CIVIL LITIGATION

CHAPTER 1 - WHAT IS LITIGATION

1. An Overview

1.1 'Litigation' is the process of taking a legal case or dispute to a court of law.

1.2 'Civil litigation' concerns disputes involving civil law and not disputes involving criminal law.

1.3 'Civil litigation' covers a wide range of disputes. Some examples of civil litigation disputes include:

- someone fails to perform their obligations under a contract;
- a loved one dies and a relative has been cut out of the will;
- an individual faces bankruptcy or a company faces insolvency;
- a director of a company improperly takes money from a company;
- an individual injures themselves while on someone else's property;
- a company uses a similar or the same logo or brand name as another company.

1.4 Lawyers conduct civil litigation cases for clients. A law firm will generally ask the following three questions when a client is considering commencing a case:

(a) '*Who are you?*'

(b) '*What do you want?'*

(c) '*What power does the court have?*'

1.5 The first question ***'Who are you?'*** relates to the client. The law firm should perform a 'conflict search' to check that there is no reason why the firm cannot act for the specific client. For example, the firm may have previously acted against the client and received confidential information that may now prevent it from acting for the client. The way conflict searches are conducted will depend on the internal case management systems used by the firm.

1.6 The first question also seeks to ensure that the correct person is giving instructions to the law firm. For example, if the client is a company, the firm may need to check that the individual giving instructions has the authority of the company to do so.

1.7 The second question is ***'What do you want?'*** This question requires the law firm to find out what the problem is and how the client wants to fix it. If commencing a court case is the method to be used to try and fix the problem, there must be a proper legal basis for the claim. This is known as a "*cause of action"* – the client must have a cause of action to commence a court case.

1.8 The client must also ensure that they commence a court case promptly as there are time limits in which claims must be started. The time limit is known as the "*limitation period*".

1.9 The limitation period depends on the type of complaint. Limitation periods can prevent a client from bringing their case. In some instances, the limitation period cannot be extended. For this reason, limitation periods should be treated very seriously. When working in a law firm as a paralegal:

- do not make any assumptions about the limitation periods;
- bring the matter to the attention of a solicitor promptly;
- ask the solicitor when the limitation period will be considered and inform the client of timeframes.

1.10 The second question also helps the client work out if litigation is the best option. For example, it may be better for the client to pursue options outside the court system (known as "*alternative dispute resolution*"), rather than commencing a court case. Alternative dispute resolution is discussed later in the course.

1.11 The last question, ***'What* power *does the court have?'*** focuses on the role of the court or tribunal. Different courts and tribunals have different powers (called the "*jurisdiction*" of the court or tribunal).

1.12 The 'jurisdiction' of the court determines the type of dispute that a court or tribunal can deal with, and how the court or tribunal can assist the client. For a plaintiff to bring a case in a court, he or she must establish that the court has both jurisdiction in relation to the subject matter and the territory for the dispute.

1.13 Without jurisdiction, the court has no power to determine the dispute or enforce the judgment. If you choose a court that is not the appropriate court, it can affect the client's ability to bring the claim later in the appropriate court and the client's liability to pay legal costs. The Australian court system and some of these jurisdictional limits are discussed later in this course.

1.14 Sometimes a client wants something that the court does not have the power to give. If the client wants a remedy that the court cannot grant, the client may still be able to negotiate for that outcome through alternative dispute resolution.

2. Definition of Key Terms

Below are some of the terms commonly used in civil litigation:

***Affidavit*:** A written statement given by a person who either swears on oath or affirms that the contents are true and correct. That statement may be later relied upon in court.

***Applicant*:** The person who commences the court case. Depending on the court or tribunal, the person may be called the 'Plaintiff' instead, or on an appeal, an 'Appellant'.

Authorities: The other court cases relied upon in the court case.

***Balance of probabilities*:** The standard of proof in civil cases.

***Cause of action*:** The legal basis for the client's complaint, for example, breach of contract, misleading and deceptive conduct, negligence.

Cross-Claim: A claim by one party to the proceedings against another party to the proceedings. There must be a close degree of connection in the subject matter to the main case for the claim to become a cross-claim.

Damages: Money awarded to a party generally to compensate them for loss or injury or to put them back into the position the person would have been had the wrong not occurred.

Defendant: The person who has been sued in the court case. Depending on the court or tribunal, the person may be called the 'Respondent' instead.

Discovery: A court facilitated process to obtain documents from another party that are in their possession and relate to matters in dispute.

Exhibit: A document or thing produced to the court for the purposes of becoming evidence in the proceeding.

File: The process of formally lodging documents with the court or tribunal.

Join / joinder: Formally adding a party to the court case.

Judgment: The final order/s of the court or tribunal after a hearing. The court or tribunal may give reasons for the order/s.

Jurisdiction: The extent of the legal authority or power of the court or tribunal.

Hearing: There are different types of hearing: a 'directions hearing', an 'interlocutory hearing' and a 'final hearing'. At 'directions hearing', the court or tribunal makes orders about the case management from a procedural perspective. At an 'interlocutory hearing', the court or tribunal hears a specific issue in the matter before the final hearing. A 'final hearing' involves the court listening to and determining the dispute between the parties.

Hearsay: When the person does not personally see or hear the evidence, but does so from another source (either another person tells them, or from a document). Hearsay has a formal definition in statutes dealing with evidence and is discussed in Chapter 5 in more detail.

Injunction: An order of the court that compels a party to do or refrain from doing something. Injunctions are described as either 'final injunctions' and 'interim injunctions' depending on how long the injunction is in place.

Inter-party correspondence: Communications between the parties to the litigation. If the parties have legal representation, letters or emails to each other will generally go through their legal representatives.

***Interlocutory Application*:** A formal request to the court to deal with an issue that arises before a final hearing. It may be a procedural step, such as requesting discovery, or a request for relief, such as an interim injunction.

Leave: Permission from the court or tribunal to do something that the party would not otherwise have a right to do.

Letter of Demand: A letter sent from the person (or their legal representative) about the matter in dispute making demands from the addressee before a court case is commenced.

Limitation Periods: The time within which a person must commence a legal action. The limitation period depends on the cause of action.

Notice of Motion: A court form for taking a formal step in the proceedings. Depending on the court or tribunal, it may also be called an "Interlocutory Application".

Notice to Produce: A court document asking your opponent to give you documents.

Orders: The decision or judgment of the court or tribunal. The court or tribunal makes procedural orders for the conduct of the case. After the final hearing, the court or tribunal make orders on the issue in dispute between the parties. Orders may be accompanied by 'reasons' that explain the basis for their decision or judgment.

Originating Process: A court form that commences a court case, for example, a Statement of Claim.

Party: The persons involved in the court dispute.

Plaintiff: The person who commences the court case. Depending on the court or tribunal, the person may be called the 'Applicant' instead, or on an appeal, the 'Appellant'.

Pleadings: The court documents that outline the parties' cases.

Proceedings: Another word for the case or litigation after it has been commenced until the court or tribunal makes a final decision.

Respondent: The person who has been sued in the court case. Depending on the court or tribunal, the person may be called the 'Defendant' instead.

Retainer: An agreement with a lawyer setting out the scope of work.

Sealed: A copy of a court document that has been stamped by the court after filing.

Self-represented litigant: A party to the proceedings who does not have legal representation and represents himself or herself.

Service / Serve: The formal process of providing court documents to the other side in the litigation. The court rules explain how different documents are required to be served, including whether the document must be served personally, and the timeframe for serving the document.

Statement of Claim: A court form that commences a court case.

Subpoena: The term commonly used to describe a court document that asks someone to produce documents or attend court to give evidence.

3. Legal Representation

3.1 The Australian legal system is difficult to understand for someone who has not been formally legally trained. The courts and tribunals cannot give legal advice or conduct an individual's case on their behalf. The courts and tribunals follow certain practices and procedures in how they receive information and evidence in a court case. For those reasons, many individuals will choose to retain a lawyer.

4. Engaging a Lawyer

4.1 Generally, a person involved in a court case has the option of being represented by a lawyer. However, there are some jurisdictions that discourage legal representation, such as in the New South Wales Civil and Administrative Tribunal (NCAT) or the Victorian Civil and Administrative Tribunal (VCAT). An individual who represents himself or herself is called a "*self-represented litigant"*.

4.2 Would the client benefit from having a lawyer? There are positives and negatives in having legal representation. One factor to consider is the legal costs that will be incurred.

