Nola Pearce (NP): Thank you everyone for coming, both our online audience and people who have kindly joined us at Level Twenty Seven Chambers. Thank you very much to Queensland Young Lawyers for hosting our event this afternoon. You are, just to ensure you have joined the right meeting, you are hopefully about to enjoy an hour of an introduction to pleadings. I am one of your two presenters today. My name is Nora Pearce, I am from Quay 11 Chambers. We are kindly putting this together with Level Twenty Seven. You will hear shortly from Salwa Marsh, from the Level Twenty Seven group.

Now, I should say at the outset, perhaps to correct one small item of potentially misleading or deceptive conduct. Those who have homes to go to will I trust be very pleased to know that, contrary to what was said on Twitter, we will not discuss all things pleadings. We really could be here for quite a while. I promise you, we will let you go before that happens. However, as a little sneaky treat, we will mention a couple of points that, following tonight's session, if we have a level of interest, Salwa and I would love to create a session two, which might be at a more medium level, once everyone has perhaps had a chance to digest what we have put in tonight. And maybe even to put some of these basics into effect, try them out because we would love to take you on a further journey into pleadings, talk about some of the nuanced aspects, particularly starting to use these basics by way of a strategic approach to your litigation, which between you and I, is where pleading becomes really fun.

So, in lieu of talking about all things pleading, what we would like to have chat about are these things. [Slide 2] I will particularly cover the first three. These are the three main points that I would like you to take away. Bare minimum requirements. And I do want to talk about both the state courts and the federal courts because most of us are probably doing the business in each. We have of course the extreme advantage that Justice Keynes is a Queenslander. His input into the Federal Court Rules is quite clear. There are some similarities, many, I would say, but some key differences which are worth having in mind.

Also, to then talk about perhaps key differences between these ideas of material facts, particulars and evidence because these become crucial in terms of what needs to be included in a pleading, what should not, what cannot, and where is the dividing line between them.

Then I would like to talk about, super brief, and this hurts my heart to do it so briefly because this really is the fun part. The idea of the responsive pleading, which of course could be either your defence, could be your reply, could be an internal counterclaim, what is involved in a responsive pleading, again at an introductory level, and the key idea of the direct

explanation under the UCPR. That will be the key gateway, I hope, into our session at a later stage.

Salwa will then very helpfully give that a surrounding context by talking about particularly some key before and after steps to support a good pleading. In both, again, the state and federal courts.

KEY FRAMEWORK – UCPR CH 6 & FEDERAL COURT RULES DIV 16.1

[Slide 3] That is our key framework. I can only emphasise there is absolutely no substitute for being familiar with the rules. Those two areas, chapter six of the UCPR and Division 16 of the Federal Court Rules are not long and not particularly difficult. As I said, there are so many similarities that once you begin sort of diving into one you will get a feel for what you might expect to see in the other. There is just no substitute for that because, of course, part of the trick with any skill such as a good pleading is you don't know what you don't know. So do familiarise yourself with those rules as best you can and keep those current.

Of course, there are also some common law aspects. I will mention a couple of those tonight without trying to create a complete textbook on the point. But some interesting decisions can give us a lot of meat on the bones of what the rules set out.

[Slide 4] Let's talk about what we must plead. This is our overview. This is the area that I would like to cover. I will do them in this order. Bare minimum is in the state courts rule 149. As you can see there 16.02 and 16.03 of the Federal Court and sufficient particulars, which as I said, leads us into a couple of other questions that I would like to cover off. The going further aspect is the responsiveness, the direct explanation to satisfy rule 166, emphasising that that is only in the state courts. I will say more about that. And of course, some specific matters that each of the respective sets of rules require you to plead.

Now, I should say that if you are feeling that you would like to end up with some notes, I feel certainly slides will be available, if that allows you to just enjoy the presentation without feeling that you have to put your glass of wine down to make too many notes.

BARE MINIMUM TO PLEAD

Material Facts

[Slide 5] So what I would like to say about those items are these. These rules are relatively similar. It is not a coincidence, it is not even going to any influence of any particular Queenslanders. It is just the simple fact that these rules reflect literally hundreds of years of common law. You must, as you probably know, plead material facts, but not evidence. Things that if not stated might take the opposing party by surprise. Unsurprisingly, the relief that you

seek. I have mentioned there particularly some additional rules that also go further to talk about particular aspects of particular types of damages, say, a comparison if you are claiming general damages, as opposed to a debt or liquidated demand. Do take a look at those rules that I have mentioned regarding relief.

Specific Legislative Provisions

A key aspect is any specific legislative provisions. Now, most of the time, we will do this without thinking about it. The most obvious things is, of course, if you have a statutory cause of action, so we are talking about the statement of claim stage. Of course, you might particularly mention statutory consumer guarantees arising under the ACL, particular causes of action arising under any given statute, of course, you must mention them. Equally, that can occur at the defense stage, commonly where we are pleading that something is in apportionable claimant or the defendant plans and entitlement to proportionate liability, important always to indicate the provisions on which you rely.

Particulars

Here is the fun part, sufficient particulars to make clear the case, avoid surprise and allow the other party to plead. Now, in summary of those five points, I would like to say three things. One, material facts versus particulars, let's begin right there because we know that we must plead sufficient material facts to make out the claim or the defence. Now, that is exactly what it means, go back to 101 of whichever subject it was that governs the cause of action that you are pursuing, and look to the elements of it. So of course, if you are pleading a payment contract, you are going to need to establish that there was one, go back to those elements: tort, breach of duty, a duty existed, breach, causation, loss. Make sure that all of those material facts are set out there.

