SUPREME COURT
OF THE NORTHERN TERRITORY

Self-Represented Civil Litigant Handbook

Publication released April 2026

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Chapter One: Introduction

Disclaimer and Alternative Resources

This Handbook is provided by the Supreme Court of the Northern Territory to assist self-represented litigants in civil matters. This is done by providing information on Court practices and procedures.

This Handbook contains only very general information and in abbreviated form. It only covers the substantive law insofar as it is required to elaborate on procedural issues. It does not purport to cover all the contingencies which might occur in the course of a case.

No claim is made as to the accuracy of the contents of this Handbook, and the contents do not constitute legal advice. All self-represented litigants are encouraged to obtain legal advice from a lawyer before taking any steps in proceedings. The Court does not accept any liability for anything which occurs as a result of reliance on the contents of this Handbook, nor will any concessions be made on that account.

Most litigation conducted in the Supreme Court is complicated, and not all persons are capable of conducting proceedings in the Supreme Court without professional assistance.

Lawyers can be sourced via internet search engine or by enquiry to the Law Society. The contact details for the Law Society are:

Telephone: (08) 8981 5104
Email: info@lawsocietynt.asn.au
Website: www.lawsocietynt.asn.au

For a list of agencies which provide legal advice for free or at low cost, please visit the following website: nt.gov.au/law/processes/get-legal-advice.

There also are a number of resources which can be utilised to assist litigants in the conduct of proceedings, discussed below.

The Supreme Court website (www.supremecourt.nt.gov.au) contains useful material such as various practice directions and the judgments handed down by the Court.

Further, there are various websites which provide a wealth of resources. Examples include:-

1. Australasian Legal Information Institute ('Austli') – www.austlii.edu.au
2. Foundation Law – www.lawfoundation.net.au
3. Comlaw – www.comlaw.gov.au
4. Findlaw – www.findlaw.com.au
5. Law Society – www.lawsocietynt.asn.au

All Northern Territory legislation, including repealed legislation, is available from the Parliamentary Counsel website by following the links from legislation.nt.gov.au.

There are a number of easy-to-follow legal publications that can be referred to. For example, the Northern Territory Legal Aid Commission publishes an online handbook titled the 'Northern Territory Law Handbook' which can be found via the following link: ntlawhandbook.org/foswiki/NTLawHbk/NTLawHandbook.

Legal Aid agencies in most other jurisdictions publish a similar guide to the Northern Territory Legal Aid Commission, and some have an online version. Care needs to be taken when using interstate references due to the likely differences in procedure.

Although laws and procedures are not generally interchangeable between the various States and Territories, many of the procedures in the Northern Territory Supreme Court are based on those in Victoria and so publications in Victoria may be a particularly relevant alternative source.

There are many legal texts which can be referred to. They may be available through reference libraries. There are texts covering evidence, procedure and pleadings. Some are very specialised texts dealing with specific matters or procedures such as discovery, subpoenas and the like.

Judgments of various courts, but specifically those of the Supreme Court of the Northern Territory, are relevant due to the principle that like cases are to be decided alike.

More generally, a case may specifically decide an issue dealing with either a point of law or procedure or the interpretation of the section of an Act.

Judgments from all Australian jurisdictions are available on the websites referred to above. Judgments of the Northern Territory Supreme Court are also available on its website.

Generative Artificial Intelligence

Before using generative artificial intelligence ('AI'), it is important that you understand the risks associated with its confidentiality and accuracy.

You should not enter any private, confidential, suppressed or legally privileged information into a generative AI program. Some of these programs will remember every question which you ask of them or any other information which you input.

AI does not just learn information from internet search engines – it also learns from the information which other users input. This means that you are at risk of releasing to other users your private and confidential information, as well as unintentionally breaching any suppression order.

Information provided by AI may be inaccurate, incomplete or out-of-date. It may also be based on law which does not apply in the Northern Territory, let alone in Australia. More often than not, generative AI programs will produce fake cases, quotes or

legislation. It may also provide misleading or incorrect information about the law and how it may apply to your case.

If you use generative AI, it is best practice that you double check its accuracy against those free legal resources outlined above. Ultimately, *you are responsible* for ensuring that all the information which you rely upon is accurate.

Failing to ensure accuracy will result in you intentionally misleading the Court. In doing so, you invite the opportunity for your pleadings being struck out or for adverse costs being ordered against you. To better understand these negative implications, you should respectively refer to Chapters 3 and 15 of this Handbook.

The Court

The Court comprises the Judges and the Associate Justice. The Judges have unlimited original jurisdiction. The Associate Justice's jurisdiction is limited as set out in the *Supreme Court Act 1979* (NT) and the *Supreme Court Rules 1987* (NT).

The *Supreme Court Rules* regulate the procedures and practices of the Court, and they are the primary reference source for procedural matters. This Handbook is essentially a summary of those rules in respect of the various topics discussed.

The *Supreme Court Rules* follow a format of numbering as orders with sub-rules. For example, the rules dealing with costs are contained within Order 63. There are 76 sub-rules in that order. For example, the rule dealing with costs sanctions for issuing proceedings in the Supreme Court in lieu of the Local Court is Rule 22 of Order 63. In this Handbook, the formatting will be abbreviated to the commonly used parlance. So, Rule 22 of Order 63 will be referred to as Rule 63.22.

The applicable rule referred to in this Handbook is cited. The abbreviation 'SCR' used in this Handbook means the *Supreme Court Rules 1987* (NT).

Registry Staff

Of the staff in the Supreme Court Civil Registry, only the Registrar has legal qualifications. The remainder of the staff are administrative staff. Therefore, they can only provide limited administrative assistance in relation to civil proceedings, probate, appeals from the Local Court (both civil and criminal) and Court of Appeal matters.

Registry staff cannot provide legal advice about your matter. They can provide you with information regarding the Court's administrative processes, such as listing enquiries. They can advise you how to access precedents for Supreme Court forms, which are prescribed by the SCR. However, they cannot help you to complete your Court documents.

Further, registry staff cannot tell you what to say in Court and they cannot speak to a Judge or the Associate Justice on your behalf.

In checking documents, the role of Registry staff is limited to formal matters such as drafting a document pursuant to the SCR and Practice Direction 3 of 2020 (as amended).

For the above reasons, you *cannot* rely on any information given to you by Registry staff in Court.

Communications with the Court

All correspondence should be addressed to the Registry in the first instance at Dwnsupcrtreg.Doj@nt.gov.au

The Court is situated in State Square next to Parliament House and the postal address of the Court is GPO Box 3946, Darwin, NT 0801.

It is not appropriate to communicate with a Judge or the Associate Justice other than in Court proceedings. There are exceptions to this rule and Registry Staff can provide you with an email address for the Associate to a Judge or the Associate Justice.

Within a Judge or the Associate Justice's Chambers is their Associate. The role of an Associate to a Judge or the Associate Justice is to assist them both in Court and in Chambers on legal matters and case management. This is by acting as an intermediary between parties and the bench. It is wholly inappropriate for there to be a private audience or correspondence between parties and a Judge or the Associate Justice.

A good practical guide in respect to the consideration which apply in respect to communications with the Court (which will have a similar application) can be found on the Federal Court of Australia's website at www.fedcourt.gov.au/going-to-court/i-am-a-party/communicating-with-the-court.

Chapter Two: Pre-Action Requirements

Proper Court

It is first necessary to determine the proper court in which to commence proceedings.

There are two courts exercising civil jurisdiction in the Northern Territory: the Northern Territory Local Court and the Northern Territory Supreme Court. There is also one tribunal, which is the Northern Territory Civil and Administrative Tribunal ('NTCAT'). NTCAT exercises limited civil jurisdiction for the purpose of determining certain matters such as small claims or tenancy disputes.

NTCAT has a small claims jurisdiction up to a value of $25,000.00. The Local Court has jurisdiction for claims up to a value of $250,000.00. The Supreme Court has unlimited civil jurisdiction.

Where appropriate, both the Local Court and the Supreme Court have the power to transfer proceedings to each other.[1]

There are consequences if a matter is commenced in the wrong court. Cost penalties can apply if a claim is brought in the Supreme Court when it should have properly been commenced in the Local Court.[2] Additionally, a significantly higher filing fee applies in the Supreme Court.

For further information, you may refer to the following websites: www.ntcat.nt.gov.au and www.localcourt.nt.gov.au.

Pre-Action Procedures

Parties to potential legal proceedings are encouraged to engage in pre-action conduct prior to actually commencing proceedings. The process to be followed is as set out in the SCR, being Order 1A (Part 2). The Local Court does not have a similar requirement.

The purpose of Order 1A is to encourage the early exchange of information about a claim. This is to enable parties to avoid litigation by agreeing to the settlement of the claim before proceedings are commenced, as well as to support the efficient management of proceedings if litigation cannot be avoided.

Order 1A applies to any proceeding which could be commenced in the Supreme Court (either by Writ or Originating Motion) and where there is or is likely to be a dispute between the parties as to what orders the Court should make.

