CHANGES TO COMMERCIAL AND CORPORATIONS PRACTICE IN THE FEDERAL COURT OF AUSTRALIA

By Michael Legg

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Snapshot

- In 2016, the Federal Court established a National Court Framework ('NCF') to fundamentally reform and govern how the Court operates. The Court is now organised and managed nationally with nine key National Practice Areas ('NPAs') created.
- To give effect to the NCF and NPAs, new practice notes were issued: a Central Practice Note, NPA specific practice notes and general practice notes. The new practice notes took effect on 25 October 2016.
- This article provides an overview of the key changes to commercial and corporations practice.

In 2016, the Federal Court established a National Court Framework ('**NCF**') to fundamentally reform and govern how the Court operates. The Court is now organised and managed nationally with nine key National Practice Areas ('**NPAs**') created. All of the Court's practice notes have accordingly been revised and reissued.

The Court still employs the individual docket system ('**IDS**'). The general principle underlying an individual docket system is that each case commenced in a court is randomly or sequentially allocated to a judge of the court at the time of filing, who then supervises all pre-trial steps and hears the case when it is ready for trial. The idea is that by giving a judge 'ownership' of a case the judge then has the ability and incentive to exercise control.

Under the NCF, matters are now centrally allocated to judges based on the availability of judges with expertise in the relevant NPA and the needs of the case. However, once allocated to a judge it will remain with that judge for case management and disposition. The NPAs of the Court are:

- Administrative and Constitutional Law and Human Rights;
- Native Title;
- Employment and Industrial Relations;
- Commercial and Corporations;
- Taxation;
- Intellectual Property;
- Admiralty and Maritime;
- Federal Crime and Related Proceedings; and
- Other Federal Jurisdiction.

Federal Court Practice Notes

To give effect to the NCF and NPAs the Federal Court has reissued all practice notes. There are three broad categories of Practice Note.

The Central Practice Note (CPN-1) is the core practice note for Court users and addresses the guiding NCF case management principles applicable to all National Practice Areas ('**NPAs**'). Each NPA may have its own practice note that contains NPA-specific case management principles and requirements.

General Practice Note ('**GPNs**') are intended to apply to all or many cases across NPAs, or otherwise address important administrative matters. GPNs address such matters as Class Actions, Expert Evidence, Survey Evidence, Costs, Subpoenas and Notices to Produce and Access to Documents.

All 26 practice notes took effect on **25 October 2016.**

Central Practice Note (CPN-1)

CPN-1 explains the NCF and NPAs. It also addresses the individual docket system and allocation principles as explained above. The practice note recites the overarching purpose of civil practice and procedure, namely 'to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible' and emphasises the statutory duty on the parties and their lawyers to co-operate with the Court and among themselves to assist in achieving the overarching purpose. CPN-1 also provides a slight change of emphasis from the view that effective case management requires court control. The practice note states:
'While the Court will manage the issues in dispute, the proceeding is always the parties' proceeding. In everything they do, the parties should approach their role as the primary actors responsible for identifying the issues in dispute and in ascertaining the most efficient, including cost efficient, method of its resolution'.

This is not a return to the days of party control which the High Court in *Aon Risk* described as 'long gone' (*Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at [113]). Rather it is a recognition of the need for parties to comply with the overarching purpose and to be actively involved in running their cases efficiently. The Court, the parties and their legal representatives all have roles and responsibilities for the effective conduct of litigation.

Readers would be well served by reviewing Chief Justice Allsop's remarks in 'Judicial Case Management and the Problem of Costs', UNSW Law Civil Justice Reform Seminar, 9 September 2014 (see: *www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20140909* and (2015) 39(3) *Australian Bar Review* 228).

The practice note also sets out the Federal Court's approach to case management which may be summarised as the early identification and narrowing of the issues in dispute, determining the necessary procedures or steps that will be required, such as discovery, lay and expert evidence, but minimising their scope to what is needed for the just determination of the dispute.

Interlocutory applications and hearings are to be minimised. The trial is to be set down as early as appropriate and judgment delivered expeditiously.

The practice note highlights a number of facilitators of case management such as technology, alternative dispute resolution, preliminary issues of fact or law, agreed statements of facts or law, and capping of costs.

CPN-1 also addresses:

- the process to bring on urgent applications, including injunctions and the roles of the docket judge and duty judge;
- commencement of proceedings, including innovative pleadings processes where appropriate;
- alternative dispute resolution, including mediation and referees;
- discovery and the manner in which the Court expects parties to approach it – only seeking discovery when it is necessary, minimising the burden and acting cooperatively. The Court expects that any discovery request will be justified and proportionate to the nature, size and complexity of the case. Any search for documents will be comprehensive but proportionate. A party providing discovery must, if requested, explain the search steps taken;
- evidence and witnesses, including what evidence is necessary and how it should be managed (eg written or oral evidence);
- interlocutory hearings, which are to be minimised and any dispute only listed before the court after the parties or their legal representatives have conferred in good faith;
- pre-trial case management hearing;
- written submissions and list of authorities;
- parties' conduct and communication with the court;
- judgment and the court's aim to deliver judgment within three months of the receipt of final submissions; and
- costs.

Commercial and Corporations Practice Note (C&C-1)

The Commercial and Corporations NPA covers commercial and corporations disputes within federal jurisdiction, including commercial contract disputes; disputes concerning the conduct of corporations and their officers; commercial class actions; insurance disputes; financial and transactional disputes; insolvency matters, both corporate and personal; consumer claims (including regulator claims); competition matters (including economic regulator-related matters); and international commercial arbitration disputes.