As opposed to particulars which, and I do that face because it is one of those things that the rule sounds good in the saying and then it becomes a little bit different in the practice. Then in stage two, when we talk about particulars, I will make it a little bit more difficult again, but for now, let's say this, as I have mentioned in that last little arrow dot point, again, hundreds of years of case law have made quite plain that what the court is looking for in terms of required level of particularity is enough to allow your opponent to know the case that it has to meet to avoid surprise and to allow them to plead. Okay, great.

We then also have here a distinction between particulars and evidence. Anyone who has ever answered a request for particulars often knows that one of the best ways to resist a request for particulars is to say it is not truly a request for particulars it is a request for evidence and I am not obliged to plead the evidence. How do we know that? We go back to the first

one, looking at the rules that I have mentioned there specifically, they each say plead the material facts but not the evidence.

AVOIDING SURPRISE – *SIMS V WRAN, CHAN V GOLDENWATER*

Great. Where do these three intersect? And how do we find the way through it? I will give you the guiding principle is the avoidance of surprise. That is the ticket to the whole thing in terms of working out when you can hold your cards a little closer and lean on some of these rules to say "I will not disclose this material". Almost always an attempt to be very clever will be trumped by the obligation to avoid surprise. Examples of that, particularly there is a just a lovely quote for a matter of from the New South Wales Court of Appeal at the decision from Justice Hunt in *Sims v Wran*. Look, it is getting on a bit, it is a 1984 case. But again, it is just restating principle in a helpful way. What His Honour said was that the starting point, and particularly with what I mentioned if you are trying to resist say a request for particulars, the starting point is what *is* it you must disclose, what *is* necessary to guard against surprise. The starting point is not what can be said without disclosing my evidence. They are different. If in order to avoid surprise you have to give away a bit of your evidence, well, that is the way it is going to be and that is where the cards will fall, if you should find yourself in the applications list. I should say that is, the idea that avoiding surprise, trumps rules about saying delivery of particulars and not evidence. It trumps a number of other rules and we might mention them either later tonight, or indeed in our session two.

Now, what is helpful here is to just have a little consideration then of what it actually means to avoid surprise. And we are a bit lucky here. By that, of course, I mean, luckier even than been together to talk about pleadings on Thursday, really lucky that in May of this year [2021], the Court of Appeal delivered a decision in a matter of *Chan v Goldenwater*. Very short decision, because of course, it was just on a procedural point. The gist of this was a question about whether further particularity had to be given more of a certain allegation. A relatively simple facts scenario in that a Chinese national, or Chinese woman, had come to Australia and her very helpful friend, who agreed to help her purchase a unit, gave her certain advice about how to do that within a trusts structure and basically told her a few porky pies along the way. The gist of the objection to the claim, the pleading of the statement of claim and the request for particulars, which went all the way to the Court of Appeal, was the suggestion that the plaintiff was obliged to plead and I am quoting here from the judgment in the Court of Appeal "the precise words used in the relevant foreign language". It suggested that, when to be fair, this was what was pleaded was really quite plain. Ultimately, that was the conclusion that the President came to, and the other two members of the court agreed. It is most certainly in this case, not necessary to go to the exact words said in Chinese and how that translates. We know from other provisions of the UCPR that generally it is sufficient to plead the effect of words that were said, of course, the exceptions are when the actual words are

crucial. Usually, that would be a defamation case, misleading or deceptive conduct, that kind of thing. In this case, the President went on to say this, which is really helpful in terms of getting a handle on this surprise issue. His honor, having, of course, appeared in more trials than I have had hot dinners, you could see a little bit of tongue in cheek when he says this. He says that "…the rule does not require a pleader to guarantee that the opposing party will encounter nothing unexpected at the trial. Trials are full of the unexpected. The rule requires the pleading to contain all that is reasonably and fairly necessary to ensure that the opposing party is not met at the trial by an unexpected turn in the case which that party acting in good faith and reasonably is unable to meet because of a natural failure to prepare to meet it having regard to the content of the pleading."

Now, whether this was put in the original Chinese language with strict translations and things, as opposed to the effect of the words which were pleaded, made, in His Honour's view, absolutely no difference in this case. And so, the appeal was resisted. And the judge particularly mentioned that that what surprise means in the context of the rule, which has in one form or another existed since 1873. So there we go, unlikely to change anytime soon.

So having gotten a little bit of a handle on material facts, particulars, and evidence, I will mention also one more thing that is your absolute bare minimum is establishing the jurisdiction of the court. This is one of those things that if you are lucky you might have heard it at uni, you might not. Your second luckiest position is to have been sitting down in Judge McGill's court while he gave your opponent a roasting because they got it wrong. Luckily, I was in that group. The third category is the guy getting the roasting. Okay, that didn't happen.

JURISDICTION

Startune [Pty Ltd v Ultra-tune Systems (Aust.) Pty Ltd] is simply about the fact that fine if you proceed in the Supreme Court it is a court of unlimited jurisdiction, go to town, bring your matter, go for it. However, if you are in a court of limited jurisdiction, such as the District Court, it must be evident on the face of the pleading that the court has a jurisdiction to hear it. The usual and simplest case and of course is there is a page and a half of jurisdictional basis for a District Court to become involved. The main one, of course, is the monetary jurisdiction. You need to make it quite plain that it is within the AUD 750,000 limit. Of course, if you do not know yet, you are quite entitled to say "has suffered loss and damage or seeks recovery of damages or something or other in a sum not exceeding AUD 750,000". It really is that simple. That will get you over the *Startune* hurdle which is establishing on the face of the pleading that the particular court has the jurisdiction to hear the pleading. That is probably enough about that.

RESPONSIVE PLEADINGS

[Slide 6] I have mentioned particularly that I wanted to talk about the options in the, what I am calling the responsive pleading, defence reply answer. This is where things differ slightly in the beginning and then the roads diverged quite significantly as between the two sets of rules. As I mentioned, they are on the slides. Federal Court you have to expressly admit or deny things. Simple, so far, so good. If you were pleading in New South Wales, so far, you would be on exactly the same path, no difference.