Very generally, Order 1A requires a proposed Plaintiff to communicate with the intended Defendant in providing details of the claim which are sufficient to enable the claim to be understood. Copies of essential documents *must* be provided at the same

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1 *Supreme Court Act 1979* (NT) s 16(2).
2 SCR r 63.22.

time. If one party does not hold necessary documents for the claim, they may request a copy from the other party. Often, this sort of communication will be presented in the form of a letter.

A Defendant is required to promptly acknowledge the Plaintiff's Order 1A correspondence. Thereafter, they submit a detailed response within a reasonable time. That response must include copies of any documents on which the Defendant relies and indicates whether, and to what extent, the claim is accepted.

It is contemplated that the parties will then seek to undertake some form of alternative dispute resolution, with proceedings only to be commenced after that avenue has been exhausted. The commencement of proceedings in Court is intended to be the last resort.

Non-compliance with Order 1A is not a bar to the issue of proceedings. However, there are costs consequences for non-compliance. Even if a party has commenced a proceeding, there will still be an expectation that Order 1A will be complied with during the course of the proceeding (i.e. parties may be given time to engage in the Order 1A process before other formal Court processes are ordered).

At the Initial Directions Hearing of the matter, the Associate Justice will ask parties about their compliance with Order 1A.

Chapter Three: Proceedings

Time Limits

Civil proceedings must be commenced within a fixed time after the cause of action arises.

In general, provisions within the *Limitation Act 1981* (NT) set the necessary time limit. The general time limit fixed by that Act is three years from the date when the cause of action arises (e.g. for tort and contract).

Some specific Acts of Parliament set a special time limit for the commencement of proceedings (e.g. the *Police Administration Act 1978* (NT) provides two months for claims made against the Northern Territory for actions of police officers).

Generally, a cause of action arises on the date of the event giving rise to the claim. For example, where there is a claim for personal injuries, the clock will start from the time of the accident or other event leading to the injury(ies) sustained.

In contract claims, the ascertainment of the date may be more problematic. In general, terms a claim for damages for breach of contract arises at the time of the breach.

Most time limits set by the *Limitation Act 1981* (NT)[3] or by other Acts may be extended by a court in specific circumstances.

Filing Fees

Fees are payable on the commencement of proceedings.

Current fees are available on the Supreme Court website. There is one rate for a business or corporation, and another rate for an individual.

If you are facing financial hardship, you may apply for a fee waiver or for the deferral of the whole or part of the fee. Likewise, payment by instalments may be permitted. This type of application must be supported by a statutory declaration which outlines the circumstances of your financial hardship.

The relevant form for a fee waiver is available in the 'Commonly Used Forms' section of the Supreme Court website. Alternatively, you may contact the Registry for a copy of this form.

Electronic Filing

The Supreme Court only accepts the electronic filing of documents in the Civil Jurisdiction. All civil files in the Supreme Court are managed electronically, and only in certain circumstances will you be required to provide hard copies of documents.

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3 *Limitation Act 1981* (NT) s 44.

Practice Direction 3 of 2020 (as amended) provides information on electronic filing. All filing should be sent to NTSC.efile@nt.gov.au and *not* directly to the Associate of a Judge or the Associate Justice.

Originating Process

Actions in the Supreme Court are commenced by either a Writ or an Originating Motion.[4]

A self-represented litigant would mostly be involved in the type of matter routinely commenced by Writ, and therefore only matters commenced by Writ is dealt with in this Handbook. The prescribed form for a Writ is available in the 'Commonly Used Forms' section of the Supreme Court website.

A Writ can be issued with either an Endorsement of Claim or a Statement of Claim. If you are unsure which is required, then you should refer to rule 5.04(2) of the SCR.

An Endorsement of Claim is a broad general statement outlining the nature and basis of the claim. A Statement of Claim sets out all of the material facts and particulars which the Plaintiff must set out for the purposes of their claim.

Different time limits apply to the steps after the issue of the Writ, and this will depend on whether the Writ is issued with an Endorsement of Claim[5] or a Statement of Claim.[6]

It should be noted that a proceeding shall be commenced by Originating Motion when there is no defendant to the proceeding, whereby or under an Act an application is authorised to be made to the Court where it is required to be used per rule 4.05 of the SCR, or where it is unlikely there will be substantial disputes as to facts and therefore pleadings and discovery are not necessary.

Service

There are two types of service: personal and ordinary. 'Service' means that you provide a copy of the relevant document, as filed with the Court, to the other party. The SCR specify when a Court document must be served personally. For example, an originating process (either a Writ or Origination Motion) must be served personally on each defendant.[7]

In general, service must be affected personally. Rules 6 and 7 of the SCR generally deal with matters relevant to service.

Personal service on a natural person will be affected by leaving a copy of the document with the person to be served or, if he/she does not accept the copy, by putting the copy down in his/her presence and telling him/her the nature of the document. For more information on this, you may refer to rule 6.03 of the SCR.

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4 SCR r 4.01.
5 SCR r 14.01.
6 SCR r 14.02.
7 SCR r 6.02.

Personal service on a corporation is affected by serving the document on an officer of the corporation.

There are other specific provisions for personal service on children, people under a disability, the Commonwealth or Northern Territory Crowns.

Ordinary service can be affected by leaving the document at the proper address of the person to be served, by sending it by prepaid post to their proper address, or alternatively, to their email address or their solicitor's email address.

Ordinary service on a corporation can be affected by posting the document to the registered office. The registered office is that set out in the company's official documents and can be ascertained by a search at the offices of the Australian Securities and Investments Commission ('ASIC').

There are additional requirements where service has to be affected in another State or Territory. Service outside of the Northern Territory requires a document to be attached to the Writ, which is known as a Form 1 Notice under the *Service and Execution of Process Act 1992* (Cth). The requirement is a mandatory one and failure to comply renders the service totally ineffective.

In certain circumstances, the Court may permit service to be affected other than personally.[8] This is known as substituted service. In appropriate cases, the Court can also deem service that has not been strictly affected according to the rules as valid service.[9]

Substituted service is generally ordered only after a party has exhausted all reasonably available means to effect personal service. The methods of substituted service vary according to the circumstances. It may take the form of service by post, service on another person, notification by email or text of the proceedings or service by advertisement in a newspaper (or a combination of the same).

Generally, service of a Writ must be affected within 12-months of its Court filing. Service cannot be affected after this time without first obtaining the permission of the Court.[10]

After service has been affected, it is necessary to prove the same. This is done by an Affidavit of Service.[11] This step will be unnecessary if the Defendant files an Appearance, discussed further below.

It is necessary for the Affidavit of Service to specify the time, date and place when service was effected, by whom service was affected, the documents served (including the Form 1 Notice referred to above, where appropriate) and the method by which it was established that the person required to be served was in fact the person served. The latter requirement is usually proved by the process server asking of the person

8 SCR r 6.09.
9 SCR r 6.10.
10 SCR r 5.12.
11 SCR r 6.16.

served whether they are the person named in the Writ and the person served responding in the affirmative.

Appearance

The next step after service is properly affected is for each of the Defendants to file a Notice of Appearance with the Registry. The form for a Notice of Appearance is available in the 'Commonly Used Forms' section of the Supreme Court website.

This document informs the Court and all parties that a person or entity(ies) that you intend to participate in the proceeding to contest the action. Unless the Court otherwise permits, a Defendant cannot take any step in a case without first filing an Appearance.[12]

Where a party is a company, the director(s) can file an appearance. However, no further steps can be taken in the proceeding without representation by lawyers. This is unless the Court approves otherwise.[13] If you seek that the Court dispenses with the requirement for legal representation, you should refer to Chapter 7 of this Handbook.

The timing of when Defendants are required to file their Notice of Appearance will depend on where the Defendant is served. The different time limits for filing are set out in the Writ. For example, Rule 8.04 of the SCR provides that the time is 7-days when served within 200km of the Registry and it is 21-days if it is served outside of the Northern Territory.

Service outside of Australia is more complicated and generally requires compliance with various international conventions.[14] Private bailiffs or process servers can be engaged to effect service in Australia. They will charge a fee for their service, which usually includes the preparation and provision of the affidavit confirming service. These fees can be recovered as part of the costs of the claim by the successful party.

Following service, the steps thereafter will depend on whether each Defendant files its appearance or fails to do so within the required timeframe. Those next steps are nonetheless outlined in Rules 14.02, 14.04, 14.05 and 14.07 of the SCR.

Where a Defendant fails to file its appearance, see Chapter 4 of this Handbook.

Address for Service

The filing of an appearance is required to stipulate an address, which must be within 30km of the Registry where the writ was issued, at which documents can be served on the Defendant either by email, post and or personal delivery.[15]

As it must accommodate personal delivery, a post office box or similar postal address will not suffice. Likewise, the Writ is required to contain an address for service of the

12 SCR r 8.02.
13 SCR rr 1.13, 2.04.
14 SCR r 7.
15 SCR r 6.05.

Plaintiff and this must also be within 30km of the Registry where the Writ was issued.[16]

Effectively, all processes to be served on a Plaintiff after commencement, and on a Defendant after filing an appearance, can be affected by post or delivery to the address for service (i.e. via ordinary service). Personal service, although permitted, is not required.

