common and useful exception to the rule against hearsay is the business record rule: section 69 *Evidence Act*.

### 25.6.4 Opinion

*In matters of opinion our adversaries are insane*

Oscar Wilde

With some exceptions, opinion evidence will not be admitted to prove the existence of a fact about which the opinion was expressed.<sup>13</sup> However, many opinions as to everyday events and common knowledge are saved by the lay opinion rule under s 78 or by the common knowledge rule under section 80(b) of the *Evidence Act* respectively. That said, section 78 of the *Evidence Act* only permits opinion evidence where it would not be possible to describe the particular event or observation in terms of the bland facts alone.<sup>14</sup>

The most important skill in drafting an affidavit or statement is to determine the difference between fact and opinion. While the distinction might seem obvious, people opine in their general conversations so commonly, that opinions (or conclusions) generally pass unnoticed. When considering the example of the car travelling around the corner,

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11 See section 59 of the *Evidence Act 1995* (NSW)

12 See section 75 of the *Evidence Act 1995* (NSW)

13 See section 76 of the *Evidence Act 1995* (NSW)

14 *R v Van Dyk* [2000] NSWCCA 67 at 129-133

a statement that 'The wind rushed past me as the car went past with sufficient strength to blow a polystyrene cup out of my hand' is an observation. However, a statement that the car was exceeding the speed limit, or going 100 km an hour, is an opinion. In distinguishing between opinions and facts it is useful to concentrate on the witnesses observations of sight, hearing, touch, taste or smell. Some level of personal experience may be necessary to give context to this observation, such as, for example, 'I smelt a pungent sulphuric smell like the smell produced from rotten eggs', although observations of sight can usually be described with precision without needing to resort to experience, analogy or conclusion. Of course, in the case of expert opinion evidence, different considerations apply as detailed below.

Sometimes it is necessary to state a lay opinion to give clarity to the meaning. Alternatively, the witness's state of mind may well be a relevant fact, and so any conclusion they have drawn may be relevant and admissible as such despite its apparent conclusionary form. If the statement is admitted as going to the witness's understanding, then you should be satisfied that the witness's understanding is relevant. Wherever possible, in either case the reasons for an opinion should then be spelled out in the form of observed facts. That way the witness's conclusion rises no higher than the stated reasons/facts given and the conclusion is capable of being tested. Judges are thus more likely to admit them. For example, a witness might say that:

I formed the view that the Plaintiff was not a reliable employee and decided to terminate his employment for that reason. I formed this view because he was late every Monday morning by between 30 minutes and 1 hour for the whole of the 3 months he was employed by the company, and on the occasions (about one in three) I asked him for a reason he shrugged his shoulders and said words to the effect of "You know how it is on Monday mornings", but did not give any reason or excuse I could understand. None of the other employees were late without being able to give a reason which I considered good, including that they had a sick child, or some other family commitment or personal illness, or some misadventure such as a broken down vehicle or a train strike, or the like.

### 25.6.5 Further tips

When drafting an affidavit it is common to give some background evidence about the deponent to assist the Court as to who the witness is and their connection to the proceedings. Usual background matters include:

- (a) Where does the witness fit in?
- (b) Which party are they connected with?
- (c) How many affidavits have they sworn in the proceedings?
- (d) What are the witness's qualifications and/or background?
- (e) How long has the witness held the relevant position?

Providing some background about the witness gives the Court some sense of context as to the basis of the evidence that the witness gives about events relevant to the litigation.

## 26. EXPERT EVIDENCE

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### 26.1 Introduction

Expert witnesses can play a significant role in litigation. Subject to compliance with the rules of the relevant Court and section 79 *Evidence Act*, experts can give evidence of their opinion within their field of expertise. Section 79 provides that if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person, which is wholly or substantially based on that knowledge.

The key practical issues to consider when it comes to using an expert witness are the role of any potential expert witness in any matter, including when it is appropriate to retain an expert witness, how to select, engage and brief an expert witness and how an expert's evidence should be presented and used. When choosing your expert you should remember that the witness's qualifications must relate to a topic that is properly the subject of expertise and that topic must be relevant to the issues arising on the pleadings.

You must familiarise yourself with the relevant practice notes of each court in relation to the use of expert witnesses, and the practice notes of any list in which the matter appears (e.g. the Commercial List, Professional Negligence List etc.) which may contain further provisions.

#### 26.1.1 Common law

The common law, prior to statutory intervention, provided various principles on the admission of expert evidence. Such principles are still applicable today and are reflected in the statutory scheme. In short, they are:<sup>1</sup>

- (a) The witness must have the relevant expertise in terms of knowledge and experience to give the evidence in question;
- (b) The expertise of the witness must qualify as a recognised field or area of expertise;

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1 For further information on these principles and an in-depth analysis of the field, refer to J B Hunter, Cameron and Henning, *Litigation 2: Criminal Procedure and Evidence* (7<sup>th</sup> Edition), Lexisnexis, Australia, 2005



- (c) The evidence given by the expert must not relate to matters of so called common knowledge, that is, where an ordinary person could make a sound judgment on the evidence without having some particular experience or training;
- (d) The expert's opinion must be based upon and relate to a matter within his or her expertise;
- (e) The basis of the expert's evidence may be required to be established by admissible evidence. This principle is known as the basis rule and there is some degree of uncertainty as to its precise requirements and application; and
- (f) The ultimate issue rule may operate to prevent the expert witness from expressing any opinion about an 'ultimate' issue to be determined by the trier of fact. This rule applies to both lay and expert evidence.

### 26.1.2 Statute

Section 79 of the *Evidence Act 1995* (NSW) provides another exception to the rule excluding opinion evidence – opinions based on specialised knowledge. Specifically, it provides that the rule excluding opinion evidence does not apply if:

- (a) The person giving the opinion has specialised knowledge based on training, study or experience; and
- (b) The opinion that person wants to give is based on that specialised knowledge.

The 'common knowledge' and 'ultimate issue' rules have been expressly abolished by the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) (herein the Uniform Evidence Acts, 'UEA'). See section 80 of the UEA.

The question that remains to be determined in relation to this section is whether the requirements of 'specialised knowledge' imports the 'recognised field of expertise' rule as formulated at common law and to what extent the factual basis of opinion must be in evidence. As to the latter, see the decision of Heydon JA in *Makita (Australia) Pty Ltd v Sprowles*<sup>2</sup> who summarised the preconditions for admissibility under section 79:

...the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or

substantially based', applies to the facts assumed or observed so as to produce the opinion propounded.

The common law contextualises the statutory provisions and as a result, it is important to be familiar with the common law authorities relating to expert evidence.

## 26.2 General principles

### 26.2.1 Specialised knowledge

The UEA does not define specialised knowledge but by virtue of section 79 of those Acts, it is clear that it can be based on either 'training' (such as high-level education) or 'experience'. As mentioned above, this is an instance where one must consult the common law for guidance:

- (a) *Clark v Ryan*<sup>3</sup> provides a rationale for the allowance of expert evidence, namely, that experts are able to give opinions about something that a jury is not capable of doing. If an expert cannot do this, or is not qualified to make such inferences, then his/her opinion is inadmissible.
- (b) Compare this case with *Weal v Bottom*<sup>4</sup> where a truck driver of 30 yrs experience could give evidence based on his experience with particular trucks at a particular bend. Ultimately, Weal was decided on the basis that the truck driver was not giving his opinion per se, but rather recounting his experiences. The jury could then form their own view and take into account the 'expert's' opinion.

### 26.2.2 Qualifying the expert

Peer recognition in established disciplines will generally guarantee court recognition of the witness' expertise, unless the witness lacks necessary expertise on a particular topic within their general speciality. For instance, a general medical practitioner would not likely be able to give an expert opinion on complex questions of neurology; notwithstanding neurology is a field of medical science.

Further, a witness can be an expert on a particular topic on the basis of his or her practical experience, e.g. police are often allowed to give limited opinions based on their long experience in certain areas (drugs,

3 (1960) 103 CLR 486

4 (1966) 40 ALJR 435

road accidents, etc).<sup>5</sup> A person may also have what in some cases is called, 'ad hoc expertise,' based on specific experience.<sup>6</sup>

### 26.2.3 Fields of expertise

As previously noted, at common law, expert opinion evidence is only admissible if the opinion is derived from a recognised 'field of expertise'. The difficulty lies in formulating criteria for accepting or rejecting as 'areas of expertise' novel or developing bodies of knowledge. There exist two alternative tests emerging from authorities deriving from the United States in answering the question of whether a field is a field of 'specialised knowledge'.

- (a) The Frye test requires that there be 'general acceptance' of the proposed field by those with authoritative knowledge of the broader relevant discipline.<sup>7</sup>
- (b) The other test is the Daubert test which rejected the Frye test and instead stipulated a series of criteria for defining 'scientific knowledge' (therefore asking the question "is it good science?" and allowing the Court to assess the reliability of a particular area of knowledge, rather than making the general acceptance of the scientific community the sole criterion). The criterion that may be considered include: whether the new technique is falsifiable, whether it has been subject to peer review in credible publications, whether enough is known about errors relating to the theory (or technique), and whether the theory or technique has gained general scientific acceptance.

It appears that the Courts generally rely on either one of the tests, a combination of the two, or simply the concept of reliability as governed by the relevance and discretionary exclusion provisions. For further cases on this area, you may want to consider the following:

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5 See for example *R v Blackwell* (1996) 87 A Crim R 289, as well as *R v Shephard* [1993] AC 380 (HL) (where a store detective who had great experience of the store's computerised system was permitted to give evidence as to the reliability of register printouts)

6 See *R v Leung and Wong* (1999) 47 NSWLR 405 relying on *R v Menzies* [1982] 1 NZLR 40; *R v Butera* (1987) 164 CLR 180; *R v Eastman* (1997) 158 ALR 107 and *R v Cassar and Sleiman (No 17)* [1999] NSWSC 436

7 *Frye v United States* 293 F 1013 (1923)

- (a) Reliability: (*Casely-Smith v FS Evans & Sons Pty Ltd*<sup>8</sup> (bushfire behaviour); *R v Runjanjic*<sup>9</sup> (battered woman syndrome); *R v Lewis*<sup>10</sup> (bite-marks)).
- (b) General acceptance and reliability: (*R v Bonython*<sup>11</sup> (police handwriting evidence); *Osland v R*<sup>12</sup> (battered woman syndrome)).
- (c) Probative value outweighed by prejudice: tendered scientific evidence: *R v Tran*<sup>13</sup>; *R v Lucas*.<sup>14</sup>
- (d) Likening of ‘specialised knowledge’ in s 79 to position at common law: ‘special knowledge or experience...which is sufficiently organised or recognised to be accepted as a reliable body of knowledge,’ *HG v R*.<sup>15</sup>

The High Court decision in *Veleviski v R*<sup>16</sup> is also authoritative in this field. Justices Gummow and Callinan JJ applied *Bonython*<sup>17</sup> and held that “[t]he concept of ‘specialised knowledge’ imports knowledge of matters which are outside the knowledge of experience of ordinary persons and which ‘is sufficiently organised and recognised to be accepted as a reliable body of knowledge or experience.’”

#### 26.2.4 The opinion must be within the expert’s area of expertise

An expert may express an expert opinion only about a matter actually within his or her area of expertise.<sup>18</sup> This requirement has been formalised by section 79 of the EA which specifies that the opinion must be ‘wholly or substantially based’ on the ‘specialised knowledge’ of the witness, which must be based on the ‘training, study or experience’ of the witness.

8 (1988) 49 SASR 314

9 (1991) 56 SASR 114

10 (1987) 29 A Crim 267

11 (1984) 28 SASR 45

12 (1998) 197 CLR 316

13 (1990) 50 A Crim R 233

14 [1992] 2 VR 109

15 (1999) 197 CLR 414

16 (2002) 187 ALR 233

17 (1984) 28 SASR 45

18 *Clark v Ryan* (1960) 103 CLR 486

In *HG v R*,<sup>19</sup> Gleeson CJ considered the practical ramifications of the section 79 formulation: “An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based and the opinion in question...”

Accordingly, in adducing expert opinion, the reasoning process involved in arriving at the opinion must be exposed. Specifically, the facts on which the opinion is based, and the inferences drawn from those facts, must be made evident. Further, the specialised knowledge of the witness must be identified with precision and it must be demonstrated that the opinions expressed are strictly referable to that knowledge.

Expert opinion must be based upon factual observations but arrived at wholly or substantially by utilising the expertise of the witness. In *Velevski v R*,<sup>20</sup> Gaudron J made the point that the term ‘specialised knowledge’ in section 79 does not preclude an expert witness from having regard to matters that are within the knowledge of ordinary persons in formulating his or her opinion. As noted in the joint decision of Gummow and Callinan JJ:

Training, study or experience”, the words used in the section, necessarily include, as they must in all areas of expertise, observations and knowledge of everyday affairs and events, and departures from them. It will frequently be impossible to divorce entirely these observations and that knowledge from the body of purely specialised knowledge upon which an expert’s opinion depends. It is the added ingredient of specialised knowledge to the expert’s body of general knowledge that equips the expert to give his or her opinion.<sup>21</sup>

### 26.2.5 The basis rule

The High Court decision in *Ramsay v Watson*<sup>22</sup> has been interpreted as endorsing the view that where the foundation of an opinion is not established by admissible evidence, then the opinion is inadmissible. The UEA rely on the relevancy rules (sections 55 and 56) and the general exclusionary discretions (sections 135 or 137) to control evidence of opinions whose basis is not disclosed by any admissible evidence. In *Makita (Australia) Pty Ltd v Sprolles*,<sup>23</sup> Heydon JA suggested that the common law position remains in the jurisdiction where the UEA apply.

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19 (1999) 197 CLR 414

20 (2002) 187 ALR 233

21 at [158]

22 (1961) 108 CLR 462

23 (2001) 52 NSWLR 705

Alternatively, in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*,<sup>24</sup> the Full Court of the Federal Court held that the facts and the opinion must be separated out so that the reasoning process is exposed, but that the facts and assumptions need not be proven before determining admissibility. Furthermore, it was also said that many of the matters specified by Heydon JA in *Makita*, 'involve questions of degree, requiring the exercise of judgment' and that in trials without a jury they should usually be considered as going to weight rather than admissibility.

Ultimately, while the common law formulation of the basis rule does not exist in the UEA, the premise on which it is based remains of practical significance and effect.

## 26.3 Selecting an expert

The selection of an expert is a very important task. Names of potential experts can be obtained from a number of sources including clients, industry publications, recent cases, the Law Society and colleagues.

Experts should be at arms length to their appointers since any bias exhibited by an expert in favour of a party may affect the probity of that expert's evidence.

## 26.4 The expert's purpose

Experts are generally retained to prepare expert reports which will be adduced into evidence, either in the form of a witness statement or as an annexure to an affidavit. When preparing reports, experts should consider any expert material prepared on behalf of other parties within their area of expertise and may include in their report material 'in reply'. When the matter proceeds to trial, the expert witness should be available to be cross-examined on matters of opinion in their report.

Experts should be engaged as early as possible in the litigation, particularly in very technical cases. An expert's knowledge and input can be critical with respect to evidentiary issues in litigation.

Your instructions to the expert and the scope of that expert's engagement should be well considered, precise and preferably in writing. You should provide a letter of engagement clearly setting out the issues on which the expert is requested to express an opinion. The engagement

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24 [2002] FCAFC 157

should be confirmed by the expert in writing, whether by signing your letter or by a letter in reply.

It is important to keep in mind that your opponent can obtain a copy of your letter and the material with which you brief the expert. The person being asked to give an expert opinion should be satisfied that he or she qualifies as an expert in relation to the issue.