UCPR starts to sound a little bit more interesting. What the rule actually says makes it sound like it gives you four options. At the beginning, you feel like you have all these many, many roads to traverse. That is not actually the case, as we will see. It says you complete an admission, non-admission, a denial, or another matter, but literally the words that are in "another matter". I suggest right now that pleading another matter is very rare. Use it very judiciously and it is almost certain to be reserved for things like an embarrassing pleading, which just to go back to some other basics, an embarrassing pleading is one were you literally cannot respond to it. It could be something as simple as a grave grammatical or typographical error. And I don't mean the silly kind where you know perfectly well what your opponent intended to say. I mean the one where you just read it and I literally do not understand what this means. That is an "embarrassing pleading". You may well say "The defendant is unable to plead paragraph six of the statement of claim because it is embarrassing", and maybe give some more detail, that would be pleading another matter. Okay, good.

Now, if you are unsure, this is a key category of response in a responsive pleading. Federal Courts, this is contained within, as you can see there, the original 16.07 rule which deals with responses. You may, having just told you you have got to either expressly admit or deny, then here is a third option. Not helpful, but here we are, state the uncertainty…And that is my summary of the rule. The words, we will get to, the actual wording, in a second. The rule then says that the effect of just having done so saying that you are, doesn't know, and is therefore unable to admit, this is the wording that you want from the rule. Having said that, the allegation is deemed denied. This is really significant - you can tell by my serious face and the pause. That is an absolutely stark contrast to what happened under the UCPR. This is where we have sort of reached the fork in the road because UCPR says that we have already seen one of your four options is to plead a non-admission and provide a direct explanation for it. Okay, now we are starting to get to the fun stuff. Now, again, it seems like we have a number of options of how to respond to these things "Oh, wow, get a direct explanation for why I'm not admitting it." I can tell you right now that you are not at large at this point. The simplest and easiest way through here is just to follow the words of the rule. I can't emphasize this strongly enough. [Slide 7] In each case, this is an example of just following the rule, you could not be said to have done the wrong thing, by taking either of those courses.

What is important? It would be unlikely you would have something struck out for this. But I will tell you, this happens to me all the time. I constantly have, you know as counsel of course, we are called on to settle pleadings all the time, which is wonderful. I constantly have solicitors who want to add in this extra little bit. "Oh, no, I want to not admit the allegation because it's solely within the knowledge of the plaintiff." Really, who cares? It doesn't matter if it is within anybody's knowledge, all that matters to entitle you to plead a non-admission and to provide an appropriate direct explanation for that is that despite reasonable inquiries the party remains uncertain of the truth of the allegation. That is the only basis provided by the rules. I just cannot emphasise strongly enough to just keep your pleading simple, throwing in that other stuff really just takes it nowhere. I should say at that point that generally I try to think of a pleading, it is kind of like a piece of fabric. When you first draft it, it is going to be this open weave kind of Hessian that is floating about in the wind, and by the time you have refined it, applied all your best rules and strategy you will have a beautiful tightly woven piece of silk that nothing will get through. That is always what you are aiming for. In aid of that, just my two main overall suggestions are do not include things that are unnecessary or achieve nothing, things like I have just mentioned are one of them. Secondly, always to question why you are putting in things, why do I need to say this? What is the purpose here? Am I just throwing that in because it is the firm precedent and we always say that? Not always the best reason for inclusion in your pleading and can lead to errors later on.

[Slide 7] Now, much more interestingly than just not knowing is…Sorry, I should actually say, forgive me, before I move on to the denial. Having just said that the key ticket is that despite reasonable inquiries you are unable to admit the allegation, if you are not sure if it is true, the reasonableness of the inquiries, the rule tells us it is to do with the complexity of the matter and the time that it has been on foot. We have all been there, you know, the client sat on the statement of claim for a couple of weeks, maybe they sent it to the insurer, they sat on it for another week. And now we have exactly four days to put on a defence. That may well be peppered with non-admissions which are quite reasonable at that stage of the game. There is, of course, an ongoing obligation to conduct those inquiries such that by the time you approach a trial you really should have hopefully very few non-admissions left. So do bear that in mind. That is what the reasonableness requirement pertains to.

DENYING ALLEGATION OF FACT

However, denying an allegation of fact. Federal Court, simple enough, we have already seen it, just expressly deny it. That is fine. "Defendant denies the allegations in paragraph four, the statement of claim." Move on. Subject to what? Avoiding surprise. Okay, so we have talked about that.

UCPR, this is where it gets really interesting, you must plead the denial and provide a direct explanation for it. Now, we will do a bit of case law because that is where the fun is. Particularly before we do this, so that we realise it is not just talking about case law, for the fun of talking about case law, is the consequence of not getting this right is grave. The short answer is that if a direct explanation for *either* an admission or a denial is either not provided, or is not a compliant direct explanation, so sort of observing the guidelines that we will be giving you tonight. The original fact is deemed admitted, this is an unbelievably powerful tool in the litigation, it is quite frightening. Frankly, it is very frightening. This is a point where I really could talk for some time, but we are going to save that as a strategic aspect and we would love to see you for a session two on deemed admission, how to deal with it and how to avoid it, how to sort of force your opponent into a corner if you can, always good, if you can get the litigation on a short leash. We would love to talk about that in some more detail. So let's put a bookmark there. For now, please do take my word for it that a failure to get the direct explanation right is very serious. So let's see if we can get it right.