Pleadings Timetable

The first step is for the Plaintiff to file and serve its Statement of Claim. This step only applies if the Writ includes an Endorsement of Claim, not a Statement of Claim. In this case, the time limit for the filing and service of the Statement of Claim is 14-days after the filing of appearances.[17]

The next document is the Defence, which is filed by the Defendant(s), and a Counterclaim (where applicable). The time limit for this is 14-days after the filing of an appearance where the Writ includes a Statement of Claim[18] and 14-days after service of the Statement of Claim where the Writ contained only an Endorsement of Claim.[19]

If the Defendant makes a Counterclaim, then the Plaintiff must respond to the Counterclaim by filing a document known as a Defence to Counterclaim within 14-days of service of the Counterclaim.[20] It is similar to a Defence, which is what a Defendant files in respect of a Statement of Claim.

If there is no Counterclaim to be made, and there are matters in the Defence to which the Plaintiff needs to respond, the Plaintiff does so by filing what is called a Reply within 14-days of service of the Defence.[21]

Likewise, if there is a Defence to Counterclaim and the Defendant needs to respond, that is done by a Reply to Defence to Counterclaim and must be filed within 14-days of service of the Defence to Counterclaim.[22]

All Court documents filed up to this point are referred to as ‘pleadings’. Once all necessary pleadings have been filed and, after a further 14-days, it is said that the pleadings are “closed”.[23]

Most pleadings are complicated legal documents. They are required to set out all the material facts and particulars necessary to establish the Plaintiff’s claim. Pleadings are a critical and important part of any civil claim.

The purpose of the pleadings is to notify both the Court and the Defendant of the nature of the Plaintiff’s claim, the case the Defendant must meet and the issues to be decided

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16 SCR r 6.05.
17 SCR r 14.02.
18 SCR r 14.04(a).
19 SCR r 14.04(b).
20 SCR r 14.07.
21 SCR r 14.05.
22 SCR r 14.07.
23 SCR r 14.08.

by the Court. A party is not entitled to obtain any relief which is not set out in the pleadings.

Pleadings are the ambit for the evidence which can be called. Only relevant evidence can be called, and the statement of material facts and particulars in the pleadings are the primary factors by which relevance is determined.

Rule 13 of SCR sets out the specific requirements for pleadings. It is not exhaustive, as case law also sets the requirements. However, a discussion of that case law is outside the scope of this Handbook and legal advice should instead be sought.

Despite the time limits fixed by the SCR for the taking of various steps, there is a provision in the SCR which enables the Court to either extend or abridge the time allowed for the taking of any.[24]

Insufficient Pleadings

There are varying consequences if an insufficient pleading is filed and served.

The simplest is that a request for particulars is made by the other party. This is a document, often in the form of a letter, which sets out specific matters which the other party requires the pleading party to specify.

Any dispute about the appropriateness of a request for particulars or of the supplied particulars will ultimately be resolved by the Court either at a Directions Hearing or on a specific application (e.g. an interlocutory application, discussed in Chapter 7 of this Handbook) made by one of the parties.[25]

A more significant consequence is that an application may be made either for the pleading to be struck out or for Summary Judgment to be entered in favour of the other party.[26] The more serious of the two is a Summary Judgment, discussed further below.

The striking out of a pleading does not automatically dismiss an action. The Court will usually give a party time to file an amended pleading. Amending a pleading may have an impact on the timetable as time must be allowed for filing of amended pleadings in response by the other parties.

There are also cost consequences which follow an amended pleading. A party who makes an amendment or who is ordered to make an amendment bears the costs of all parties of all things which follow from the amendment irrespective of the ultimate result in the case.[27]

24 SCR r 3.02.
25 SCR r 13.11.
26 SCR rr 23.01-23.02.
27 SCR r 63.11(7).

A party may amend a pleading once without permission of the Court, or the consent of the other side, at any time before the close of pleadings.[28] Additionally, a party can amend a pleading at any time with the consent of the other party.[29]

By an application filed by a party, the Court may grant permission to amend a pleading at any stage of the process.[30] Recent changes to the law effectively mean that there is a practical limit to when an amendment can occur. This is because courts now take into account factors such as the necessity of case management and the proper utilisation of court resources in determining such applications.

Summary Judgment can be sought either by a Plaintiff or Defendant.[31] It operates as a final determination of the claim. The basis for Summary Judgment is that it is apparent that, on the face of the pleadings, either the Plaintiff's claim or the Defendant's defence cannot be maintained such that the other party should be entitled to judgment in a less formal way than through the trial process.

Once pleadings are closed, two other documents are to be filed with the Court: a List of Documents and a Litigation Plan. Both are separately discussed below at Chapters 6 and 11 of the Handbook, respectively.

Additional Parties

An additional Plaintiff or Defendant may be added to the proceedings on the application of either party.[32] Where an additional party is added, then orders in relation to the timetable of pleadings for those additional parties and Lists of Documents (if required) will be made.

Usually, additional parties can only be added with the permission of the Court.[33] The Court seeks to avoid multiple proceedings which may cover the same issues and will normally allow the addition of a party if it will bring finality to the proceedings. Different considerations may apply if the case is at an advanced stage.

A Defendant is entitled to join a party, known as a Third Party, without the Court's permission so long as it is done within 28-days of filing a Defence.[34] This applies where the Defendant claims a right to be indemnified for the claim made by the Plaintiff by the proposed Third Party.

A claim against a Third Party is commenced by a document known as a 'Third Party Notice'. This essentially recites the nature of the Plaintiff's claim against the Defendant and then sets out all the material facts relevant to establishing the Defendant's claim against the Third Party.

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28 SCR r 36.03(a).
29 SCR r 36.03(b).
30 SCR r 36.03(b).
31 SCR r 22.
32 SCR r 9.06.
33 SCR r 9.02.
34 SCR r 11.05(2).

The Third Party is then required to file a Notice of Appearance,[35] followed by a pleading known as a Defence to Third Party Notice, within 14-days after filing an appearance.[36]

A Third Party joined by a Defendant is treated as a Defendant for all purposes under the SCR. Therefore, a Third Party is required to comply with rules relating to Lists of Documents and the like.[37]

Likewise, a Third Party is also able to join subsequent parties through the third party process in the same way as the Third Party was joined.[38]

Where a Defendant has served a Counterclaim on the Plaintiff, the Plaintiff is then entitled to join a Third Party in respect of that Counterclaim.[39]

35 SCR r 11.08.
36 SCR r 11.08.
37 SCR r 11.12.
38 SCR r 11.16.
39 SCR r 11.17.

Chapter Four: Default

This section deals with the position wherever a default occurs. For example, a default by a Defendant in filing an appearance, a default by a party in filing a pleading, a default in complying with an order made by the Court, or a failure of a party to attend when required.

The default which is most likely to occur early in a proceeding is when a Defendant does not file an appearance within the time required following service of a Writ,[40] or if a Defendant fails to file a Defence within the time required from its filing of an appearance.[41] A party may also be in default by failing to serve pleadings or failing to comply with an order made by the Court, such as for discovery.

A default in the filing of a Defence can also occur if a Defence has been struck out and an Amended Defence is not filed within the time ordered for that purpose.[42] A Plaintiff can then seek judgment or interlocutory judgment, as the case may be, in the same way as if no Defence had been filed in the first place.

If the claim is a liquidated amount, then the Plaintiff is entitled to informally enter judgment.[43] Once that occurs, the effect is as if the matter had proceeded to trial and the Plaintiff was awarded a judgment for that amount.

A liquidated amount is one which does not require an assessment of damages. Rather, a simple arithmetic calculation (e.g. a claim for debt). On the other hand, a claim for damages for personal injuries requires the Court to assess and determine the amount of damages.

Where the claim requires damages to be assessed, the Plaintiff is entitled to enter interlocutory judgment for damages to be assessed.[44] The effect of this is that liability is determined in favour of the Plaintiff and the matter proceeds purely on evidence going to the issue of the assessment of the damages.[45] The Defendant may still be heard on any assessment.

Similar consequences follow if a party fails to attend Court when required. For example, if a party fails to attend a Directions Hearing, the Court may dismiss the claim where the party is the Plaintiff or strike out the Defence where the party is the Defendant.[46]

Wherever judgment is entered, including by interlocutory judgment, the party in default may apply to have the judgment set aside.[47]

If the judgment is set aside, then the matter is reinstated and proceeds in the normal way. Appropriate orders will be made which fixes a timetable for procedural steps.

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40 SCR r 21.01.
41 SCR r 21.02.
42 SCR r 21.02(3).
43 SCR rr 21.01(2), 21.03(1)(a).
44 SCR r 21.03(1)(b).
45 SCR r 51.01.
46 SCR r 48.11.
47 SCR r 21.07.

When deciding on an application to set a judgment aside, the Court will require an explanation for the default and to be satisfied that the defaulting party has a prima facie defence to the claim.

Whether an order for default judgment is made will depend on the explanations offered and the remaining circumstances of the case, such as the prejudice to the other side or the extent of and reason for noncompliance.

Chapter Five: Case Management

Case Management is the process by which the progress of a case is monitored by the Court. This is to ensure that the case proceeds in a timely and orderly fashion, and without unnecessary delays.