4.3 It is important to note that even if a party is successful in court, it is very unlikely that they will be able to recover all of their legal costs from the other side. In fact, some jurisdictions are 'no cost jurisdictions'; which means that, except in exceptional circumstances, a successful party won't have their legal costs covered by the other side at all. In some courts and tribunals, legal costs are capped, meaning that legal costs may be able to be covered but only up to a limited amount.

5. The Different Types of Lawyers

5.1 The legal profession is administered and regulated on a state basis. A solicitor or barrister is admitted to practice in a particular Australian state or territory. Legislation and rules govern the way that solicitors and barristers can conduct their practice. Only certain legally trained individuals can call themselves a 'legal practitioner', 'barrister', 'solicitor', 'attorney', 'counsel' or 'lawyer' as set out in the statute. The *Legal Profession Uniform Law Application Act 2014* applies to lawyers and law practices in Victoria and New South Wales. In Queensland, it is the *Legal Profession Act 2007* (Qld).

5.2 There are two types of lawyer: 'barristers' and 'solicitors'. In New South Wales and Queensland, there is a 'split' profession, meaning that an individual cannot practice as both a solicitor and as a barrister at the same time. In Victoria, the professions of barrister and solicitors are 'fused', meaning that legal practitioners are admitted to practice in the capacity of both a solicitor and barrister, but there is also an independent bar that enables lawyers who wish to practice solely as barristers to do so.

5.3 A solicitor is more likely to be involved in the everyday management of a court case. A barrister is more likely to be engaged for their knowledge of court practice and procedure and their specialty in court advocacy. In most cases a barrister will be engaged through a solicitor rather than directly through a client. When a barrister is engaged directly by a client it is called a 'direct access brief'.

5.4 Barristers operate independently as sole practitioners. A barrister cannot practise in partnership or as an employer of another legal practitioner, or as an employee. They

also cannot practice as a director of an incorporated legal practice or by or through an unincorporated legal practice

5.5 Barristers are referred to as senior or junior counsel. 'Senior counsel' (SC) (or formerly appointed as Queens Counsel (QC)) are Australian lawyers who hold the appropriate status, as conferred by the Crown in any capacity or as recognised by the High Court or a Supreme Court of any jurisdiction. They tend to work on more complex or difficult cases. Barristers who are not senior counsel or Queens Counsel are referred to as 'Junior Counsel'.

5.6 In New South Wales, the rules refer to a barrister's work as:

- appearing as an advocate;
- preparing to appear as an advocate;
- negotiating for a client with an opponent to compromise a case;
- representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution;
- giving legal advice;
- preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
- carrying out work properly incidental to the kinds of work referred to above; and
- such other work as is from time to time commonly carried out by barristers.

5.7 Because barristers cannot do certain work that solicitors do, a client may wish to retain a solicitor. For example, barristers cannot:

- send correspondence for a client;
- 'file' / lodge documents with the Court for the client;
- 'serve' / send documents to the opponent;
- 'accept service' / receive documents from the opponent for the client;

6. Communications After Legal Representation Has Been Obtained

6.1 If a person has appointed a lawyer, the communications that relate to the litigation will tend to be through the lawyer. The opponent's solicitor should not be contacting the client directly except in limited specified circumstances.

7. Confidentiality Obligations

7.1 Law firms receive a large amount of confidential information. That information should not be shared with other people outside the law firm. For some matters, you may also be restricted on how you share information within the firm. Keep confidential files in places that have adequate security, such as locked cabinets. Immediately report any lost or stolen items.

7.2 Special care should be taken when preparing documents for court or disclosing information outside the firm. Otherwise, confidential information may be unintentionally disclosed. Check:

- annexures and exhibits to affidavits;
- documents that are sent in response to compulsory court processes, such as a subpoena or notice to produce;
- email attachments, the lower email chain and email recipients;
- metadata on documents. It is often best to create a new version of word documents so that amendments and edits cannot be seen.

7.3 The firm will need to claim confidentiality for documents that are confidential to the client (for example, trade secrets or financial information that may give a competitor an advantage) at the time of submitting the information to the court or tribunal. There will be problems if confidentiality is not claimed at the outset. An affidavit or statement to support the claim for confidentiality will often be required. A bare assertion that the documents are confidential is usually insufficient.

7.4 Another reason for being careful with documents disclosed outside the firm is that they may be protected by legal professional privilege. Documents that have been made or prepared for the legal proceedings may attract legal professional privilege. For example, emails between the firm and the client or documents that have been created with litigation in mind. If you send those documents outside the firm or disclose them in court documents without asserting that they are privileged, then you may unintentionally waive the privilege.

7.5 Documents that have been compulsorily produced (for example, in response to a notice to produce or a subpoena) can only be used for the purpose for which they were disclosed and not for a collateral or ulterior purpose. This is the implied undertaking called the 'Harman undertaking'. For example, documents obtained from your opponent in one court proceeding cannot generally be used in different court proceedings.

7.6 Occasionally media outlets contact law firms for media comment on high profile cases or cases of public interest. Generally, comments should not be made publicly about court proceedings or material published as it may be prejudicial to the progress of the court proceedings.

8. The Role of a Paralegal

8.1 A paralegal is not a lawyer and cannot hold himself or herself out as being a 'lawyer'. A paralegal also cannot use the title 'legal practitioner', 'attorney', 'attorney', 'solicitor' or 'barrister'.

8.2 A paralegal assists lawyers with a range of tasks during a court case, including:

- organising folders;
- assisting in finding cases or statutes (legal research);
- filing and arranging service of documents;
- obtaining background information from the client;
- preparing briefs for barristers (covered in more detail later in this course);
- ordering transcripts and attending court;

- assisting with communications.

8.2.1 Organising Folders

(a) For internal documents prior to the final hearing, there is no prescribed way to organise litigation folders. An easy way to organise folders is as follows:

- court documents (court forms, court orders)
- inter-party correspondence
- client correspondence
- plaintiff's / applicant's evidence
- defendant's / respondent's evidence

(b) You could use the following format for the spine of the folders:

[Court] [Name of case and case identifier] **[Name of folder]**	Federal Court of Australia John Smith v Joe Blogs NSD 1/2019 **Court Documents**

(c) If there are multiple notices of motion / interlocutory applications, it is helpful to prepare a folder for the documents relating to that notice of motion / interlocutory application, rather than placing it in the court documents folder.

(d) It can also be helpful to print the spines for the plaintiff / applicant's evidence in a different colour (e.g. green) from those of the defendant / respondent (e.g. red) for easy identification in court.

(e) Before a final hearing, the parties will arrange a court book. This will be a paginated folder/s of all of the documents to which the judge/court and parties will refer. The rules and practice notes need to be checked and legal representatives will need to confer to prepare the court book.

8.2.2 Assisting Finding Cases or Statutes

(a) Cases can be located on legal search databases, such as LexisNexis and Westlaw. Use the authorised reports of cases where available:

Court	Authorised Report	Citation
High Court	Commonwealth Law Reports 1903 on	CLR
Federal Court	Federal Court Reports 1984 on	FCR
Supreme Court of New South Wales	New South Law Reports 1970 on; State Reports NSW 1901- 1970, 1901 – 1950; New South Wales Law Reports 1825 – 1900	NSWLR SR NSW NSWLR
Supreme Court of Victoria	Victorian Reports 1957 on or Victorian Law Reports 1875 to 1956	VR VLR
Supreme Court of Queensland	Queensland Reports 1958 on State Reports Queensland 1902-57	QdR St R Qd

(b) When referring to cases, use pinpoint references to relevant paragraph numbers and page numbers. Court practice notes should be checked for how to prepare a list of authorities and how to refer to legislation and cases.

(c) Print legislation from the Commonwealth or State websites, rather than Austlii. Check that you have the legislation that was in force at the relevant time given the facts of your case. 'Point in time' legislation is available on the Commonwealth and State legislation websites. The document can be downloaded and selected pages then printed.

