

CIVIL LITIGATION PRACTICE: COMPLETE COURSE NOTES

TASK 1: INITIATING AND RESPONDING TO CLAIMS

ACTIVITY 1.1: ASSESSING THE MERITS OF A CASE

1. The Fundamental Framework: Why Assess Merits?

- 1.1 The "Reasonable Prospects of Success" Test
 - Legal Source (NSW): Application Act Sch 2 cl 4
 - The Test Defined: *Keddie v Stacks/Goudkamp Pty Ltd*
 - Consequences of Failure: Disciplinary action and personal costs orders
- 1.2 The Client's Core Concerns

2. Step 1 – The Initial Interview & Taking Instructions

- 2.1 Professional Thresholds – Can You Act?
 - Competence (ASCR 2015 r 4)
 - Conflicts of interest (ASCR 2015 rr 10, 11)
 - Client capacity (including corporate authority)
- 2.2 The Interview Technique – Do's and Don'ts
 - Interviewing alone (ASCR 2015 r 25)
 - Open questions only (no leading questions)
 - File notes – the client's account prevails in absence of a note
- 2.3 Information Checklist for a Contract Claim (Debt Recovery)
 - Documents required (agreements, invoices, delivery dockets)
 - Payment/security evidence (guarantees, PPSR records)
 - Debtor's identity – ASIC search mandatory

3. Step 2 – Analysis Using the Proofmaking Model

- Level 1: Legal source

- Level 2: Cause of action
- Level 3: Elements
- Level 4: Material facts
- Level 5: Evidence
- Application to the Defendant's case

4. Step 3 – Identifying Weaknesses & Defences

- 4.1 Common Defences in Contract/Debt Claims
 - No concluded agreement, no consideration, failure of condition precedent
 - Set-off or cross-claim, illegality or penalty, statute-barred
- 4.2 The "Genuine Steps" Requirement – Pre-Litigation
 - *Civil Dispute Resolution Act 2011* (Cth)
 - Genuine steps statement (ss 6, 7)
 - Personal costs orders for non-compliance (s 12)
 - *Superior IP International Pty Ltd v Aheam Fox* [2012] FCA 282

5. Step 4 – Preliminary Advice and Outcome

- 5.1 Elements of Preliminary Advice
 - Cause(s) of action, prospects of success, remedies, process options
 - Limitation periods (6 years for simple contract – *Limitation Act 1969* (NSW) s 14)
 - Estimate of costs and disbursements
- 5.2 Critical Risk Management
 - Confirm all advice in writing
 - Client proceeding against advice – documentation required
 - Must never commence proceedings with no reasonable prospects (ASCR 2015 r 21)

6. Summary – Merits Assessment Checklist

ACTIVITY 1.2: DRAFTING AN INITIAL LETTER OF ADVICE

1. The Purpose and Importance of the Initial Letter of Advice

- Confirms oral advice

- Manages expectations
- Protects against negligence claims
- Complies with professional obligations (ASCR 2015 r 7.1, 7.2)

2. The Preliminary Costing & Disclosure Obligations

- 2.1 Mandatory disclosure requirements (LPUL s 174)
 - Basis of calculation, estimate of total costs
 - Client's right to negotiate, right to receive a bill
 - Dispute resolution (Office of the Legal Services Commissioner)
- 2.2 Disclosure thresholds (\$750 and \$3,000)
- 2.3 Continuous disclosure obligation (LPUL s 174(1)(b))
- 2.4 Client understanding (LPUL s 174(3))
- 2.5 Money on account (ASCR 2015 r 35.1)

3. Structure and Content of the Initial Letter of Advice

- 3.1 Opening: Retainer and scope
- 3.2 Summary of instructions
- 3.3 Causes of action and applicable law
- 3.4 Preliminary assessment of prospects of success
- 3.5 Remedies sought
- 3.6 Alternatives to litigation (ASCR 2015 r 7.2)
 - Negotiation, mediation, conciliation, arbitration, expert appraisal
- 3.7 Costs advice – the most critical section
 - Uniform Law costs vs Ordered costs
 - Estimate of costs (range, not single figure)
 - Hollow judgment warning
- 3.8 Timeframes and limitation periods
- 3.9 Recommended next steps and action required by client
- 3.10 Closing: Confirm instructions and warning against proceeding contrary to advice

4. Sample Initial Letter of Advice – Debt Recovery (District Court)

5. Checklist for Reviewing an Initial Letter of Advice

ACTIVITY 1.3: DRAFTING PLEADINGS

1. What is a Pleading? – Foundational Concepts

- Definition (CL202 §3.1)
- Examples of pleadings
- Two main functions (UCPR r 15.1)
- Consequences of poorly drafted pleadings