The expert should be asked to make appropriate enquiries before accepting an engagement to ensure that they do not have any actual or potential conflicts of interest. Importantly, your expert must endeavour to form, and be allowed to form, an independent view – one that would hold regardless of the party by whom they are instructed. By doing this, your expert will generally be free from criticism that they are a mere advocate of the party instructing them. An expert must endeavour to be impartial.

## 26.5 Briefing the expert and the scope of the expert's report

Once an expert has agreed to act as an expert witness on behalf of your client, you will need to send them a brief and/or letter of engagement. The expert will then produce an expert's report.

The terms of your engagement should address, among other things:

(a) **Conflict of interest**

List other parties in the proceedings, ask the expert to confirm no current or past connection with the other parties and that they are aware of no conflict of interest in acting as an expert on behalf of your client in the matter. Also, ask the expert not to take on any matter which conflicts or may potentially conflict with the instructions you are giving them.

(b) **Instructions**

- (i) Be specific with regard to the issues on which you wish the expert to provide an opinion.
- (ii) Make sure you ask for opinions that are contingent on the answers given in other opinions if you want the expert to provide further evidence, e.g. "give an opinion as to compliance with OH&S" and "if you opine that there is lack of compliance, provide an opinion on the steps to be taken and costs involved in complying".

(c) **Qualifications**

Notify the expert that they will need to include their qualifications and experience in the report.

(d) **Factual summary**

Ask the expert to include a factual summary of the matter setting out the source/s of those facts.

(e) **Documents**

Provide a list of documents enclosed with the brief.

Notify the expert that if there are any documents upon which they rely, or which may assist them in forming their expert opinion when preparing the report, these documents should be included in their Expert Report.

(f) **Assumptions**

Notify the expert that any assumptions they make should be clearly identified in their report, together with the effect on their expert opinion if any of those assumptions prove to be incorrect.

(g) **Alternative interpretations**

Notify the expert that plausible alternative interpretations of data should also be included in their report.

(h) **Any limitation or qualification on expert evidence**

Notify the expert that they must qualify the opinion given in their report if they consider their report to be incomplete or inaccurate without the qualification, if they are unable to form a conclusive opinion because of insufficient research or insufficient data, or for any other reason.

(i) **Reliance on work performed by others**

Notify the expert that their report must identify those areas where their opinion relies on work carried out by others. To the extent that their opinion relies on work carried out by others, the expert should:

- (i) review the work and original documents to the extent necessary to form their opinion; and



- (ii) where the work performed by others is of a significant nature, identify in their report the extent of their reliance on that work.
- (j) **Duties and responsibilities of expert witnesses** – Expert Witness Code of Conduct  
Enclose the applicable Expert Witness Code of Conduct and emphasise the need for the expert to familiarise themselves with the Code of Conduct and confirm that they understand the code, and agree to be bound by it, in their report.

## 26.6 Expert reports

Expert evidence is regularly prepared in the form of an “expert report,” which can usually be annexed to an affidavit that is then sworn by the expert. It is essential that matters of form be addressed with particular care when preparing an expert report:

- (a) An expert should be given a clear set of facts upon which to base their opinion. Such facts can be based upon the evidence provided to the expert to consider, such as affidavits and other documents. Alternatively, such facts can be based upon ‘factual assumptions’ that the expert can be asked to make before giving their opinion. If factual assumptions are made, then evidence establishing such assumptions will be required if the expert’s opinion is to be of any utility.
- (b) The expert should clearly set out their qualifications as a person with specialised knowledge based on their training, study or experience. Usually, a curriculum vitae is required to be included with the report outlining the expert’s tertiary or other qualifications, and number of years of practice.
- (c) The expert should be asked to read and acknowledge the Expert witness code of conduct (found at Schedule 7 UCPR) as required by UCPR 31.23 for Supreme, District or Local Court proceedings. Similarly in the Federal Court, expert witnesses should be asked to read the Practice Note CM 7 – Expert Witnesses in Proceedings in the Federal Court of Australia.
- (d) The expert must set out all of the material and assumptions that the expert has relied upon within the report.

- (e) The expert must set out the reasons for each conclusion. This must be done so that any other person who is an expert in the field can see how and why the expert has reached that conclusion.
- (f) The expert must be careful to limit their opinion to their own area of expertise and not to stray beyond that specialty area. Each opinion should set out the facts and reasoning upon which the opinion is provided. It is important that expert statements clearly distinguish the assumptions and facts relied upon from the opinions and conclusions provided. Most often, the expert's conclusions will depend on the starting premise or the assumptions that they make. These assumptions need to be proven through other witnesses and separated from the expert's analysis.

The critical rule for drafting expert statements is to set out at the beginning of the statement the assumptions for which the expert does not have personal knowledge. Not only does this focus the expert on what is assumed, as opposed to concluded, but it also reminds the lawyers that those are the facts that need to be proven through other witnesses. Heydon JA, when sitting on the New South Wales Court of Appeal, made some very pertinent observations about the requirements of an expert opinion in the matter of *Makita (Australia) Pty Ltd v Sprowles*.<sup>25</sup> Those comments can be summarised as follows:

- (a) it must be agreed or demonstrated that there is a field of "specialised knowledge";
- (b) there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
- (c) the opinion proffered must be "wholly or substantially based on the witness' expert knowledge";
- (d) so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proven by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proven in some other way;
- (e) it must be established that the facts on which the opinion is based form a proper foundation for it; and
- (f) the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached. That is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert

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25 [2001] NSWCA 305

by reason of “training, study or experience” and on which the opinion is “wholly or substantially based”, applies to the facts assumed or observed so as to produce the opinion propounded.

Expert reports are often completed in the form of a report without any adherence to the Court format, or even a letter to the instructing solicitors.

Usual practice is to draft a short affidavit annexing the report and the curriculum vitae of the expert.

## 26.7 Adherence by expert to guidelines and practice notes

### 26.7.1 Expert guidelines

Experts in proceedings in the Supreme, District and Local Courts must adhere to the Expert Witness Code of Conduct in Schedule 7 UCPR. See also:

- (a) UCPR 31.23 – Code of Conduct;
- (b) UCPR 31.27 – Experts' Reports;
- (c) UCPR 31.28 – Admissibility of expert's report.

Experts in the Federal Court must adhere to Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia.

### 26.7.2 Retrospective acknowledgement of guidelines / Code of Conduct

While an expert witness must comply and expressly adhere to the Code of Conduct, a failure to express this code is not necessarily fatal to the report of written evidence of the expert. In *Barak Pty Ltd v WTH Pty Ltd*,<sup>26</sup> an expert report annexed to an affidavit was allowed into evidence despite an omission to include the acknowledgement. The counsel representing the party seeking to admit the report successfully sought leave to examine the expert and evidence was led that the expert was aware of the existence and contents of the Code before writing the report and agreed to be bound by it. The report was subsequently allowed into evidence. The ideal position however is to avoid such a situation and to ensure that there is an acknowledgement of the Code in the report.

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26 *Barak Pty Ltd v WTH Pty Ltd* [2002] NSWSC 649

Note that the expert witness must be aware of the existence of the Code of Conduct, and that being unaware of the Code necessarily means that the expert has formed their view without reference to the relevant Code of Conduct.<sup>27</sup>

### 26.7.3 Relevant Practice Notes

#### **Federal Court of Australia**

For proceedings in the Federal Court, see CM 7 - Expert Witnesses in Proceedings in the Federal Court of Australia, which practice note replaced the Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia from 25 September 2009. The guidelines set out in this practice note:

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

#### **Supreme Court**

For proceedings in the Supreme Court, see the following:

- (a) General Practice Note SC Gen 2, 1 March 2006. A party may not search for or inspect in the registry any document in any proceedings for order under UCPR 31.18 (which relates to experts' reports) except with the leave of the Court.
- (b) General Practice Note SC Gen 4, 17 August 2005. Affidavits, pursuant to UCPR 31.26, relating to directions for further evidence by an expert, are required to be filed.
- (c) General Practice Note SC Gen 10, 17 August 2005. Single Expert Witnesses. The purpose of this practice note is to prescribe the procedures surrounding the use of single expert witnesses in the Court.
- (d) General Practice Note SC Gen 11, 17 August 2005. Joint Conferences of Expert Witnesses. The objective of this practice

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<sup>27</sup> See *Commonwealth Development Bank of Australia Pty Ltd & Anor v Claude George Rene Cassegrain; Gerald Cassegrain & Co Pty Ltd & Ors v Commonwealth Development Bank of Australia Pty Ltd & Ors*; [2002] NSWSC 980

note is to facilitate compliance with any directions of the Court given pursuant to Division 2 of Part 31 of the UCPR.

- (e) Equity Division Practice Note SC Eq 3, 10 December 2008. This relates to case management procedure in the Commercial List and Technology and Construction List.
- (f) Equity Division Practice Note SC Eq 5 – Supreme Court Equity Division – Expert Evidence in the Equity Division, 2 February 2009 – which restrict the number of experts that can be used, provides for the appointment of joint experts and sets out the requirement that a party promptly seek directions from the court in relation to adducing expert evidence (which in any event is required by rule 31.19 UCPR).
- (g) Common Law Division Practice Note SC CL 5, 29 January 2007. Explains the operation of the General Case Management List, and covers expert witnesses in personal injury cases, concurrent expert evidence and single expert witness.
- (h) Common Law Division Practice Note SC CL 7, 31 March 2008. Explains the operation of the Professional Negligence List.

You should also be aware of the effect of Part 31 of the UCPR on relying on expert evidence and cross-examining expert witnesses.

### **Land and Environment Court**

For proceedings in the Land and Environment Court, see:

- (a) Practice Direction No.22, 2 February 2004. Covers the Expert Witness – Code of Conduct, experts' conference and requirements for joint conferences.
- (b) Practice Direction No.1 of 2005, 1 February 2005.

### **District Court of New South Wales**

For proceedings in the District Court of New South Wales, see:

- (a) Practice Note DC (Civil) No 1. Covers use of expert reports and time standards in the General List.
- (b) Practice Note DC (Civil) No 2. Covers expert evidence and case management in the Commercial List.

You also should be aware of the effect of Part 31 of the UCPR on relying on expert evidence and cross-examining expert witnesses.

### **Workers Compensation Commission**

For proceedings in the Workers Compensation Commission, see Practice Direction No.3, 1 November 2006.

### **Dust Diseases Tribunal of New South Wales**

For proceedings in the Dust Diseases Tribunal of New South Wales, see Practice Note No. 1 of 2005.

## **26.8 Peripheral issues**

### **26.8.1 The hearsay rule**

There is an interrelationship between the hearsay rule and the opinion rule in particular, in the context of satisfying the basis rule. For example, if an expert opinion as to financial matters is given which is based in part on business records, the question of hearsay does not arise with respect to the business records as the hearsay exception to business records overcomes this hurdle.

However, consider the case where a property expert gives an expert opinion as to the value of land in Sydney and the expert relies on statistical information published in a journal. In this example, the statistics relied on would fall foul of the hearsay rule.

Conversely, admissible hearsay may also lead to the admissibility of opinions.<sup>28</sup>

### **26.8.2 Joint opinions**

The requirement that the opinion must be based “wholly or substantially” on specialised knowledge can have significant implications where an opinion is expressed jointly by more than one person, as with expert reports adduced in evidence.<sup>29</sup>

### **26.8.3 Discretionary exclusion**

Remember the discretionary exclusionary provisions under section 135 (section 137 in criminal proceedings) of the UEA. Even if otherwise

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28 See *R v Whyte* [2006] NSWCCA 75

29 See S Odgers, *Uniform Evidence Law*, (7<sup>th</sup> Edition), LexisNexis, Australia, 2006, 300 and *Cooke v Commissioner of Taxation* (Cth) (2002) 51 ATR 223; *Paino v Paino* [2005] NSWSC 1313

admissible, evidence of an expert's opinion may be excluded under one of these sections so it is important to be familiar with them.<sup>30</sup>

## 26.9 Resolving conflicting expert evidence

There has been a steady trend towards securing alternatives to cross-examination as a means of adjudicating conflicting expert evidence. The court may direct a conference of experts with a view to refining the areas of dispute (UCPR 31.25) or direct that they be cross-examined at the same time (so-called "hot-tubbing" – UCPR 31.26; Order 34A rule 3, *Federal Court Rules*). Alternatively, in rare cases, the court may even appoint its own expert (UCPR 31.28).

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30 S Odgers, *Uniform Evidence Law*, (7<sup>th</sup> Edition), LexisNexis, Australia, 2006, 300 provides a good overview of these issues at p. 306

## 27. ADMISSIONS BY NOTICE

*Amanda Beattie, Sharna Clemmett and Roslyn Cook*

### 27.1 Introduction

An admission is a concession in a dispute from one party to another party. The effect of an admission is to facilitate proof of something in dispute. This can be done by removing something from the field of what is in dispute. For example, a statement of claim may allege that the plaintiff is a company able to sue in its own name, and the defence may admit that allegation. In this case, the parties no longer dispute the fact that the plaintiff is a company – it is no longer part of the dispute.

Alternatively, proof of something in dispute can be facilitated by making the burden of proof easier. For example, the plaintiff may wish to prove the balance of their bank account on a particular day. To do this, the plaintiff may tender a document that they claim is a bank statement. If the defendant admits that the document is a bank statement, the document may be admitted into evidence as proof of the balance of the account as at the date of the statement. If the defendant did not admit that the document was a bank statement, then the plaintiff would need to prove their balance in another more onerous way, for example by calling their bank manager to give evidence.

An admission by notice is a form of admission that is concerned with either facts in dispute and/or the authenticity of documents relevant to a fact in dispute.

### 27.2 Notices to admit

UCPR 17.1-17.4 and Order 18 of the *Federal Court Rules* govern admissions by notice. Those rules establish a mechanism whereby the ‘requesting party’ sends a notice to admit to the ‘admitting party’. The notice requests that the admitting party make certain admissions in favour of the requesting party. The admitting party has 14 days to respond. If the admitting party decides that the admissions will be made, no response is required – the admissions are deemed to be made after 14 days.

If the admitting party does not agree to make the admissions, the admitting party must send a notice (known as a notice disputing) to the requesting party identifying the facts and/or the authenticity of documents in the requesting party’s notice that are not admitted.



Notices to admit may request the admission of facts or the authenticity of documents. In the Local, District and Supreme Courts the approved form of the notice to admit is Form 17, and the approved form of the notice disputing is Form 18. In the Federal Court, the approved forms for those purposes are Forms 25 and 26, respectively.

### 27.3 Admissions of fact (“Notice to Admit Facts”)

The best use of a Notice to Admit Facts is with respect to those facts that are material or at least relevant to the proof of a party's case, but are not seriously in dispute. For example, two parties may have had a motor vehicle collision and the plaintiff is suing the defendant for the cost of repairs to a car registered in the plaintiff's name. The plaintiff alleges that the collision was caused by the negligence of the defendant. The defendant admits that they were at fault in the car collision, but says the damage caused to the plaintiff's car is not as significant as the plaintiff claims.

In order for the plaintiff to succeed, they will need to prove that they own the car that was damaged in the collision. However, the real issue in dispute is how much damage was done to the car and not who owns it, as the car is registered in the plaintiff's name. The plaintiff's ownership of the car is therefore not seriously in dispute and is a fact appropriate to be the subject of a Notice to Admit Facts.

Having identified which facts will be contained in the Notice to Admit Facts, how should the notice be drafted? The Notice to Admit Facts should consist of paragraphs, each of which expresses one simple fact in positive terms.

For example, a notice could request the admission of the fact that the plaintiff owned a blue BMW registration number ABC-123.

Another way to draft the notice would be:

- (a) the plaintiff owned a BMW car;
- (b) the plaintiff's BMW was blue;
- (c) the plaintiff's car bore registration number ABC-123.