(d) An example of how to review point in time legislation is set out below:

- To view the amendments to the *Trade Marks Act*, go to the Federal Register of Legislation at www.legislation.gov.au.
- Search using the magnifying glass in the top right hand corner. Type in 'Trade Marks Act' and press enter.
- The first result is the "Trade Marks Act". Click on that result to see that the next page states "Trade Marks Act 1995" and in green writing "In force – latest version". This means that it is the current version of the Act. An old version of an Act will say 'In force – Superseded Version'.
- If you click on "View series" it will show under the heading 'Compilations' the different versions of the Act over time, as it has been amended by different amending statutes. The top version says "Trade Marks Act 1995 Latest"; clicking on that version will take you to the current version of the statute.
- There are endnotes located at the end of the Act. The endnotes show the amending statutes and identify amendments to certain sections of the Act. For example, endnote 4 of the current version of the Trade Marks Act shows that section 3 of the Trade Marks Act was 'am No 59, 2015'. This means that section 3 was amended by Act No. 59 in 2015.
- The legislative history located in endnotes section 3 will help explain what is meant by 'Act No. 59 in 2015'. It shows that there were a few amending statutes in 2015, but that the Act No. 59 in 2015 was titled 'Norfolk Island Legislation Amendment Act 2015'.

- To obtain a copy of the Norfolk Island Legislation Amendment Act, perform a separate search on the Federal Register of Legislation. The contents of that Act shows that it amended a number of statutes, including section 3 of the Trade Marks Act.

8.2.3 Filing and Arranging Service of Court Documents

(a) Documents can be filed with the court either electronically or in person (either at the registry or before a registrar or judge). Check the particular court website or contact the registry to confirm if the court uses electronic filing. Check the court rules for times within which documents must be filed and times when the court registry opens and closes. Court practice notes also cover certain restrictions on courts accepting documents, for example if the size of the file is beyond a certain size.

(b) In some instances, the court will take time before returning a copy of the document that has been stamped. It is common for parties to serve the unstamped document and to inform the opponent that a sealed copy will be served once it becomes available and follow with the sealed copy when it is received from the court.

(c) Court rules explain how to serve documents and the timeframe for serving documents. A few tips:

- inter-state service can require additional notices to constitute valid service, so check to see what constitutes valid service, e.g. the *Service and Execution of Process Act 1992* (Cth).
- for documents sent by post, registered post could be used to provide tracking details to confirm that the document was delivered.
- if proceedings have not commenced yet, check that a lawyer receiving documents on behalf of the opponent has instructions to accept service.

(d) A process server can be used for serving documents and can provide an affidavit to confirm the service of the documents.

8.2.4 Obtaining Background Information From The Client

(a) Detailed file notes of conversations with clients should always be kept, including the date, time and participants. Files should be kept up to date with file notes.

(b) Some difficulties that may arise when obtaining information from a client include:

- Unavailability. Be aware of client's availability such as overseas travel, and obtain relevant contact details.
- Language barriers. If English is not the client's native language, a translator may be required. For example, for a witness to formally

give evidence in an affidavit or in court. The need for a translator should be raised early in court proceedings.

- Capacity. If a client is old or infirm, a medical certificate may be required to confirm that the client has capacity or to obtain instructions from an individual with power of attorney. If a client is underage, instructions should be sought from a parent or guardian.
- Conflicts. If there are multiple clients, there must not be a conflict of interest in the firm acting for both the parties. Even though parties' interests may be aligned at the beginning of a court case, circumstances can change as the case progresses. The clients should be informed by a lawyer if it becomes apparent that there is a conflict of interest. If their interests are not aligned, one party's case may have a negative impact on the other person's case.
- Integrity of evidence. If the clients are witnesses in the case, the witnesses should be spoken to separately about their evidence and not in the presence of the other witnesses. Only where a solicitor believes there are reasonable grounds that special circumstances require a conference with more than one lay witness should such a conference be given. Also the witnesses will need to be informed that they should not discuss their evidence with each other so as to reduce the risk of evidence being effected by conferral.

8.2.5 Ordering Transcripts and Attending Court

(a) Transcripts may be ordered for a record of court attendances. Ordering transcripts can be done through the court or tribunal website and should be organised beforehand. The pdf versions are most useful for page numbers.

(b) If you have not been admitted as a lawyer, you will be attending court with a qualified solicitor. Following these steps will help the solicitor:

- Read the File:
    - Remind yourself of the facts of the matter and issues in dispute and last orders.
- Check Previous Court Orders:
    - If there has been a failure to comply, the solicitor will need to explain the non-compliance. It can be useful to obtain an affidavit from the client to explain the breach if time permits. The client should seek to comply with the court orders as soon as possible; and asked as to a realistic timeframe when compliance will be met, and the reasons why earlier compliance is not possible.

- Check the Proposed Orders:
    - Do not assume that the court will make consent orders. Know the reason for each order.
    - Check that the court has the power to make all of the orders.
    - If orders propose relisting the matter again, check that it is listed on a day that the court sits (for example, watch out for public holidays, and certain lists are only heard on a particular day each week).
    - When attending court for a hearing date, check for unavailable dates of the client, witnesses, the firm and counsel.
- Check That Your Solicitor Has Contacted the Client and Finalised Instructions:
    - If the client is attending court, organise a meeting place, contact numbers and arrange to have a mobile with you.
    - If the client is not attending court, check the client's contact details and availability so that he or she can provide instructions by telephone at short notice if the solicitor needs to take instructions. If the court asks for information that counsel or the solicitor do not know, he or she may request the court to stand the matter down in the list to enable time to obtain instructions from the client.
- Check the Courtroom Details:
    - The courts update their listing details the day before usually after 4.30pm the previous day. You can access the details of where your matter is listed by checking on the court or tribunal website. For example, for court cases that are in the New South Wales courts, you can access the details of the listing using the website: www.onlineregistry.lawlink.nsw.gov.au.
    - On the home page, you can type in search terms such as the party details, or to select from the drop down items such as the 'date' of listing or whether it is criminal or civil in the 'jurisdiction'. When you see the name of your case, click on the hyperlink and you will be presented with details. You may also wish to check with the barrister's clerk if they need any help taking the trolley up to the courtroom.
- Check the Court Facilities:
    - If you are attending court for a hearing, you may want to check if there is a conference room where the solicitor and the client can spend time when the court breaks.

- Check Whether the Judge is Robing:
    - For a final hearing, some courts require counsel to wear robes and wigs. Check the specific court for details. If there is doubt, the associate of the judge may be able to provide details to the solicitor or counsel.
- Bring Documents and Other Incidentals:
    - Bring court documents and any interparty correspondence that may be read by the barrister to support the argument.
    - Bring previous orders that were made by the court.
    - Ensure that there are sufficient copies of documents - bring at least one copy for the barrister, one copy for each other party to the proceedings and one copy for the judge.
    - Take basic stationary such as stapler (with staples), a hole punch and post it notes. If you are expecting to access and photocopy documents, ensure you have checked with the court or tribunal on their facilities so that you have a credit card / change / copy card. Ensure you have contact details of counsel, the firm and your client.
- Follow the Court Procedures at Court:
    - A court list is usually located at the front of the courtroom that lists the matters which the court is due to hear. Once your barrister has arrived, you can fill in the appearance sheet on their behalf. The appearance sheet will also indicate if the other side has arrived yet.
    - With your solicitor, find your client, counsel. Then find the opposing counsel to speak about the orders proposed.
    - Sit in the correct place. Generally, the legal representatives for the applicant or plaintiff will sit on the left hand side (from the direction of entering the courtroom, or the judge's right hand side).
    - Check the procedure for your list. Some lists are called through chronologically while other lists are called through according to the parties standing up and mentioning the matter. If you do not know, you can ask another practitioner in advance or on the day.
- Take Notes During Court:
    - Take specific notes of orders that are made, particularly if it is a court where these orders are not available online.
    - During an interlocutory or final hearing, take detailed notes. Counsel may wish to go back to an answer or comment from the judge or witness.
    - Take specific notes of when a document becomes an exhibit at final hearings.

- <u>After Court, Do Final Checks:</u>

    - Check the online portal for the orders that were made by the court. Check that there are no mistakes in the orders.
    - Monitor upcoming deadlines; an easy way to ensure that you are aware of court deadlines is to send around an Outlook appointment to those lawyers who are involved in the matter, with a reminder to occur a week beforehand.
    - The client should be informed of what happened and the court orders that were made.

8.2.6 Communications

(a) You may be requested to assist with communications. Other than filing documents, there may be some instances when solicitors will need to communicate with the court. For example, if the parties agree on the form of orders for the court to make ('consent orders'), both parties may agree to send a request to the court for the orders to be made 'in chambers' (ie. without the parties attending court).