DIRECT EXPLANATION - *CAPE YORK AIRLINES PTY LTD V QBE INSURANCE (AUSTRALIA) LTD*

The other thing to particularly mentioned here, although it seems like a small thing, is that the direct explanation according to the rule must accompany the denial of non-admission. It means what it says. There is case law on this, it has got to be patently clear that the two belong together, not somewhere else in the document or for the reasons, you know, above. Not helpful. What is the direct explanation? Now let's talk about this. If you read no other case, I can only commend to you this beautiful decision of Justice Daubney in *Cape York Airlines [Pty Ltd v QBE Insurance (Australia) Ltd]*, it is mentioned on screen [Slide 8]. What this does particularly is wrap up in one beautifully, mercifully short, judgment is the aspect of what it means to have this direct explanation. Why are we doing it? What does it look like? And what is its status? is the way the questions posed in the judgment. Let's address those in turn.

Why are we doing this? I will give you the short answer because His Honour tells us in his judgment. Consistently with rule five, of course, and I have said this before, but again, only in state courts. "The requirement for the direct explanation," His Honour says, "compels the responding party to expose at an early stage its rationale for joinder of issue." You have got to say early and clearly what it is that your trouble is. His Honour then says "So it necessarily compels the responding party to formulate it." In other words, the party must ask itself and be able to answer the question, why am I denying this fact?

[Slide 9] How do we do this? It seems like a good idea, doesn't it? Again, keep reading *Cape York Airlines* it is all there. His Honour said there are basically, in most cases, the direct explanation for a denial will be one of these three things. And I have just given you a couple of examples there. Particularly go straightforward. As His Honour says, there was a completely

different factual matrix for some reason. And it could be, it didn't happen, didn't happen at all. However, it is, depending on your action.

The second point is your different factual matrix, which is your answer kind of like that, but it was a bit different. I have given an example there. Something that might occur, say in a misleading or deceptive conduct case.

The third, His Honour suggested is, if the allegation is inconsistent with other matters, and I have just given an example that you might see, say, in a personal injury action. If you have got a plaintiff absolutely determined to insist that he is quite incapable of working ever again. Well, that would be a very reasonable basis to say I deny that fact answering the question that His Honour says, this really forces the defendant to pose, "Well, I'll tell you why I think that's nonsense. And it's because I keep seeing this guy at touch footy." That is kind of inconsistent with an absolute inability to work. So just an example.

Something that is worth mentioning again, and I know I am giving you a lot of flags here, but in order to not be bogged down in this whole thing tonight, you will see particularly looking at the first one that I have used those keywords "the denial" and we have got our direct explanation, which is accompanying it. Wording can differ slightly here, but not very much. I always tend to use the wording "believes that to be untrue because…" Now the reason we do that is a couple of things. Number one, you are making it patently clear that this is your direct explanation to satisfy rule 166, hello, red flag, because that is what we need. I should also add in here that His Honour makes it quite clear, just in case there is any doubt from the examples I have given, His Honour says categorically that saying "I deny the allegations in paragraph four because they are untrue" is not a compliant direct explanation. Why? His Honour says that once you look at the scheme of the rules that we have already now had a brief chance to discuss, admissions, non-admissions and denials, the only reason to plead a denial is because you believe it to be untrue. Simply saying that, His Honour says, tells your opponent nothing. What you need to do is say why, and these are the three grounds usually on which you might rely.

So tempting to go on but the gist of it too, perhaps just by way of comparison point at this, comparing the use of the words "believes that to be untrue", which I have said is the red flag. Hi, Hi, this is my direct explanation, say compare that with "and says that", you might then say some other things - key difference. On the one hand up here you have a thing which is clearly your direct explanation. Remember, I said that *Cape York Airlines* also discusses what is the status? What is the status of the thing that is in the explanation? The point of the whole decision is to say that it is no more than satisfying the statutory requirement to give the explanation it does. Crucially, the things that we have said there do not of themselves

become facts in issue. This is really key. Compared with "defendant denies", "doesn't admit", whatever you like, "and says that", now we are in the positive case territory. That is where a defendant or obviously in a reply is mounting a positive case. That opens up all sorts of things, obligations to particularise, disclosure, burdens of proof, admissibility of evidence based on relevance, all changes, whether something is a direct explanation or positive case. Let's leave it at that for now. I would really love you to percolate over that for the next weeks or months, hopefully, with an opportunity to try out your skills. And when you kind of come back, we are going to talk about how you can really have some fun with that.

SPECIFIC MATTERS ONE MUST PLEAD

[Slide 10] Otherwise, specific matters, things that the rules expressly say that you must plead. UCPR first, this time. There are a number there. There is no point reading them all out. They go for about a page and a bit. Again, I can only emphasise you do have a read of the rules because you need to know what you need to know and no exceptions. I have mentioned particularly things that may be generally relevant to claims or defences. Most of those I trust speak for themselves.

A really key item that I think is really worth talking about because, in my experience, it is most often missed is the obligation under 1(k) and 1(m) to plead knowledge or a state of mind. I mentioned in quotes there particularly what the rule is talking about.

Now, the reason I think this can be troublesome is not only in itself, but combined with the last dot point there which is the requirement of 150(2) to say that if you are relying on inference for any of those things, you have to say so, and you have to say the fact on which you rely to draw the inference of one of the matters at the top. Now, this is between you and I, a little bit interesting. How often do people see pleadings? I see them every day, just throwaway lines "the defendant knew or ought to have known". Really? That is at its heart one of those states of mind. Of course, once you get into things like malice, serious misconduct, fraud, there is a whole layer of additional professional obligations. We won't go there tonight.

I particularly wanted to mention, if you read *Cape York Airlines*, and you just want more, I can only commend to you an amazing decision from earlier this year [2021] in the matter of *Quinlan v ERM Power* which was a decision of Justice Bowskill in the Queensland Supreme Court. Damian Clothier QC of these chambers was one of the counsel for one of the successful parties. It is a fantastic decision about a number of pleading aspects. This obligation to plead and particularise a knowledge case or a state of mind case is right at the heart of the judgment. It is really great to read, particularly if you are in any doubt or if you are uncertain about taking my word for how important it is to get this right.