Depending on the case and the issues that are likely to be uncontentious, another preferable way to draft the notice would be:

- (a) the plaintiff owned a BMW registration number ABC-123; and
- (b) the plaintiff's car was blue.

The reason for the differences is that while you may be seeking the admission of a fact that is not seriously in dispute, your opponent may hold a different view and believe that a particular fact is seriously in dispute. By breaking up the facts to be admitted into single propositions, you maximise the number of facts which your opponent will admit are true.

Breaking down every fact into single propositions can sometimes be laborious and it is a question of judgment in each case how the notice should be drafted. You may decide to save yourself some work by combining several propositions of fact into a single paragraph thinking that your opponent will admit those propositions while leaving other potentially contentious propositions of fact alone in their own paragraphs. Finding the right balance is simply a matter of experience. If in doubt, use paragraphs that each express one simple fact in positive terms.

How do interrogatories interrelate with Notices to Admit Facts? Interrogatories also seek admissions from another party, but they do so by asking questions instead of stating propositions. If you know the admission that you want made, then a notice to admit is the appropriate vehicle to secure an admission. If you don't know the admission that you want made, then interrogatories are appropriate.

## 27.4 Admissions of authenticity (“Notice to Admit Authenticity of Documents”)

These are misleadingly referred to as admissions of documents. This creates confusion because the practice of admitting a document into evidence takes place during the hearing, which is not what notices to admit documents are all about.

A Notice to Admit Authenticity of Documents does nothing more than seek an admission that the document subject to the notice is authentic. Prior to service, a copy of the relevant document is attached to the notice to admit. If the admission is made, then the admission is that the attached document is a true copy.

Returning to the example of a plaintiff's bank balance, the plaintiff can prove their bank balance by admitting into evidence a document that the plaintiff claims is a bank statement. Before the document is admitted into evidence, there needs to be evidence that it is a bank statement for the relevant account. Perhaps the plaintiff's bank manager comes to court and says:

I am a bank manager. I work at ABC bank. ABC bank issues statements to its customers. This is a statement issued to the plaintiff, one of ABC's customers.

Alternatively, the plaintiff may serve on the defendant a Notice to Admit Authenticity of Documents, requesting the defendant to admit that the attached document is a photocopy of a bank statement issued by ABC bank to the plaintiff. If the authenticity of the document is not disputed, then there is no need to call the bank manager, because the defendant has admitted that the attached document is a bank statement from ABC bank.

Authenticity is just one aspect of admitting a document into evidence. You might have an authentic document that is not admissible. For example, it may not be relevant, or may consist of inadmissible opinions. Establishing authenticity only satisfies one hurdle in getting a document into evidence.<sup>1</sup>

For convenience, a party may serve a Notice to Admit Facts and a Notice to Admit Authenticity of Documents in the one notice (see Form 17).

## 27.5 Disputing facts and authenticity

Why bother making concessions at all? Surely it is to your client's advantage to make your opponent's case as difficult as possible. If so, then just respond to every notice to admit with a notice disputing – right? Wrong.

Barristers and solicitors are obliged to promote the efficient administration of justice – see Bar Rules 41 and 42, and Solicitors' Rules 23.A15 and 23.A15A. Sections 56(3) and (4) of the *Civil Procedure Act* (2005) emphasise the further duty of all parties to proceedings to assist the court in its obligation to give effect to the overriding purpose. Indiscriminately responding to every notice to admit with a notice disputing is in breach of those obligations.

There is also a costs risk associated with disputing facts and authenticity of documents. If a notice disputing is served and the relevant facts/authenticity subsequently proved, regardless of the outcome of the proceedings, the admitting party must pay the requesting party's costs occasioned by that proof on an indemnity basis, unless the Court otherwise orders: rules 42.8 and 42.9.

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1 Further reading: *National Australia Bank Ltd v Rusu* 1999 47 NSWLR 309; [1999] NSWSC 539; BC9902958

## 27.6 Withdrawing admissions

After a notice admitting has been served and admissions made, the admitting party may change its mind and decide that it does not want to make the admission. This is like retracting a confession. It is known as withdrawing an admission.<sup>2</sup> If an admission is withdrawn, then the dispute proceeds as if the admission were never made.

If an admitting party wishes to withdraw an admission, then it should first seek the consent of the requesting party. If consent is given, then consent orders may be made granting leave to withdraw. If consent is not given, then the admitting party should move the Court for a grant of leave. The rules do not provide any guidance as to what the Court will consider when exercising its discretion to grant leave, but the following is a list of factors that will probably be taken into account:

- (a) When the admission was made;
- (b) Why no notice disputing was served within time;
- (c) The amount of time that has passed since the admission was made;
- (d) What stage the litigation has reached at the time leave is sought;
- (e) Why leave is now being sought;
- (f) Whether there will be any prejudice to the admitting party if leave is granted, e.g. has the requesting party already served evidence which relies on the admission that was made;
- (g) Whether the admission formed part of a tactical approach to the litigation, from which it would be unjust to allow the admitting party to resile; and
- (h) Whether the admission was a mistake on the part of the lawyers and for which the client should not be punished.

When moving the Court for a grant of leave, the admitting party's evidence and submissions should address each of these issues.

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2 In the Local, District and Supreme Courts, Rules 17.3.3 and 17.4.3 of the *Uniform Civil Procedure Rules* 2005 (NSW) permit an admitting party to withdraw an admission with leave of the Court. In the Federal Court, Order 18, rule 1(2) of the Federal Court Rules permit an admitting party to withdraw an admission with leave of the Court.

## 28. BRIEFING COUNSEL

*Stuart Cork and Joshua Knackstredt*

### 28.1 Why work with barristers?

You should work with counsel because they possess skills that you may not possess and are necessary to successfully conduct litigation. Nothing quite focuses the mind on the strength of an argument or the usefulness of evidence like the prospect of having to explain it to a judge or jury (and the criticism of opponent and judge alike for getting it wrong). Barristers are constantly focusing on what will win, not just what is arguable.

Another reason to work with counsel is that at times it is less expensive for counsel to deliver professional services to your client, than it is for a solicitor. Barristers have lower overheads than solicitors, and operate in a far more competitive market (barristers are required to be self-employed, even though they are organised into chambers). Alternatively, they provide a 'surge' capacity when excess workloads reduce your capacity to service clients effectively.

Traditionally, solicitors maintained general practices and barristers became specialised advocates. Barristers became not simply experts in the practice of litigation, but also experts in particular fields of law. At least in New South Wales, the position is changing. The modern approach is for solicitors to specialise in either litigation or transactions (also known as corporate work). A solicitor specialising in litigation (of whatever type) will become familiar with the practice of litigation and no longer turn to barristers for everything to do with litigation; instead solicitors turn to barristers to deal with the more complex and specialised aspects of litigation.

Significant or complex interlocutory applications, hearings and appeals will usually be conducted by barristers. This is because barristers specialise in forensic advocacy, irrespective of what other areas of law they know. Forensic advocacy is advocacy employed in lawful dispute resolution, for example trial advocacy or appellate advocacy.

Most barristers come to specialise in one or several fields of law, in addition to specialising in forensic advocacy. Consequently, legal problems can be resolved quickly and cost-effectively by seeking the input of counsel experienced in a particular field of law.

When it comes to providing clients with written legal advice, there is no reason why an experienced solicitor should not be able to provide as good an advice as an experienced barrister, unless the conclusions to be expressed depend on an assessment of the evidence necessary to prove the facts. Barristers are usually in a position superior to that of solicitors to assess what the facts in issue will be at trial, as barristers deal with proving the facts more often than solicitors. It is one thing to provide an advice based upon certain facts, however proving those facts in court is another matter.

If you require another lawyer to give a considered advice, you will usually find it much quicker and easier to arrange for a barrister to give that advice. Clients are often far more receptive to being charged for an advice given by counsel than to being charged a comparable amount for advice given by a solicitor, even though the total sum paid may be the same (or a little more).

Although many solicitors develop good advocacy skills, barristers are often regarded with a higher level of respect in court and generally appear more frequently in court than solicitors. In addition, barristers receive specialised forensic advocacy training from the Bar Association before they commence at the Bar and on an ongoing basis throughout their careers. By retaining the right barrister to act as an advocate for your client, you are likely to enhance your client's prospects of success in a hearing.

Barristers provide a fresh perspective on a case, which is often difficult to obtain within a firm. Often it is easier for a barrister to deliver bad news to a client than it is for the client's own solicitor, even though a solicitor may have previously given contrary advice. A client may be more receptive to advice that a case has significant problems when that advice is received from a third party, and this may assist in allowing an established relationship with a client to continue.

## 28.2 Retaining and briefing counsel

Briefing counsel is the phrase used in the practice of law to mean the engagement of a barrister to do something on behalf of the solicitor and/or the client. Barristers can be briefed to:

- (a) advise;
- (b) appear; or
- (c) advise and appear.

In civil litigation, there are 5 main types of brief to advise:

- (a) on liability - who is going to win, based on assumed facts;
- (b) on quantum - how much the winner is going to get;
- (c) on evidence - how liability and quantum are going to be proven;
- (d) on prospects - the barrister's estimate as to the likelihood of success having regard to fact, law and available evidence; or
- (e) generally – on any or all of the above topics and anything else the barrister thinks is important (not recommended).

It is not considered good practice to brief barristers to 'advise generally' and many barristers will refuse such a brief, as it fails to define the scope of the tasks they are required to perform and the division of responsibility between solicitor and counsel.

Unless otherwise stated, the assumption will be that if counsel is briefed to advise, then counsel is to provide a written advice. If what you intend is for counsel to advise in conference, then this should be clearly noted on the brief as to advise in conference.

When deciding whether or not to brief counsel, it is often a good idea to telephone the counsel you want to brief. If the brief is to advise, have a brief discussion with the barrister and raise any time constraints. If it is a brief to appear, find out if the barrister is available on the particular day.

If you intend to brief counsel to appear, then the latest time to retain counsel is immediately before a hearing date is allocated. Even if the hearing date is months away and your counsel is comparatively junior, you should always contact either counsel directly or the clerk of chambers to ensure that the hearing is allocated to a day when counsel is available. This is important, as counsel may have a conflict of interest or may be briefed in another matter at the same time and might not, therefore, be able to take on the matter. Instead of waiting until a hearing date is on the horizon, it is preferable for counsel to be briefed as early as possible, so that preparation of the pleadings, evidence and other matters can be undertaken with counsel's input.

Having retained counsel to advise or to appear, you then have to supply counsel with a brief. This is a collection of papers that counsel will need in order to act as an advocate.

If you are in doubt as to what should go into a brief, err on the side of including something in the brief rather than leaving it out. Try to

think of what documents you would need to be given if you were asked to come to an understanding of the matter without the benefit of any prior involvement. Do not include original documents in briefs. If it is necessary for counsel to have access to an original document in order to advise, then invite counsel to contact you to make suitable arrangements (usually a conference). Counsel rarely has the facilities to safely receive, retain and preserve original documents. Copies can always be replaced, but once originals are lost they are gone forever.

Briefs should be printed on one side of the paper. If a document is double-sided, make sure it is photocopied as two single pages. Documents should be hole-punched and placed in a lever arch folder (or similar). The following details should appear on the cover of the folder:

- (a) your details (your name, firm name, reference, telephone number, facsimile number, DX, etc);
- (b) counsel's details (name, chambers);
- (c) the name of the matter; and
- (d) either "Brief to Advise" or "Brief to Appear" as appropriate.

If counsel is briefed to appear, then the brief cover should also clearly identify:

- (a) the name of the plaintiff;
- (b) the court file number;
- (c) the name of the party for whom you act;
- (d) your client's status (e.g. second defendant, third cross-defendant etc);
- (e) the jurisdiction;
- (f) the venue; and
- (g) the date upon which counsel is to appear.

An example of a brief cover sheet appears at the end of this chapter.

If your dispute concerns a company in any way, you should obtain a historical company extract from the Australian Securities and Investments Commission (ASIC) database. A copy of that extract should be placed in the brief. Similarly, if land is in issue, then you should obtain a historical title search. There is more often than not some useful piece of information found in historical searches that is absent from current searches.



Do not bother paginating a brief, as many counsel reorganise briefs when they receive them to accord with their preferred practice. You should, however, include a table of contents after the observations to record what was sent to counsel and what was not.

Briefs usually comprise:

- (a) observations;
- (b) pleadings;
- (c) affidavits and statements;
- (d) evidence; and
- (e) other relevant documents.

### 28.2.1 Observations

Observations are a short summary of *at least* the following:

- (a) identification of your client;
- (b) identification of the parties to the dispute and if necessary their respective solicitors;
- (c) the nature of the dispute; and
- (d) what you want counsel to do.

Solicitors write the observations. Observations should not be so lengthy as to be cumbersome. In most cases, there is no need to recite the detailed facts of a matter. Counsel will read the entirety of the brief, and there is no need to waste your time repeating what is contained in the rest of the brief. Focus on painting a thumbnail of the dispute, drawing attention to important matters that may be overlooked, and identifying what you want the barrister to do.

However, if work has already been done, including research notes and memoranda, letters of advice etc., and you can direct counsel to the material and certain key issues, which would of course greatly assist counsel (and your client's exposure to fees) in getting on top of the brief as quickly as possible.

An example of observations appears at the end of this chapter.

### 28.2.2 Pleadings

Pleadings are confined to those court documents that are relevant. This is often the most recent statement of claim and defence, or the notice of motion if counsel is briefed to appear on a motion.

Notices to admit facts and authenticity of documents, and offers of compromise should also be included.

Interlocutory orders, if relevant, should also be included.

### 28.2.3 Affidavits and statements

Do not include every single affidavit and statement ever made in the proceedings – only those that are relevant to the hearing (e.g. if briefing counsel to appear at trial, then affidavits in support of interlocutory motions that have already taken place are likely to be irrelevant. However, you need to use your judgement as in some circumstances such affidavits are likely to be relevant (as, for example, where the opposing barrister is likely to use them in cross examination) and ought to be included.

The affidavits and statements should be separated into groups, with each group being the depositions of a particular party. That is, there will be a collection of plaintiff's affidavits, a separate group of first defendant's affidavits, a separate group of second defendant's affidavits and so on.

In each group, affidavits should be organised alphabetically by the surname of the deponent. If a deponent has sworn more than one affidavit, then the affidavits should be arranged in chronological order.

### 28.2.4 Evidence

Evidence encompasses all the evidence that is not an affidavit or statement. This will usually include:

- (a) experts' reports;
- (b) evidentiary certificates under section 177 of the *Evidence Act 1995*;
- (c) extracts from official registers (e.g. Business Names Register, Land Titles Register, Australian Business Number Register, etc); and
- (d) documents (e.g. discovered documents) to be used in cross-examination.

### 28.2.5 Other relevant documents

Many briefs will need to contain a section at the end containing miscellaneous documents. There is usually some relevant correspondence, whose purpose is at least to provide the necessary background for counsel. Such correspondence should be placed in this section of the brief. It is usual to include letters to the client so that counsel knows what

the client has been told. There may also be documents produced under subpoena. Both the subpoena and the documents produced in answer to it should go in this section unless the documents are voluminous and not relevant to what counsel is being asked to do (e.g. if a security for costs application has been run earlier in the proceedings and subpoenas have been issued in respect of that application, the documents produced in such an application may no longer be relevant to the substantive proceedings and therefore should not be included).

### 28.3 Counsel's fees

Counsel will usually provide two documents: a costs agreement, and a costs disclosure document. In some cases, these documents will be provided as one document. Irrespective of whether counsel provides these documents, remember your obligations under section 310(1) of the Legal Profession Act 2004 to disclose to your client certain matters about counsel's costs. Those matters should be contained in the costs disclosure document. It is prudent to send the costs agreement and costs disclosure document to your client as soon as possible after they are received. Bear in mind that it is usually the case that it is your firm that is retaining counsel on behalf of your client. The primary obligation to ensure counsel is paid is, therefore, upon your firm. For this reason it is often sensible to obtain sufficient funds from your client to be held in trust on account of counsel's fees to ensure that counsel is paid on time.