(b) The court should not be contacted in the absence of the other party. Before communicating with the court, consent should be obtained from the other side in relation to the correspondence proposed to be sent to the court. Once the other side consents, correspondence to the court should copy the other side into the correspondence.

8.3 A paralegal is not entitled to 'engage in legal practice'. The *Legal Profession Uniform Law* (NSW) defines 'engage in legal practice' as 'includes practise law or provide legal services, but does not include engage in policy work (which, without limitation, includes developing and commenting on legal policy). The Uniform Law defines 'legal services' as 'work done, or business transacted in the course of legal practice.' In each case, it will be a question of fact. For example:

- advising on the legal character or prospects of litigation is engaging in legal practice: see *The Council of the Law Society of New South Wales v Australian Injury Helpline Limited and Ors* [2008] NSWSC 627 per Adams J.
- In *Legal Services Commissioner v Walter* [2011] QSC 132 at [27] – [28] and *ACCC v Murray* [2002] FCA 1252 it was said that the following practices especially when taken in combination lie near the very centre of the practice of litigation law:

    - advising parties to litigation in respect of matters of law and procedure;
    - assisting parties to litigation in the preparation of cases for litigation;
    - drafting court documents on behalf of parties to litigation;
    - drafting legal correspondence on behalf of parties to litigation;
    - purporting to act as a party's agent in at least one piece of litigation.

8.4 If you are concerned that you are performing work that is usually done by a solicitor or which may lead to an inference that you are a solicitor, you should consult with your supervisor.

8.5 As you will be assisting solicitors, it is helpful to keep in mind their professional obligations,. You may wish to read the solicitor conduct rules that apply in your state. In New South Wales and Victoria they are the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and in Queensland, they are the *Australian Solicitor Conduct Rules*. Solicitors have a paramount duty to the court and the administration of justice. Work should be delivered honestly, competently, diligently and promptly.

CHAPTER 2 - COURTS

9. Role of the Court

9.1 In Australia, the courts or 'judiciary' are separate from the other arms of government, being the executive and parliament. The Australian constitution speaks about "The Parliament", "The Executive Government" and "The Judicature". While the executive and parliament make and enforce the laws, the courts interpret and apply the laws.

9.2 As Australia is a federation, this impacts the way in which laws are developed and applied. Australia was originally colonised through six separate British colonies of Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia. The colonies subsequently united to form the Commonwealth of Australia, and the colonies then became states of the Commonwealth. The Australian Constitution established the federal parliament which came into effect on 1 January 1901 through the Commonwealth of Australia Constitution Act. The Australian Capital Territory and Northern Territory were later created in 1911.

9.3 Under the federal system, the federal Parliament and state parliaments share powers to make laws. In particular:

(a) The federal parliament can make laws relating to national matters such as defence, currency, bankruptcy and insolvency, copyrights, patents of invention and designs and trade marks, marriage, immigration.

(b) The state parliament can make laws for the peace, order or welfare and good government of the state. The power of the states to make powers is limited by section 109 of the Australian Constitution which provides that when a law of a state is inconsistent with a law of the Commonwealth, the law of the Commonwealth shall prevail and the state law shall, to the extent of the inconsistency, be invalid.

9.4 The courts decide disputes according to the law. The general purpose of the courts is the just, quick and cheap resolution of the real issues in dispute between the parties. The courts seek to eliminate delay and implement its practices and procedures so that the legal costs are proportionate to the importance and complexity of the subject matter in dispute. Lawyers have a duty to assist the court in these objectives.

9.5 Since the High Court decision of AON Risk Services Australia Ltd v ANU (2009) 239 CLR 175 the courts have taken a more active role in case management. In determining whether to grant leave for a party to amend its pleadings, the court took into account all circumstances of the case and factors including the reason for and length of the delay, the prejudice other parties would suffer if amendment were allowed, the point at which the application was made and the prejudice of other litigants. As a result, court deadlines need to be carefully monitored and steps taken in proceedings at the earliest opportunity without delay.

10. Court System

10.1 The court system in Australia is described as 'adversarial'. This means each party presents their argument and evidence in support to the court and the court decides if the party has proved their case to the standard of proof. This is in contrast to an

'inquisitorial system', in which a judge has a more active role in investigating the dispute through asking questions or calling witnesses.

10.2 Australia has federal and state courts. The Commonwealth has three levels of general federal courts:

(i) the High Court

(ii) Federal Court

(iii) Federal Circuit Court.

10.3 NSW, Victoria and Queensland have three levels of courts of general jurisdiction:

(i) the Supreme Court

(ii) the District Court (called the County Court in Victoria)

(iii) the Local Court (or the Magistrates Court in Victoria and Queensland).

10.4 There are also specialist courts, for example, the Land and Environment Court of New South Wales, and Victorian Children's Court and Coroners Court. This guide does not propose to cover those courts.

10.5 In addition to the courts, there are also a number of tribunals in Australia which are not discussed in this guide, for example:

(i) the New South Wales Civil and Administrative Tribunal (NCAT)

(ii) the Victorian Civil and Administrative Tribunal (VCAT)

(iii) the Queensland Civil and Administrative Tribunal (QCAT)

(iv) the Administrative Appeals Tribunal (AAT)

(v) the Copyright Tribunal

(vi) Fair Work Commission.

10.6 A person who listens to and decides a dispute in a tribunal is called a 'tribunal member' rather than a 'judge'. Tribunals are generally less formal than courts and seek to resolve disputes more efficiently and with lower costs.

10.7 The court rules and court practice notes assist litigants understand how to conduct the court case and the expectations from practitioners.

11. Jurisdictional Limits of the Courts

11.1 Different courts and tribunals have limits on the types of disputes they can hear, and the monetary limit of matters on which they can determine.

11.2 In some instances, the litigant will have a choice between jurisdictions. Some factors include the legal costs in each (e.g. filing fees can differ), the experience of the judges in each, and the likely time to receive judgment or backlog of the court. There may also be costs consequences if proceedings are brought in a higher court when they could have been brought in a lower court.

11.3 The jurisdiction exercised by a court will be either federal or state / territory jurisdiction. Another distinction is between the jurisdiction of a court when it hears

the matter for the first time, compared to when a court hears a dispute on an appeal ('appellate jurisdiction').

11.4 The list below does not cover all of the courts and tribunals in each state, but to give you an idea of some of the different powers of each.

11.4.1 Federal

High Court

(i) The High Court of Australia is the highest court and the final court of appeal for federal and state matters. The High Court is established under Chapter III of the Australian Constitution. It hears disputes about the Constitution, and civil and criminal appeals from all courts in Australia.

(ii) The High Court has original jurisdiction in all matters arising under the Constitution or involving the interpretation of the Constitution under the *Judiciary Act 1903* (Cth). However, that jurisdiction is not exclusive, meaning that other courts may able to decide constitutional questions, and the High Court is the ultimate court of appeal.

(iii) The High Court has appellate jurisdiction as the final court of appeal in Australia.

Federal Court of Australia

(i) The Federal Court is a superior court of record. It is a court at law and in equity. It does not have inherent jurisdiction but only incidental power to control its own processes.

(ii) The Federal Court has original jurisdiction under section 39B of the *Judiciary Act 1903* (Cth). Under section 39B(1A)(c), the Federal Court has jurisdiction in any 'matter' 'arising under' any Commonwealth laws, other than criminal matters.

(iii) The Federal Court have power to hear matters on matters including bankruptcy, corporations, industrial relations, native title, taxation and trade practices laws and to hear appears from decisions of the Federal Circuit Court (except for appeals from family law decisions).

(iv) Section 19 of the *Federal Court of Australia Act 1976* (Cth) provides that the court has such original jurisdiction as is vested in it by laws made by the Parliament. Section 32 of the *Federal Court of Australia Act 1976* (Cth) also confers 'associated' jurisdiction on the Federal Court for matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the court is invoked.

(v) The Federal Court also exercises appellate jurisdiction in civil matters.

11.4.2 New South Wales

Supreme Court

(i) The Supreme Court of New South Wales is the highest court in New South Wales and a superior court of record. The Supreme Court has inherent jurisdiction in addition to its specific statutory jurisdiction. Section 23 of the *Supreme Court Act 1970* (NSW).provides that the court has all jurisdiction which may be necessary for the administration of justice in New South Wales. This is a broad jurisdiction.