2. The Governing Rules – NSW District Court

- CPA, UCPR, Practice Notes
- Key UCPR Parts: 6, 14, 15, 19

3. The Six Key Rules of Pleading

- Rule 1: State material facts ONLY
- Rule 2: State ALL material facts relied upon
- Rule 3: Do NOT plead evidence
- Rule 4: State material facts, not law
- Rule 5: Be as brief as the nature of the case allows
- Rule 6: Provide particulars of relief and damages

4. The Proofmaking Model – Applied to Pleadings

- Table: Level 3 (Elements) → Level 4 (Material Facts – PLEAD) → Level 5 (Evidence – DO NOT PLEAD)
- Example: Debt recovery claim

5. Types of Claims: Liquidated vs Unliquidated

- Definitions and examples
- Default judgment procedure differences

6. Drafting the Statement of Claim (Liquidated Debt Recovery)

- 6.1 Formal requirements (UCPR r 4.2)
- 6.2 Relief claimed (UCPR r 6.12)
 - Principal amount, fixed costs (cl 24), pre-judgment interest (CPA s 100)
 - Interest rate: 4% above RBA cash rate (UCPR r 6.12(8))
- 6.3 Pleadings (Material facts) – Chronological structure (14-paragraph example)
- 6.4 Verification (UCPR r 14.23)
- 6.5 Notice to defendant (UCPR r 6.13)
- 6.6 Reasonable prospects certificate (Application Act Sch 2 cl 4)

7. Common Money Counts (Short Form Pleading)

- UCPR r 14.12
- Advantages and disadvantages
- Warning: Notice to plead facts (Form 16) can delay default judgment

8. Particulars (UCPR Pt 15)

- 8.1 Definition and purpose
- 8.2 When particulars are required
 - Negligence, misrepresentation, fraud, damages, interest
- 8.3 How to present particulars

9. Responding to a Statement of Claim – Drafting a Defence

- 9.1 Options for responding: admit, deny, not admit, do not know
- 9.2 Cannot plead the general issue (UCPR r 14.20)
- 9.3 Example defence (CL202 Appendix 5)
- 9.4 Verification of defence
- 9.5 Timing: 28 days after service (UCPR r 14.3)

10. Cross-Claims and Set-Off

- UCPR Pt 9, CPA ss 21, 96

11. Checklist for Drafting a Statement of Claim

12. Common Pitfalls to Avoid

13. Sample Structure – Statement of Claim (Liquidated – Debt Recovery)

TASK 2: APPEARING IN INTERLOCUTORY APPLICATIONS

ACTIVITY 1: DRAFTING COURT DOCUMENTS FOR AN INTERLOCUTORY APPLICATION

1. What is an Interlocutory Application?

- Definition
- Purpose: procedural or interim relief
- Distinction between interlocutory application and final hearing

2. Documents Required for an Interlocutory Application

- Notice of Motion (NSW) or Interlocutory Application (Federal)
- Supporting Affidavit
- Short Minutes of Order

3. Drafting the Notice of Motion (NSW District Court)

- 3.1 When to use a Notice of Motion
- 3.2 Required content (UCPR r 18.1)
- 3.3 Eight rules for drafting orders
 - Certain of the power, draft "in personam", active voice, prescriptive orders, precise time provisions, concise language, complete orders, exact words
- 3.4 Example – Notice of Motion for Default Judgment (Form 38)
- 3.5 Example – Notice of Motion for Substituted Service (UCPR r 10.14)

4. Drafting an Interlocutory Application (Federal Court)

- Form 35 (FCR r 17.01)
- Urgent applications without notice (ex parte) – duty of full disclosure (*Thomas A Edison Ltd v Bullock*)

- Affidavit for urgent application – must address urgency

5. Drafting the Supporting Affidavit

- 5.1 Hearsay exception in interlocutory proceedings (Evidence Act s 75)
 - The "5 Ws" test
 - Example of proper hearsay evidence
- 5.2 Structure of a supporting affidavit
- 5.3 Weight of hearsay evidence (*Geoffrey W Hill & Associates v King*)

6. Drafting Short Minutes of Order

- 6.1 What are Short Minutes of Order?
- 6.2 Format requirements
- 6.3 Example – Directions hearing
- 6.4 Example – Interlocutory injunction (Federal Court)

7. Consent Orders

- Definition and requirements (FCR r 39.11)
- Notations (recitals)

