SUPREME COURT
OF THE
NORTHERN TERRITORY OF AUSTRALIA

PRACTICE DIRECTION
NO 6 of 2009

TRIAL CIVIL PROCEDURE REFORMS

Part 1 – Application

1. Unless otherwise ordered by a Judge, this Practice Direction applies to all civil proceedings commenced by writ (other than a writ of habeas corpus) or by Originating Motion where the Court has ordered that the proceeding continue as if by writ or has ordered pleadings in accordance with O.4.07 pending in the Supreme Court on 1 January 2010 (the commencement date) or commenced thereafter.

2. Pursuant to O.48.28, this Practice Direction is to apply until 31 December 2010.

This Practice Direction has been extended and will expire on 31 December 2020.

Part 2 – Pre-action Conduct

3. The objectives of this part are:

   3.1 to encourage the exchange of early and full information about a prospective legal claim;

   3.2 to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings;

   3.3 to support the efficient management of proceedings where litigation cannot be avoided.

4. Parties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation. It should normally include:

   4.1 the plaintiff writing to give details of the claim;

   4.2 the defendant acknowledging the claim letter promptly;

   4.3 the defendant giving within a reasonable time a detailed written response; and

   4.4 the parties conducting in good faith genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.

5. If there are circumstances which require a plaintiff to commence proceedings before complying with this part, the parties should endeavour to comply with the spirit of this part as soon as reasonably possible after proceedings have commenced.

Note: For example, urgent applications to the Court for injunctions, or to avoid the action becoming statute barred, might excuse non-compliance.

6. The plaintiff 's letter should:

   6.1 give sufficient concise details to enable the recipient to understand and investigate the claim without extensive further information;

   6.2 enclose copies of the essential documents on which the plaintiff relies and any documents (except privileged documents) which might significantly impair the plaintiff's case;

   6.3 ask for a prompt acknowledgement of the letter, followed by a full written response within a reasonable stated period;

   (For many claims, a normal reasonable period for a full response may be one month.)

   6.4 state whether court proceedings will be issued if the full response is not received within the stated period;

   6.5 identify and ask for copies of any essential documents, not in the plaintiff's possession, which the plaintiff wishes to see;

   6.6 state (if this is so) that the plaintiff wishes to enter into mediation or another alternative method of dispute resolution; and

   6.7 draw attention to the Court's powers to impose sanctions for failure to comply with this Practice Direction and, if the recipient is likely to be unrepresented, enclose a copy of this Practice Direction.

7. The defendant should acknowledge the plaintiff's letter in writing within 14 days of receiving it. The acknowledgement should state when the defendant will give a full written response. If the time for this is longer than the period stated by the plaintiff, the defendant should give reasons why a longer period is needed.

8. The defendant's full written response should as appropriate:

   8.1 accept the claim in whole or in part and make proposals for settlement; or

   8.2 state that the claim is not accepted.

9. If the claim is accepted in part only, the response should make clear which part is accepted and which part is not accepted.

10. If the defendant does not accept the claim or part of it, the response should:

    10.1 give detailed reasons why the claim is not accepted, identifying which of the plaintiff's contentions are accepted and which are in dispute;

    10.2 enclose copies of the essential documents on which the defendant relies, and any documents (except privileged documents) which significantly impair the defendant's case;

10.3 enclose copies of documents asked for by the plaintiff, or explain why they are not enclosed;

10.4 identify and ask for copies of any further essential documents, not in the defendant's possession, which the defendant wishes to see; and

(The plaintiff should provide these within a reasonably short time or explain in writing why he is not doing so.)

10.5 state whether the defendant is prepared to enter into mediation or another alternative method of dispute resolution.

11. The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the plaintiff and defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if this paragraph is not followed then the Court may have regard to such conduct when determining costs.

12. Subject to any order of the Court documents disclosed by either party in accordance with this Practice Direction may not be used for any purpose other than resolving the dispute or any subsequent proceeding relating to the dispute, unless the other party agrees.

13. If, in the opinion of the Court, non-compliance with this Part has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to delay or costs being incurred in the proceedings that might otherwise not have been incurred, the orders the Court may make include:

13.1 an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;

13.2 an order that the party at fault pay those costs on an indemnity basis;

13.3 if the party at fault is a plaintiff in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;

13.4 if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate than the rate at which interest would otherwise have been awarded.

Part 3 – Case Management Conferences

14. The purpose of this part is to ensure that proceedings are the subject of active and effective judicial case management such that the real issues of substance which are in dispute between the parties, and only those issues, are resolved by the Court justly, promptly, economically, and in proportion to the nature of the dispute. The parties and their representatives must assist the Court in managing cases to achieve this end.