The Case Management process commences with the convening of an Initial Directions Hearing presided by the Associate Justice.[48] The bulk of the Case Management is conducted by the Associate Justice, though the Associate Justice may also transfer the matter to a Judge for Case Management. Judges may manage complex cases, such as those which are likely to be document intensive, require complex pleadings or will also likely require more than two weeks for trial.

The Initial Directions Hearing is scheduled within two months of the issue of a Writ or within 21-days of the filing of an appearance, whichever first occurs.[49] An Initial Directions Hearing usually deals with the following matters:-

1. Categorising the action;
2. Setting timetables for pleadings, completion of discovery and filing of Litigation Plans;
3. Dealing with any initial applications for extensions of time limits;
4. Determining whether discovery should be dispensed with in matters where Order 1A applies;
5. Scheduling a Case Management Conference[50] or a further Directions Hearing; and
6. Advising a likely or estimated trial date.

Categorising the action is determined by reference to the complexity of the matter, its urgency and the likely duration of the trial.[51] Most routine matters are categorised as 'B', which relates to matters which are not urgent and will require in excess of three days for the trial.

Following the Initial Directions Hearing, there will usually be further Directions Hearings or, in cases where Order 1A applies, a Case Management Conference. Ideally, Directions Hearings are kept to a minimum. Often, they are used to monitor matter progression when there are long periods of adjournments between listings.

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48 SCR r 48.04.
49 SCR r 48.04(1)-(2).
50 SCR r 48.11A.
51 SCR r 48.06.

Chapter Six: Discovery

Discovery is the process by which a party disclose to the other party details of relevant documents which they hold and facilitates the inspection of the same. This process commences with the filing of the List of Documents, which was briefly referred to in Chapter 3 of this Handbook.

For matters in which Order 1A applies, the discovery process is intended to be dealt with by the pre-action disclosure process. If properly complied with, this should mean that the formal discovery process is unnecessary. Hence, this process is usually dispensed with and is usually done by way of order at the Initial Directions Hearing.

If discovery is not dispensed with, then each party must file and serve a List of Documents within 21-days after the close of pleadings or such other time as the Court determines.[52]

The form[53] for a List of Documents is available in the 'Commonly Used Forms' section of the Supreme Court website. It essentially identifies documents which the party has in its possession, custody or control that is relevant to the issues in dispute. This disclosure requirement extends to specifying documents which a party has had in its possession, custody or control but no longer has at the time of the filing the List of Documents.

For example, if a party has sent a letter but no longer holds it, they must provide sufficient details to describe it (such as date and addressee(s)) and how that letter was disposed of. This must be done even if the party has retained a copy of the letter, which is discoverable in any event.

It is known for the Court to make an order for particular discovery where it has grounds to believe that a document or class of documents may be in possession of a party but has not been discovered by the same.[54]

It should be noted that a List of Documents makes special provision in respect of documents known as 'privileged documents'. Although a party is obliged to include privileged documents in the List of Documents, the actual production of those documents cannot be compelled in normal circumstances.

There are various forms of privilege, though the usual one is legal professional privilege. This essentially relates to communications between a legal practitioner and their client, or with others, for the purposes of legal advice. A self-represented litigant is unlikely to have any privileged documents for this reason.

Although there is no obligation to provide privileged documents, the List of Documents must state the nature of the document over which privilege is claimed. It must include sufficient detail to enable the other party to assess the validity of that claim of privilege.

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52 SCR r 29.03(2).
53 SCR r 29.04.
54 SCR r 29.08.

If the claim for privilege is disputed, then that matter will be decided by the Court. This is usually following an interlocutory application.

Essentially, the test for determining whether a document is discoverable is relevance. In an expanded form, the test is that a document is discoverable if it either advances one party's case or adversely affects the other party's case.

However, documents which are only relevant because they may be the starting point of a train of enquiry, leading to the ascertainment of other possible relevant documents, are only discoverable upon a specific order being made by the Court.[55] The Court will want to be satisfied of the need for such an order before it is made.

The Court has a power to limit discovery to exclude documents or classes of document as the Court determines.[56] This rule is designed to prevent unnecessary discovery.

A List of Documents usually is signed by or on behalf of the party making discovery. However, one party may require the other party to verify discovery by way of Affidavit. This would require that party to swear the contents of the List of Documents.[57] In any case, the Court can order such an Affidavit.

It is possible for a party to seek discovery of documents against a non-party.[58] Similar provisions apply for discovery against non-parties as for discovery between the parties to an action.

A non-party is entitled to have legal representation for the purposes of compliance with an order for non-party discovery. The costs of that legal representation are usually ordered to be paid by the party applying for the order.

For the purposes of discovery, a document has a broad definition. It is not limited to paper documents. The Court can give directions as to the mode of discovery for items such as videotape, audiotape and the like including information stored on computer hard drives and portable memory devices.[59]

Inspection of documents usually occurs shortly after parties file and serve Lists of Documents.[60] In routine cases inspection usually occurs informally (i.e. by one party requesting, and the other party providing, copies of certain documents).

In cases where there is more extensive discovery, actual physical inspection may occur. The SCR provide for formal ways to arrange appointments for inspection. The Court can give directions in the absence of agreement, if copies are refused or if unreasonable conditions are imposed by a party.[61]

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55 SCR r 29.02(3).
56 SCR r 29.05.
57 SCR r 29.03(5).
58 SCR r 32.07.
59 SCR r 29.12.
60 SCR r 29.09.
61 SCR r 29.11.

Chapter Seven: Pre-Trial Procedures

Earlier in this Handbook, reference has been made interlocutory applications. These are the applications by which orders and directions are sought and are usually in respect of procedural matters. For this reason, interlocutory orders do not finally determine the issues between the parties.

Interlocutory applications are heard at 10.00am on each Thursday in the Interlocutory and Mentions List at the Court. Interlocutory applications filed before 4.00pm on a Tuesday can be listed on the Thursday of that week. This is provided that the application is urgent. Otherwise, all other interlocutory applications are heard on a Thursday within three weeks of filing. That is, unless the parties request a special date for any particular reason.

Most interlocutory applications are heard and determined by the Associate Justice. The more complex applications are usually heard by a Judge, though they may also be heard by the Associate Justice.

The more “routine” types of interlocutory applications include:-

1. Discovery, including non-party discovery;
2. Leave to issue subpoenas;
3. Leave to amend pleadings;
4. Leave to join parties;
5. Leave to administer interrogatories;
6. Substituted service;
7. Setting aside default judgments; and
8. Extending or abridging time limits.

The more “complex” types of interlocutory applications include:-

1. Summary judgment;
2. Striking out a pleading;
3. Freezing order;
4. Search order; and
5. Interim injunction.

Interlocutory applications are made by filing the appropriate Summons[62] available in the 'Commonly Used Forms' section on the Supreme Court website.

Evidence on an interlocutory application is generally by an Affidavit which provides all of the evidence required for the application.[63] This is for the purpose of establishing a party's entitlement to the order sought in the application.

The Summons and Affidavit(s) are to be served on the other party and other interested persons. For example, a person against whom an order for non-party discovery is sought. The opposing party may also file evidence by way of Affidavit.

Although all evidence is intended to be in Affidavit form, in appropriate cases, permission of the Court may be sought to cross-examine the author of an Affidavit.[64] This is also specifically provided for in applications for Summary Judgment.[65]

Hearsay evidence is allowed in interlocutory applications. This is provided that the source of the information and the grounds for believing that information is set out.[66]

An interlocutory application will not necessarily be finally heard and determined on the date that it is first heard by the Court. This is because much depends on both availability and whether the parties are ready to proceed with the matter.

At the first Mention of an interlocutory application, the parties can expect the Associate Justice to deal with routine matters and to make programming orders with a view to listing the hearing of the application.

62 SCR rr 46.02, 46.04.
63 SCR r 40.02(a).
64 SCR r 40.04(1).
65 SCR r 22.07.
66 SCR r 43.03(2).

Chapter Eight: Affidavits

An Affidavit is a statement in writing which is sworn or affirmed. It will set out evidence to be used before the Court.

Affidavits are broadly used in Court. They are required to support an interlocutory application, as discussed in Chapter 7 of this Handbook.