Within the NCF's Commercial and Corporations NPA, there are six sub-areas:

- Commercial Contracts, Banking, Finance and Insurance;
- Corporations and Corporate Insolvency;
- General and Personal Insolvency;
- Regulator and Consumer Protection;
- Economic Regulator, Competition and Access; and
- International Commercial Arbitration

Urgent applications

Urgent originating applications will be dealt with by a specialised Commercial and Corporations Duty Judge. All interlocutory applications are to be brought to the attention of the docket judge. If an urgent interlocutory application cannot be dealt with by the docket judge then it is to be immediately referred to the duty judge.

Commencing proceedings

An originating application commencing proceedings may be supported by:

- a document entitled 'concise statement';
- a statement of claim; or
- an affidavit.

The concise statement is not a short form of pleading but rather a pleading summons that is not to exceed five pages and does no more than summarise:

- the important facts giving rise to the claim;
- the relief sought from the Court (and against whom);
- the primary legal grounds (causes of action) for the relief sought; and
- the alleged harm suffered by the applicant, including – wherever possible – a conservative and realistic estimate or range of loss and damage.

It will usually be accompanied by an expedited case management hearing. The respondent may be required to file a concise statement in response.

The choice between a statement of claim and an affidavit is guided by the *Federal Court Rules 2011* and *Federal Court (Corporations) Rules 2000*. The *Federal Court Rules* stipulate that an originating application must be accompanied by a statement of claim where the applicant applies for relief that includes damages (r 8.05). Otherwise either may be used.

The general approach has been that a proceeding that involves a dispute of facts should proceed on pleadings and a statement of claim should be served. On the other hand, an affidavit is appropriate where the dispute mainly concerns questions of law (Bernard Cairns, *Australian Civil Procedure* (11th ed, 2016, Thomson Reuters) at [3.170]). The *Corporation Rules* state that, unless the Court otherwise directs, an originating process, or interlocutory process, must be supported by an affidavit stating the facts in support of the process (r 2.4).

C&C-1 requires the statement of claim or affidavit to address four key components to clearly explain the applicant's case, namely:

- the material facts giving rise to the claim;
- the relief sought by the applicant (and against whom);
- the legal grounds for the relief sought; and
- the alleged harm suffered by the applicant, including – wherever possible – a conservative and realistic estimate or range of loss and damage.

C&C-1 states '[t]he Court anticipates that the majority of commercial and corporations matters will be assisted by being commenced with a concise statement', and 'that a minority of commercial and corporations matters will be more effectively commenced by a statement of claim or affidavit'. How this advice will interact with r 8.05 will need to be determined.

Of note is that no reference is made to genuine steps statements as required by the *Civil Dispute Resolution Act 2011* (Cth), but such statements would clearly be required unless an exclusion applied.

Request for expedition – the former Fast Track

The Fast Track procedure that applied generally is now treated as primarily a commercial list procedure, but has been replaced by parties requesting an expedited or truncated hearing process and a tailored or concise pleading process. Presumably a party seeking an expedited process would commence proceedings with a concise statement.

Case management

The approach in CPN-1 outlined above applies to the Commercial and Corporations NPA.

If a concise statement is used to commence proceedings then the first case management hearing will be within two to three weeks of filing of the application.

The first case management hearing in this method seeks to 'triage' the case, ie to assess accurately the true character of the legal disputes and establish the most appropriate way to prepare the case for trial and any alternative dispute resolution process.

If a statement of claim or affidavit is used to commence proceedings then the first case management hearing will be within three to five weeks of filing of the application.

The first case management hearing will flexibly organise the interlocutory steps in the proceeding so that the proceeding may be conducted as effectively and efficiently as possible and, where appropriate, a final hearing date will be set.

Discovery

The approach in CPN-1 outlined above applies to the Commercial and Corporations NPA. However, C&C-1 goes on to outline two procedures drawn from international commercial arbitration as being techniques that may have particular utility to commercial cases: the Redfern discovery procedure and the memorial procedure.

The Redfern Discovery Procedure (so-called in international commercial arbitration) involves the preparation of a schedule, which is prepared collaboratively by the parties and supervised by the Court. It should be an expeditious process which takes account of the financial and operational burden of litigation on commercial parties. The key characteristics of the Redfern Discovery Procedure are:

- the exchange of requests for specific documents or limited categories of documents;
- the requests clarify why the documents are relevant and material in nature by specific reference to any pleading, affidavit, concise statement or evidence;
- the other party to the request consents or objects to each request and provides reasons for objections;
- the parties prepare a schedule containing the requests and responses; and
- the Court determines each disputed request.

Requests may be rejected by the Court for a number of reasons, including where the request:

- relates to documents that are insufficiently relevant or immaterial;
- relates to documents that are specially protected (eg through legal professional privilege);
- places an unreasonable burden on the party requested to provide documents;
- is disproportionate to the case or unfair in the circumstances.

The memorial procedure involves the parties filing their pleading-related material together with key documents and evidence in one consolidated process at an early stage in the proceeding.

Electronic discovery is further addressed in the Technology and the Court (GPN-TECH) Practice Note.

Alternative dispute resolution, interlocutory steps, evidence, pre-trial case management hearing

The approach in CPN-1 outlined above applies to the Commercial and Corporations NPA. C&C-1 specifically states that: '[t]he thoughtful and creative use of ADR techniques (including confidential conferences) for both substantive and procedural issues should be recognised by the parties as potentially very important in resolving or streamlining the running of commercial cases'.

Conclusion

Further information about the NCF, NPAs and practice notes is available from the Federal Court's website. See: *www.fedcourt.gov.au*. **LSJ**