### 28.4 Obtaining advice from counsel

In conjunction with forensic advocacy, legal advice is the main area of barristers' work.

Barristers' advice can be formal or informal. A formal advice is delivered either orally or in writing. If advice is delivered in writing, it has traditionally been in the form of what is known as a "memorandum of advice". In some cases, barristers will simply provide their advice in the form of a letter, in the same way that solicitors' provide advice to their clients.

When a barrister gives formal advice orally, there will be a meeting between the barrister and solicitor (and usually, but not always, the client) in which the barrister will give their opinion. There will usually be no written record of that advice, other than the solicitor's notes.

Be sure to remember that even if counsel is briefed to assist in the preparation and running of proceedings, you still have an obligation as a solicitor to ensure that your client's case has "reasonable prospects of success" (see section 347 of the Legal Profession Act 2004). Do not rely upon counsel to do everything for you, as you have an obligation to know and understand your client's case.

## 28.5 Instructing counsel

"Instructing counsel" involves attending court at the same time as counsel. Counsel sits at the bar table, and you, as the instructing solicitor, sit beside or behind them. Here are some tips on what you should and should not do.

Bring a pencil case to court with spare pens, paper, post-it notes and other office supplies. A stapler is particularly helpful. If counsel ever runs out, he or she will turn to you to fill the gap. There will seldom be time to run back to the office or out to the nearest stationers.

Take notes of the proceedings. Take particular care to note any orders made. Also take a note of the evidence as best as you can.

On a separate piece of paper, take note of exhibits. Make yourself a blank precedent that you can photocopy before coming to court, with rows and columns to record the exhibit and/or "marked for identification" number, a description of what the item is, the name of the witness through whom the item was tendered, and which party tendered it (e.g. plaintiff or defendant).

Have copies of important documents to hand, in case counsel needs another copy for the Judge, a witness or to cover some other eventuality. Always bring a spare copy of every affidavit or witness statement, for the witness to use in the witness box. If unsure of what else to bring, telephone counsel before the hearing and ask what they want you to have available.

If counsel is wearing robes, never tug those robes to get counsel's attention. This is extremely irritating and off-putting. If you want to get counsel's attention, pass a note to them on the bar table. If necessary, get up and walk to the bar table and place a note beside counsel.

Example of a brief cover sheet (see 28.2)

SMITH ats STATE OF NSW

District Court at Lismore

1234 of 2008

BRIEF TO ADVISE AND TO APPEAR AT LISMORE ON 16 JUNE  
2008

Volume 1 of 3

To:	From:
A. D. Vocate Barrister Lionel Murphy Chambers Level 6, 88 Phillip Street Sydney NSW 2000 DX 123 Sydney Telephone (02) 9220-1111 Facsimile (02) 9220-2222	Albert Brown Blue, Black & Brown DX 1234 Lismore Telephone Albert Brown: 1234-5678 Mobile Albert Brown: 0412-345-678 Telephone Blue, Black & Brown: 1234-5000 Facsimile: 1234-5001 Reference: ABC123

## Example of observations (see 28.2.1)

### OBSERVATIONS TO COUNSEL

We act for John Smith, the defendant in District Court proceedings at Lismore.

In 1999, Mr Smith entered into a contract for the sale of stationery with Lismore High School. You will see that the contract provided for "A32" notebooks to be of specific quality (used for art students), priced in accordance with a formula that gave the school the benefit of a discount for high volume purchases in any financial year. A copy of the contract appears at Tab 2 of the brief.

Mr Smith supplied certain amounts of A32 notebooks. In 2003, the school reviewed the supplies and complained that some notebooks supplied in a batch 18 months earlier failed to meet the quality demanded by the contract, and were supplied at a price that did not give the school the requisite volume discount. The school sought to recover about \$86,000 in overpayments.

You will see the defence is twofold:

First, our client says that the notebooks were supplied to the requisite quality, but after 18 months the paper deteriorated due to no fault of his own. He instructs us that the notebooks were probably improperly stored. His statement (which appears at Tab 5 of the brief) outlines his reasons for reaching this conclusion.

Second, there appears to be a calculation error on the part of the school.

Notwithstanding our client's position, the matter has proceeded to litigation and the State of New South Wales (for the school) has commenced proceedings against Mr Smith.

Counsel is briefed to:

Advise on evidence; and

Appear at Lismore District Court on 16 June 2006.

With compliments

Albert Brown  
Blue, Black & Brown  
15 April 2009

## 29. ADVOCACY

### *Jonathan Adamopoulos and Nelson Arias*

*Advocacy is tact in action*

Sir Owen Dixon

*The work of the advocate demands a precise knowledge of the law and a thorough grasp of its principles. He must be able to recognise quickly which of its principles is relevant to his case and make use of it to his client's profit.*

Sir Garfield Barwick

### 29.1 Introduction

This chapter is intended to provide an outline of some important attributes of good professional advocacy. It concentrates upon advocacy in the form of oral submissions to a Court. Advocacy in the form of written submissions have become in recent times increasingly important.

### 29.2 Effective advocacy

A good starting point in any guide on advocacy is to identify the attributes of effective advocacy. From the outset, it is important to take in account that circumstances alter cases. The nature of the case, the evidence available, the legal principles applicable, the type of adjudicator and the current state of the law all have an impact on a case and the course that it will take. Stephen Nathanson<sup>1</sup> sets out the four key requirements of good advocacy. We will use these requirements as an outline to explore important attributes of effective advocacy. Many of these concepts will relate to each other. For example, identifying a good strategy will require thorough preparation.

### 29.3 Achievable goals and flexible strategies

An advocate must identify what it is they are trying to achieve by the process being embarked and must then adopt a means to achieve that end while bearing in mind that as a case progresses, new hurdles may

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1 *Non-Trial Advocacy: A Case Study Approach*, Cavendish Publishing, London, 2001, pp 1-4

appear. For example, should a judge reject a particular submission, the advocate should have a strategy in place to still achieve their desired goal. Equally important, an advocate should never attempt to achieve something that is impossible.

### 29.3.1 Thorough preparation

Preparation is critical. There are three essential steps:

- (a) Consider what the facts of the case are. It is important to have an open mind and consider all of the facts – not simply the ones that are more favourable. Having a good grasp and clear understanding of the facts is an essential pre-cursor to preparing the legal aspects of the case.
- (b) Identify the relevant principles of law that are applicable to the case.
- (c) Reconcile the facts with the legal principles to try and achieve the best result. This is not only a task requiring consideration of the strengths of the case, but also its weaknesses and how they may be overcome. Also to be considered is how particular facts will be proved.

An important part of preparing for court is conferring with a client and prospective witnesses in conferences. Such conferences require time and patience to ensure that you can obtain a clear understanding of your client's instructions, understand the facts as your client (or prospective witnesses) see them and to properly advise, as appropriate.

### 29.2.3 Effective communication

The role of an effective advocate is to persuade a judge, jury, magistrate or other decision-maker. Effective communication is needed to convey the case of a party.

A useful starting point to this requirement is the words of Lord Macmillan:<sup>2</sup>

If I were to select the rule which in my estimation above all other should govern the presentation of an argument in Court it is this: always keep steadily in mind that the judge is seeking material for the judgment or opinion which all through the case he knows he will inevitably have to frame and deliver at the end. He is not really interested in the advocate's pyrotechnic displays: he is searching all

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2 Address delivered to the Birmingham Law Students' Society in December 1933



the time for the determining facts and the principles of law which he will ultimately embody in his decision.

The following additional points supplement Lord Macmillan's advice.

- (a) **Clarity:** The judge or magistrate should be able to grasp at once the essence of what is being put by the advocate. In many cases, the judge or magistrate will be hearing the matter for the first time. Take the time to provide the key facts and stage of the matter. To assist in this process provide chronologies, summaries and other aids for the court especially where the matter is complex.
- (b) **Brevity:** Be mindful of who you are directing your submissions to. If you are in a court with a busy list, short and pithy submissions will likely be more effective.
- (c) **Direct Communication:** When speaking to a judge or magistrate, remember that submissions are made in a formal conversation. Avoid the need for a script and confine yourself to an outline of a particular structure. Like any conversation, you should maintain eye-contact where possible.

Another important part of effective communication is to present with the correct use of grammar. A common error is the confusion of nouns with verbs and vice versa. For example, a person does not conference the witness, rather they confer with the witness. A person does not access something, rather they have access to something.

A final point on improving effective communication is to gain a sense of the judge, magistrate or registrar you will appear in front of. Sit in the public gallery and observe the judge or magistrate prior to appearing.

#### 29.2.4 An appealing story

Cases do not operate in a vacuum. Attached to each case is a person with a motive for seeking a particular end. There may have been unfortunate circumstances relevant to the case. You may seek to present an appealing story to justify, in a moral sense, the reason for the party's desired result. This forms part of the persuasive attribute of the advocate – that because of the particular circumstances, that it is only natural that party deserves the particular end sought. This should be contained within the reasonable confines of the case and the circumstances.

## 29.3 Considering ethical obligations

Professional legal ethics form the foundation of all sound professional legal advocacy. The High Court of Australia in *Clyne*<sup>3</sup> identified two classes of rules that advocates should follow:

- (a) those rules that are 'designed to primarily regulate the conduct of members of the profession in their relations with one another'. Those rules can often be found in the written law; and
- (b) the rules that are a 'standard of common decency and common fairness' that are not necessarily written. The court stated:

A [lawyer] does not lie to a judge who relies on him for information. He does not deliberately misrepresent the law to an inferior court or to a lay tribunal... He does not, in cross-examination to credit, ask a witness if he has been guilty of some evil conduct unless he has reliable information to warrant the suggestion which the question conveys.<sup>4</sup>

You should read and review all of the Solicitors' Advocacy Rules, which substantially reproduce the main parts of the NSW Barristers' Rules.

## 29.4 Court etiquette

There are established rules and practices concerning appropriate professional conduct in court. The rules and practices of etiquette are distinct although they ensure that the business of the court is conducted with good order and discipline and in an atmosphere of dignity and gravity appropriate to the administration of public justice.

### 29.4.1 Appearances

Every court needs to know who it is who is actually going to appear in the case which the court is about to hear.

Often, there will be a sheet or sheets listing the matters to be called on that day or in that list, and the parties to each of the matters. You should, before the commencement of the callover of matters, write your name below the party. If there is more than one defendant, for example, it may be that only the first defendant is listed. In that event, you should put something like:

<sup>3</sup> *Clyne v NSW Bar Association* (1960) 104 CLR 186

<sup>4</sup> *Clyne v NSW Bar Association* (1960) 104 CLR 186 at [22]

J. Smith (for the Second Defendant)  
or less formally  
J Smith (2D)

All lawyers must announce their appearance to a judge or magistrate. The practice may vary depending on the court. You cannot go wrong if you are more formal, and state:

May it please the court, I appear for the plaintiff Smith in this matter.  
My Name is Jones.

In each case, particularly in busy callover and directions lists, many lawyers simply state:

Your Honour, Jones for the Plaintiff.

Your Honour, Smith for the First and Second Defendants

If there is a potential difficulty in the spelling of your name, then you should also spell it to the Court for the assistance of the Court Reporter.

### 29.4.2 The bench

All judges and magistrates are referred to (on the bench) as 'Your Honour'. When appearing before a Registrar, the appropriate form of address is 'Registrar'.

### 29.4.3 Addressing your opponent

If you are a solicitor, and your opponent is a solicitor, you should refer to him / her as Mr. Jones / Ms. Jones, as appropriate. You can say 'My Friend' but not 'My Learned Friend'.

If you are a solicitor, and your opponent is a barrister, you should refer to him / her as Mr. Jones / Ms. Jones or 'My Learned Friend'.

If you are a barrister, and your opponent is a junior barrister, you may refer to him or her as 'My Friend' although 'My Learned Friend' seems to be used as well. If your opponent is a Queens Counsel or Senior Counsel, you must call him or her 'My Learned Friend'.

If you are a barrister, and your opponent is a solicitor, you should refer to him or her as Mr. Jones or Ms. Jones. It is sometimes the practice to call him or her 'My Friend' as opposed to 'My Learned Friend' but the former practice is apt to confuse people so it is better to not follow it.

### 29.4.4 At the bar table

Lawyers at the bar table should follow some important rules of convention. Some of these are outlined below:

- (a) It is important to observe the convention of standing and bowing when the judge or magistrate enters or leave the courtroom.
- (b) When one person at the bar table is speaking, the other should be seated. Hence there should generally only be one lawyer on their feet at any one time.
- (c) Until the next matter is called, if the judge is still sitting, you should NOT leave the bar table unattended. You should wait for the next matter to be called AND for a representative in that matter to approach the bar table and be about to mention their appearance before you leave the bar table.
- (d) If you need to leave, and the next matter has no response or it is yet to be called outside, you should ask the judge or magistrate to be excused prior to departing. Say "Your Honour, may I be excused?"
- (e) 'On hearing the outcome of your case, it is appropriate to say 'As the court pleases.'

## 29.5 Case citations and referring to some portion(s) of a case report

### 29.5.1 Citing cases

In your submissions you may often need to make references to a reported (or unreported) case in the past. From the outset, is important to identify whether the case cited was a criminal matter or civil. In criminal cases, the 'v' is pronounced as 'against' whereas in other matters (such as civil matters) it is pronounced as 'and'. Avoid using the word 'versus' or saying 'v'. The letter 'R' (for *Regina* or *Rex*, as the case may be) is often used in criminal cases and is pronounced as 'The Crown'.

When providing a citation to the court, you should state the name of the case in full. For example, *Brown v West* (1990) 169 CLR 195 would be orally cited as follows:

Brown and West, a decision of the High Court of Australia, reported at (1990) 169 of the Commonwealth Law Reports at page 195.

You should also direct the court to the relevant passages and decision of a particular judge either by paragraph number or by page number, e.g.:

The relevant passages are to be found in the decision of Justice Dawson on page 200.

If *Brown v West* was unreported, it would be orally cited as follows:

Brown and West, an unreported decision of the High Court of Australia, on 1 March 1990.

With the advent of the internet, many cases are also found online. Such cases will have a media-neutral citation such as "HCA" (High Court of Australia), "NSWSC" (New South Wales Supreme Court), "NSWCA" (NSW Court of Appeal) or "FCAFC" (Full Court of the Federal Court of Australia).

Take the case, *Brent v Federal Commissioner of Taxation* [1971] HCA 48. This signifies that the case can be found in a list of decisions of the High Court of Australia in 1971 and that the particular index number is 48. Brent is a decision which has been reported. As a result, when referring to this case, you should provide the citation of the report.

### 29.5.2 Referring to the judge

When referring to the decision of a judge, note who made the decision. In a law report, often you will find that a judge will have a post nominal abbreviation. Common abbreviations are:

- 'J' (Justice),
- 'JA' (Justice of Appeal),
- 'AJ' (Acting Justice),
- 'P' (President e.g. President of the Court of Appeal),
- 'LJ' (Lord Justice or Lady Justice, in UK decisions),
- 'LC' (Lord Chancellor, in UK decisions),
- 'DCJ' (District Court Judge),
- 'LCM' (Local Court Magistrate).

These abbreviations are primarily and solely for use in writing. It is important that an advocate state the full title of the judge, e.g. 'Mr. Justice Gummow', not 'Gummow J'.