Her Honor particularly stated things like the combined effect of these rules require the explicit linking of facts to inferences. It requires you, Her Honour said, to spell it out. She said that it is not appropriate to plead a whole lot of facts and leave it to the other party to guess which ones are relied on to create the inference. Or, Her Honour went on to say, it is equally appropriate to, because this was the submission of the plaintiff, to leave it to the court to make a correct decision – very bold admission. As Her Honour explained, of course, the drawing of an inference is a matter of fact, not a matter of law. And we already know that you have to plead your material facts. So that is why Her Honour said it is not a matter for you to just throw down on your pleading a whole lot of facts and expect the court to reach the correct decision. It is a wonderful decision to have a look at once you are getting into more complex pleadings and how to mount a challenge to one. So if you come to session two, expect to hear a bit more about that decision.

[Slide 11] A tip, it is always nice to think about how to do these things. This is a case where it speaks for itself really. It is just an example of what it is meant to be simple. The things that are suggested by the UCPR were meant to simplify the pleading process and the process of making cases known to your opponent. That is a way of doing it. Whereas we have all seen those crazy paragraphs "Yeah, the defendant knew". Usually, in my experience, it will be rolled up in something else. "Oh, the plaintiff didn't know what the document meant because the defendant well knew she spoke little or no English." There are about six allegations there all rolled up together. And so not only teasing those apart to do one thing at a time, which if you go back a little bit in chapter six in UCPR tell you to try as much as you can to put one concept per paragraph, novel I know, to not offend against that but also to tease these things out and give the details when you are bringing an inference case.

As I mentioned, the Federal Court is not dissimilar. There are a couple of rules there, slightly different wording, but I don't think you could go too wrong by taking a very similar approach. The descriptions are a little bit different, "a condition of mind" as opposed to "a state of mind". Nothing in it for the difference.

I feel I have done my best to give a broad introduction to the difference between material facts, particulars and evidence. Now we are asked to give particulars of facts. And you can start to feel that you are getting a headache, but don't. It is really just talking back to what is the purpose of our particulars, it is letting the other party know the case that we are making. Avoid surprises at the trial and allow them to plead so each and every time, that is what we are looking for.

[Slide 12] Now, what I should say here, just before I wrap up and let Salwa continue, is that you should not for the things I have said about emphasising how important it is to give sufficient

particularity, do not, I cannot say this strongly enough, do not take this as a license from me to just start working vast swathes of things into your pleading under the heading of 'particulars'. In fact, you will see, if you have extreme pleasure of having me settle a pleading for you, my pleadings almost never have that, you will almost never see the heading of particulars. Generally, things are just pleaded as a material fact, as we saw here. Arguably, it would not be a noncompliant pleading to have some of these things in our heading under particulars. However, if you would like to know why I do not do that, why it is so helpful to pause to take another route, you will have to come back to session two.

Now, over to Salwa.

BEFORE & AFTER PROCEEDINGS – KEY CONSIDERATIONS

Salwa Marsh (SM): [Slide 13] In a lot of ways, Nola has very, very helpfully talked you through the very difficult surgery of putting a pleading together. I am the person who is taking the snapshot, before and after. I think in a lot of ways, this photograph, which I must say, I took a very long time to identify last night because there is just so much good stuff. It really, to me, communicates the process of litigation very, very well because you do your first draft right, and it is together, you have got your big earrings on, you are really dressed up. You have done your best but that your hair do is a little bit messy and you are still kind of finding your feet. But then by the time you are at trial, you have got your war face on, you have potentially overcooked some bits of it, let's be honest, but everything is looking a lot stronger and a lot more polished.

BEFORE PROCEEDINGS – KEY CONSIDERATIONS

[Slide 14] So, we will start with Kim in her 20s and we will talk about some of the before aspects of pleadings. These are the sorts of things that you should be thinking about when you are at that stage of a proceeding when you are really scoping it out. Your clients come to you and this terrible thing has happened. What can we do? A part of that process is sitting down and identifying what the factual scenario is, what the documents are available, who are our parties, what are our causes of action. That actually can be the really challenging part of this whole process. Really, one key step is identifying who are we going to sue? That can often be a difficult question, particularly because you are often in a position where you do not have enough knowledge, you do not know all the facts yet, you are still really trying to understand the story from your client.

Who are the parties?

The first question I think to ask is very often, firstly, really what is the cause of action, but also as a part of that, who are your parties? One of the tools that you can use to help you in

answering those questions are those that are identified on the slide, and there is a slight difference between the jurisdictions.

In the Federal Court, you actually have an opportunity to seek preliminary discovery. Now, you will know that in the Federal Court you do not get discovery as of right as you do in the State Court, you have to apply. You have to apply for preliminary discovery. You can basically apply for discovery, which is in the nature of identifying the circumstances of a prospective other side. That is a step that you would take by application before proceedings that. That is a handy little tip, and a handy tool that you can access.

In the state courts it is a bit different. In the UCPR there is not much you can do before you have commenced proceedings. You can actually interrogate, which is a really little used tool. Basically, you apply to the court to ask questions of the other side. The court will, in the right circumstances, grant you that opportunity. One of the questions you can ask are the sorts of questions which would tend to identify a prospective defendant or respondent. The difference in the state courts is that you have got to have already commenced proceedings. What you are doing in that case is you are looking for other potential respondents. In a defamation case, you might say, well, this person published this material to these people, then that material found its way in these places, and you might interrogate about the intermediary to see whether they were another instrument of publication. So the techniques are slightly different as distinct between the two courts but they are useful things to think about and to factor into that early preliminary stage where you are really thinking, what are our causes of action? Who do we sue? I must say, a part of that inquiry is also, who has pockets? These are the sorts of questions that you might be asking. These tend to go mainly to the identity your other parties but I think something that should be rolled into that inquiry.

