

## Pre-trial Procedures

### Failure to comply

**State** – Civil Courts in South Australia require a number of pre-action procedures to be complied with prior to commencement of litigation. **Rule 61 of the UCR** outlines the pre-action protocols. In addition, **rule 7 of the Solicitor Conduct Rules** specifically provides that lawyers **must advise** their client about ‘reasonably available alternatives to litigation’. Failure to adhere to pre-action protocol before instituting proceedings can have serious consequences: **r 61.14(1)**.

(2) The Court will list the proceeding for a special directions hearing to determine whether orders should be made for any pre-action steps or steps in lieu to be taken.

(3) At the directions hearing, the Court may make such orders as it thinks fit including (without limitation)

(a) for a pre-action **step** or **step in lieu to be taken**;

(b) for a **stay** of other steps in the proceeding **until such steps have been taken**;

(c) for ordinary steps in the proceeding to be taken; or

(d) for **costs** (applicant will not be able to recover costs or preparing, filing or serving the claim and statement of claim if in default: **r 61.13(1)(a)**)

**State** – In addition, the *UCR* contemplates costs consequences for default of pre-action procedures.

### Process

As such, compliance with the following procedures must be observed carefully with respect to **each party joined or intended to be joined**:

Notice of Claim – Letter providing formal notice of claim to other party, sent by Applicant within 3 months before commencing an action: **r 61.7** (6 months if personal injury: **r 61.6(2)**)

**Reply to notice** – within 21 days (**r 61.2(b)**);

If not resolved:

**Pre-action meeting** – parties must negotiate in good faith to arrange a meeting if: the dispute is not resolved within 7 days after the time for service of the last pre- action document under Division 3 (**r 61.12(1)(a)**); and arrangements for a pre-action meeting have not already been agreed (**r 61.12(1)(b)**).

**NB**, there are a number of exceptions to compliance with the pre-action protocol, provided for under **rule 61.8(1)**:

(a) on commencement of the action, the applicant **applies for a search order** under rule 112.2 or **freezing order** under rule 112.14;

(b) on commencement of the action, the applicant **applies for an interlocutory injunction** and reasonably fears that, if given a pre-action claim, the respondent will act in a manner that would frustrate the grant of the injunction.

## Commencing Litigation; Pleadings & Joinder of Parties

### Jurisdiction Selection

Depending on the sum claimed, the selection of judicial forum may differ:

1. **State** – The **Magistrates Court** may preside over claims up to \$100,000: **s 8(1), *Magistrates Court Act 1991***;
2. **State** – The **District Court** may preside over claims of amounts greater than \$100,000 for Non-Personal Injury Matters and \$100,000 for Personal Injury Claims;
3. **State** – The **Supreme Court** may preside over all civil matters but may remit matter to lower Courts if appropriate.

**State** – our client seeks damages of \$XYZ and accordingly, it may be more appropriate and cost-effective to institute proceedings in the lower Court owing to the [presumptive cost provisions](#) that apply in relation to award obtained. In addition, the filing and Court fees associated with the lower Court are far less onerous.

### Applying for Extension of Time

1. What is the **time limitation** for the purported cause of action;

Contract – 6 yrs: **s 35(a)**, *Limitations of Actions Act 1936 (SA)*;

Tort – 6 yrs: **s 35(c)**, *Limitations of Actions Act 1936 (SA)*

2. **State** – The Court has the general power to extend the time so prescribed or limited to such an extent, and upon such terms (if any) as the justice of the case may require: **s 48(1)**;

3. When did the **cause of action accrue**? – may be several points in time, Applicant may wish to argue that it hasn't expired but Respondent may wish to contend that **it has expired**;

4. The Court has the general power to extend the time so prescribed or limited to such an extent, and upon such terms (if any) as the justice of the case may require: **s 48(1)**;

5. **When may the power be exercised**?: **s 48(3)** – the power in **subsection (1)** **does not**:

(b) empower a court to extend a limitation of time prescribed by this Act unless it is satisfied –

(i) **material facts** were not ascertained until some point within 12 months before the expiration or occurring after, and the action was instituted within twelve months of ascertainment; or

(ii) plaintiff's failure to institute resulted from representations or conduct of the defendant (or someone reasonably believed to be acting on behalf).

5. According to s 48(3a), a fact is **not to be regarded as material** to the plaintiff's case for the purposes of subsection (3)(b)(i) unless:

(a) it forms an **essential element** of the plaintiff's cause of action; or

(b) it would have **major significance** on an assessment of the plaintiff's loss.