Although the SCR does not specifically require this, a Judge or the Associate Justice will usually order that all Evidence-in-Chief at trial is to be by Affidavit. This is so that witnesses are only cross-examined orally for the purpose of reducing the time required for trial.[67]

Whilst hearsay is allowed in affidavits in support of interlocutory applications in certain circumstances, the normal rules of evidence apply in respect of Affidavits used for any other purpose. Therefore, hearsay evidence is not permitted.[68]

With note to Rule 43 of the SCR and Practice Direction 3 of 2020 (as amended), the following are the more essential requirements for an Affidavit:-

1. It is to be in the first person.[69]

2. It is to be divided into consecutively numbered paragraphs and as far as possible, each paragraph is to deal with a distinct portion of the subject matter.[70]

3. It is to be fully paginated.[71]

4. Each annexure coversheet has an electronic bookmark.[72]

5. The date of swearing/affirming must appear on the first page immediately beneath the title of the proceeding.[73]

6. The back sheet of the Affidavit must identify the party on whose behalf it is filed and specify the name of the deponent and the date of swearing.[74]

7. The contents are to be confined to facts which the deponent is able to state of his/her own knowledge.[75]

8. An Affidavit containing an alteration, errata or interlineation in any part of the Affidavit may be filed but it may not be used in Court without the Court's

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67 SCR rr 40.02(b), 40.03(1)(b).
68 SCR r 43.03(1).
69 SCR r 43.01(1).
70 SCR r 43.01(4).
71 Practice Direction 3 of 2020 (as amended) at [4.2].
72 Practice Direction 3 of 2020 (as amended) at [18].
73 SCR r 43.01(7).
74 SCR r 43.01(8).
75 SCR r 43.03(1).

permission. That is, unless the person before whom the Affidavit is sworn has initialled the alterations in each case.[76]

9. Documents and physical evidence to be used in conjunction with an Affidavit are to be annexed to the Affidavit unless that is inconvenient, in which case it may be made an exhibit.[77]

10. Extracts of a document can be recited in the body of the Affidavit in lieu of annexing the document.[78] This is particularly useful when the document is large and the part relied upon is relatively small.

Documents or other items of physical evidence can be exhibited or annexed to the Affidavit.[79] Copies are acceptable for this purpose, provided that the original is not required for any particular reason.

If the deponent to an Affidavit wishes to annex an item that cannot be converted to .PDF, .JPEG or .TIFF format, then an Index of Manually filed Documents can be filed.[80] That material must be described sufficiently so as to identify where it is referred to in an Affidavit. It must then delivered to the Registry on a USB. This procedure can also apply to material that is too large to be uploaded to the Court's electronic file management system.

Additionally, the *Oaths, Affidavits and Declarations Act 2010* (NT) outlines some formal requirements for Affidavits. Generally, you should refer to section 14 of that Act.

Generally, an Affidavit may be sworn before any authorised person (e.g. Justice of the Peace or Commissioner for Oaths). This is regulated by the *Oaths, Affidavits and Declarations Act 2010* (NT), which sets out the class of persons before who may swear an affidavit.[81]

For the avoidance of doubt, a party or an employee of a party should not be the person before whom an Affidavit is sworn. Such an Affidavit can only be used as evidence with permission of the Court.[82]

An Affidavit which has not been filed and served may not be relied upon without the Court's permission. For that reason, such affidavits are handed up to the Court and permission is then sought for that purpose.[83]

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76 SCR r 43.05.
77 SCR r 43.06.
78 SCR r 43.06(3).
79 SCR r 43.06(2).
80 Practice Direction 3 of 2020 (as amended) at [5.1], pt 12.
81 *Oaths, Affidavits and Declarations Act 2010* (NT) s 15.
82 SCR r 43.10(1).
83 SCR r 43.09.

Chapter Nine: Proof and Aids to Proof

Burden of Proof

Generally, the Plaintiff has the obligation to prove all of the relevant facts in a case. This obligation is known as the 'burden of proof'.

In some circumstances, a Defendant may have the burden of proof in part. For example, if a Defendant in a false imprisonment claim alleges that a detention is justified, then the Defendant bears the burden of proving that.

In civil proceedings, the required standard of proof is on the balance of probabilities. In the simplest terms, the balance of probabilities means whether something was to happen more likely than not.

Evidence

The most common form of evidence before a Court is oral evidence. This is evidence given verbally by a witness for matters of their own knowledge and observation.

Oral evidence is not in any special category of evidence. Except for specified and limited circumstances, it does not need to be corroborated by any physical evidence.

Physical evidence refers to the production of a document or thing, and the tendering of the same in Court as an exhibit. The same rules of evidence apply to physical evidence as with oral evidence.

A document or item can only be tendered in evidence if it can be proved either via oral testimony or by any of the admission processes, discussed further below. If it is required to be proved by oral testimony, then there must be first-hand testimony. For example, where a witness is the author of a letter, they need to give evidence confirming the contents of that letter.

In all cases, there may be exceptions to the rules of evidence. However, that discussion is beyond the scope of this Handbook. Legal advice should be sought instead.

Aids to Proof

Parties are able to utilise certain procedures which aid the proof of various matters. Many of these are designed to avoid the calling of unnecessary evidence, particularly where a matter is either uncontroversial or not disputed.

The most common and straightforward aid to proof is an admission on the pleadings.

Admissions

Any fact in a pleading that is admitted by the opposing parties, either in their pleadings or in any other acceptable and binding form,[84] is taken to be proved.

Additionally, there is a procedure commonly known as the 'Notice to Admit' or 'Notice to Produce'. This is particularly useful where facts may not have been admitted in pleadings, but where some considerable expense may have to be incurred to prove those facts.

A party can serve a Notice to Admit or Produce on the other party. It must specify various facts and identify various documents. It must also include a request that the other party to admit those facts or documents.[85] If not admitted, the party required to prove those facts or documents must still prove them in the ordinary way. However, once proved, that party is entitled to the costs of proof unless the Court otherwise orders.[86] This is irrespective of the final result in the matter.

Certain documents are admissible by their very nature. For example, official certificates (e.g. certified birth or death certificate). The relevant legislation provides for the form of a document which is able to be tendered in Court without any further proof. Various official documents are also able to be tendered in the same way.

Certain facts are so uncontroversial and obvious that specific proof is not required, and the Court can treat those facts as being proved. This is known as 'judicial notice'. The principle is that if a fact is so generally known that an ordinary person may reasonably be presumed to be aware of it, the Court takes 'notice' of it. For example, local conditions such as names and directions of important streets in a town.

There are also a number of procedures which can be adopted to obtain evidence. Discovery and inspection has already been discussed in Chapter 6 of this Handbook. A similar process, as already discussed, also operates in respect of persons who are not parties.

Subpoenas

In appropriate cases, subpoenas can be issued to persons to attend Court for the purpose of giving evidence and/or producing documents.[87] There are many rules which apply to this procedure and care needs to be taken. This is because, as is the case with non-party discovery, parties who are served with a subpoena are entitled to legal representation to deal with the subpoena and their costs are usually ordered to be paid by the party issuing the subpoena.

Unless the date specified on the subpoena is the date of trial,[88] then leave of the Court is required to issue a subpoena with an early return date.[89] An interlocutory application

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84 For example, SCR r 35.02.
85 SCR rr 35.03, 35.05.
86 SCR r 65.16.
87 SCR r 42.
88 SCR r 42.03(6).
89 SCR r 42.02(a)(ii).

should be filed for this purpose or, if other parties consent, then a Consent Order should be filed.

Interrogatories

Interrogatories are a set of questions by one party which are to be answered on oath by another party. Interrogatories cannot be administered by right. It is necessary to first obtain the permission of the Court by way of an interlocutory application.[90]

The Court must consider various factors in deciding whether the permission will be granted. This includes the need for and the relevance of the information sought, whether the interrogatories will facilitate the expedition of the case (including consideration of the likely costs involved or saved), and whether other means reasonably available of ascertaining the information have been unsuccessfully attempted (e.g. Discovery, Inspection, Request for Particulars, Notice to Admit or Produce).

Noting the above, what is "reasonable" will vary from case-to-case. In addition to Court processes, regard must also be had for more basic means of ascertaining the information (e.g. interviewing potential witnesses).

Examinations and Testing

The rules also provide a procedure where an application can be made for an order for examination and/or testing of physical objects.[91] For example, the inspection of a motor vehicle involved in an accident or the testing of it to determine its roadworthiness.

Expert Reports

Many witnesses who give evidence in Court are experts in their field. Those persons usually provide an expert report.

Rule 44 of the SCR deals generally with expert reports. Additionally, Practice Direction 4 of 2009 Court deals with expert reports. Rule 33 of the SCR deals with a specific type of expert report. Namely, a medical report. It also contains provisions for compelling a Plaintiff to attend a medical examination.[92]

An expert report or a medical report cannot be tendered in its own right, except whereby agreement between the parties. This means that, ordinarily, the author of the report must be called to give evidence.

90 SCR r 30.02.
91 SCR r 37.
92 SCR r 33.04.

Chapter Ten: Alternate Dispute Resolution

The Court encourages parties to attempt to resolve disputes other than by way of trial. The advantages of this are that it avoids the significant disruption to the parties, as well as the substantial costs and delays that can occur through the Court process.

The requirements of Order 1A specifically requires the parties to consider alternative dispute resolution prior to the issue of proceedings. This is discussed above in Chapter 2 of this Handbook. An alternate dispute resolution includes a Mediation and/or Settlement Conference.[93] One or the other will almost invariably occur before a matter proceeds to trial.

Both a Settlement Conference and Mediation are confidential. The SCR specifically state that nothing said here can be used in evidence, except to prove the nature and extent of any agreement which may have been reached.[94] This is designed to encourage parties to be as open as possible, with a view to maximising the possibility of a resolution of the dispute.

Settlement conferences are usually presided by the Associate Justice, though some may be presided the Registrar. Mediations, however, are usually adopted in more complex matters.