(ii) The Supreme Court hears matters in their first instance as well as matters on appeal in the Court of Appeal. The Supreme Court is divided into the Common Law, the Equity Division and the Court of Appeal, as explained in section 38 of the *Supreme Court Act*.

District Court

(i) The District Court is an inferior court of record. The District Court does not have inherent jurisdiction but has an incidental jurisdiction to control its own processes.

(ii) Section 44 of the *District Court Act 1973* (NSW) explains the court's civil jurisdiction and that the District Court can only deal with certain types of claims and cases of a limited value (generally speaking $750,000 but a lower amount for some cases). For some limited cases, the parties can file a memorandum of consent to enable the court to consider a case up to $1.125 million under section 51 of the *District Court Act 1973* (NSW). A person should not commence a case for the type of matters in section 48 of the *District Court Act*, which relate to certain claims under $4,000 and certain claims involving land.

(iii) The District Court has the same equitable jurisdiction as the Supreme Court for the type of matters listed in section 134(1) for matters under a certain monetary amount. The District Court has a limited power to grant injunctions under section 46 and section 140 of the *District Court Act*. The District Court also has permission to hear any equitable defence under section 6 of the *Law Reform (Law and Equity) Act.*

Local Court

(i) The Local Court is an inferior court of record. The Local Court does not have inherent jurisdiction, but it has an incidental power to control its own processes. The Local Court does not have to follow decisions of the District Court.

(ii) Section 9 of the *Local Court Act 2007* (NSW) explains the court's civil, special and criminal jurisdiction. The civil jurisdiction is described in Part 3 of the *Local Court Act 2007* (NSW). The Local Court can only deal with certain types of claims set out in section 33. Those matters include proceedings for wills, passing off or wrongful imprisonment, defamation, infringement of patent or copyright, detention of goods or title to land.

(iii) The Local Court can only determine cases of a limited amount. The Small Claims division of the Local Court can determine claims up to $10,000. The General division of the Local Court can determine claims

up to $100,000 or a lower amount for damages arising from personal injury or death) as explained in section 29 of the *Local Court Act*.

(iv) The 'special' jurisdiction is set out in Part 4 of the *Local Court Act* and explains that the Local Court has jurisdiction where it has been given that jurisdiction by another Act or law, other than criminal proceedings or proceedings covered by the jurisdiction in Part 3 of the Act.

(v) The Local Court does not have any equitable jurisdiction.

11.4.3 Queensland

Supreme Court

(i) The Supreme Court of Queensland is the highest court in Queensland and a superior court of record. The Supreme Court has inherent jurisdiction in addition to its specific statutory jurisdiction under the *Supreme Court of Queensland Act 1991* (Qld). The trial division generally deals with civil disputes involving amounts greater than $750,000.

(ii) The Supreme Court hears matters at first instance and on appeal in the Court of Appeal. Sections 29 and 45(2) of the *Supreme Court of Queensland Act* address the jurisdiction of the trial court and court of appeal.

District Court

(i) The District Court is an inferior court of record. The District Court does not have inherent jurisdiction but an incidental jurisdiction to control its own processes.

(ii) Section 68 of the *District Court of Queensland Act 1967* (Qld) explains the court's civil jurisdiction and that the District Court can only deal with certain types of claims and cases of a limited value (generally between $150,000 and $750,000).

Magistrates' Court

(i) The Magistrates Court is an inferior court of record. The Magistrates Court does not have inherent jurisdiction but has an incidental jurisdiction to control its own processes.

(ii) The *Magistrates Court Act 1921* (Qld) explains the jurisdiction of the court. Under section 4, the Magistrates Court deals with civil cases if the amount in dispute is up to and including $150,000. Under section 4A, it may be possible in some instances for the Magistrates Court to hear a claim of more than $150,000 where the parties agree in writing. Under section 5, the Magistrates Court may also be able to hear the claim if the party reduces the claim to the prescribed limit.

11.4.4 Victoria

Supreme Court

(i) The Supreme Court of Victoria is the highest court in Victoria and a superior court of record. The Supreme Court also has inherent jurisdiction in addition to its specific statutory jurisdiction. The Supreme Court has jurisdiction under the *Constitution Act 1975* (VIC). The Supreme Court does not have a monetary limit. Section 85 of the Constitution Act provides that the Court has jurisdiction in or in relation to Victoria its dependencies and in the areas adjacent thereto "in all cases whatsoever and shall be the superior court of Victoria with unlimited jurisdiction".

(ii) The Supreme Court hears matters in their first instance as well as on appeal. The Supreme Court is divided into the Trial Division and Court of Appeal. The Trial Division has three divisions: the Commercial Court; the Common Law Division and the Criminal Division.

County Court

(i) The County Court is an inferior court of record. The County Court does not have inherent jurisdiction, but has incidental power to control its own processes.

(ii) The *County Courts Act* 1958 (VIC) explains the jurisdiction of the County Court. There is no jurisdictional limit in terms of monetary value - The County Court deals with civil claims for amounts over $100,000. Section 37(1)(a) provides that the court has jurisdiction for "All applications, claims, disputes and civil proceeding s regardless of the type of relief sought or the subject-matter as are not by this or any other Act excluded from its jurisdiction".

(iii) The County Court hears matters at first instance. The Court has a Commercial Division that deals with matters that include debt recovery, contract, trust and property and a Common Law Division which deals with damages and compensation cases.

Magistrates Court

(i) The Magistrates' Court is an inferior court of record. The Magistrates' Court does not have inherent jurisdiction, but has incidental power to control its own processes.

(ii) The *Magistrates' Court Act 1989* (VIC) explains the jurisdiction of the Magistrates' Court. Under section 100, the Magistrates' Court can hear and determine civil disputes up to the value of $100,000 arising from debts, claims for damages, other monetary disputes or equitable relief. It is a broad civil jurisdiction. There are some exclusions for example, for prerogative writs and equivalent administrative law proceedings under section 100(2).

(iii) Section 100 also provides that the Magistrates' Court has jurisdiction to hear and determine any other cause of action if the Court is given jurisdiction to do so by or under any other Act.

12. Appeals

12.1 A client who is dissatisfied with the outcome of a case may be able to take the case to a higher court to change or cancel the lower court's decision.

12.2 A client will not always have a right of appeal. In some cases there is only a right to appeal on a question of law, or may require leave of the court.

12.3 As there is often a strict time limit for starting an appeal, the rules should always be checked. The legislation, rules and practice notes also explain the rights to an appeal, the appropriate court in which an appeal should be brought and the forms in which an appeal should be lodged.

12.4 Depending on the type of appeal, the case before the appellate court may be either a rehearing of the matters again and enable further evidence to be led, or may only allow an appeal on a question of law and require leave to adduce further evidence.

12.5 If the client appeals a decision, the client may also need to apply for a 'stay' on the proceedings below so that the judgment of the lower court is not enforced while the appeal proceedings are on foot.

CHAPTER 3 - BRIEFING A BARRISTER

13. Identifying a Barrister

13.1 Barristers operate from a group of offices called 'chambers'. The administrator responsible for the operation of a set of chambers, called the 'clerk', can provide details of a barrister's hourly and daily rates and confirm expertise and availability.

13.2 Where a barrister has been engaged through a solicitor, the solicitor is responsible for arranging the scope of work with the barrister and costs. If there are any timing issues, for example, a limitation is soon to expire, the urgency of the matter should be drawn to the barrister's attention at the earliest opportunity as he or she may not have availability to review documents or settle pleadings on short notice.

14. Organising a Brief

14.1 Once a decision has been made to brief a barrister, a brief is prepared. A brief is simply the name of the folder of material provided to the barrister. The barrister or his or her clerk may be contacted to see if there is a preferred form in which they are to receive the brief, such as electronically or hard copy or page size.

14.2 Generally a brief is an A4 folder containing a cover sheet naming the proceedings and the contact details of the barrister. The contents of the brief tends to include behind numbered tabs in the following order:

(i) An index

(ii) Observations

(iii) Chronology

(iv) Court documents (each behind a separate numbered tab)

(v) Any relevant inter-party correspondence

(vi) Other relevant documents

14.2.1 Index

(a) There is no set format but the following format is useful. The date will be the date of filing of the court pleading or the date of affirmation / swearing of an affidavit:

	Description	Date
1.		
2.		

