Case management reforms in the Federal Court of Australia

By Daniel Tynan

In 2016, the Federal Court implemented a range of case management reforms as part of the court's National Court Framework (NCF). Under the NCF, the work of the court has been organised into nine National Practice Areas (NPAs) with some practice areas (Commercial and Corporations and Intellectual Property) divided further into sub-areas, based on established areas of law. The court has put this structure in place in order to foster consistent national practice, the utilisation of specialised judicial and registrar skills and the effective and expeditious discharge of the business of the court.

The nine NPAs 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
- Other Federal Jurisdiction.

The Commercial and Corporations NPA sub-areas are: Commercial Contracts, Banking, Finance and Insurance; Corporations and Corporate Insolvency; General and Personal Insolvency; Economic Regulator, Competition and Access; Regulator and Consumer Protection and International Commercial Arbitration.

The Intellectual Property NPA sub-areas are: Patents and Associated Statutes; Trade Marks and Copyright and Industrial Designs.

When commencing proceedings, an applicant is required to nominate the relevant NPA and sub-area, although the court will check this. Specialist judges are assigned to matters in each NPA or sub-area. The individual docket system remains, so matters are allocated to a particular judge and will generally remain with that judge.

A key component of the NCF reforms has been the review of all the court's practice documents. Following consultation with the profession, on 25 October 2016, the Federal Court issued 26 new national practice notes. These practice notes replace the 60 pre-existing practice notes and administrative notices.

The new practice notes fall into three categories:

> 1. The Central Practice Note (CPN-1) sits at the core of all of the practice notes and addresses the guiding NCF case management principles applicable to all NPAs. One of its main aims is to ensure that case management is not process-driven or prescriptive, but flexible - with parties and practitioners encouraged and expected to take a common-sense and co-operative approach to litigation to reduce its time and cost. CPN-1 emphasizes that the court's rules and processes should not be viewed as inflexible and that the court is open to innovative solutions to case management as long as those solutions facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible in accordance with the terms of ss 37M and 37N of the *Federal Court Act 1976* (Cth).
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> 2. NPA Practice Notes. Interlocking with the Central Practice Note are the new NPA practice notes. Each of the NPAs, except Federal Crime and Related Proceedings and Other Federal Jurisdiction, have a NPA practice note. The NPA Practice Notes raise NPA-specific case management, however, parties may also seek to adopt the processes set out in one NPA practice note for use in a different NPA. For example, the use of concise statements for commencing proceedings which is set out in the Commercial and Corporations Practice Note (C&C-1) may be used in other NPAs where appropriate.
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> 3. General Practice Notes (GPNs). There are 17 new or amended GPNs. These practice notes apply across all NPAs. A number of GPNs set out new or more comprehensive arrangements in a variety of key areas, such as Class Actions, Expert Evidence, Survey Evidence, Costs, Subpoenas and Notices to Produce and Access to Documents.

Set out below are some key features of the new practice notes.

Concise statements - commencing proceedings

One of the most important changes introduced by the court is the method of commencing proceedings. The *Commercial and Corporations Practice Note (C&C-1)* provides that proceedings may be commenced using an application accompanied by a concise statement, affidavit or statement of claim.

Clauses 5.4 and 5.5 of C&C-1 provides that:

> The purpose of a concise statement is to enable the applicant to bring to the attention of the respondent and the court the key issues and key facts at the heart of the dispute and the essential relief sought from the court before what might be the considerable cost of preparation of detailed pleadings is incurred. While the form of the concise statement is described in more detail below, it must first be emphasised that the concise statement is not intended to substitute the traditional form of pleading with a short form of pleading, but instead should be prepared more in the nature of a pleading summons, and may be drafted in a narrative form.

> If a concise statement is filed with the originating application, no further originating material in support (whether by statement of claim or affidavit) is required to be filed until the Court orders that to be done.

The Federal Court anticipates that the majority of commercial and corporations matters will be assisted by being commenced with a concise statement. Concise statements are limited to five pages and must set out: the material facts giving rise to the claim; the relief sought; the legal grounds for the relief sought; and the alleged harm suffered by the applicant, including, if possible, a conservative and realistic estimate or range of loss and damage. When a concise statement is filed an expedited case management hearing will take place within two to three weeks.

The Federal Court expects that in a minority of matters which are simple, have narrow grounds of dispute, may be in the lower range of quantum claims and will benefit from a one-step pleading process, a short statement of claim not exceeding 15 pages may be used.

Since the introduction of the new NPAs arguments have been raised by respondents that the concise statement fails to sufficiently identify the case to be met. In the process of "triaging" a matter at the first case management hearing (cl 6.9), however, the court is open to considering the claim (or aspects of it) which may warrant further elucidation by means of traditional pleading procedure, amendment to the concise statement or other processes, for example, by the provision of particulars or a schedule of material facts which supplements the concise statement.

The ACCC has already used concise statements in a wide range of matters including consumer protection cases, product safety and franchising matters as well as competition cases.

In *ACCC v Cornerstone Investment Aust Pty Ltd* [2016] FCA 445, a case concerning allegations of systemic unconscionable conduct and misleading or deceptive conduct, Gleeson J ordered that the ACCC's concise statement be amended and supplemented by further material particulars of aspects of the case against the respondent.