A Judge, the Associate Justice or the Registrar are able to act as a mediator. This is with the proviso that they can have no further part in the proceedings beyond that Mediation. In some instances, external mediators may also be appointed. The Court keeps a list of approved mediators for this purpose.[95] That list is available via the Supreme Court website. In any event, the parties are free to agree on an external mediator of their choosing.

The procedures at a Settlement Conference and Mediation vary on a case-to-case basis. Those procedures will depend on the circumstances of the case and will be determined by the host of the Settlement Conference or the Mediator. Accordingly, procedures are tailored to suit the circumstances.

In the lead up to a Settlement Conference or Mediation, the parties will usually be directed to exchange a precis of their case. A precis is commonly referred to as a 'position paper'. Essentially, it is a summary of the party's position for the purposes of the Settlement Conference or Mediation. It is provided for the benefit of both the person presiding and the other parties.

Unless otherwise ordered, the costs of a Settlement Conference or a Mediation are 'costs in the proceeding'.[96] This means that the decision on the costs of the substantive proceedings will apply to those costs.

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93 SCR rr 48.12-48.13.
94 SCR rr 48.12(8), 48.13(8).
95 SCR r 48.13(9).
96 SCR rr 48.14.

Chapter Eleven: Procedure to Trial

The trial date is set at either a Listing Hearing or, if applicable, at a Case Management Conference.[97]

Where counsel (i.e. a barrister) has been retained to appear at trial but does not appear at the Listing Hearing, the instructing solicitor who appears must provide a counsel's certificate before the matter may be listed for trial. This is unless the Court decides otherwise.[98]

In the lead up to a Listing Hearing or Case Management Conference, parties are required to file what is called a 'Litigation Plan'.[99] This is briefly discussed in Chapter 3 of this Handbook.

It is required that each party file their Litigation Plan and serve it on the other party within one month after the close of pleadings. It will contain information about specific matters relevant to the management of the case up to the date of trial (e.g. the number of witnesses to be called, which witnesses are still to be interviewed, the exchange of statements or affidavits of the evidence of witnesses, the required time to enable steps to occur, estimates of the duration of the trial and any interlocutory steps which may be required before trial).

If the filing and service of a Litigation Plan has not already occurred prior to a Listing Hearing or Case Management Conference, orders are usually made for parties to file and serve affidavits of all of the Evidence-in-Chief upon which they intend to rely.[100]

Ordinarily, the timetable for affidavits is staggered. This may mean that the Plaintiff files their affidavit(s) first, being approximately one month before trial. The Defendant will then file their affidavit(s) approximately two weeks later. These particular affidavits are intended to contain all the evidence of each witness. Any further Evidence-in-Chief will require permission from the Court. In some cases, directions for affidavits are given at the Civil Call Over.

The Listing Hearing or Case Management Conference will conclude with an order referring the matter to the Civil Call Over list. This is time which is set aside for a Judge to allocate a trial date and Judge for all civil cases which are ready for trial. The dates for the Civil Call Over are listed on the Supreme Court website.

The Civil Call Over is held approximately six weeks before the commencement of the civil sittings, which is when a Judge will only hear civil matters (i.e. there will be one week where a Judge hears only civil matters, and another week where they only hear criminal matters).

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97 SCR r 1A.
98 SCR r 48.18(2)(b).
99 Practice Direction 4 of 2004.
100 SCR r 40.03(1)(b).

Once a matter is listed for trial, and unless a fee waiver is already in place, a Setting Down for Hearing fee become due and payable by the Plaintiff, pursuant to the *Supreme Court Regulations*.

Chapter Twelve: Offers of Compromise

As discussed in Chapter 10 of this Handbook, parties are encouraged to attempt to resolve disputes without proceeding to trial.

An Offer of Compromise is a formal way of making and recording an offer to settle a matter. Both the Plaintiff and the Defendant can submit an offer of compromise.

The contents of an Offer of Compromise are confidential. For this reason, it is not kept on the Court file. Instead, the Registry Manager will seal and maintain it separate from the Court file. The confidential nature is such that any offers made are not disclosed even to a Judge or the Associate Justice.

Where an Offer of Compromise is made, the SCR allows the other party to accept an offer within 14 days from the date which the offer is made.[101] Where an Offer of Compromise is not accepted, its effect depends on the result in the case after trial.

If the other party rejects the Offer of Compromise and provides a counteroffer which is not better than the final result, then different costs orders can be made depending on the circumstances.[102]

If, say, the offer made by a Plaintiff means that they will recover more than that amount offered, the Plaintiff can seek costs on a basis which would result in recovery of more than the usual amount of costs.[103] Conversely, if a Plaintiff achieves less than the amount offered by a Defendant, then a cost penalty usually applies. This may mean that only costs up to the date of the offer are recoverable by the Plaintiff, who must then pay the costs of the Defendant from that time.[104]

Noting the above, the consequences of not bettering an Offer of Compromise can be quite severe.

Sometimes, an Offer of Compromise cannot be expressed in such simple terms as is envisaged by the formal Court process. An alternative to the formal procedure exists where a party sets out the terms of its offer in detail. This may come in the form of a letter (in lieu of the Court form) and on the basis that the letter cannot be used in Court except for the purposes of determining a costs order at the appropriate time. This is known as a '*Calderbank* offer'. Cost orders similar to those which may be made for an Offer of Compromise can likewise be made.

101 SCR r 26.03(3).
102 SCR rr 26.08, 63.15.
103 SCR r 26.08(2).
104 SCR r 26.08(3).

Chapter Thirteen: At the Trial

Housekeeping

It is encouraged that self-represented litigants view similar proceedings in the Supreme Court prior to the hearing of your own case. This is with the aim that you will become familiar with the courtroom and the procedures.

Certain standards of behaviour and observance of protocol are expected of any person in a courtroom:-

1. Being suitably dressed.
2. Practicing respectful and collegiate behaviour to all persons in the courtroom.
3. No eating and drinking, although drinking water would usually be permitted.
4. No chewing gum.
5. Only speaking where necessary and at a volume that does not disrupt proceedings. Remember that the acoustics in the Court are directed towards the bench.
6. Not speaking or moving around while witnesses are being sworn in or when the Judge or Associate Justice is speaking.
7. Mobile phone must be turned off – simply leaving it on silent is not sufficient as they can still then interfere with the Court's recording equipment.
8. Laptops and iPads may be used in the courtroom but may be prohibited by the presiding Judge or Associate Justice.
9. Video or other cameras (including from mobile phones), tape recorders, two-way radios or other electronic equipment are not permitted to be used in the courtroom without the express permission of the Court.
10. Sunglasses, caps, hats and the like should not be worn unless there is a valid reason. If so, you should write to the Associate of the presiding Judge or Associate Justice seeking permission well in advance of your hearing.
11. You must bow to the Judge or Associate Justice when you enter or exit the courtroom.
12. A Judge and Associate Justice are to be addressed as 'Your Honour'.
13. Legal practitioners are addressed by their surname (e.g. 'Ms Smith').
14. Parties addressing or being addressed by the Court should stand unless they are otherwise unable to.
15. Only one person should address the Court at any time.

You should ensure that you have everything you need, such as stationery, copies of the documents, your correspondence with other parties and other relevant persons, the exhibits you intend to tender and all documents necessary for you to conduct your case. Originals of documents should be available, where applicable.

Formalities

Depending on the nature of the case, it will be heard either by a Judge or the Associate Justice.

The Judge or the Associate Justice will sit on the bench. The legal practitioners will sit at the bar table. You should sit in the body of the Court until the case is called on by the Associate to the Judge or Associate Justice.

The Judge or Associate Justice, their Associate and the legal practitioners[105] will wear robes and/or wigs.

Court staff will announce the intended entry of the Judge or the Associate Justice. They will request everyone to be silent and to stand. All persons in the courtroom are to remain standing until the Judge or the Associate Justice is seated at the bench.

The Associate to the Judge or Associate Justice then will call on your matter. Following this, the parties will announce their appearance (e.g. 'My name is Smith, initial J, and I appear for the Defendant in these proceedings').

Barristers will announce their appearance first, lawyers thereafter. Once this has occurred, you should stand and announce who you are. Only then will the Judge or Associate Justice invite you to take a seat at the bar table with the legal practitioners.

If you require someone to assist you in the proceedings, this should be raised with the Judge or Associate Justice well in advance of the hearing. The general rule is that parties may only be represented by lawyers. Such assistance is known as a being a 'McKenzie friend'. Whether you will be permitted to have a 'McKenzie friend' is entirely at the Court's discretion.

It is important to note that the role of a 'McKenzie friend' is limited to passive duties. Further, it is only in rare and exceptional circumstances that a 'McKenzie friend' is permitted to address the Court or otherwise take an active role in proceedings. If you seek the Court's discretion to grant you a 'McKenzie friend', then you should refer to Chapter 7 of this Handbook.

Preliminary Issues

If any preliminary issues are raised, this is to be decided by the Court before the trial commences. This may include identifying any witnesses present in the courtroom or the calling on of subpoenas, which is discussed in Chapter 9 of this Handbook.