14.2.2 Observations

(a) Observations are designed to give counsel an overview of the case, with reference to the specific documents in the folder.

(b) The observations should also explain the scope of counsel's work (called the 'retainer'). Any critical deadlines should be raised as well, such as known limitations issues. For example, if your client would like

counsel's advice in relation to a specific question, or if counsel is briefed to advise on the matter generally, this should be specified.

14.2.3 Chronology

(a) For some more complex matters, it is helpful to include a chronology. A chronology sets out the key facts in date order. Use the format below. The 'Reference' column should cross reference the document used to obtain the information.

(b) Excel can be used to prepare a chronology easily as it enables you to enter rows and then it automatically can sort the rows into date order.

Date	Description	Reference

14.2.4 Court Documents

Include all court documents that have been filed by a separate tab. If a court document is in draft form and needs to be reviewed and settled by the counsel, this should be clear from the index and the observations.

14.2.5 Any Relevant Inter-Party Correspondence

This will depend on the type of matter. For example, for interlocutory disputes, there will often be a series of letters exchanged between the parties on the issue before a notice of motion or interlocutory application was filed. That correspondence may help to give context to the barrister reviewing the file for the first time.

14.2.6 Other Relevant Documents

There may be other documents which are helpful to include. This depends on the type of matter and scope of instructions, but could include critical pieces of evidence in the client's possession or documents obtained through compulsory court processes such as subpoena or discovery.

CHAPTER 4 - PLEADINGS

15. What are Pleadings?

15.1 Well-drafted pleadings are critical. The function of pleadings is to state with sufficient clarity the case that has to be met; define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and to give the defendant an understanding of the plaintiff's claim in aid of the defendant's right to make a payment into court (*Dare v Pulham* (1982) 148 CLR 658). Pleadings define the scope of the proceedings and refine the issues for determination by the court.

15.2 The court rules for the court in which the proceedings have been brought will determine the form of pleadings. For example, pleadings are defined in the dictionary to the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) as including 'a statement of claim, defence, reply and any subsequent pleading for which leave is given under Part 14, but does not include a summons or notice of motion'.

15.3 The correct court forms to use for a statement of claim, defence, reply generally can be found on the website of the relevant court / tribunal. Court forms show blank spaces to complete. For proceedings in a court in which the *Uniform Civil Procedure Rules* (NSW) apply, the statement of claim or summons will state basic information, as required by UCPR 4.2:

(a) the name of the court, division (if relevant),

(b) the list (if relevant),

(c) the venue at which the proceedings are intended to be heard,

(d) the title of the proceedings,

(e) the nature of the process (summons or statement of claim),

(f) the solicitor's name (if a solicitor is engaged),

(g) if filed by someone either than the party or the party's solicitor or agent,

(h) the capacity in which the person acts, the party's address and the address for service,

(i) the solicitor's email address (if a solicitor is engaged), and

(j) the email address of a party (if no solicitor is engaged) or stating that the party has no email address, and the address of the defendant (if it is known).

15.4 For proceedings in a court in which the *Uniform Civil Procedure Rules* (NSW) apply, Part 14 of the UCPR explains how the contents of pleadings should be set out:

(a) The document should be as brief as the case allows: UCPR 14.8;

(b) The paragraphs should be consecutively numbered. Each paragraph should deal with a separate matter so far as it is convenient: UCPR 14.6

(c) The document should contain only a summary of material facts, and not evidence by which the material facts are to be proved: UCPR 14.7. The 'material facts' are all of the facts on which the cause of action depends, including matters that go to aggravation of damages or mitigation of damages. It does not include matters that only go to the question of costs.

(d) If a document or spoken words are referred to, the effect of the document or spoken words should be stated so far as it is material and not the precise terms of the document or spoken words except so far as those terms are material: UCPR 14.9;

(e) A fact does not need to be pleaded if the fact is presumed by law to be true, or the burden of disproving the fact lies on the opposite party: UCPR 14.10;

(f) Condition precedents are assumed to have been met: UCPR 14.11

(g) Any matter should be pleaded specifically that if not pleaded would take the other side by surprise: UCPR 14.14(1)

(h) In a defence or subsequent pleading, any matter must be pleaded specifically that makes any claim, defence or other case of the opposite party not maintainable or that raises matters of fact not arising out of the preceding pleading: UCPR 14.14(2). The matters include but are not limited to fraud, performance, release, statute of limitation, extinction of right or title, voluntary assumption of risk, causation of accident by unknown and undiscoverable mechanical defect and facts showing illegality.

(i) Pleadings must be consistent with previous pleadings: UCPR 14.18

(j) Pleadings may raise points of law: UCPR 14.19

(k) A pleading may not plead the general issue: UCPR 14.20

(l) The pleadings must not claim an amount for unliquidated damages (except in the local court for certain motor vehicle matters): UCPR 14.13

(m) There are specific rules for possession of land: UCPR 14.15, pleadings of facts in short form for certain money claims: UCR 14.12 and for defamation: UCPR 14.30.

(n) The pleadings must give such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet: UCPR 15.1. 'Particulars' are discussed in a little further detail below.

(o) The pleadings must comply with the rules on joinder of causes of action and joinder of parties; UCPR 6.18 to 6.28

(p) Pleadings must be verified; UCPR 14.22-14.24

16. Particulars

16.1 A cause of action must be alleged with sufficient particulars to define the issues and inform the opposite party of the case to be met. The degree of particularity depends on common sense and the circumstances of each case. The purpose of particulars is not to cure defective pleadings. As stated above, pleadings must give such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case to meet under UCPR 15.1.

16.2 Particulars are set out either in the pleading or, if inconvenient, in a separate document: UCPR 15.9.

16.3 Depending on the cause of action, the court rules may also specify additional particulars that need to be provided. For example, in proceedings to which the UCPR applies, the rules require specific particulars for allegations such as:

(a) fraud (UCPR 15.3),

(b) conditions of mind (UCPR 15.4)

(c) negligence and breach of statutory duty in common law tort claims (UCPR 15.5)

(d) out of pocket expenses (UCPR 15.6)

(e) exemplary damages (UCPR 15.7),

(f) aggravated damages (UCPR 15.8)

(g) specific property matters (UCPR 15.11)

16.4 If a party considers that insufficient particulars have been provided in the pleading, it may request further and better particulars. There are some differences between the courts as to when they will make orders that a party provide further particulars.

17. Statement of Claim

17.1 The court rules explain the form of pleadings that should be used. As explained above, a statement of claim is a form of pleadings. It commences a legal action in particular courts.

17.2 For courts in which the UCPR is applied, the statement of claim will need to include, as required by UCPR 6.12:

(a) what relief is sought,

(b) if the relief requires the determination or direction of the court on any question, the question for determination / direction,

(c) costs (if seeking costs payable for the enforcement of a lump sum debt or liquidated sum for damages)

(d) exemplary or aggravated compensatory damages;

(e) an order for interest up to judgment;

(f) for a liquidated claim, a claim for an order for interest up to judgment must specify the period/s for which interest is claimed and, may specify the rate/s at which interest is claimed.

17.3 The statement of claim must also state the following details, as required by UCPR 6.13:

(a) that, unless a defence is filed in the registry, the proceedings may result in a judgment or order against the defendant;

(b) it must give the address of the registry where the statement of claim is filed; and

(c) it must specify the time limited by the rules for filing a defence (which under UCPR 6.10(1) is 28 days after service of the statement of claim or such other time as the court directs).

17.4 There are additional rules under UCPR 6.17(5) for proceedings where the plaintiff makes a liquidated claim but make no claim of any other kind.

17.5 The court may grant leave to amend a pleading: see for instance in New South Wales, the *Civil Procedure Act 2005* (NSW). Amendments to a statement of claim (ie. Preparing an 'Amended Statement of Claim) are generally prepared by saving a new electronic version of the Statement of Claim and using underlining and ~~strikeout~~ to show additions and omissions from the original Statement of Claim. New paragraphs should be added with a letter following the original paragraph number. For example, if inserting two paragraphs after paragraph 2, call the new paragraphs '2A' and '2B'.

18. Defence

18.1 As explained above, a defence is also a form of pleadings. As the name suggests, it sets out the legal and/or factual basis for defending the action. The rules set out requirements for a defence, for example, see UCPR 14.26 and 14.27 in relation to admissions, traversing pleadings and joinder of issue, as well as the timeframe in which a defence must be filed and service.