When referring to a Chief Justice, the correct form of reference is, for example, 'the Chief Justice, Justice Gleeson' and later as 'Chief Justice Gleeson'. Similarly, when referring to the President of the Court of Appeal, the correct title would be, for example, 'the President of the

Court of Appeal, Justice Mason' and later as 'President Mason'. Some judges have also had knighthoods conferred on them. In such a case, it is normal to say, for example, 'the Chief Justice, Sir Garfield Barwick'.

### 29.5.3 Referring to the reasoning

When referring to a decision it is important to bear in mind that a judgment and reasons for judgment are two different things. When referring to a report, you are referring to the reasons of the court arriving to a particular outcome (judgment). It is acceptable to say 'the decision' rather than 'the reasons.'

You may need to make reference to a case previously dealt with before the House of Lords. Lords of Appeal in Ordinary do not deliver judgments; rather, they make speeches. This stems from a long-standing practice (until recently) where Law Lords actually gave their respective judgments as speeches to and on the floor of the House of Lords.

Likewise, the Privy Council does not give judgments but instead tenders advice to the Queen. In a strict sense, a decision of the Privy Council should be cited as being 'the advising of the Judicial Committee of the Privy Council in [case name].'

### 29.5.4 Referring to cases with multiple judges

A court, typically an appellate court, which is constituted by two or more judges, will often disagree, either upon the outcome of the appeal or upon the reasoning supportive of the an agreed outcome. In such an event, it is correct to cite the joint majority reasons if there is a joint majority judgment or the joint minority reasons if there is a joint minority judgment.

If there is a judge who provides his or her own reasons, then you would refer to the 'separate reasons of Justice X, one of the minority (or majority).'

On some occasions the full bench will provide one set of reasons. In such a case, it is appropriate to cite these reasons as being the reasons of the Court.

## 29.6 Courtesy in court

Courtesy is an important part of maintaining professionalism as an advocate. There are many things you can do as a lawyer appearing before court that can greatly assist the court. Some of these are laid

down in Practice Notes that are issued from time to time by a particular Court. It is important that you consider the Practice Notes as they are treated seriously by the Court. Practice Notes can be obtained online through the Court's website.

### 29.6.1 Providing a chronology

A chronology of events is a great asset in presenting the case of a party. Many judges or magistrates when hearing a case will be hearing its facts for the first time. Therefore a chronology that is handed-up to the bench will provide a useful guide for the judge or magistrate to follow the case. This will also save the judge or magistrate time from having to jot down key facts or dates and means you can engage more with them.

### 29.6.2 Providing a list of authorities

If you are referring to authorities in your submissions, you should attempt to provide a list of authorities or unmarked copies of the case (preferably in their official reported format). This will, again, save the judge or magistrate from having to record the location of the case. It may also mean that you can dispense with full citations of the case (with leave of the court).

Note that Practice Notes of various courts will require a list of authorities in particular circumstances (particularly appeals). You should consider the requirements in the Practice Notes as to what should be included.

Should a list of authorities not be supplied to the court then you should prepare a good quality photocopy of the case to the court. This would also be the case when referring to specific legislation that the judge or magistrate may not have direct access to while they are sitting at the bench.



Part 9  
Settlement







## 30. SETTLEMENT

*Nicole Cerisola, Stuart Cork, Elizabeth Magill and Laura Rush*

### 30.1 Introduction – client’s instructions

At various stages of the proceedings, your client’s instructions should be obtained as to the terms of any potential settlement of the proceedings, and any matters to be incorporated in any such settlement. As the matter progresses, the client’s instructions may change. For example, once evidence is served, the client’s prospects of success will become more apparent and this will likely affect their attitude towards settlement. Also, once the case has begun, and the Judge has made comments or witnesses have been cross-examined, the client’s position will be clearer and their attitude towards settlement may change again.

The decision to settle is the client’s and should be based on the circumstances of the case at any given time, coupled with their lawyer’s advice as to the prospects of success. For this reason, it is highly recommended that you advise your client to attend the court hearing in full or in part, or at the very least, be available via telephone during the hearing. If the matter is close to settling and the client’s instructions cannot be obtained, then the court should be informed that the parties are close to settlement and a short adjournment requested.

### 30.2 Client’s understanding of the dispute

Given the above, the client must have a good understanding of the dispute and its prospects to be able to make an informed decision about resolution of the dispute.

Key issues to consider include:

- (a) the strengths of the case, its weaknesses and pitfalls;
- (b) issues that need to be resolved, in order of priority;
- (c) the client’s preferred outcome, and how it impacts on all parties. The preferred outcome needs to be considered in terms of impact on profitability, productivity, future business and personal relationships, time and resources;
- (d) reality test: is the client being realistic about the strength of their position? Is the preferred outcome a reasonable proposition?

- (e) the potential outcomes in terms of best case and worst case scenarios. A range of options should be identified which may resolve the problem, focusing on the client's real needs and concerns, rather than its strict legal rights. The alternatives to a settlement must be considered in light of cost, the risk of losing a court case and the potential impact on the client's business if the dispute is not settled. Also, are there any aspects of the client's commercial relationship with the other party which provide a common ground?
- (f) developing a negotiating strategy. The dispute must be considered from the other party's perspective and options should be identified that may be acceptable to the other side. For example, whether there are any tradeoffs, non-financial benefits, discounting of a monetary settlement in return for ongoing business, early payment or other benefits; and
- (g) the bottom line, given the key issues that need resolution, the strengths and weaknesses of the client's position, and the potential implications if the negotiated settlement is not achieved.

Before putting an offer to the other side, you must ensure that your client is first given a reasonable estimate of the costs incurred to date and the legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay).<sup>1</sup>

### 30.3 Essential terms

Any concluded agreement must deal with all essential matters. Any offers or counter offers must incorporate all essential terms, and this can be achieved by having available a proposed form of agreement. Matters to be considered are:

- (a) entry of judgment or agreement for judgment in default of payment: if a lesser sum has been agreed upon, the plaintiff should insist that judgment be entered for the full amount of its claim (with a stay of execution of the judgment pending payment). If the lesser amount is to be paid by way of instalments, there should be a clause triggering the enforcement of the full judgment immediately upon default of any one instalment (if acting for the defendant, it is preferable that judgment not be entered). Entry of judgment provides an additional layer of protection in

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<sup>1</sup> Section 313, *Legal Profession Act 2004*

the event that the other party does not honour the settlement agreement;

- (b) releases: if required, releases of whom and in respect of what matters;
- (c) whether any indemnities or guarantees are required;
- (d) costs: is it preferable to try to agree on the quantum of costs in any settlement rather than allow for an assessment of costs? Before going to court, you should obtain a print out of costs, disbursements and work in progress for the history of the matter for use in negotiating a fixed sum;
- (e) confidentiality: any agreement that terms not be disclosed;
- (f) protection against default under the settlement arrangements; and
- (g) whether any admissions of liability or certain facts are to be included (e.g. that the party was in breach of contract and the other party is entitled to rely upon that breach for contractual remedies if the settlement is breached).

## 30.4 Offers of compromise and Calderbank letters

### 30.4.1 Purpose and rules

The purpose of offers of compromise and Calderbank letters are to encourage settlement and to provide the offering party some protection on costs.<sup>2</sup>

The offer of compromise must be in writing, state that it is made in accordance with the UCPR (and particular reference to Part 20, Division 4 is recommended). It must be expressed either as being exclusive of costs or made on the basis that there be a verdict for the defendant with each party bearing its own costs. An offer of compromise cannot be made “inclusive of costs”. An offer of an amount of money plus costs, without specifying the costs, is still an offer that is exclusive of costs. In addition, if the offeror has made (or been ordered to make) any interim payment to the offeree, then the offer of compromise must state whether the offer is in addition to that amount. An offer of compromise must

<sup>2</sup> The rules governing the making of offers of compromise are set out in Part 20, Division 4 of the *Uniform Civil Procedure Rules 2005* (NSW) and the costs ramifications flowing from offers of compromise can be found in Part 42, Division 3. The rules do not contain a precedent, however, the requirements for the document are set out in Rule 20.26 of the *Uniform Civil Procedure Rules 2005* (NSW).

represent some real element of compromise and not just the best result a party could hope to obtain.

There is no requirement of a specified time for acceptance. However, if it is specified, it must be at least 28 days after the offer is made if the trial is more than 2 months away, or 'such time as is reasonable in the circumstances' if the trial is less than 2 months away. The offer must not contain any term that negatives or limits the mandatory costs consequences of an offer of compromise that is not accepted.

Although an offer of compromise can be made at any time prior to judgment being delivered, it should be made as soon as possible in the proceedings to offer any protection in relation to costs. There are restrictions on making an offer of compromise if the offeror's case has not been fully particularised, and all documents must have been made available that would enable the offeree to fully consider the offer. An offer cannot be withdrawn without leave of the court, and the offeror will usually need to prove special circumstances, such as a mistake, new evidence coming to light or a recent decision in its favour.

### 30.4.2 Effect

An offer of compromise can be accepted by serving written notice of acceptance on the offeror any time within the period for acceptance. Once accepted, any party to the offer can enter judgment in accordance with the offer. The offeror is entitled to its costs on a party-party basis up to and including the date of acceptance unless the offer specifically provides for some other regime in relation to costs. Unless otherwise stated in the offer, payment of any monies or the doing of any act in accordance with the offer is taken to be required within 28 days of acceptance.

If the plaintiff makes an offer prior to the trial which is not accepted and recovers a verdict no less favourable than the offer which was made, the plaintiff is entitled to costs on a party-party basis up to and including the date of the offer and on an indemnity basis thereafter (unless the court orders otherwise). If the offer is made on or after the first day of the trial, the indemnity costs portion of the order is assessed from 11am on the day after the offer was made.

If the defendant makes an offer of compromise which is not accepted and the plaintiff receives a verdict equal to or less favourable than the offer, then the defendant is entitled to an order for indemnity costs from the day after the offer was made or, if it is made after the commencement

of the trial, from 11am the day after the offer was made. The plaintiff is still entitled to its party-party costs up to the time when the defendant's indemnity costs order commences.

The court retains its discretion to override the above consequences of an offer of compromise. However, the starting point is that it is an entitlement under the rules that must be displaced by showing exceptional circumstances -the fact that the verdict was only slightly larger or smaller than the offer is not a basis for doing so. One factor which may entitle the court to make an order at variance with the rules is where the offeror's case changed significantly after the date of the offer.

### 30.4.3 Multiple defendants

Where there are multiple defendants, if the defendants are alleged to be jointly and severally liable to the plaintiff and there are rights of contribution between them, an offer can only be made if it is to compromise a claim against all the defendants, and the offer must be made on the basis that the defendants will be jointly liable to the plaintiff if the offer is accepted.<sup>3</sup>

### 30.4.4 Calderbank letters

A Calderbank letter should be used instead of an offer of compromise when an offer incorporates terms which involve more than simply an offer to pay money or when the defendant does not, for whatever reason, want a formal judgment recorded against it. There is no formal requirement as to the form of the letter. A Calderbank letter was also traditionally used when a party did not want to offer costs (because it had a strong defence) or where it was to be made less than 28 days before the trial. Both of these issues are now addressed by the UCPR such that an offer of compromise can be effectively served at any time (including after the start of the trial) and can be made in terms that there be a verdict for the defendant with each party to bear its own costs. However, there still may be circumstances in which a client cannot comply with the rules in respect of an offer of compromise and in such cases a Calderbank offer is appropriate.

A Calderbank offer should always:

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<sup>3</sup> Note the impact of section 35 of the *Civil Liability Act* 2002 regarding apportionable claims in this respect.

- (a) state that it is an offer within the principle derived from *Calderbank v Calderbank*,<sup>4</sup> and put the other party on notice that it will be relied on for an indemnity costs application;
- (b) be headed “without prejudice save as to costs”;
- (c) set out the reasons the opponent’s case will fail (although an offer can sometimes be relied on even when the reasons are not set out);
- (d) give sufficient time to the other party to consider the offer (this may be a short time if the hearing is close and the parties are therefore aware of their position);
- (e) represent a genuine compromise of the case (although with a strong case a defendant offering to “walk away” and bear its own costs may be a compromise of its position if there is a verdict for the defendant); and
- (f) be exclusive of costs.

The costs consequences of a Calderbank letter are not an automatic entitlement as they are with offers of compromise. However, the making of a Calderbank offer is clearly a matter that the court is entitled to take into account in the exercise of its costs discretion and which can justify the making of an indemnity costs order.

The authorities lean strongly towards the granting of an indemnity costs order where a party does no better at hearing than an offer they should have accepted. Ultimately, it comes down to a decision as to whether it was unreasonable for the offeree to have rejected the offer. The advantage of making an offer of compromise under the UCPR over a Calderbank offer is that submissions need to be made as to whether it was unreasonable not to accept a Calderbank offer, whereas this is not an issue where an offer is made under the UCPR.

## 30.5 Recording settlement

### 30.5.1 Parties

The identity of the parties to the settlement needs to be made clear.

Find out who is needed to perform all the obligations under the arrangements by which the matter will be resolved (including any third parties with possession of property or makers of personal guarantees for the

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<sup>4</sup> *Calderbank v Calderbank* [1976] Fam 93; [1975] 3 All ER 333; [1975] 3 WLR 586

obligations of corporate defendants), and ensure that they are included in the settlement negotiations.

If a deed of release is required, ensure it correctly reflects the releases being given and is properly executed by all parties (as well as by any necessary third parties). Remember that it may be necessary to build into the deed of release additional parties or covenants by the parties to provide certain guarantees – ensure that you have their agreement.

If settlement occurs at court, be sure to consider whether any other parties will need to be bound by the settlement. Note that the court will not make orders binding third parties who are not parties to the proceedings. Short minutes of order will need to be prepared, so it is a good idea to seek an adjournment to enable precision in drafting.

If short minutes are being prepared at court, make sure that they properly reflect the nature of the settlement and take care to ensure that your client understands the orders that are to be sought. Try to at least have a heads of agreement signed that clearly sets out the terms of the settlement, as the orders made may not contain all of the terms of settlement. For example, the court may record in the orders that it has taken note of certain things, such as undertakings given as part of the settlement. Make a detailed file note of your client's instructions regarding the settlement and of what has been said by the other parties to cover yourself in the event of any misunderstanding.

Make sure that the persons or entities agreeing to the settlement have authority to do so. For example, your client's insurers may have rights of subrogation that might preclude an insured from settling proceedings without the agreement of the insurer where the insured has made a claim under an insurance policy in relation to the subject matter of the proceedings.

### 30.5.2 Payment

Matters to consider include:

- (a) time for payment;
- (b) method of payment (e.g. bank cheque);
- (c) whether payment is to be made in a lump sum or by instalments;
- (d) whether tax will be deducted from the settlement sum, for example where the settlement sum is characterised as an eligible termination payment or redundancy payment;



- (e) whether there should be any terms in the deed of settlement or orders regarding interest;
- (f) whether, in default of payment of an instalment, the entire amount of the judgment is to become payable;
- (g) whether any right to set-off is permitted; and
- (h) disposal of proceedings, which may not be immediate if payment of any settlement sum is to be made at a time in the future. If possible, proceedings should be stood over to a day following the due date for payment where the payment is to be over a relatively short period (i.e. a week), although note that the courts will refuse to allow proceedings to remain on foot in order to supervise the payment of instalments under a settlement.

### 30.5.3 Court proceedings

If court proceedings have already been commenced, then the mechanism for disposing of those proceedings needs to be included, either by way of a discontinuance, or a judgment by consent for one party or the other.

The decision to discontinue requires consideration of separate releases. Under UCPR 12.3, a discontinuance subject to the terms of any consent to the discontinuance does not prevent the Plaintiff from bringing fresh proceedings or claiming the same relief in fresh proceedings (except, perhaps, insofar as there may be an abuse of process or accord and satisfaction argument).