Identifying a basis to plead

[Slide 15] Another aspect of this scoping exercise is identifying a basis to plead. Really, part of that is, you have got your client, they are terribly upset, they will come to you and they will say, "Oh, this happened", and you say, "Great, give me the documents". So very often, once you have looked at the documents, the story is a little bit different or there is a nuance that is interesting and important. As a part of this process I think it is really important to start putting together a statement from your client which are the sorts of things that they would swear to, if they are required to ultimately. Maybe you don't commence, it may be that you settle before the stage of evidence. But putting together a statement is, I think, a really important stage of scoping out a case because you really identify what it is that your client says happened. You really interrogate them in the same way you would if you are putting together an affidavit. By drafting that information at that stage, you might not square it up, then you might keep it on the backburner as something that you would use as the basis for an affidavit later, but I do

think it is important to capture the story at that time because we all know human memory is a funny thing. You know, as more information comes out, and comes to light, and you think more carefully about a series of events, any number of things can happen. I think it is really important to capture what your clients says happened. Really to understand that and to understand the facts that they say are significant to them because that can help you in shaping your course of action.

The other thing, that dovetails into all of this is that as solicitors and as barristers we all have ethical obligations in terms of pleading. We cannot just write a story, we cannot just say, this would be a terrific case so we will bung that in there. You have an obligation to have a basis for everything that you plead. Part of this process is flushing out the documents and flushing out the story so you can say, yes, this is the series of events that happened, this is our cause of action and these are the material facts to that cause of action. I think this is a really important part of the process.

There is also a question like next to pleading based on instructions. Now, sometimes you will have a client who will say, "Well, I'm telling you this is this is what happened," or "Aah, I haven't looked at the documents but I know it was this." I am always pretty reluctant to plead on the base of instructions. I am the sort of person who would tend to be more inclined to say, let's look further into the documents. If we cannot find them in the documents let's ask more people at the company, or let's ask more people who might know. And let's get some statements together so that we can say we have got a really good basis to plead because the last thing you want is to plead facts that you say go to your cause of action and to find that you cannot make them out. That does not help anyone. I find quite often you will have clients who, when you press them, the story is not inconsistent but there are material aspects of it that would change your opinion, which they might not immediately disclose because they do not know it is important, how can they? I think this is a really important part of this process.

COMMENCING PROCEEDINGS – KEY CONSIDERATIONS

I am now going to go on to commencing proceedings. These are those kind of, I am not going lie, I am not going dress it up. This is why I had this is why I had to have Kim's help. These are kind of boring rules about what documents you need to commence but they are important to know and they are broadly similar as between the two courts, but you do need to know them. I have got them on the slide [Slide 16]. I will go through them quite quickly. Hopefully something good to have a resource.

Originating application

[Slide 17] The first is that if you are starting a proceeding in the Federal Court, we must do so by an originating application. An originating application must be accompanied by another

document. Depending on the circumstances, that might be a statement of claim, or it might be an affidavit, depending on the nature of the damages. Those rules are flushed out in rule 8.05, which I won't go into a great deal of detail.

What I am interested in is rule 805 1(b) and 2(b) which talks about a practice note issued by the Chief Justice. This is, I think, an important point to raise because it is a little bit different, which is that in the General Practice Note (GPN1) and in also the Commercial and Corporations Practice Note (CNC1) which are Federal Court practice notes, what is called the concise statement method is articulated, which is a bit of a different approach to a pleading. I think the professionals are really grappling with them. Just to give you kind of a bit of a high level summary, concise statement who is a narrative document, it is five pages. It provides the important facts giving rise to the claim, the relief sought from the court, and against whom, the primary legal background, or your causes of action and also the alleged harm. Really, it is kind of your elevator pitch, it is like if you are explaining what this cause of action means, we do it in this five page document. Now, very, very often, you will start with a concise statement and you will turn up to your first case management conference and the judge will say, "Now I want you to plead it", or your opponent will say, "Now I want you to plead it out." That is because there is a very ancient and important history underpinning the pleading process, which I think is really important. I think part of it is that you have this very technical process where you incrementally narrow the issues in dispute by having to go through every fact you say underpins your cause of action, and having to respond to every single fact you say responds to that and also discloses your defence. You really do get to the stage of narrowing the issues and making very clear what are the issues in dispute? What is this? What is the focus of our evidence? Because that process is really important. Very often the court will say, "No, no, you must plead, this is far too complex, you must plead. We can't do this on a concise statement." But there have been a number of cases, and there continue to be a number of cases, run based on concise statements. I have done a number of cases run exclusively on concise statements. I must say it is not my preference because I think the level of precision required to plead I think is ultimately beneficial. I have run one case to trial and to an appeal on a concise statement. I remember having a really unedifying submission being made at the appeal as to what the case was, in reference to a particular aspect of it. My thought was that you would not do that in a pleading. If you pleaded this out, that would not be the world that we are in. Nonetheless, there is a great appetite for concise segments because they avoid the need for a lot of the pleading fights that we will talk a little bit more about, which are expensive and time consuming, and can be quite frankly, a distraction. So I can see the benefit of it.

Concise Statements

[Slide 18] There is an interesting judgment, which I will refer to, I think later on, from the Chief Justice. Those are really the resources that you should be looking to about concise statements. *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* is a case that I know Mel who is in the audience has been involved in, as was I. This was a really interesting case. The Chief Justice was there for the first case management conference, which seemed a bit unusual. I think he really wanted to express some views about the concise statement methods. If your accompanying document is a concise statement, and I must say that is a matter of choice. It is not necessary to start with a concise statement, though many parties do. I would have a look at that case. His Honour said that our concise statement was very helpful, which I very pleased with, but also gave some guidance as to the sorts of cases that might usefully proceed by way of concise statement. He says that those are things like unconscionable conduct, the cases where there is circumstantial kind of vibey things are relevant which have sort of less about kind of precise facts and are more, I kind of call it more kind of about the "vibe". That is a really helpful judgment if you are proceeding by way of concise statement, or if you want to commence by concise statement.