18.2 While not a requirement, it is easier from an administrative perspective to ensure that the paragraphs in the defence match the paragraphs in the statement of claim so that it is easier to reference later.

CHAPTER 5 - EVIDENCE

19. What is Evidence

19.1 Evidence is the means by which a party seeks to prove their case. In a civil court case, the litigant must prove the facts of their case on the balance of probabilities. The facts to be proved depend on the litigant's cause of action.

19.2 The courts and tribunals have rules that determine how they accept evidence to determine the dispute between the parties. The rules will differ according to the court or tribunal and the applicable law, such as whether it is a federal law or a state law. For example, some lower courts or tribunals do not have rigid rules of evidence and seek to conduct the case with as little formality as possible.

19.3 The Commonwealth has enacted the *Evidence Act 1995* (Cth). Federal courts such as the Federal Court of Australia apply this Act. The *Evidence Act 1995* (NSW) and the *Evidence* Act *2008* (Vic) are largely the same as the Commonwealth Act. In Queensland, has not enacted the uniform evidence act but rather uses the *Evidence Act 1977* (Qld). References to the *Evidence Act* below assume references to the Commonwealth Act unless specified otherwise. The *Evidence Act* does not oust the common law.

19.4 The court often orders a time within which the parties must file or serve their evidence in support of their case. Give realistic timeframes and to seek consent from the other side if it is anticipated that the timeframes cannot be met. If a party has been in breach of the court timetable for putting on their evidence, the court or tribunal may make a 'self executing order' that if the evidence is not filed or served by a particular date, that the party must obtain leave of the court or tribunal in order to rely upon that evidence.

19.5 When preparing evidence, all of the elements of the cause of action should be considered to ensure that there are no gaps.

20. How is Evidence Presented

20.1 Evidence can be presented to the court or 'adduced' in different ways. Evidence can come from a person, that is a witness, or from a document.

20.1.1 Witnesses

(a) Under the Commonwealth *Evidence Act* here is a rebuttable presumption that a person is competent and compellable to give evidence.

(b) Evidence from a person can be either 'lay evidence' or 'expert evidence'.

(c) Often parties seek experts to give an opinion, where the person has specialised knowledge based on their training, study or experience, and the opinion is wholly or substantially based on that knowledge. The expert must expose their reasoning process (see *Makita v Sprowles* (2001) 52 NSWLR 705).

(d) If the evidence is technical or requires someone with expertise to explain it, then the court case may require expert evidence. Check the practice notes and the rules of court as to whether you can and if so, how you can adduce expert evidence. In some courts, the parties will require 'leave' of the court in order to give expert evidence. Depending on the court, there may be practice notes or court rules that require parties to confer with the other side to determine if they can agree upon a single expert before an expert is selected.

(e) Evidence that is not expert evidence is 'lay evidence'.

(f) Generally, a witness gives evidence by attending the court or tribunal. In some circumstances, a witness can give evidence remotely by phone or videoconference link. Check the rules for the court or tribunal for how to do this. Generally, the witness sits outside the room until they give their evidence and swears an oath or gives an affirmation before giving evidence.

(g) The way in which a witness gives evidence will depend on the level of formality of the court or tribunal. Generally, the party who asked the witness to attend the court or tribunal will ask questions of the witness in "examination in chief". If a witness has prepared an affidavit, the affidavit may be 'read' at this stage. This does not always involve the statement being read out loud but can involve the court taking the affidavit as read. Affidavits are discussed below.

(h) The opposing party will then ask questions in "cross examination". During cross-examination, the questions that can be asked include 'leading questions'. A 'leading question' is a question that:

(i) directly or indirectly suggests a particular answer to the question; or

(ii) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked.

(i) An example of a leading question is 'You did take the train, didn't you?'. The question directly suggests the answer 'Yes'. Another example is: 'When you took the train, you went to Town Hall, didn't you?' The question is leading for two reasons: firstly, it suggests the answer 'Yes' and assumes that the witness took the train and not some other method of transport, even though the witness has not been asked any questions about the mode of transport before.

(j) The party that called the witness then has an opportunity to ask further questions of the witness that have arisen from the 'cross examination'. This is called "re-examination". The court or tribunal member may also ask questions at any stage.

(k) When a witness is answering a question, the lawyer for the other side may stand up and say 'objection'. The court or tribunal will then decide whether to allow the witness to answer the question. Until the court or

tribunal has made a decision, the witness should not answer the question.

(l) The role of a witness is to give their evidence truthfully and to the best of their knowledge and recollection.

(m) There are obligations on legal practitioners to preserve the integrity of evidence. A witness should never be:

(i) advised or suggested that false or misleading evidence should be given or condone another person giving such evidence.

(ii) coached by being advised what answers the witness should give to questions which might be asked.

(n) The witness should answer the question asked of him or her directly. If the witness does not understand the question or could not hear it, the witness can ask for the question to be repeated. Under the *Evidence Act,* generally if a witness cannot remember the answer to a question asked in court, the witness may only use a document to refresh his or her memory if the court grants leave for the witness to do so.

(o) There is also a professional principle of *Browne v Dunn* based on notions of procedural fairness which requires a party to put propositions to a witness in cross-examination where the party seeks to lead inconsistent evidence. Lord Herschell LC in *Browne v Dunn* described the principle this way:

"It seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit".

(p) When the witness is in the process of giving evidence in cross-examination, they should not confer with their lawyer except in very limited and specified circumstances. For example, if the court or tribunal breaks during the morning, at lunchtime, in the afternoon or overnight before the witness has finished giving their evidence, it is wise not to approach the witness or be left alone in their presence.

(q) In some instances, an unexplained failure to call a witness may lead to an inference that the evidence, if adduced, would not have assisted the party's case. This is called the rule in *Jones v Dunkel*. The evidence would have been likely to shed light on a particular matter and where it would reasonably have been expected that the evidence would be adduced.

(r) If a litigant considers that a witness will assist their case, they may be able to use the formal court process to compel the witness to attend court through a 'subpoena'. Someone who receives a subpoena can approach the court or tribunal and ask that they do not need to comply with it on various grounds, and if the court or tribunal agrees then it will 'set aside' the subpoena. Some of the grounds include that the subpoena is oppressive in seeking too many documents or going too far back in time, or that it is used for an improper purpose and amounts to an abuse of process.

20.1.2 Affidavits

(a) Affidavits are commonly prepared for civil proceedings. There should always be a proper basis for any matters of fact stated in an affidavit, and particular care taken in relation to statements that allege criminality, fraud or serious misconduct given the gravity of these kinds of allegations.

(b) The Court rules and practice notes will explain the way in which affidavits are filed and served, including whether they need to be submitted to the court and the time for service, and who can make an affidavit. The Federal Court and state court rules for affidavits are slightly different, in terms of the form, annexures and exhibits, procedure for filing and service.

20.1.3 Documents

(a) If the litigant believes that there is documentary evidence that will assist their case which is in another party's possession, before the final hearing, it can ask for those documents either informally in the form of a letter or email, or formally through the court processes, often through issuing what is called a 'subpoena'. In issuing a subpoena, a party cannot go 'fishing expedition' but must identify the document or thing to be produced with reasonable particularity (see for instance, *Spencer Motors v LNC Industries* [1982] 2 NSWLR 921). Documents that have been produced in response to a subpoena are not automatically evidence before the court but must be tendered either alone or through a witness. Other formal court processes for obtaining documents are 'discovery' and issuing a 'notice to produce'.

(b) A 'document' is described broadly in the Evidence Act as 'any record of information and includes:

(i) anything on which there is writing; or

(ii) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or

(iii) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or

(iv) a map, plan, drawing or photograph.'

(c) A document can be 'tendered' as a stand-alone document or the document can be proved through a witness. Generally the parties will confer before the hearing about the documents they agree are relevant and can be tendered without objection based on admissibility.

(d) Documents can be proved through a witness by annexing or exhibiting them to their affidavit. If a document has been shown to a witness but a party wishes to put the document into evidence later, the document may be tendered and 'marked for identification'. The document will be produced to the court but will not become evidence at that point in time.

(e) If there are voluminous or complex documents, a party may seek to tender a summary of the documents by seeking a direction of the court in this way, under section 50 of the *Evidence Act*. The statute explains how the party must proceed before seeking such a direction.