8. Consequences of Badly Drafted Orders

- CPA ss 98, 99

9. Checklist for Drafting Interlocutory Court Documents

- Notice of Motion / Interlocutory Application
- Supporting Affidavit
- Short Minutes of Order

10. Substantive vs Machinery Provisions

11. Example – Complete Interlocutory Application Package (NSW District Court)

ACTIVITY 2: PREPARING ORAL SUBMISSIONS

1. The Foundation: Preparation Before You Speak

- 1.1 First steps – The Proofmaking Model
- 1.2 Develop a theory of the case
 - Structure: identify main issue, take stance, present arguments, identify opposing theory, present counter-arguments
- 1.3 Prepare a chronology
 - Format: Date, Event, Source (affidavit paragraph)

2. Structure of Oral Submissions

- 2.1 Introduction (who you are, who you act for, what you want, why)
- 2.2 Background (neutral summary of factual context; representational theme)
- 2.3 Legal framework (principles governing court's discretion)
- 2.4 Application of law to facts (4-step structure)
- 2.5 Conclusion

3. Preparing Written Outline of Submissions

- 3.1 Format of written outline (example: application to set aside default judgment)
- 3.2 Differences between written and oral submissions (table)

4. Delivery Techniques

- 4.1 Voice projection and pace
- 4.2 Eye contact with the Bench
- 4.3 Use of notes (avoid reading – use schedule of key points)
- 4.4 Use the lectern
- 4.5 Overcoming nerves
- 4.6 Start strong and finish strong

5. Responding to Questions from the Bench

- How to handle questions
- If you don't know the answer: "I am unable to assist the court in that regard"
- If the question interrupts your flow

6. Responding to Your Opponent

- Listen and take notes
- Structure of a reply

7. Ethical Obligations During Oral Submissions

- 7.1 Paramount duty to the court (ASCR 2015 r 19.1, 19.2, 19.6)
- 7.2 Duty not to mislead
- 7.3 Duty to assist the court
- 7.4 Ex parte applications – full disclosure (ASCR 2015 r 19.4, 19.5)
- 7.5 Do not personalise your submissions

8. Handling Documents During Oral Submissions

- Referring to affidavits (name, date, paragraph number)
- Handing up documents
- Pause while the judge reads
- Chronologies

9. Courtroom Etiquette for Oral Submissions

- 9.1 Addressing the Bench ("Your Honour", "Registrar", etc.)
- 9.2 Standing and sitting (only one lawyer stands at a time)
- 9.3 When the judge enters or leaves (bow, remain standing)
- 9.4 Do not interrupt
- 9.5 Self-control (no facial expressions of amusement or annoyance)

10. Checklist for Oral Submissions

- Before the hearing
- At the bar table
- Ethical obligations

11. Example – Complete Oral Submission (Application to Set Aside Default Judgment)

TASK 3: SETTLING PROCEEDINGS AND ENFORCING JUDGMENT

ACTIVITY 1: ENFORCING A JUDGMENT

1. Preliminary Matters – Before Enforcement

- 1.1 The reality of enforcement – managing client expectations
- 1.2 Entry of judgment – prerequisite for enforcement (CPA s 133; UCPR r 36.11)
- 1.3 Limitation on enforcement – 12 years (*Limitation Act 1969* (NSW) s 17; CPA s 134(2))
- 1.4 Interest after judgment (CPA s 101; UCPR r 36.7(1))
 - Prescribed rate: 6% above RBA cash rate
 - No interest if paid within 28 days (CPA s 101(3))
 - Application of payments (CPA s 136)
- 1.5 Selecting the appropriate enforcement method (CPA s 106)
 - Writ for the levy of property, garnishee order, charging order
 - Other options: bankruptcy, winding up
- 1.6 Timing

2. Examination of the Judgment Debtor (CL207 §4)

- 2.1 Purpose of examination
- 2.2 Procedure – Examination Notice (Form 51/52)
- 2.3 Procedure – Order for Examination (Form 53; UCPR r 38.2)
- 2.4 Conduct of the examination (UCPR r 38.4, 38.5)
 - Usual questions asked (CL207 Appendix 4)
 - Searching questions to ask
- 2.5 Failure to attend – arrest warrant (UCPR r 38.6; CPA s 97)
- 2.6 Advantages and disadvantages
- 2.7 Settlement at examination (CPA s 90)

3. Garnishee Orders (CL207 §5)

- 3.1 What is a garnishee order?
- 3.2 Attachable debts (CPA s 117, 119)
 - Wages/salary, bank accounts, rent, contract payments
 - Protected payments and Crown debts