Another benefit of commencing by way of concise statement is you might have a really good case. You might say, well, we don't have to go to the expensive pleading, we will put it in a concise statement that will ventilate the issues and then it might be that we can mediate. So there are strategic benefits to this rather unusual model that I think we are still sort of getting used to.

Statement of Claim & Application

[Slide 20] Now back to my super glam rules with commencement. In the UCPR there are a number of different originating processes. The key processes for present purposes are a claim and application. Obviously a claim, statement of claim, same document. Application is obviously a much abridged document. You ordinarily do not commence by way of application, there are only a few circumstances where you would. [Slide 21] This dovetails into rule 9 which provides the circumstances where claims are compulsory, which is really just kind of the general position, unless you have a special circumstance where the rules permit or require commencement by application.

[Slide 22] Similarly, there are technical rules as to where an application might be appropriate. The usual processes is a claim. Applications might be permitted in certain circumstances such as where there is not enough time to prepare concise statements of claims and you need urgent relief. Or, you have got a matter which is really just sort of a question of law.

So, commencing by application is unusual but it is still something that you need to be aware of. So done with early 20s Kim. This is when she is friends with Paris Hilton, she has got this job

where, what is she doing at that stage? Her whole job is to renovate celebrity cupboards. That is her schtick, that is how she becomes known and famous.

AFTER PLEADINGS

[Slide 23] Now we are at superstar, über rich, über famous Kim because we are talking about after we pleaded. There are a few kinds of things that are useful to think about.

Other Constitutive Documents

I have flagged other constitutive documents here in the manner of concise statements. In that case that I referred to before, the Chief Justice also refers to a few other different types of constitutive documents which are basically agreed facts, or facts which are agreed but the relevance of which might be in dispute, facts which are contested and the nature of the contest of facts that are in dispute and then a document that might identify competing legal analysis of those facts. He kind of foreshadows a number of different types of document that you might constitute a proceeding with. He actually asked us to do that in that case. He said, I want this series of different types of documents, which was quite an adventure. More and more people are using statements of agreed facts, which are in many ways somewhat like the combination of a statement of claim and defence but in a single document. You list all the stuff that you agree and in doing so you identify this stuff you do not agree. Very often, that is a very helpful document because the facts really are not an issue, everyone agrees the facts, it is about the construction of the contract, or it is about the legal interpretation of the termination. So very often, that is a very useful document and can really assist the court. A lot of the tribunals now request statements of facts, issues, and contentions or an agreed list of issues in dispute. There are a number of other constitutive documents which can, in a sense, do some of the work that a pleading might do and can assist the court in proceeding.

Now, I am rapidly running out of time, but I am going to just go through two more points.

Rules of Strike Out

[Slide 24] I have set up the rules of strike out in the Federal Court and the UCPR. You can strike out parts of pleadings in both jurisdictions for largely the same reasons. But I think it is useful to bear in mind some of the comments that Nola made earlier about not putting in stuff that is unnecessary and does nothing. Those things are primed for strike out, as are things that are embarrassing, as are things that do not really support your cause of action, as are things that are just pejorative or abusive. These are the sorts of things where you think, oh, that's not really fair, that doesn't go to anything, that's not a relevant fact in issue. Those are the sorts of things that you might apply to strike out. You also might apply to strike out quite substantial parts of a statement of claim. You might do that if you say "Well, you have pleaded this cause of action. But in order to make that out, you need several material facts that you don't have here." So

you might seek to strike out a cause of action. The thing with strike out is you need to weigh up the strategic benefit of doing so because sometimes if you apply to strike out then the court will permit an opportunity to replead and so your opponent might fix the problem. So that is part of the strategic analysis when you are considering whether or not to strike out.

Amendment

[Slide 25] The last point that I want to raise really is just about amendment. I will give you that in a fairly abridged way [Slide 26] which is that in both jurisdictions you need leave to amend your originating application. Your core constituent document requires leave to amend but there is some more latitude to amend your statement of claim.

In the Federal Court you may amend a pleading once, at any time, before pleadings close without the leave of the court, so you get one get one crack. But again, your opponent might apply for a number of reasons for that amendment to be disallowed.

In the UCPR, your originating process requires leave in order to amend and you may then amend your statement of claim at any time before a request for trial date has been filed so you have much more latitude to amend in the state courts. But again, there is sort of a similar provision for your opponent to apply for an amendment to be disallowed. These sorts of things really are just things to bear in mind.

I am conscious that no one likes to amend, it feels a bit murky to amend. I am also conscious that, as you remember from early 20s Kim, it is early days, you often do not know all of the information after discovering more information comes out. After working with your clients you might develop nuances to your evidence. So as time progresses it is fairly standard to have to make tweaks to those sorts of documents. This provides a guideline as to how you might do that.

Now, I will hand back over to Nola to wrap us up. I am conscious that we do not have a lot of time. But if questions would be useful, we can either do them now or if you want to ask us questions afterwards.

TAKEAWAYS

NP: [Slide 30] Of course, I would be remiss if I did not make at least a shameless reference to why you should brief some of these things to your friendly local counsel. As Salwa has mentioned, it is very often, aside from the two best reasons, which are usually complexity and some need for strategic decision, which of course can be a little bit of a trick because again it can be a situation where a solicitor perhaps, particularly early career lawyers, can have a difficulty again, knowing what you don't know. Good example, however, arises from that

decision I mentioned in the *Chan* matter in the Court of Appeal last month, where in fact the matter went before Justice Flanagan at first instance and then went on to the Court of Appeal. At both of those stages, they were running the argument that we need these particulars of the exact words spoken in the original language. Why? To avoid surprises at the trial, allow us to know the case and allow us to plead. Well, the surest way to defeat that argument was in fact what had occurred in that an earlier iteration of the defence had provided a wonderfully comprehensive response to the allegations. Yes, things to that effect were said, things that effect were not said, that was not the overall effect. So in fact, it was quite plain that they really did know the case, they were quite capable of responding to it. And that factored of course into judicial discretion whether that there is a real dispute here. That, aside as I say from the sheer complexity, strategic decisions are often one of the best reasons to involve counsel in your pleading stage.