21. Admissibility of Evidence

21.1 The rules of evidence determine what type of evidence can be given. This is called 'admissible evidence'.

21.2 This guide does not seek to explain all the circumstances in which evidence will be considered admissible or inadmissible. Some examples of when evidence will not be admissible includes if the evidence occur where the evidence is:

(a) irrelevant

(b) hearsay evidence.

(c) opinion evidence.

(d) evidence of the decision or of a finding of fact in an Australian or overseas proceeding.

(e) tendency and coincidence evidence;

(f) credibility evidence;

(g) privileged;

(h) discretionarily excluded or limited.

21.3 Some of these concepts are explained further below in the context of the Commonwealth Evidence Act. However, as the rules will depend on which court the litigation takes place, and as there are exceptions to a number of these rules, you should always check the rules to determine if the evidence is likely to be inadmissible. The court can also waive rules of evidence under section 190.

21.4 Once evidence is admitted, the court or tribunal can decide how much weight or importance to give that piece of evidence. If evidence is not admitted, the court or tribunal does not look at that evidence at all when deciding the case.

21.4.1 Relevance

The evidence must be relevant to a fact in issue in the proceeding. Relevance has a low threshold. However, evidence will not be relevant if it is too speculative to rationally affect the assessment of the probability of a fact in issue as it is based on speculation and second hand views: see *HG v Queen* (1999) 197 CLR 414.

21.4.2 Hearsay Evidence

(a) Under section 59 of the Evidence Act, the hearsay rule excludes evidence under the hearsay rule. The hearsay rule excludes evidence:

(i) of a 'previous representation';

(ii) made by a person

(iii) where (it can reasonably be supposed) that the maker intended to assert the existence of a fact (asserted fact); and

(iv) where that evidence is adduced to prove the existence of a fact.

(b) It is easiest to understand the hearsay rule using examples.

(i) Example 1: A says to B "I saw a car drive into a wall". Evidence from B will not be admissible to prove that the car drove into the wall because of the hearsay rule.

(ii) Example 2: A emails B to say 'I heard a crash. The email from A will not be admissible to prove that there was a crash because of the hearsay rule.

(iii) Example 3: A makes a note that says, 'I smelt smoke'. The note will not be admissible to prove that there was smoke because of the hearsay rule.

(c) In all of these examples, A could give evidence that he saw a car crash and smelt smoke, without that evidence being effected by the hearsay rule.

(d) There are also exceptions to the hearsay rule, including but not limited to:

(i) where the maker of the representation is not available (s64),

(ii) evidence is for a non-hearsay purpose (s60)

(iii) for business records (s69)

(iv) for interlocutory proceedings (s75);

(v) admissions (81)

(e) Certain exceptions can only be relied upon if notice has been given.

21.4.3 Opinion Evidence

(a) Under section 76 of the Evidence Act, opinion evidence is inadmissible. There are specific exceptions to this rule, for example:

(i) summaries of voluminous or complex documents (s50(3));

(ii) evidence relevant otherwise than as opinion evidence (s77);

(iii) lay opinions (s78);

(iv) expert opinions (s79).

(v) admissions (s81);

22. Privilege

22.1 In general terms, client legal privilege is a statutory right of a client defined in s117 of the *Evidence Act* to object to the adducing of evidence that would, if admitted, result in disclosure of: "confidential communications" and "confidential documents" made and prepared for the purpose of providing legal advice (s118) or preparing for legal proceedings (s119). Settlement negotiations are also excluded from admission into evidence under section 131.

22.2 Client legal privilege is akin to, but distinguishable from, legal professional privilege at common law.

22.3 The Evidence *Act* also provides for circumstances where client legal privilege can be lost under s121 to 126. Privilege cannot be waived by the court under s190.

23. Discretion

23.1 Under the *Evidence Act* there are discretionary exclusions and limitations for the court to exclude or limit evidence under sections 135 to 136, where the probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to the arty, or misleading or confusing, or cause or result in an undue waste of time.

23.2 There is also the discretion to exclude improperly or illegally obtained evidence under section 138 where the undesirability of admitting evidence in that way is not outweighed by the desirability of admitting the evidence.

CHAPTER 6 - ALTERNATIVE DISPUTE RESOLUTION

24. What is Alternative Dispute Resolution?

24.1 Alternative Dispute Resolution or "ADJ" is a process for seeking to resolve a dispute other than by court or tribunal decision.

24.2 Under the conduct rules in New South Wales, Victoria and Queensland, a solicitor has an obligation to inform the client about alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has an understanding of those alternatives to permit the client to make decisions about the client's best interests in relation to the matter.

24.3 At law, there are also certain requirements for certain matters for a client to have sought to resolve the dispute before commencing a court case. For example, see the *Civil Dispute Resolution Act 2011* (Cth).

24.4 Disadvantages of litigation include:

(a) The outcome is uncertain.

(b) The process is often costly. Even if a party is successful, not all legal costs will be covered, if at all.

(c) It is often time consuming. It takes time to prepare and present a legal court case and then for the court or tribunal to make a decision. Even after a court or tribunal has made its decision, an unsuccessful party may be able to appeal the decision. The parties then need to prepare and present their case on the appeal and the court or tribunal has to make a decision on the appeal.

(d) The outcome is outside the control of the parties, but in the hands of the court or tribunal.

(e) The courts and tribunals also only have limited powers so that the outcome that a person wants to achieve may not be possible through the court system. It can also preserve the relationship between the parties, which is particularly important if the outcome which the parties seek

24.5 ADJ gives control back to the parties to determine an outcome from the case. The outcomes can be more flexible and better suited to the requirements of the parties. The outcomes can give finality to the proceedings more quickly (rather than the risk of an appeal), and resolve the dispute more cost effectively (without the risk of incurring further legal costs).

24.6 ADJ can take many forms, the most common of which are mediation, conciliation and arbitration.

24.7 It is worthwhile confirming that the offers and contents of the discussion are confidential and 'without prejudice'. Under the Evidence Act, evidence cannot be adduced of communications between parties in dispute or a document prepared in connection with an attempt to negotiate a settlement of a dispute and will not be admissible: see sections 131 and 134. This is a question of fact and the words 'without prejudice' are neither necessary nor determinative, but evidence a relevant intention that the communications are "in connection" with settlement negotiations: *Barrett Property Group v Dennis Family Homes (No 2)* (2011) 193 FCR 479.

25. Mediation

25.1 In mediation, the parties seek to negotiate an outcome between them with the assistance of an independent individual, the mediator.

25.2 The mediation process is not rigid. Depending on the type of mediation, the parties may agree to provide a 'position paper' to the mediator in advance of the mediation. A 'position paper' gives a high level summary of the issues in dispute and your side's arguments. Commonly, the parties will meet with the mediator at the beginning of the mediation where the mediator explains the process of the mediation and each side may give an opening outline of their case. Afterwards, the parties then break off into separate rooms with the legal advisors and mediator shuffles between the rooms to help facilitate parties making offers of settlement.

26. Conciliation

In conciliation, an independent individual is the conciliator who helps identifies the issues in dispute and develops and proposes options and considers alternatives to resolve the dispute with the parties. The conciliator is more active than a mediator in proposing options, but does not ultimately determine the dispute.

27. Arbitration

In arbitration, an independent individual hears from both parties and makes a ruling on issues in dispute. The arbitration is more formal than mediation and conciliation. It is closer to a court process as witnesses can be called and evidence given, but without the same formality of the court. The parties need to agree before the arbitration process that the arbitrator's decision is binding and enforceable.

CHAPTER 7 - RESOURCES

Some further reading and resources are available at:

Law Societies

- Law Society of New South Wales: www.lawsociety.com.au
- Bar Association of New South Wales: www.nswbar.asn.au
- Queensland Law Society: www.qls.com.au
- Bar Association of Queensland: www.qldbar.asn.au
- Law Institute of Victoria: www.liv.asn.au

Court practice and procedure in New South Wales:

- *Ritchie's Uniform Civil Procedure New South Wales*
- *Civil Trials Bench Books – Judicial Commission of New South Wales* at www.judcom.nsw.gov.au

Drafting pleadings:

- *Bullen & Leake & Jocab's Precedents of Pleadings*, 18th Edition, Lord Brennan QC, William Blair QC, The Rt Hon. Lord Justice Jacob, Brian Langstaff QC

Evidence in New South Wales:

- *Uniform Evidence Law 13th Edition,* Odgers