- 3.3 Application for garnishee order (Form 69; UCPR r 39.34, 39.35)
- 3.4 Garnishee's response (UCPR r 39.40)
 - Time for payment (14 days)
 - Protection for judgment debtor (CPA s 122)
 - Garnishee's entitlement to expenses
 - Failure to comply (CPA s 124)

4. Writs of Execution (CL207 §6)

- 4.1 Types of writs: levy of property, possession of land, delivery of goods
- 4.2 Common features of writs
 - Sheriff's duties (UCPR r 39.7, 39.15)
 - Distribution of proceeds
- 4.3 Priority of writs
- 4.4 Duration of writ (12 months; UCPR r 39.20)
- 4.5 When leave is required (UCPR r 39.1(1))
- 4.6 Advantages and disadvantages

5. Writ for the Levy of Property (CL207 §7)

- 5.1 Property that may be seized (CPA s 106)
 - Protected property: clothing, bedroom/kitchen furniture, tools of trade up to \$2,000 (UCPR r 39.46)
- 5.2 Procedure (Form 65; UCPR r 39.2, 39.3)
- 5.3 Seizure and sale of goods (UCPR r 39.30)
- 5.4 Seizure and sale of land (UCPR r 39.6(3))
 - Monetary restriction: judgment debt must be \$20,000+
 - 9-step procedure for sale of land
 - Effect of registration of writ (CPA s 113)

6. Writ for Possession of Land (CL207 §8)

- 6.1 When to use (CPA s 104)
- 6.2 Procedure (Form 59; UCPR r 39.1, 39.3(2))
- 6.3 Advantages and disadvantages – circumvention risk

7. Charging Orders (CL207 §10)

- 7.1 What is a charging order? (CPA s 126)
- 7.2 Property that may be charged (shares, money on deposit, equitable interests)
- 7.3 Procedure (Form 73/74; UCPR rr 39.44-39.45)
- 7.4 Enforcement limitation – 3 months

8. Payment by Instalments (CL207 §3)

- 8.1 Agreement to pay by instalments (UCPR r 37.1A)
- 8.2 Application to pay by instalments (Form 46/47)
 - Stay of execution pending determination (UCPR r 37.5)
- 8.3 Registrar's powers (UCPR r 37.3)
- 8.4 Objection to instalment order (Form 50; 14 days)
- 8.5 Court's powers on hearing (UCPR r 37.4)
- 8.6 Effect of instalment order
 - Stay of execution (CPA s 107(2))
 - Default – order ceases (UCPR r 37.7)
 - Variation by judgment creditor (UCPR r 37.6)

9. Bankruptcy and Winding Up (CL207 §11-12)

- 9.1 Bankruptcy (individual debtors)
 - Jurisdiction, debt threshold (\$10,000), time limit (6 years)
 - Disadvantages
- 9.2 Winding up (corporate debtors)
 - Jurisdiction, ground (insolvency – Corporations Act ss 9, 95A)
 - Statutory demand threshold (\$4,000 – s 459E)
 - Key distinction from bankruptcy: no judgment required for statutory demand

10. Checklist for Enforcing a Judgment

- Before enforcement
- If information about assets is unknown
- Enforcement methods selection table
- Enforcement documentation summary table

11. Costs Consequences of Settlement Offers

- 11.1 Why settlement offers matter for enforcement
- 11.2 Formal offer of compromise (UCPR r 20.26)
- 11.3 Costs where offer not accepted (UCPR r 42.15 – Defendant's offer)
- 11.4 Disclosure obligations on settlement (LPUL s 177)

12. Practical Tips for Enforcement

- 12.1 Managing client expectations
- 12.2 Strategic considerations
- 12.3 Professional obligations (ASCR 2015 r 34.1.1, 34.1.2)

MODULE: TASK 1 – INITIATING AND RESPONDING TO CLAIMS

ACTIVITY 1: ASSESSING THE MERITS OF A CASE

Core Objective: To systematically determine whether a prospective claim or defence has "reasonable prospects of success" before any formal dispute resolution or court process is initiated.

1. THE FUNDAMENTAL FRAMEWORK: WHY ASSESS MERITS?

Before you file a single document, you must assess merits. This is not merely good practice; it is a professional and legal obligation.

1.1 The "Reasonable Prospects of Success" Test

- Legal Source (NSW): Schedule 2, cl 4(1) of the *Legal Profession Uniform Law Application Act 2014* (NSW) (Application Act).
- The Rule: A law practice must not provide legal services on a claim or defence for damages unless the practitioner reasonably believes, on the basis of provable facts and a reasonably