105 Practice Direction 6 of 2017.

If any of your witnesses are present in the courtroom, you should inform the Associate to the presiding Judge or Associate Justice before they are seated at the bench (i.e. before the formal part of the proceedings commence). All witnesses are then ordered to leave the courtroom until they are required to give evidence. Once a witness gives evidence, they are free to remain in the courtroom and observe the remainder of the proceedings.

If a party seeks an adjournment during the trial, it will only be granted with good reason. An adjournment means that the hearing of a matter is put off for another time or day.

It is important to note that the law has changed recently and adjournments at a late stage will generally be refused. Should an adjournment be granted, then the costs of the cost of the other party will invariably be 'thrown away' (i.e. wasted). It is almost always the case that those costs are ordered against the party seeking and obtaining the adjournment.

Plaintiff's Opening Address

The Plaintiff opens its case with a summary of the issues and the evidence to be called, including an indication as to how the evidence will prove the facts in issue. Following this, the Plaintiff will commences the evidence by calling witnesses in turn.

Although the order of the witnesses is up to the parties, they will usually be called in an order which will make the evidence easier to follow.

However, the actual Plaintiff (or the Defendant, as the case may be) should always be the first witness called. This is so as to avoid the suggestion that a party's evidence later into the trial was tailored to take into account their witnesses' evidence.

It is not mandatory that witnesses attend to give evidence. There are some matters which can be agreed between the parties prior to the commencement of the trial. For example, where a witness is only required to prove uncontroversial and unchallenged evidence, the other party may simply agree to the affidavit of that witness being tendered as evidence in lieu of their attendance. Documents can be tendered by consent in the same way.

Examination of Witnesses

It is required that you have arranged for the attendance of witnesses at suitable times. This includes, where necessary, the issuing and serving of subpoenas on witnesses and in sufficient time.

Irrespective of which party calls the witness, the evidence of each witness involves three stages: Evidence-in-Chief, Cross-Examination and Re-Examination.

Examination-in-Chief

The first stage of evidence is Examination-in-Chief.

As discussed in Chapter 11 of this Handbook, Examination-in-Chief will ordinarily be provided by way of affidavit. The affidavit is proved by asking the witness to view the affidavit, to confirm that the signature appearing on the affidavit is that of the witness, to confirm that the affidavit was sworn or affirmed, and to confirm the truth of the contents of the affidavit.

As most of the witnesses' evidence will be in affidavit form, objections to the admissibility of the evidence are dealt with before the witness gives evidence. It follows that parts of an affidavit may be struck out where evidence is inadmissible.

Given that an affidavit will contain a witness' Evidence-in-Chief, it will only be necessary to obtain further evidence from that witness where there is an update to provide, to supplement matters since the affidavit was sworn or affirmed, or to address matters raised in the other parties' affidavit evidence.

Different rules apply to Evidence-in-Chief and Cross-Examination. The latter is discussed further below. For now, a key difference is that leading questions are prohibited in Evidence-in-Chief whereas they are permitted in Cross-Examination.

An example of a leading question is one which suggests to the witness an answer which the examining party would prefer:-

> *'Were you at State Square at noon on the 25th of this month?'*

This tells the witness that the answer sought is 'State Square'. The correct way to ask this question in Evidence-in-Chief is:-

> *'Where were you at noon on the 25th of this month?'*

It has been said that any question which can be answered with a simple yes or no response is a leading question. However, that is not always the case and there are exceptions to the rule.

Using the example above, uncontroversial matters would rarely be the subject of an objection to a leading question. Further, the rule against leading questions is relaxed when it is for the purposes of introducing a new topic or a new line of questioning.

Other rules of evidence apply equally to all stages of evidence. This includes relevance, inadmissibility by reason of hearsay, or that the evidence expresses an unqualified opinion or conclusion.

Cross-Examination

The second stage of evidence is Cross-Examination.

Cross-Examination involves the opposing party's counsel asking questions of the witness. This serves to challenge the testimony that is in dispute and to test the credibility of the witness. Although leading questions are allowed in Cross-Examination, the Court may still impose limits.

Certain things must occur in Cross-Examination. The *Browne v Dunn* rule requires a party to specifically put any contrary version of any aspect of the evidence to the witness, giving them an opportunity to comment on the same. This includes both verbal evidence and documentary evidence. On this basis, documents which challenge the version of the witness must be produced and shown to the witness.

Care is required when cross-examining a witness on a document authored by another person. This is because the party must be able to prove that document at a later stage. Clearly, that process should only be undertaken where the party can prove such a document and has made the necessary arrangements for that purpose.

In Examination-in-Chief, a party is not permitted to cross-examine its own witness. This means they cannot challenge the evidence of their witness except in limited circumstances. For this reason, care should be taken to ascertain precisely what evidence a witness will give before calling them on. If a party's witness contradicts them in any material aspects, it will have an adverse effect on their case.

Re-Examination

The third stage of evidence is Re-Examination.

The witness being examined will again be questioned by the party who called the witness. Generally, the same rules as for Evidence-in-Chief will apply (e.g. no leading questions and no cross-examining the witness).

Re-Examination is not a further opportunity to extract evidence from a witness. Questions in Re-Examination will not be allowed unless they arise out of the Cross-Examination of the witness. Even then, it will only be allowed to the extent that clarification of that evidence is required.

Further, Evidence-in-Chief may be permitted by the Court in its discretion. Permission is not easily given as it does disrupt the usual process. If it is given, then leave is usually given to the other parties to further cross-examine the witness.

Giving Evidence

You should be aware that the presiding Judge or Associate Justice may ask questions of a witness. However, this is usually kept to a minimum.

The Judge or Associate Justice may also inform an unrepresented party of the options they have, but they will not advise of which option to take. This is because they are only able to provide limited assistance to an unrepresented party.

It should be known that the Judge's or Associate Justice's understanding of a case is necessarily limited to the evidence called at any particular stage and to the documents on file. Accordingly, you should not rely on questioning by the Court to either assist you or to fill in any gaps in your case.

The actual steps which occur when a witness gives evidence are:-

1. If they are not a party, then they will usually be out of the courtroom when they are called.

2. Court staff will call on the witness and, assuming they are present, lead them to the witness box. If the witness is a party, then the Court will simply invite the party to move to the witness box.

3. The Court will ask the witness whether they would prefer to take a religious oath or simply a promise to tell the truth. Nothing turns on the choice the witness makes – it is a matter of personal preference.

4. The witness is then 'sworn' according to the preferred choice.

5. The first question asked of a witness is their name, address and occupation.

6. Where there is Evidence-in-Chief in the form of affidavits, the affidavit is proved as set out above.

7. Any questions to supplement the Evidence-in-Chief are then asked.

8. The witness is cross-examined.

9. The witness is then re-examined.

10. The Court will excuse the witness, and they are then free to leave.

There are some simple rules to follow when giving evidence:-

1. The evidence needs to be easy to follow and should therefore be given in chronological or logical order.

2. It is imperative that a witness speaks slowly to allow all concerned to make whatever notes they need regarding the evidence.

3. Importantly witnesses should not ramble on. They should answer only the question asked as succinctly and simply as possible.

Conclusion of Examinations

After the Plaintiff has called its last witness, the Plaintiff will advise the Court that their case is closed. The Defendant's case then commences with appropriate modifications the above procedure.

When the Defendant has closed its case, the parties will make submissions to the Court. The submissions are an opportunity for a party to review the evidence that has been presented and to attempt to persuade the Court to determine the case in their favour. Generally, the Plaintiff will address the Court first. This is unless the Defendant has called evidence other than that of the actual Defendant.

Once the submissions have concluded, the Court will then make a decision on the matter. If the Court gives its decision immediately, this is known as an *Ex Tempore* decision. This does not will usually occur, but the Court may do so in very clear cases or if the case is brief and the evidence is not complex. If the Court does not make an *Ex Tempore* decision, it will state that its decision is 'reserved'. This means that it will be given at a later date.

On conclusion of the hearing, and either an *Ex Tempore* decision is given or the decision is reserved, a Daily Hearing fee becomes due and payable by the Plaintiff. This is unless a fee waiver is already in place.

Once the presiding Judge or Associate Justice has finalised their decision (otherwise known as a 'judgment'), this will be handed down by way of email or in an open court. The decision will usually be in writing and, if so, published online once it has been handed down.

Chapter Fourteen: Enforcement

Once a decision has been made, the amount found by the Court in favour of a party becomes a debt due to that party. However, the decision does not include any provisions for the enforcement or payment of that debt. Enforcement is an entirely separate process.

The manner of enforcement in a judgment is entirely up to the party in whose favour the judgment is given. Although the liable party may be able to negotiate an arrangement with the successful party, it remains entirely up to the successful party to either agree to any such proposal or to proceed in any other manner available to that party.

The options for enforcement of debt are:-

1. Payment by instalments. If this option is taken, it is usually preceded by the liable party being summoned to the Court for the examination of their assets, liabilities, income and expenses.[106] The Court will then make an order for payment by instalments.

2. Warrants may be issued for the seizure and sale of assets, including real estate.[107]

3. Attachment of debts.[108] This occurs where a judgment debtor is owed money by another and payment of that debt is redirected to the judgment creditor.

4. Attachment of earnings.[109] The Court can order a part of a judgment debtor's earnings to be paid direct to the judgment creditor.