Where proceedings involve a liquidated claim, the defendant may file an acknowledgement to the debt which will result in the entry of judgment.<sup>5</sup>

The court may refuse to make orders sought by the parties for a variety of reasons, including lack of jurisdiction, improper interference with the procedure of the court, or where the orders for declarations sought by the parties might be determinative of a matter affecting parties not involved in the consent judgment. A judgment entered by consent can also be set aside on sufficient cause being shown by a party to the proceedings who was not a party to the agreement. Ensure that the orders to be sought are reasonable and that you can clearly explain to the court why such orders are being sought (without waiving any privilege or making any admissions that the parties might not want made).

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<sup>5</sup> *Uniform Civil Procedure Rules 2005 (NSW)* 20.34

District Court Practice Note 1, Part 13, requires parties to file settlement documents whether they be terms of settlement, consent orders, or a notice of discontinuance, as soon as possible. Until settlement documents have been filed, the parties must attend when the matter is listed before the court. Where a matter that has already been allocated a hearing date settles, the list office is to be advised immediately.

### 30.5.4 Releases

Matters to consider when drafting deeds of release:

- (a) work out the parties to the deed of release and ensure that they are correctly identified (e.g. make sure that the correct company name and ACN or ABN is recorded);
- (b) in the recitals to the deed, clearly identify the issues in dispute, as the release will be limited to those matters known to the parties at the time;
- (c) ensure that all of the necessary terms are included and are expressed clearly and unambiguously;
- (d) make sure any requirement for payment is clearly set out, including the date for payment, the method of payment and whether the payment will be subject to tax;
- (e) whether there are any issues that have not been pleaded in the proceedings that need to be released (a release may not be valid to the extent it attempts to release rights a party did not know it had);
- (f) indemnities;
- (g) confidentiality;
- (h) governing law;
- (i) acknowledgment of legal advice or a recommendation that legal advice be sought (in particular, if one party is unrepresented or under a disability);
- (j) warranties, covenants and undertakings;
- (k) liability for stamp duty and taxes;
- (l) which party is liable for any GST payable and whether a tax invoice is to be provided;<sup>6</sup>

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6 GST can be a legal minefield, so if your client is registered for GST note that your client may be liable to pay the GST for the amount of the settlement payment to be made before the payment is actually received, if at all. If there is any doubt, consult your barrister

- (m) guarantees and conditions precedent;
- (n) the dismissal or other disposal of any proceedings on foot;
- (o) ensure that if a company is executing the deed that you have either performed a company search and checked that those signing are directors or secretaries and it is a good idea to include in the execution clause words to the effect that the deed is being executed on behalf of the company in accordance with section 127 of the *Corporations Act 2001* (Cth).

### 30.5.5 Indemnities and guarantees

Indemnities need to be considered where there is a possibility that the same or a similar dispute might arise in another form from which your client requires protection. For example, an action may be taken by another party claiming through (or by right of) one of the parties to the proceedings or an as-yet uninvolved third party may bring an action in its own right. Whenever guarantees are being required, this will affect the identity of parties to the settlement documentation.

### 30.5.6 Undertakings and agreements

In addition to payments and releases, it is not uncommon for settlement arrangements to encompass the delivery up of goods, the assignment of property or undertakings in the nature of injunctions. Consideration as to timing and consequences of default are required as well as who is to bear the costs of the transport of goods, etc.

Consider if leave of the court may be required for settlement. Certain claims under the Family Provisions Act and settlements involving the payment of damages to a minor must be approved by the court. In this instance, it is advisable to include a 'best endeavours' covenant within any deed of release and settlement.

### 30.5.7 Counting the cost of settlement

Costs associated with finalising and documenting the settlement should be considered. Settlement as a phase of dispute resolution must be budgeted for, in the same way as any other part of the dispute. Secondly, there are tangible costs of settling sooner rather than later and of abandoning the opportunity to have the matter determined in court.

It is also important to ensure that parties have the intention, will and capacity to resolve the dispute within the timeframe contemplated by the settlement arrangements. For example, in the settlement of a

property dispute, consideration needs to be given to the purchaser's ability to effect completion and when they will have in place the necessary funds for doing so. Consideration also needs to be given to the costs associated with enforcing the terms of the settlement if the other party defaults under the settlement arrangements.

### 30.5.8 Insolvency issues

If you have any concerns about the ability of a party to pay the settlement sum, be aware that if that party enters into liquidation there are provisions for the clawback of any payments by a liquidator if they fall within certain periods.<sup>7</sup>

In circumstances where there is a genuine concern about the ability of a company to pay the settlement sum, it may be useful to negotiate the settlement so that a director will be included in the deed of release as personally liable to pay the settlement sum on default of the company.

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<sup>7</sup> See Part 5.7B of the *Corporations Act*





Part 10  
Enforcing  
Judgments





## 31. ENFORCING JUDGMENTS

### *Sine Dellit and Riona Moodley*

#### 31.1 Introduction

Once judgment has been entered in favour of a plaintiff, the plaintiff becomes known as the ‘judgment creditor’ and the defendant becomes the ‘judgment debtor’. Obtaining payment of a judgment for damages usually signals the end of a dispute. Sometimes the judgment debt will be paid quickly without further dispute. If costs have been awarded and if the quantum of costs is not agreed to, then costs assessment may be required.

When a judgment debtor neglects or refuses to pay the judgment debt, you will need to take action. A solicitor filing and serving a Notice to Cease Acting on behalf a judgment debtor often signals to the creditor that further action will need to be taken to enforce the judgment debt against the debtor.

This chapter provides an overview of the most common remedies available to judgment creditors to enforce judgment debts. It is an introduction to the enforcement of monetary judgments – that is, enforcement of court orders requiring payment of money by way of damages or for the payment of a liquidated claim. The enforcement of other types of court orders, such as mandatory injunctions or contempt proceedings are not covered.

#### 31.2 Insolvency actions and enforcement

Broadly speaking, actions for the winding up of a corporation under the *Corporations Act 2001* (Cth) or the sequestration of an individual debtor’s estate under the *Bankruptcy Act 1966* (Cth), are founded on principles of insolvency law and are more draconian in their effect. These procedures or ‘insolvency actions’ should be considered as a different category to more traditional enforcement actions available to a judgment creditor.

Whilst insolvency actions may be conducted and funded by a single creditor, such proceedings are considered by courts as being conducted for the benefit of all creditors and in the public interest. Parliament has determined that it is not in the public interest to allow insolvent persons or corporations to continue to trade when they are unable to pay debts and thereby incur further debts to creditors.



Insolvency actions are, strictly speaking, not used to enforce an individual judgment debt, but intended to serve the interests of creditors and the public by placing a corporation into liquidation or individual into bankruptcy, when they are unable to pay debts to creditors as and when they fall due. It is for this reason that when a creditor agrees to have a petition to bankrupt an individual or application to wind up a company withdrawn, they will usually need to seek leave from the Court to have the action dismissed. Other creditors may seek leave to be substituted into the proceedings or 'step into the shoes of the original creditor', irrespective of whether the original creditor does not wish to proceed the winding up application.

The nature of insolvency actions contrasts with other types of enforcement action where judgment creditors will generally be able to discontinue enforcement action against a judgment debtor without the need to seek leave from the court or the consent of the judgment debtor: see for example UCPR 39.12 (where the judgment creditor may direct the sheriff to cease or suspend enforcement action).

In insolvency proceedings the court may entertain applications by the creditor or debtor to adjourn the proceedings for a period in circumstances where a creditor and debtor negotiate arrangements to pay the debt claimed. The court is often reluctant to grant lengthy adjournments to enable the parties to resolve the matter and will often only agree to a short adjournment. Courts often indicate to parties that insolvency proceedings should not be used simply as a mechanism for 'debt collection'. In practice however, many judgment creditors utilise insolvency proceedings in the hope of recovering payment of judgment debts rather than for the dominant purpose of winding up or sequestrating a judgment debtor's estate.

### 31.3 Enforcement options available

The law of enforcement of judgments finds its modern form in both state and federal statutes. Broadly speaking, Federal Courts have similar enforcement remedies to State Courts. For proceedings in the NSW Supreme, District and Local Courts the procedure for enforcement of judgment debtors is set out in the CPA and the UCPR. The rules of a particular court will govern how judgments are enforced.

UCPR 38 (SCR Part 43; DCR Part 32; LCR Part 28) deals with examination of judgment debtors. This is not strictly a method of enforcement but a method of gathering information concerning a judgment debtor's

financial position. UCPR 39 (SCR Parts 44-47) deals with enforcement more generally. Careful consideration should be given to which particular method of enforcement is most appropriate and effective, having regard to the circumstances of the matter and the judgment debtor's financial position. Paying proper attention to the options available at the outset increases the chance of recovering a judgment debt more efficiently on behalf of the judgment creditor.

## 31.4 Examination of the judgment debtor

### 31.4.1 The examination notice

It is often useful to obtain information on the financial position of the judgment debtor prior to incurring further legal costs on behalf of a judgment creditor in attempting to recover an outstanding judgment debt. Ascertaining a judgment debtor's financial position can greatly assist a creditor in determining the most effective enforcement method to recover a debt. An examination of a judgment debtor is a relatively cost effective method to achieve this. You can serve an examination notice on a judgment debtor requiring the judgment debtor to answer questions and produce documents regarding their financial position in accordance with UCPR 38.1.

An examination notice should be filed and served in accordance with the UCPR and specify the period of time (being not less than 28 days) within which the judgment debtor must comply. To complete the notice, specify the same documentary evidence that will be needed at any 'in court' examination of the debtor. An examination notice is a court procedure that is conducted outside the courtroom.

### 31.4.2 Production of documents

An examination notice can require a judgment debtor to answer material questions in relation to their financial position and produce documents.<sup>1</sup> When issuing an examination notice you should seek production of documents, which tend to show the judgment debtor's true financial position. Examples of documents that should be sought include:

- (a) Documents evidencing the name and address of the judgment debtor's employer or, if unemployed, relevant documentation in that regard from, say, Centrelink;
- (b) Driver's licence;

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<sup>1</sup> Rule 38.1 of the *Uniform Civil Procedure Rules 2005* (NSW)

- (c) Rate notices;
- (d) Other bills showing the judgment debtor's current home address;
- (e) Recent bank statements and passbooks for accounts held in the judgment debtor's name at any bank, credit union or other financial institution;
- (f) Recent bank statements and passbooks for accounts held jointly by the judgment debtor with another person/s at any bank, credit union or other financial institution;
- (g) Income tax returns and group certificates for, say, the last 3 years;
- (h) Registration documents in respect of any car, motorcycle, boat, truck, trailer, caravan, tractor or other motor vehicle owned by the judgment debtor, or in their possession;
- (i) Share certificates and any other documents evidencing insurance policies, annuities, options, stocks, warrants and any other investment; and
- (j) Documentary proof of all unpaid debts.

### 31.4.3 The examination

If there is no sufficient answer or production of documents, a notice of motion may be filed in the proceedings for an examination order (Form 41). This must be supported by an affidavit as to the judgment debt not being satisfied, service of the examination notice, failure to answer the notice at all or sufficiently,<sup>2</sup> the absence of any instalment order having been made and any failure to comply with notices served in the previous 3 months.<sup>3</sup> The examination order must be served at least 14 days prior to the examination hearing.

The examination will be conducted in the court where the order was given. However, if the examination is conducted in District Court or Local Court proceedings and the judgment debtor resides more than 30 kilometres away from the court where the order was given, then the examination will be conducted at the nearest court to the debtor's residence.<sup>4</sup> Where the judgment debtor is a corporation, an officer or former officer of the corporation may be subject to examination.<sup>5</sup>

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2 Not applicable in the Supreme Court of NSW, See 38.2 of the *Uniform Civil Procedure Rules* 2005 (NSW).

3 Not applicable in the Supreme Court of NSW, See 38.2 of the *Uniform Civil Procedure Rules* 2005 (NSW)

4 See 38.4 of the *Uniform Civil Procedure Rules* 2005 (NSW)

5 See 38.7 of the *Uniform Civil Procedure Rules* 2005 (NSW)

If the judgment debtor fails to comply with the order or fails to appear at the nominated time and place for the examination, an arrest warrant can be issued by the court of its own motion or on the application of the judgment creditor.<sup>6</sup> If the judgment debtor complies with the examination order and appears at court, the Registrar or judgment creditor (or legal representative) will conduct the examination, unless the court orders otherwise.<sup>7</sup> Sample questions can be based around the examination notice seeking the sort of information you hoped to obtain from documents sought for production. Standard questions asked of most judgment debtors include the following:

- (a) What is your full name?
- (b) What is your home address?
- (c) Do you propose to change your home address in the near future? If so, state your new address.
- (d) What is your date of birth?
- (e) What is your marital status?
- (f) Does your spouse/de facto work?
- (g) How many dependants do you support? State their names, ages and relationship to you.
- (h) What is your driver's licence number, the state/territory in which it was issued and its expiry date?
- (i) What is your occupation?
- (j) Who is your employer? What is his/her address and telephone number?
- (k) What is your weekly income after income tax is deducted?
- (l) What are the regular expenses of running your household?
- (m) From whose money are those expenses paid?
- (n) What other sources of income do you have? Give details of sources and amounts.
- (o) Do you hold any interest in any shares or investments? Give details.
- (p) Do you receive a social security pension? If so, give details.
- (q) Do you receive a child endowment allowance or similar allowance? If so, give details.

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6 See 38.6 of the *Uniform Civil Procedure Rules 2005* (NSW) and Section 97 of the *Civil Procedure Act 2005* (NSW)

7 See 38.5 of the *Uniform Civil Procedure Rules 2005* (NSW)

- (r) What is the income of your spouse/de facto?
- (s) Do you receive or does your spouse/de facto receive any other income, pension or allowance? If so, give details.
- (t) Do you own or are you purchasing any property or any interest in property? Give details including address, present value, mortgage and the means of purchase.
- (u) Do you own or are you purchasing a motor vehicle in your own name or using finance? Give details such as make, model and registration number. Is the vehicle under hire purchase/lease/personal loan? Give details.
- (v) Have you any other personal property or assets, including any other deposits or investments not previously mentioned, held either in your name or jointly with any other person or persons? Give details.
- (w) Does anyone owe you money? Give details of person or institution from which it is owed, amount and the basis upon which it is being repaid.
- (x) Do you have any bank accounts? Give details, including balances, account number/s, name/s of account/s, whether savings bank or trading bank and whether held solely by you or jointly with any other person/s.
- (y) How much cash-on-hand do you have?
- (z) Are there any other unsatisfied judgments against you? Give details.
- (aa) What other debts and liabilities do you have? Give details.
- (bb) What arrangements are you prepared to make to repay this judgment?
- (cc) Where is/are document(s) A, B, C etc (e.g. bank statements, title deeds, lease agreements, employment contracts, loan agreements etc)?

In circumstances where insufficient documents are produced or information is not available at the examination hearing, care should be taken to seek an adjournment if the examination cannot be completed. If the judgment debtor is excused from the examination, a further examination of a judgment debtor cannot take place within a period of 3 months after a previous examination: UCPR 38.3(4).

## 31.5 Attachment of debts – garnishee orders

After having obtained the information desired from an examination notice, formal examination in court or otherwise, enforcement action may be taken to seize assets of the debtor. One method a judgment creditor may use to enforce a judgment debt is by obtaining a ‘garnishee order’. A garnishee order may be made by the court and directed to a third party who hold funds for or on behalf of the judgment debtor or who owes funds to the judgment debtor. In practice garnishee orders are usually directed to employers (for wages) or banks and building societies (for funds held in savings, cheque and term deposit accounts). Garnishee orders may even be made against the Crown.<sup>8</sup>

An application for a garnishee order is brought by notice of motion (Form 71 being used for attachment of wages and Form 70 for attachment of debts owed to the judgment debtor). Applications must be supported by affidavit in accordance with UCPR 39.35.