In *ACCC v Volkswagon*, a misleading or deceptive conduct case, at the first case management hearing, Foster J noted that the concise statement filed by the ACCC was helpful in identifying the key issues in dispute, but considered that the matter should be pleaded by way of a statement of claim.

In *ACCC v Oakmoore & Ors*, a cartel and exclusive dealing case commenced by concise statement, Dowsett J ordered the ACCC to file a statement of claim. His Honour observed that it was not intended that the court would spend a lot of time at the beginning of proceedings deciding whether or not the matter should proceed by way of a statement of claim or concise statement. This is essentially an instinctive process and if it is not immediately clear that the case is appropriate to proceed by way of concise statement then it should be pleaded.

In *ACCC v Phoenix* Institute of Australia Pty Ltd and Anor, an unconscionable conduct case, at the first case management hearing the respondents sought an order that the ACCC file a statement of claim. Yates J did not make this order and noted that the concise statement provided sufficient detail of the alleged conduct. His Honour said that a statement of claim would not necessarily provide any further detail given the nature of the case. Yates J said that the ACCC's evidence will further assist the respondent to understand the case it is to meet. His Honour said that these matters could be reviewed at subsequent case management hearings. His Honour ordered that the respondents file a concise statement in reply.

The point is that the court, with the parties' assistance, will focus on finding the most efficient method of identifying the ambit of the dispute between the parties and will balance that with the need to ensure that the dispute is set out with sufficient particularity to afford procedural fairness. And as noted above, concise statements may be used, if appropriate, to commence proceedings in any NPA.

Expert evidence

The *Expert Evidence Practice Note* (GPN-EXPT) applies to any proceeding involving the use of expert evidence, and includes the *Harmonised Expert Witness Code of Conduct* and the *Concurrent Evidence Guidelines*. It replaces Practice Note CM7 – Expert Witnesses in Proceedings in the Federal Court of Australia.

This practice note incorporates similar principles to the former Practice Note CM7, but emphasises that:

- An expert should be given all relevant information (whether helpful or harmful to a party's case) and that any questions or assumptions provided by an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.
- If an expert report is lengthy or complex, a brief summary is to be provided at the beginning of the report.
- Parties are now expected to collaborate and inform the court at the earliest opportunity on a range of issues relating to the use of experts, including consideration of using a conference of experts and/or a joint report. It will often be desirable, before any expert is retained, for the parties to attempt to agree on the questions to be proposed to be the subject of

expert evidence, as well as the relevant facts and assumptions.

The new Code of Conduct will require changes to the wording of the expert's acknowledgement that they have read and agreed to be bound by the Practice Note and the Code of Conduct.

The new practice note provides non-exhaustive guidance on the types of orders the court might make. Unless ordered by the court, the parties' lawyers will not attend expert conferences.

Costs

The *Costs Practice Note (GPN-COSTS)* provides that:

- Parties are expected to make a genuine effort to resolve costs issues between them early and are encouraged to use formal offers of compromise or other offers. Parties are also encouraged to use alternative dispute resolution.
- Where appropriate, the court will make consolidated cost orders which have the effect of consolidating multiple or competing costs entitlements as between the parties.
- Where costs cannot be agreed, the court has expressed a preference to make lump-sum costs orders to avoid lengthy taxation processes.

The use of technology

The Technology and the court Practice Note (GPN-TECH) promotes the effective use of technology at all stages of proceedings as well as within the court. It incorporates a number of former practice notes, including CM6 Electronic technology in litigation, CM22 Video-link hearing arrangements, CM23 Electronic Court File and preparation and lodgement of documents, GEN2 Documents and GEN3 Use of court forms.

The Federal Court embraces the use of technology and views it as an important tool in achieving the quick, inexpensive and efficient resolution of proceedings. The court aims to be flexible and adaptable to changes in technology and to the addition of emerging technology.

Parties are encouraged to utilise eLodgement, electronic exchange of material, videoconference facilities, advanced forensic and analytics technologies to minimise the document review process and to conduct hearings electronically.

Prior to the provision of discovery, parties are expected to discuss and agree on a practical cost-effective discovery plan, including the protocols to be used for the electronic exchange and efficient management of documents.

In preparation for the pre-trial case management hearing, parties are to consider the ways in which technology can be used to reduce the length of the hearing, for example, by using electronic court books, uploading documents to an electronic court-based platform or engaging an external provider to assist in conducting an eTrial.

All of the Federal Court's practice notes can be found at http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes.

Attracting the best and brightest women lawyers to the bar

By Ingmar Taylor SC

On 8 March 2017 Greenway Chambers adopted a policy that allows a chambers member to take a period of six months leave free of rent and chambers fees following the birth or adoption of a child.

Professor George Williams' recent analysis of gender equality among barristers before the High Court reveals how rarely women appear and speak before the High Court, despite the fact that for years more than half of all law graduates have been women.[1] His research shows that in more than half the matters heard by the High Court over the 2015-16 financial year, not a single female barrister appeared for any party and in the matters in which women did appear, very few had speaking parts.

His research did not extend to examining the reasons for this, but when Professor Williams discussed his findings at a recent Bar Association seminar he said that female (but not male) law students regularly questioned him about whether they should go to the bar. Why? Because they are worried that it is 'not family friendly'. Women make up less than 22 per cent of the New South Wales Bar and less than 11 per cent in