6. The Court must then have regard to the **overarching considerations** listed in ss (3b), namely:

(a) the period of extension sought and, in particular, whether the passage of time has prejudiced a fair trial; and

(b) the desirability of bringing litigation to an end within a reasonable period; and

(c) the nature and extent of the plaintiff's loss and the conduct of the parties generally; and

(d) any other relevant factor.

7. If a basis for an extension can be affirmatively grounded in the above criteria:

**Applicant** – the **Claim** must include a statement to that effect and identify the statutory basis for the extension and an affidavit setting out those reasons: r 63.1(2);

**Respondent** – if an extension of time is sought within a Cross Claim, the statement of cross claim must include a statement to that effect and identify the statutory basis for the extension sought and an accompanying affidavit setting out those reasons: r 65.3(2)

## General Pleading Rules

Pleading	
67.2(1)	A pleading must – (a) comply with the relevant prescribed form; (b) be divided into consecutively numbered paragraphs, each paragraph dealing with a separate matter; and (c) be as concise and precise as practicable

67.2(2)	A pleading must – (a) set out the <b>affirmative facts</b> relied on by the party; (b) <b>identify any statutory provision</b> relied on by the party in statement or defending; and (c) <b>give fair notice of the party’s case</b> to the opposing party so as to avoid the opposing party being taken by surprise at or in preparation for trial
67.2(3)	A pleading <b>must not</b> – (a) make <b>inconsistent allegations</b> of fact <i>unless</i> one is expressed to be in the alternative to the other; (b) contain material that is irrelevant or unnecessary to perform the functions of the pleading identified in subrule (2); (c) contain material that is evasive or ambiguous; (d) contain material that is scandalous, frivolous or vexatious; or (e) be an abuse of the process of the Court
67.2(4)	A pleading may refer to events occurring after institution of the proceeding

### Ethics and Pleadings

1. Has **X** instructed you to include a vexatious or scandalous pleading under the **r 67.2(2) (c) or (d)**;
2. **If yes**, does this conflict with a solicitor’s fundamental duty to the Court and to not deceive or knowingly or recklessly mislead the Court?: **rr 3.1 & r 19.1**;
3. **If yes**, strongly advise client not to proceed in making that pleading;
4. **If client persists**, consider terminating retainer under **rule 13.1.3** with **good cause**, providing the client **reasonable notice** of this decision.

### Claim & Statement of Claim

**UCR Pt 7, Div 1** sets out the ‘universal pleading rules’. The issues to be resolved in the action are defined and limited by the pleadings (see, eg, **UCR 71**, which outlines ‘the effect of pleadings’). In preparing the pleadings, the applicant and respondent must set out the facts and allegations that it sees as relevant to determining liability. Pleadings do not contain legal principle or argument – they are primarily about the facts and should contain a concise explanation of the facts that support the alleged cause of action, followed by the name of the cause of action.

**UCR 63.1** sets out the requirements for the form and content of a Claim and Statement of Claim:

Claim	
63.1(1)	Prescribed form – <b>Form 1</b>
63.1(2)	If extension of time sought – claim must identify statutory basis upon which it is sought
63.1(4)	Applicant must certify that: (a) whether the applicant served a pre-action claim on the respondent; (b) whether the respondent served a pre-action response; and (c) whether the parties attended a pre-action meeting.

Statement of Claim	
63.1(6)	Prescribed form – <b>Form 1S</b>
63.1(6)	(b) comply with the pleading rules in Part 7; (c) if a pre-action claim was not served, state whether the applicant was required to serve one; and (d) if the applicant states that they were not required to serve a pre-action claim, plead the relevant facts under rule 61.8(1).

### Specific Pleading Rules: Statement of Claim

The Statement of Claim is the first pleading filed in the case. The Statement of Claim is the primary means by which the applicant sets out their case. The pleading contains allegations of fact made against the respondent(s), the legal cause(s) of action, the alleged damage and the relief sought by the applicant.

Specific Rules: Statement of Claim	
67.5(1)	Compliance with prescribed forms for various actions
67.5(2)	Personal injury claim – effects and extent of injury (a) – (e)
67.5(3)	May raise a new cause of action arising after the commencement of the claim
67.5(4)	Magistrates Court – specifics of the claim value (a) – (e)