15. Parties or their representatives should attend all case management conferences:

    15.1 with an understanding of the nature of the real issues of substance which are in dispute between the parties and of their case in relation thereto;

    15.2 having considered, discussed and if possible agreed with the other party the directions they propose that the court should make at that hearing;

    15.3 with sufficient information concerning the availability of all relevant persons to enable a trial date or trial window to be fixed if the fixing of trial dates or a trial window has not already occurred;

    15.4 ready to deal with all outstanding procedural issues.

16. Case management conferences may be conducted by telephone.

17. At the case management conference, the Court will:

    17.1 fix a trial date or a trial window, if that has not already been done;

    17.2 make directions to ensure that the matter is ready for trial on that date or in that window;

    17.3 scrutinise carefully the parties' respective pleadings to ensure that they properly identify, and only identify, the real issues of substance which are in dispute between the parties;

    17.4 consider whether any claim or plea is appropriate for summary determination, strike out or determination as a preliminary issue;

    17.5 resolve any other outstanding procedural issues between the parties or, if that is not possible, to make directions for their resolution;

    17.6 consider whether any further case management conferences are likely to be required and if so to fix the date or dates for those conferences. The parties are to co-operate to avoid as far as possible multiple case management conferences in any one matter;

    17.7 make such other orders as it considers appropriate to ensure that the matter is resolved by the Court justly, promptly, economically, and in proportion to the nature of the dispute.

18. Whilst this Practice Directions remains in force, Rules 48.16, 48.17, 48.18 and 48.19 shall not apply to proceedings which are subject to this Practice Direction.

Part 4 – Trial Dates are Sacrosanct

19. All parties and their representatives must appreciate that:

    19.1 the public has an interest in ensuring that all disputes are determined justly, promptly, economically, and in proportion to the nature of the dispute;

    19.2 it is essential for determining disputes in this way that trial dates are taken seriously and assumed by the parties and their representatives to be immutable.

20. The Court will not vacate a trial date or trial window save in extra-ordinary circumstances which render a fair trial impossible and then only as a last resort after all other options have been exhausted.

21. Any party who considers that circumstances have arisen which may mean that the trial will not be able to proceed on the date or dates fixed for trial should immediately notify the Court and the other party, and take out an application for directions.

Part 5 – Discovery

22. In exercising its case management powers referred to under Part 3 above, the Court will make an order under r.29.05 dispensing with the requirement for discovery under r.29.02 (save for ongoing discovery of the documents referred to in paras 6.2 and 10.2 of this Practice Direction) unless it is satisfied that:

    22.1 discovery should be limited to particular documents or class of documents, in which case it will make an order under r.29.05 to that effect;

    22.2 discovery under r.29.02 is necessary to resolve the real issues of substance which are in dispute between the parties justly, promptly, economically, and in proportion to the nature of the dispute.

Part 6 – Offers of Compromise

23. At any time, including before proceedings have been commenced, a party may make an offer, open or without prejudice save as to costs (an "Offer of Compromise"), to settle some or all of the issues in the proceedings.

24. If the Offer of Compromise is not accepted within a reasonable time and that issue or those issues are determined by the Court in a way which is more advantageous for the party who made the Offer of Compromise than if the Offer of Compromise had been accepted, the Court will take that into account when considering:

    24.1 the exercise of its discretion as to costs under r.63.03;

    24.2 the exercise of its discretion in relation to interest under s 84 of the Supreme Court Act.

25. In the ordinary case, the Court is likely to require the party who declined but then failed to better the Offer of Compromise to pay the other party's costs from the date the Offer of Compromise could reasonably have been accepted on an indemnity basis. If the Offer of Compromise was made by a plaintiff seeking a money judgment, the Court will normally order the defendant to pay interest at an enhanced rate from the date the

Offer of Compromise could reasonably have been accepted. If the Offer of Compromise was made by a defendant defending a claim for a money judgment, the Court will normally decline to order the defendant to pay interest from the date the Offer of Compromise could reasonably have been accepted.

26. The parties' attention is drawn to their duty to disclose the nature of their case under Part 2 above and to the importance of compliance with this duty to ensure that the other party has a sufficient understanding of the case against it to make a considered judgment about whether or not to accept, or to make, an Offer of Compromise. Failure to comply with this duty is likely to mean that the Court will not take into account when considering the exercise of its discretion as to costs or interest any Offer of Compromise made whilst the offering party was in breach of this duty.

Part 7 – Costs and Interest

27. The Court will take into account, amongst other matters, whether a party has complied with its duties under the Rules and further this Practice Direction when considering:

    27.1 the exercise of its discretion as to costs under r.63.03;

    27.2 the exercise of its discretion in relation to interest under s 84 of the Supreme Court Act.

28. Notwithstanding O.63.74, where the Court decides that a party has failed to comply with its duties under the Rules and this Practice Direction, the Court may award interest on costs at a rate not exceeding the rate fixed by the Rules, plus 8 %.