Part 8, Division 3, subdivisions 1 and 2 of the CPA and Division 4 of UCPR 39 deal with garnishee orders generally. Subdivision 1 of the CPA deals with garnishee orders in relation to ‘debts’. Subdivision 2 of the CPA deals with garnishee orders in relation to ‘wages’. In respect of a debt or wages, the garnishee order takes effect as soon as it is served.<sup>9</sup> Payment of wages or salary must be made within 14 days of falling due to the judgment debtor.

In respect of wages a garnishee order continues to operate to attach to wages until the judgment debt is paid.<sup>10</sup> However, the court will generally specify the extent and duration of the garnishee order in relation to wages.<sup>11</sup> In recognition of the administrative burden imposed on employers, a judgment debtor’s employer may charge a \$13.00 administrative fee from each garnishee payment made during the term of the garnishee order. Such fees are treated as a credit against the outstanding judgment debt. However, no fees are payable if the payments are made as part of a limited garnishee order: see UCPR Schedule 3, Item 4(c).

In respect of a debt, the garnishee will normally be required to pay the amount due, up to the prescribed amount, to the judgment creditor within 14 days in accordance with UCPR 39.36 and s120 CPA. Again, the

8 See 39 of the *Uniform Civil Procedure Rules* 2005 (NSW) and Sections 106(6) and 119(4) of the *Civil Procedure Act* 2005 (NSW)

9 See 39.19 of the *Uniform Civil Procedure Rules* 2005 (NSW)

10 Section 119(3) of the *Civil Procedure Act* 2005 (NSW)

11 See 39.37 of the *Uniform Civil Procedure Rules* 2005 (NSW)

garnishee may charge a \$13.00 administrative fee for the administrative cost of making the garnishee payment: see UCPR Schedule 3, Item 4(a).

### 31.6 Failure to comply with garnishee notice

In the event that the recipient of a garnishee notice fails to comply with the order, a judgment creditor may file an application, supported by affidavit, setting out circumstances of disobedience in accordance with section 124 CPA. The court is then required to determine whether the recipient of the garnishee notice should have judgment entered against it personally for the amount that was due to the judgment creditor or the debt, wage or salary due under the garnishee order, whichever is lesser. Any amount paid by the garnishee to the judgment creditor is taken as being in reduction of the judgment debt.

### 31.7 Execution

Writs of execution against property can be issued by notice of motion in proceedings where a judgment debt has been obtained. The object of the writ is to take physical possession of property in order to sell it to satisfy the judgment debt. Upon delivery of the writ, the sheriff acquires legal right to seize property but title remains with the debtor until the goods are sold. Property that can be the subject of execution includes choses in action, dividends, equitable interests, fixtures, hire purchase agreements, judgment debts, leasehold interests, money, real estate, shares and ships. It does not however include goods belonging to a third party of which the execution debtor is trustee, pledgee or the like. In practice however, the majority of writs executed by the office of the sheriff are for the levy of property in respect of household or business goods and motor vehicles. Writs for levy of property require the sheriff to seize, advertise and auction a judgment debtor's goods and chattels. The proceeds of sale of household goods, motor vehicles, business equipment etc. are then forwarded to the judgment creditor in reduction of the judgment debt.

The application for a writ of execution is generally supported by affidavit pursuant to UCPR 39.3. An application or notice of motion for a writ of execution will either be for the:

- (a) possession of land (UCPR Form 59);
- (b) delivery of goods (UCPR Form 63); or
- (c) levy of property (UCPR Form 65).

However, a writ for possession of land owned by the debtor should only be utilised when execution against personal property will not raise sufficient funds to meet the judgment debt. The Court will usually avoid issuing this writ, if there are other means by which the judgment debtor can satisfy the debt, such as by paying the debt by instalments. In fact, the UCPR provide that land must not be sold before any other property unless the judgment debtor directs otherwise and the sheriff is satisfied that it is necessary in order for the judgment debt to be satisfied that the land be sold.<sup>12</sup> Given the nature and significant consequences (and expenses) associated with executing a writ against real property, a number of procedural steps must be fulfilled prior to the real property being sold by the sheriff. As a consequence it is rare that land is sold by way of writ for possession of land.

If the goods and chattels are to be sold by the sheriff, a writ for levy of property is required (UCPR Form 66) to be filed together with an affidavit in support pursuant to UCPR 39.3(4). A writ to levy property cannot be enforced against certain personal property of the judgement debtor, such as clothing, kitchenware and bedroom furniture. Personal property such as cars, electrical goods and furniture belonging to the judgment debtor are most commonly seized. Property not belonging to the judgment debtor may not be seized even if it is in their possession. Generally, after the relevant goods are seized, they are marked by the sheriff as being 'seized' and are removed prior to public auction: see UCPR 39.5-10 and Division 3 of Part 39 generally. The proceeds of sale are first applied in payment of the costs incurred by the sheriff and thereafter in reduction of the judgment debt. Any residual funds are returned to the judgment debtor.<sup>13</sup> The sheriff often requires security to be paid by the judgment creditor toward the costs (i.e. advertising fees etc) of executing the writ.

A writ remains valid for a period of 12 months but may be renewed on application to the court.

The judgment creditor will need to seek leave if the judgment creditor wishes to issue a writ in circumstances where the judgment debtor changes (due to assignment, death, etc), if assets are in the hands of an executor, if the writ is issued for the possession of land or against property in the hands of a receiver or sequestrator. The motion for leave is to be supported by affidavit in accordance with UCPR 39.1(2).

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12 See 39.6(3) of the *Uniform Civil Procedure Rules 2005* (NSW)

13 See 39.15 of the *Uniform Civil Procedure Rules 2005* (NSW)



## 31.8 Payment of judgment debts by instalments

A judgment debtor may seek to arrange payment of a judgment debt by instalments either by negotiation with the judgment creditor or by obtaining an order from the court.

### 31.8.1 Instalment agreements

A negotiated “instalment agreement” may be noted with the court in accordance with UCPR 37.1, at which point orders will be made reflecting the terms of the instalment agreement.<sup>14</sup> A judgment creditor will usually not seek to have the instalment arrangement recorded with the issuing court and will instead prefer to rely on agreement reached directly with the debtor. If an instalment arrangement is breached, the judgment creditor will be entitled to proceed with execution without further notice or application provided that the agreement has not been made the subject of a court order. From a judgment creditor's viewpoint, it is important for any instalment proposal to provide that the balance of the outstanding judgment debt, interest and costs becomes immediately due and payable to the judgment creditor in the event of default.

### 31.8.2 Instalment orders

In the event that a judgment creditor will not agree to accept payments by instalments the judgment debtor can apply to the court (usually the Registrar) for an instalment order.<sup>15</sup> Such application must be supported by an affidavit setting out the judgment debtor's financial position in sufficient detail to enable the court to determine whether the judgment debtor has capacity to pay the instalments being offered. The first instalment order application stays execution of the judgment debt pending the determination of the application by the Court.<sup>16</sup> Once the application is lodged, a Registrar of the Court will either make an order granting the application to pay the judgment debt by instalments or refuse the application. Parties are promptly notified of the decision and have a period of 14 days thereafter to lodge any objection to the decision of the Registrar or Court.<sup>17</sup> If an objection is lodged, a hearing to review the decision then takes place in accordance with the procedure set out in UCPR 37.4.

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14 See 37.5 of the *Uniform Civil Procedure Rules* 2005 (NSW)

15 See 37.2 of the *Uniform Civil Procedure Rules* 2005 (NSW)

16 See 37.5 of the *Uniform Civil Procedure Rules* 2005 (NSW)

17 See 37.3(3) of the *Uniform Civil Procedure Rules* 2005 (NSW)

Where an instalment order is made by the court a stay of enforcement of proceedings will immediately come into effect.<sup>18</sup> Any instalment order made by the court must be rescinded before a judgment creditor will be entitled to proceed with enforcement action. The order will usually be rescinded on proof of default of the order being put before the court.<sup>19</sup>

### 31.8.3 Reasonableness of the instalment proposal

As a general guide, the court will usually allow the judgment debt to be repaid by instalments within a two- to three-year period, or sooner if the judgment debtor has capacity. Therefore, when assessing the reasonableness of any instalment application, a judgment creditor should first consider carefully any instalment proposal which sees the judgment debt paid within this period. Provided that the judgment debtor establishes in their application that the judgment debtor has the financial capacity to meet the repayments under the proposed instalment arrangement, the application is likely to be approved unless the judgment debtor has a significantly greater capacity to repay the judgment debt within a shorter timeframe.

### 31.8.4 Interest

Interest will accrue on the outstanding balance of the judgment debt from time to time (simple not compound), in accordance with section 101 CPA at the rate stipulated in Schedule 5 of the UCPR. However, subject to any other of the court, interest will not be payable on the judgment debt if it is paid within 28 days of the date of judgment.<sup>20</sup> It is legitimate for a judgment creditor to consider the effect of interest accruing on a judgment debt, particularly larger judgment debts, when considering whether an objection to an instalment order is to be made. A general rule of thumb to apply when assessing an instalment proposal is to consider whether the judgment debt and interest accruing will be paid within a two- to three-year period from the date of judgment. For a useful summary regarding the common law in this area see the decision of *Red Lea Chickens Pty Ltd v Tansey* (unreported, NSWCA 17/07/1995, BC9505123).

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18 Section 107(2) of the *Civil Procedure Act* 2005 (NSW)

19 See 37.7 of the *Uniform Civil Procedure Rules* 2005 (NSW)

20 Section 101(3) of the *Civil Procedure Act* 2005 (NSW)

### 31.8.5 Reviewing instalment orders

The court hearing an application for a review of an instalment order may vary the order when there has been a substantial increase in the means of the judgment debtor to pay. Where a judgment creditor is served with notice of an instalment order that would see the payment of a judgment debt take place over a longer period of time, a prudent judgment creditor will seek an additional order for a review hearing during the payment period.

A review in 6 or 12 months' time could be required by a creditor as a condition of agreement or consent to the proposal. A review hearing enables the judgment creditor to seek a further hearing and, if necessary, a variation or rescission of the instalment order in the event that the judgment debtor's financial position has altered.

## 32. RECOGNITION AND ENFORCEMENT OF INTERSTATE AND FOREIGN JUDGMENTS

*Justin Hogan-Doran*

### 32.1 Overview

This chapter deals in a summary way with the procedural matters involved in recognising and enforcing foreign judgments in Australia, and NSW judgments interstate (and vice versa).<sup>1</sup>

#### 32.1.1 Foreign judgments

A judgment of a foreign court may be useful for two purposes:

- (a) its enforcement value, against local assets of the judgment debtor; or
- (b) its preclusive effect (*res judicata*, issue estoppel and *Anshun estoppel*) to prevent re-litigating the same issues in Australian courts as were litigated overseas, by mere recognition of the foreign judgment and the issues it determined.

Traditionally, foreign judgments were sued on at common law (to enforce as a debt) or pleaded in proceedings as part of a claim or defence (where local remedies are sought). However, money judgments (and certain New Zealand non-money judgments) of the superior courts and some inferior courts of certain foreign countries can be 'registered' and enforced under Part 2 of the *Foreign Judgments Act 1991* (Cth) ('the FJA'). The FJA offers a simpler, more certain process that avoids the need to commence fresh proceedings for enforcement. It is essentially an administrative or bureaucratic function, typically conducted *ex parte*, modelled on a similar process in the civil law known as an *exequatur*.<sup>2</sup> Thus, there are strict evidentiary and procedural requirements imposed on an applicant. It only becomes litigious if an application is brought to set aside registration.

Enforcement of a foreign judgment can be achieved:

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1 See <<http://www.sevenwentworth.com.au/publications/>> for greater detail and precedents

2 Which was the intention of the 1933 UK legislation on which the FJA is based

- (a) if Part 2 of the FJA applies to it, only under that Act (section 10);  
or
- (b) if Part 2 of the FJA does not apply to it, only at common law.

Recognition of a foreign judgment can be achieved as follows:

- (a) if Part 2 of the FJA applies to the judgment, it must be recognised as conclusive between the parties by an Australian court<sup>3</sup> and can also be recognised at common law.<sup>4</sup>

However, that rule does not apply, and recognition at common law will also be denied, if two requirements are met:<sup>5</sup>

- (i) either:
  - (A) registration has been effected but was set aside; or
  - (B) registration would have been set aside had the judgment been registered; and
- (ii) it is not capable of recognition at common law.

For example, the FJA would ordinarily apply to a money judgment from the New Zealand High Court, but if the basis of jurisdiction was 'tag' jurisdiction (where service on the judgment debtor was effected while he or she was fleetingly present in NZ), this is not a recognised basis of jurisdiction under the FJA, however it is sufficient at common law, so section 12(3) entitles a court to recognise it.

If jurisdiction was based on service out of New Zealand, and the only connecting factor is that New Zealand law governs the contract, then the monetary judgement would not be capable of recognition either under the FJA or at common law.<sup>6</sup>

- (b) If it is not a money judgment, but Part 2 of the FJA would have applied to it if it were, the above rules also apply.<sup>7</sup>
- (c) If Part 2 of the FJA does not apply to the foreign judgment, and Part 2 would not have applied to it even if it were a money judgment, recognition can only be effected (if at all) at common law.

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3 Section 12(1), *Foreign Judgments Act 1991* (Cth)

4 Section 12(3), *Foreign Judgments Act 1991* (Cth)

5 Section 12(2)-(3), *Foreign Judgments Act 1991* (Cth)

6 As that is not a recognised head of jurisdiction under the FJA or at common law

7 See section 12(1)

### 32.1.2 Interstate judgments

Recognition of out of state court judgments in NSW, and of NSW judgments in other states arises from the full faith and credit provision of the Constitution, at least as to inter-state judgments. State and Territory judgments are also given effect by the *Evidence Act* 1995 (Cth).

However, registration and/or enforcement require compliance with the procedural requirements of Part 6 of *Service and Execution of Process Act* 1992 (Cth) ('SEPA'). This also applies to foreign judgments which have registered interstate under the FJA which are to be enforced using the power of the local courts.

## 32.2 Registration of foreign judgments under the *Foreign Judgments Act*

### 32.2.1 Does it apply?

**Countries and Courts:** For Part 2 of the FJA to apply, the judgment must come from a country listed in Column 2 (Country) of the Schedule to the Foreign Judgments Regulations 1992. It must also come from either a 'superior court', either one listed in Column 3 of the Schedule or otherwise within that definition. If not, it can be an inferior court but only if it is specifically listed in Regulation 5. If the judgment of the superior court is merely an appeal from an unlisted inferior court, the FJA only applies if it is a rehearing de novo and not just an affirmation on appeal. A foreign law expert may be necessary to determine this.

**Judgments:** Many judgments are excluded (e.g. bankruptcy, matrimonial) but most civil and commercial causes will be covered. Both final and interlocutory judgments can be enforced. Arbitration awards that have become judgments can be registered. In all cases, it must be a judgment for money (other than tax debts) except for certain NZ and PNG tax and other judgments.

### 32.2.2 How do I register the judgment?

**When and Where:** You have 6 years to register the judgment.<sup>8</sup> You then have 12 years to enforce it.<sup>9</sup> Most judgments must be enforced in a State or Territory Supreme Court, not the Federal Court.<sup>10</sup>

8 Section 6(1), *Foreign Judgments Act* 1991 (Cth)

9 Sections 17, *Limitations Act* 1969 (NSW)

10 Section 6(2), *Foreign Judgments Act* 1991 (Cth)

**How:** The procedure in NSW is governed by UCPR Part 53. First you must file a summons in the Common Law division seeking an order for registration. The summons must state the extent to which the judgment is to be enforced, and you should request that registration occur “in the absence of the public and without attendance by the Plaintiff”. See Form 69A for the form of these orders. There is no need to serve the summons on the judgment debtor. At present, judgments in a foreign currency can only be registered in that currency, due to a legislative lacuna. The summons should be filed with a minute of order of judgment. An affidavit from a solicitor is also necessary. The affidavit must:

- (a) comply with the requirements of UCPR 53.3 and section 6(3),(11) FJA;
- (b) attach the foreign judgment and a translation; and
- (c) include information about the parties and enforceability of the judgment, as well as certifying that the judgment is not liable to be set aside on any of the grounds in section 7 FJA (see below).