5. Charging orders. Here, an order is registered on an asset owned by a judgment debtor with the effect that the proceeds of sale for that asset, or dividends earnt, will be paid to the judgment creditor. This is distinct from a sale of assets under warrant in that the charging order does not include a power of sale.

6. Insolvency, such as bankruptcy or winding up. Bankruptcy is regulated by the *Bankruptcy Act 1966* (Cth) and a winding up is regulated by the *Corporations Act 2001* (Cth).

The above options are not mutually exclusive alternatives.

106 SCR r 67.02(1)(a).
107 SCR r 69.
108 SCR r 71.
109 SCR r 72.

Chapter Fifteen: Costs

Security for Costs

At any time in the course of the proceedings, a party may apply for an order for Security for Costs against another party.[110] This mostly occurs where there is evidence that the other party may not be able to satisfy an order for costs despite a costs order.

Whether a costs order is made is up to the discretion of the Court. It is not available in all circumstances. The SCR set out preconditions to the making of an order. For example, where the Plaintiff is ordinarily resident outside of the Territory.[111]

Once the qualification is established, it remains a matter of discretion for the Court. Various factors are taken into account. For example, the strength and bona fides of the claim, and whether an order may be oppressive and may stultify the claim.

If security for costs is ordered, the Court will decide the amount and form of the security.[112] Options include the payment of the amount to the Court or for delivery of an unconditional bank guarantee.

The Court will usually fix the time by which the security is to be provided, with the proceedings typically stayed until the security is provided. A 'stay' suspends the proceedings and no further steps can be taken while a stay is in force.

Where the order is not complied with, the Court can dismiss the proceedings.[113]

Costs Orders

The general principle is that a successful party will usually be awarded their costs of the proceedings. However, it is a discretionary matter and there are various matters which the Court will take into account when exercising its discretion.

The above is simply the general rule. It is beyond the scope of this Handbook to deal with all of the factors that the Court may take into account when deciding on an appropriate costs order.

When an order for costs is made, it is usually for the costs of the proceedings. This includes Directions Hearings, Settlement Conferences and the like. It is also in addition to any specific costs orders made in the lead up to the finalisation of the matter, such as those costs discussed in Chapter 13 of this Handbook.

When costs are ordered, it is usually on what is known as a 'standard basis'. Costs may also be ordered on an 'indemnity basis'.[114]

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110 Generally, you may refer to SCR r 62.
111 SCR r 62.02(1).
112 SCR r 62.03.
113 SCR r 62.04.
114 SCR r 63.01(1).

An indemnity costs order will result in a greater amount being recovered. It is generally only made in limited circumstances, such as:-

1. Where an Offer of Compromise has not been bettered.

2. Where a claim or a defence is considered to be entirely without merit.

3. Where the party's conduct during the proceedings warrants such an order.

On either basis, a costs order will not result in absolute payment of the successful party's costs.

Taxation

Parties are also free to attempt to negotiate the finalisation of costs and, if successful, to record an agreement in binding terms. Where costs cannot be agreed, the successful party is entitled to commence the taxation process. Taxation is the process whereby the Associate Justice or Registrar assesses a claim for costs and determines the amount payable.[115]

In taxing costs, the successful party prepares a Summons for Taxation and a Bill of Costs in a prescribed form.[116] The Bill of Costs specifies the date that a cost was incurred, by whom it was incurred and the nature of the item.

The liable party has an opportunity to object to items on the successful party's Bill of Costs. An objection is in written form, filed with the Court and served on the other party at least 14-days before the date fixed for the taxation.[117] If no objection is filed within the prescribed time, the Associate Justice or Registrar may fix costs in the amount claimed without further enquiry.[118]

There are specific rules dealing with taxation which are beyond the scope of this Handbook. Self-represented litigants may refer to the costs provisions in Order 63 of the SCR and the 'Guidelines to Taxation' published on the Supreme Court's website.

Once costs have been fixed by the Court, they become a judgment and can be enforced in the same way as any judgment discussed in Chapter 14 of this Handbook.

There are fees payable to the Court for a taxation of costs. This is known as a 'taxing fee'. The taxing fee is 7.5% of the amount determined as costs and is to be paid initially by the successful party. Though, it is also recoverable from the liable party as they form part of the taxed costs.

The taxing fee is not payable if the parties resolve costs before the Associate Justice or Registrar undertakes the taxation process.

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115 Generally, you may refer to SCR rr 63.36-36.37.
116 SCR rr 63.36-36.37.
117 SCR r 63.45(2).
118 SCR r 63.47.

Interest at the rate prescribed for judgments is usually awarded on a taxation of costs from the time that the order for costs was made. The interest rate on judgment debts is calculated by using the cash rate set by the Reserve Bank of Australia plus 6%. The Court has some discretion in this regard. If there is any unacceptable delay between the filing of the Bill of Costs and when the order for taxation is made, the Court may adjust the commencement date for interest.

Appendix: Common Legal Terms

Adjourned, Adjournment	When a case is adjourned the hearing of the case is put off to another time or day.
Affidavit	A written statement that is sworn or affirmed. It can sometimes be used in place of oral evidence.
Balance of Probabilities	This is the 'standard of proof' in civil trials and, in simple terms, means more likely than not.
Barrister	Barristers are lawyers who represent clients in court, usually when engaged by a solicitor on behalf of a client. They also provide opinions and advice.
Burden of Proof	This refers to the obligation on the party who has the onus of proving a case at trial.
Call Over	A time set aside when all cases to be heard in a civil sitting are allocated final trial dates.
Date to be fixed	When a date for a hearing on a matter is required but the Court is unsure when it should be held, the Court will leave the date open to be fixed at a later date.
Default Judgment	A judgment that is obtained without the Court hearing any evidence as to the merits of the claim (e.g. when a party fails to answer a claim, judgment can be entered against them).
Defendant	The party against whom a claim is made in the civil jurisdiction.
Defence	The Defendant's pleading in answer to the Plaintiff's Statement of Claim.
Discovery	The process by which documents are disclosed and made available for inspection.

Directions Hearing	A relatively informal court appearance that takes place as part of the Case Management process and where directions are given for the future conduct of the case.
Evidence	The means by which facts in a case are proved. It can be spoken or written and can consist of physical objects such as photos and documents.
Ex tempore	A legal term usually referring to a decision which is given immediately following the conclusion of a trial. It means literally 'at the time'.
Exhibits	Evidence in physical form brought before the Court (e.g. documents, objects or electronic evidence such as CCTV, video footage, recording).
Hearing or Trial	A term referring to the time when the evidence and legal argument is presented in Court.
Interlocutory	A legal term which can refer to an order on a temporary or provisional decision on an issue at an intermediate stage of a case.
Interlocutory Application or Summons	Any application for an interlocutory order made within a proceeding.
Interrogatories	A series of questions delivered by one party to another and which require sworn answers.
Judge	A Judge is an independent judicial officer who presides over and decides cases in the Supreme Court. Judges are members of the Supreme Court and have unlimited authority to hear cases.
Judgment	A decision of the Court. It may be given verbally at the conclusion of the hearing, in which case it is known as *ex tempore* (see above). Alternatively, it may be given at a later time in writing where it will be described as 'Reasons for Decision' or 'Reasons for Judgment'.
Jurisdiction	Generally refers to the extent of powers of a Court, including as to the authority to hear a particular type of case.
Associate Judge	The Associate Judge is, like a Judge, an independent judicial officer who also presides over and decides cases in the Supreme Court but whose authority is limited to the specific authority given in the Act or the SCR.

Party, Plaintiff, Defendant	A party is one of the people or entities involved in the legal matter. A party who brings a claim is known as a Plaintiff and a party against whom a claim is brought is known as a Defendant.
Pleadings	Pleadings are written statements which alternate between the parties and contain allegations of facts and otherwise define the issues to be decided in a case.
Practice Direction	A Practice Direction supplements the SCR. It is made by the Judges for specific matters of procedure.
Reserved Decision	Following the hearing of a case the Court may reserve the decision by deferring the decision to a later date or time. In urgent cases an immediate decision may be given but reserving the provision of reasons to a later time.
Senior Counsel (SC)	Senior Counsel are legal practitioners who have attained professional eminence at the Bar. They apply to be appointed Senior Counsel ('SC'). In the past, this appointment was known as King's Counsel ('KC').
Solicitor	A solicitor is the term used to describe a legal practitioner who, although able to and qualified to appear in Court, does not routinely do so and instead undertakes the preparation of a case for Court and gives legal advice to parties.
Standard of Proof	The applicable standard or measure for determining whether a disputed fact or issue has been proved.
Subpoena	A document issued by the Court which summonses a person or entity to attend to give evidence or to produce documents. It is also sometimes referred to as a 'summons to witness' or 'summons to produce documents'.
Summons	A process issued by a court at the instigation of a party for the purpose of notifying another party of the nature of an application and to attend the hearing of that application.
Without Prejudice	Discussions or communications between opposing parties are sometimes made on a "without prejudice" basis to enable a free interchange of view. The effect of this is that if negotiations fail the parties have signalled that they do not want one another to make use in evidence of what has passed between them.