29. The Court may order costs as well as interest in accordance with para 28 against a practitioner where it is established that the practitioner rather than the client has failed to ensure that the client has failed to comply with the duties under the rules and this Practice Direction. Where there has been a significant departure from the Rules or this Practice Direction, the Court will as a general rule seek an explanation from the practitioner concerned as to the reason why this has occurred.

30. For the avoidance of doubt, for the purposes of O.63, the costs of a proceeding include the costs of complying with this Practice Direction.

Dated 11 June 2009

Acting Chief Justice

EXPLANATORY DOCUMENT FOR
PRACTICE DIRECTION NO 6 OF 2009

TRIAL CIVIL PROCEDURE REFORMS

1. Alongside and following the Woolf civil justice reforms in England and Wales in the late 1990s, major civil procedure reforms have been underway in common law jurisdictions around the world. In 1999, Queensland brought in its new Uniform Civil Procedure Rules. The next decade saw the Court Procedures Act 2004 in the Australian Capital Territory, the Civil Procedure Act 2005 and the Uniform Civil Procedure Rules 2005 in New South Wales, the new Supreme Court Rules 2006 in South Australia, the experimental "Rocket Docket" system in the Federal Court in 2007 and, this year, the implementation of the Hong Kong Civil Justice Reforms. The radical proposals of British Columbia's Civil Justice Reform Working Group including for the establishment of "information/assistance hubs" still remain under consideration. The report of Sir Rupert Jackson's committee on the costs of civil litigation in England and Wales is awaited with interest.

2. Given that our Rules are modelled on the Victorian Supreme Court Rules, of significance for the Northern Territory is the recent Victorian Law Reform Commission's Report on Civil Justice Reform (Report 14, July 2008). Following its wide ranging review of the Victorian civil justice system the committee made 177 recommendations.

3. The motivation for these reforms is the fact that traditional civil litigation takes too long and is too expensive. Delays and inefficiencies impose substantial avoidable costs and other pressures on litigants.

4. In 2008, the Judges appointed Mildren J to chair a committee comprised also of Riley J and representatives of the Northern Territory Bar Association and the Law Society of the Northern Territory to consider and make recommendations on civil procedure reform to the annual Judge's Conference in May this year.

5. That committee recommended the introduction of the following as a first step in the reform of civil procedure in the Northern Territory Supreme Court:

    5.1 All parties are to be under a general obligation to disclose the nature of their respective cases and to attempt to settle the dispute prior to commencing litigation;

    5.2 Litigation, once commenced, is to be the subject of active and effective judicial case management such that the real issues of substance which are in dispute between the parties, and only those issues, are resolved by the Court justly, promptly, economically, and in proportion to the nature of the dispute. This will include the fixing of trial dates or trial windows at the earliest opportunity;

    5.3 The parties and their representatives are to be under a duty to assist the Court in managing cases to achieve this end;

    5.4 The ambit of discovery is to be subject to review in every case, with the presumption being in favour of limiting or excluding discovery wherever appropriate;

5.5 The role of offers made "without prejudice save as to costs" is to be enhanced to encourage parties to make and accept reasonable offers of settlement, including offers made prior to the commencement of court proceedings;

5.6 Greater weight is to be placed on a party's conduct in these respects both during and before the commencement of litigation when awarding costs and interest.

6. The purpose of these reforms is to maximise the prospect of settling a dispute without incurring the costs of court proceedings. However, if the dispute is not settled and resort to court process is necessary, these reforms should also ensure that each party has a sufficient understanding of its own case and the case against it:

6.1 to make a reasonably accurate assessment of its prospects of success in securing or resisting a remedy at trial;

6.2 to make a reasonably accurate assessment of the likely time and cost involved in getting to trial;

6.3 to make a reasonably accurate assessment of the most appropriate offer (if any) to make "without prejudice save as to costs";

6.4 to discharge its duty to assist the Court to manage the case such that the real issues of substance which are in dispute between the parties, and only those issues, are resolved by the Court justly, promptly, economically, and in proportion to the nature of the dispute.

7. Further, by active case management with the support of better informed parties under a duty to assist the court, the committee and the Judges believe that the costs of and the delays in litigation will be significantly reduced.

8. Finally, the Court is expressly empowered to take into account a party's compliance with these reforms in the conduct of litigation when awarding costs and interest.

9. The Judges have accepted the committee's recommendations and the draft Practice Direction produced it to give effect to their recommendation.

10. These reforms have been identified by the committee and adopted by the Judges now on the basis that (a) their implementation is likely to result in immediate improvements in the administration of civil justice and (b) they are likely to be part of the new system once the reform process has been concluded. It is in this sense that this Practice Direction is described as a "trial". It would be wrong to assume that these particular reforms themselves are necessarily provisional.

11. Alongside monitoring these reforms, the Judges have asked Mildren J and his committee to continue their inquiry into civil procedure reform with a view to making further recommendations in relation to the Supreme Court.

Dated 11 June 2009

Acting Chief Justice