Once the judgment has been registered, which usually takes two to three days, you may serve a Notice of Registration (Form 69B). This may be served in or out of the jurisdiction, giving the judgment debtor time, typically 14 days, to respond.

### 32.2.3 Can it be set aside?

Section 7 of the FJA sets out the grounds you need to determine do not apply before you seek registration. Similarly, you may want to set aside registration, which must be done within the time allocated, usually 14 days unless you seek an extension. The registration may be set aside in circumstances including those used at common law to set aside a judgment such as denial of natural justice, fraud, public policy, lack of jurisdiction over the judgment debtor,<sup>11</sup> breach of exclusive jurisdiction agreement, or because the judgment has been wholly or partly satisfied. It may be set aside due to *res judicata* from another judgment.

### 32.2.4 Who deals with it?

A Registrar of the Supreme Court has the delegation to order registration where a request is added that it be done in the absence of the public. Public and contested hearings can be heard by an Associate Justice.

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11 Which requires some understanding of the common law grounds for recognising a foreign court's jurisdiction which are analogous to but not exactly the same as section 7.

### 32.2.5 How is it enforced?

Once registered, the foreign judgment becomes a judgment of the Supreme Court and is enforceable as for local judgments. However, before taking any step for enforcement the judgment creditor must first file an affidavit of service of the Notice of Registration or otherwise satisfy the court that service has been affected.

## 32.3 Registration of foreign judgments at common law

If the FJA does not apply, common law rules will apply to the recognition and enforcement of a foreign judgment. This is a complex area beyond the scope of this chapter. Seek expert advice from an experienced lawyer in this field.

Only money judgments can be enforced at common law. You should file originating process in the court with the applicable monetary jurisdiction. You can do this by way of Summons. If you are seeking to sue on the matters determined in the foreign judgment, but seeking a local monetary or non-monetary remedy, you should use a statement of claim and plead the material facts of the cause of action as per normal, and then plead the foreign judgment's determination of the issues.

## 32.4 Enforcement of NSW judgments interstate

Part 6 of the SEPA relates to the enforcement of NSW judgments interstate. Money judgments and orders, final or interlocutory, and certain criminal proceedings orders (but not fines) can all be enforced. The process is as follows:

- (a) obtain a sealed copy of the judgment from the registry;
- (b) lodge the sealed copy with the prothonotary, registrar or other proper officer of relevant interstate court. You may fax a sealed copy and lodge the original within 7 days.

The judgment will be enforceable in the interstate court as per their local judgments. The judgment can only be set aside in the interstate court if Part 6 does not apply. If the NSW judgment is a registered foreign judgment under the FJA, the grounds in section 7 can be relied upon in the interstate court and, if set aside there, the NSW Supreme Court must be notified.



An application for enforcement must be accompanied by an affidavit setting out that the judgment is capable of being enforced and the extent to which it is claimed to be enforced. The affidavit can set out all costs and expenses claimed in the enforcement.

## 32.5 Enforcement of foreign arbitral awards

This chapter does not cover this specialised topic in detail. An arbitral award within Australia is enforceable in accordance with the terms of the Uniform Commercial Arbitration Acts, in each state. These are in largely similar form and to largely similar effect. The recognition and enforcement of foreign arbitral awards as defined is dealt with either:

- (a) under the *International Arbitration Act 1974* (Cth) ('the **IAA**'), together with the Uniform Commercial Arbitration Acts; or
- (b) at common law.

Part II of the IAA applies to awards to which the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards applies. Part III of the IAA applies to awards to which the 1985 UNCITRAL Model Law on International Commercial Arbitration applies, having force of law in Australia under section 16 of the IAA. Part IV of the IAA deals with ICSID investor-state arbitral awards. For more information, consult a lawyer experienced in the area.



Part 11  
Unrepresented  
Litigants





## 33. UNREPRESENTED LITIGANTS

*Michael Denahy and Tannie Kwong*

### 33.1 Introduction

Courts and tribunals encounter difficulties in dealing with matters in which one, or both parties is self-represented. Similar difficulties have also been experienced by lawyers dealing with self-represented parties in commercial transactions and other non-litigious matters such as in conveyancing and probate. This chapter will concentrate on self-represented people in civil litigation.

In 2006, the NSW Law Society published the “Guidelines for solicitors dealing with self-represented parties” (the Guidelines). The Guidelines provide that the revised *Professional Conduct and Practice Rules* 1995 and the Law Society’s *Statement of Ethics* “require solicitors to act fairly and honestly towards the courts and tribunals, the profession and third parties, including opposing parties representing themselves in contentious and non-contentious matters”. The Guidelines also suggest that lawyers should train their staff on how to deal with a self-represented party and explain, in all dealings with a self-represented party, that they are neither acting for, nor providing advice to, that party.

The Guidelines focus on the Family Court and the Land and Environment Court but also provide general advice for all jurisdictions. The Family Court has guidelines for their judicial officers and provides user-friendly forms and procedures for self-represented litigants. The duties of a Family Court Judge are expressed by the Full Court in *Re F: Litigants in Person Guidelines* [2001] FamCA 348 (4 June 2001). There are no similar rules in the Land and Environment Court, but the Court’s Rules contain requirements generally in accordance with the duties of a Family Court Judge expressed in *Re F*.

While statistics do not indicate a general increase in unrepresented litigants in Australia, with the exception of family law jurisdictions,<sup>1</sup> litigants in person are still a common experience. For example, 46% of litigants in the Local Court, 18% of litigants in the Federal Court and 35% of litigants in the Administrative Appeals Tribunal are unrepresented. Young lawyers may see more litigants in person in matters which do not have reasonable prospects of success, or might be a subject of a

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1 Law Society of NSW Position Paper “Self-represented litigants”, 21 May 2002, Annexure B at p.87 (**Law Society Position Paper**)

costs order pursuant to section 348 of the *Legal Profession Act* 2004, and so are not taken on by a lawyer.<sup>2</sup> Two recent Court of Appeal decisions deal with this issue.<sup>3</sup>

### 33.2 Definition

A self-represented litigant is a person who appears without representation in a court or tribunal as either a plaintiff or defendant.<sup>4</sup>

In litigation, self-represented litigants fall into three categories:

- (a) the 'direct' self-represented litigant, where he or she choose not to seek legal advice and not be legally represented;
- (b) the 'unbundled' represented person, where he or she is themselves on record, but has sought advice on limited aspects of law or procedure, or a stage of the case; and
- (c) the client of a directly briefed barrister.

### 33.3 A right to self-representation?

In most circumstances, a litigant will have the right to represent themselves in litigation.<sup>5</sup>

Pursuant to UCPR 7.2, directors or officers seeking to represent companies must file an affidavit stating their authority to act with the originating process or defence, together with a copy of the instrument evidencing that authority. The affidavit must contain a statement to the effect that the director is aware that he or she may be liable to pay some or all of the costs of the proceedings. This acknowledgement about a costs liability is important and that requirement will often lead to the director having a change of heart about representing the company.

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2 See Hugh Mackay, "Unbundling Legal Services: Step-in, Step-out Litigation", *Law Society Journal*, July 2003 at p.48

3 *Khera v Jones* [2006] NSWCA 85 and *Malouf v Malouf* [2006] NSWCA 83; (2006) 65 NSWLR 449

4 See Law Society Position Paper, Annexure A at p.10. Please note this definition includes litigants who may have representation from a legal professional but lose that support for whatever reason.

5 See section 78 of the *Judiciary Act* 1903 (Cth); *Collins (alias Hass) v The Queen* [1975] HCA 60; (1975) 133 CLR 120 at 122; *Federal Court Rules* Order 4, rule 14(1); and Part 7 rule 7.1 of the *Uniform Civil Procedure Rules* 2005 (NSW)

### 33.4 Professional duties

Dealing with litigants in person can challenge your professional duties and obligations, in particular your duties to ensure that legal costs and court time are not unnecessarily spent and that cases are conducted efficiently and expeditiously.

You are permitted to communicate directly with a self-represented litigant who has engaged counsel directly without breaching rule 31.1 of the Revised Professional Conduct and Practice Rules, which “does not apply when the other party is represented by a barrister directly instructed by the party, and the barrister’s retainer is so limited, in accordance with the rules of the NSW Bar Association, as to preclude the barrister from conducting correspondence on the party’s behalf”.<sup>6</sup>

When negotiating a settlement, the Law Society suggests that an independent person should be present, and before concluding any settlement, you should confirm the other party’s understanding, and have this noted on the record by transcript or notation on orders or on terms of settlement. You should also understand that whilst undertakings have particular effect and importance to lawyers, lay persons are not bound in the same way and, in particular, they are not subject to disciplinary action for a breach of their undertakings. It may be difficult to enforce a lay person’s undertaking.

### 33.5 How should a judicial officer deal with a self-represented litigant?

The manner in which a court or tribunal will deal with a litigant in person will depend on that litigant’s understanding of the case, their understanding of the law, the nature of the case, the stage to which a hearing has progressed and any implications for the other side.<sup>7</sup>

A judicial officer walks a fine line between fulfilling his or her obligations to all litigants and ensuring that the efficiency of the process is maintained. Courts are required to prevent the unnecessary expendi-

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6 Rule 31.3 of the *Revised Professional Conduct and Practice Rules*

7 *Abram v Bank of New Zealand* [1996] ATPR 41-507. See also *MacPherson v The Queen* [1981] HCA 46; (1981) 147 CLR 512

ture of public and private resources.<sup>8</sup> However, a Judge cannot intervene to the extent that he or she cannot maintain a position of neutrality<sup>9</sup>.

Excessive judicial intervention can breach the judicial duty to observe procedural fairness.<sup>10</sup> However, a lawyer's failure to object to excessive intervention by a Judge can constitute a waiver or may estop a subsequent complaint.<sup>11</sup> The extent of intervention that is proper will depend on the circumstances of the case.<sup>12</sup>

Given the obligation to ensure a fair trial, a Judge is entitled to object to evidence on behalf of a self-represented litigant rather than advising that litigant of his or her right to object.<sup>13</sup> The Judge is also permitted to convey any rules or legislation to the self-represented person. However, a Judge cannot give legal advice to a litigant in person.<sup>14</sup>

### 33.6 Third parties and the self-represented litigant

A Judge or Magistrate normally has the power to permit a self-represented party to be represented by another lay person as an element or consequence of the court's or tribunal's inherent right to regulate its own proceedings.<sup>15</sup>

However, this power will be permitted in rare circumstances only. The Court will need to have regard to discretionary factors such as whether the case is one of complexity or minor or straightforward in nature. Courts are generally reluctant to allow a non advocate to represent a party if the litigation is complex in nature.<sup>16</sup>

Further, this power might not be exercised in favour of the litigant in person in a higher court.<sup>17</sup>

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8 *Mahoney AP Corporate Affairs Commission of NSW v Eddie Solomon Holdings Inc* (unreported, CA NSW, 1 Nov 1989 at 8)

9 *Minogue v Human Rights and Equal Opportunity Commission* [1999] FCA 85; (1999) 84 FCR 438

10 *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389

11 *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568; *Livesey v NSW Bar Association* [1983] HCA 17; (1983) 151 CLR 288

12 *Abram v Bank of New Zealand* [1996] ATPR 41-507

13 *National Australia Bank v Rusu* [1999] NSWSC 539; (1999) 47 NSWLR 309 at 311

14 *Johnson v Johnson* (1997) 139 FLR 384

15 *O'Toole v Scott* [1965] AC 939; (1965) 65 SR (NSW) 113

16 *Damjanovic v Maley* [2002] NSWCA 230

17 *Hubbard Association of Scientologists International v Anderson and Just* [1972] VR 340

A litigant in person is ordinarily entitled to have in court the assistance of a friend who may sit beside the litigant for the purpose of taking notes, handling or cataloguing documents/exhibits, making quiet suggestions to the litigant and generally being of assistance to the litigant in presenting his or her case to the court, provided that person does not disrupt the proper conduct of the proceedings: A person assisting a litigant in this manner has become known as a “McKenzie friend”.<sup>18</sup>

A “McKenzie friend” may not act as an advocate for the litigant in the proceedings without the leave of the court.<sup>19</sup> Leave will only be granted in exceptional cases. A “McKenzie friend” should be distinguished from a “next friend”. A “next friend” once appointed for a person who is a litigant “represents that person before the Court, and it is his or her duty to see that every proper and legitimate step for that person’s representation is taken”.<sup>20</sup>

The court generally does not provide interpreters for civil litigants who are not proficient in English. Most courts will allow self-represented persons to bring a friend to interpret for them, but they cannot advocate or speak on the litigant’s behalf.

### 33.7 Costs of the self-represented litigant

There is no power to award professional costs in favour of a successful self-represented litigant. Compensation for loss of time or some other disadvantage or inconvenience suffered by an unrepresented litigant in court proceedings are not ‘costs’.<sup>21</sup> However, a lawyer acting for themself can claim their professional costs where that is otherwise appropriate.<sup>22</sup>

If the self-represented party can prove that they have incurred expenses for their time in court and can show these expenses, the court may award these expenses as ‘disbursements’ should a party be successful.

Importantly, the fact a party is a litigant in person does not mean that the solicitor on the record is protected against an order for indemnity costs.<sup>23</sup>

18 *McKenzie v McKenzie* [1970] 3 All ER 1034

19 *Collier v Hicks* (1831) 2 B & Ad 663; (1831) 109 ER 1290; *KT v KJ & TH* [2000] FCA 831; (2000) 158 FLR 451

20 *Randall v Randall* [1938] 4 All ER 696

21 *Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403

22 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872

23 *Wentworth v Rogers* [1999] NSWCA 403



### 33.8 Refer a self-represented litigant

Before seeking 'specific' legal advice, the self-represented person may also wish to contact the court in which their matter is being heard and make an appointment with a 'chamber magistrate' to discuss their matter and options. Usually, the chamber magistrate will be a registrar of the court and be of great help to explain processes and procedures to the self-represented person.

The NSW Legal Aid Commission grants subsidies for legal costs or grants lawyers to those who meet their means test and merits test. However, apart from Family Law related matters, it is difficult for litigants to obtain grants in civil litigation.

If the Court is satisfied that it is in the interests of the administration of justice, the Court has the power to make a pro bono order in UCPR 7.35 to refer a litigant to the registrar for referral to a barrister or solicitor on the Pro Bono Panel for legal assistance. Both the Supreme and District Courts maintain a panel of lawyers for that purpose.

You may wish to refer the self-represented person to one of the following:

- (a) Law Society of NSW pro bono scheme;
- (b) NSW Bar Association legal representation scheme;
- (c) Public Interest Law Clearing House <<http://www.pilch.org.au>>;
- (d) Community Legal Centres (see the Combined Community Legal Centres Group (NSW) Inc website <<http://www.nswclc.org.au/clcs.html>>);
- (e) Family Court duty solicitor scheme (some registries only);
- (f) Federal Court referral scheme;
- (g) DPP Guidelines <<http://www.odpp.nsw.gov.au/guidelines/guidelines.html>>;
- (h) NSW Supreme and District Court referral schemes;
- (i) Salvos Legal; or
- (j) NSW Legal Aid Commission.

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