Otherwise, and with a promise to be brief, our takeaway points that we really hope will stick with you over the coming weeks are:

- Familiarise yourself with those two aspects of the rules to which we have referred, chapter six particularly in UCPR, and division 16.1 in the Federal Court Rules;
- What I have been describing tonight as the bare minimum. Keeping in mind your material facts to submission, to make out your cause of action, or your defense. I have mentioned they are also particularly relief, legislative provisions, and our very favorite, anything that is not pleaded, would take your opponent by surprise;
- The things that I described as going further as your responsive pleadings, and particularly bearing in mind the need for your direct explanation to accompany a non-admission or denial. In those specific matters that I have mentioned, particularly rule 150 of the UCPR and its parallel in the Federal Court, and particularly also if new, shiny Kim is your thing, and really binary choices are not the favour of the age but if shiny Kim is your thing, looking to the things that Salwa has particularly mentioned, to formulate the basis in the context for your initial pleading, how to fix it, amend and updated if you feel the need to, and how to attack your opponent's pleading if you feel that it is non-compliant.

We really hope that is of use. We are very, very happy to take either questions, or comments, or indeed for that matter, general winges about unpleasant experiences you may have had with pleadings, because there is nothing better than and we have all had a few. Any thoughts?

I could dump perhaps, if you are thinking about it, to add in just a short throw away about counterclaims is to generally follow the guidance that we have given you here. That really means it bearing in mind that a counterclaim generally acts as a separate proceeding. So rule

number one, if you go away from tonight with nothing else about a counterclaim, do not ever commence a counterclaim with a paragraph that says "The defendant repeats and relies on paragraphs 1-85 above." Unhelpful, complies with nothing, makes your opponent's life a misery and is bound to be struck out, so just don't. If you have a claim to claim, plead it properly. Treat it as though you were a plaintiff, observe the guidance that we have hopefully passed on tonight and take it from there.

We also have not talked about replies. I would also just add in there because that is often a question that we get, do I need to follow or apply? Seems to me often the best reason to file a reply is because there is not some kind of staged costing arrangement with their client and filing a reply gets them over the next hurdle. Not in my opinion the best reason for filing a reply, because the number one rule is that the facts in issue are those which have been raised on the statement of claim and even not admitted or denied in the defense. Simplest example, and this comes from the case law, is if the statement of claim says it is black and the defense says "no, I deny that because it's white", do not file a reply that says, "I deny that because it's white", or "for the reasons in the statement of claim". There is no need to say the same thing again. If you have made a case, move on. Unless that triggers any other thoughts or experiences or anything from our online audience?

Audience: I just have one question. Something I often did as a junior lawyer was joining an issue on another matter with the statement of claim. I recently got raked over the coals for it because that had been a habit for the last four years. Apparently it is from the 80s and it is something pointless.

NP: And we know now why don't we because what does it achieve? Is it a strict admission, non-admission, or denial or another matter? Not really. Does it provide a direct explanation? No. We see it a lot, that last paragraph, and it is littered with olde English, "Same as aforementioned, traverses each and every allegation…" It takes you literally nowhere does it. At best, if you fail to mention something already, and I have only touched on this super briefly, there is every chance that it is deemed admitted because you have not denied or not admitted it or accompanied it by a direct explanation. It just doesn't get you anywhere. That is a classic of the thing that I mentioned. Just don't do it because it is in the firm precedent.

SM: I should say as well, there is an aspect of subjectivity in these and a lot of people have really strong views. As a relatively junior practitioner myself I have a 'Burn Book' with a list of interests and passions spent of the people I work with, like they prefer yellow highlighter, Equity Text B is a big one. I think some people use that language. So, if you are working with people who like to speak that language, some people use it to indicate that, particularly in a reply, we still disagree. Some people just have really different views about it. One of the great

challenges of being a practitioner who works with a lot of different people, particularly in the early stages, you just learn people's different styles and I reckon you will still continue to see that for many years.

NP: You took the words out of my mouth. No doubt I will have caused at least one of you to have a run in with your supervising partner next week. So yes, apologies for that. All you can do is think about it. To be clear, in your own mind, you may be able to manage an argument as to why it is that you have either deviated from usual course or added something extra or taken a certain approach. Just keep thinking through it. There is just no substitute for thinking each and every time. What must I plead? Why am I saying this? What is the objective? Am I achieving it?

Audience: To what extent can strike out assist with superfluous pleadings? I'm talking copy-paste 50 pages.

SM: That sounds like a perfect situation where you might apply for strike out. We did not really spend a lot of time on it, it is quite a nuanced thing and an interesting topic. That is a hard question to answer in the abstract but if you have material that is truly unnecessary it is very obviously right to strike out. I think there are a number of different headings, they overlap…you rarely find yourself in a position where you say "it's just scandalous". Usually, you will tick a few boxes and if you have got a lot of stuff that is truly unnecessary then that is a perfect example of when you would apply to strikeout. It is a hard question to answer in the abstract. I don't know the person who posed the question, but if they want to chat more about it I can flick them the provisions. There is some very interesting case law.

NP: I would also say it is often about striking the right note with bringing an application. It is all very fine and dandy to sit in our respective offices or chambers and think "absolutely unnecessary, needs to be struck out". Sadly, we are not gifted with magic wands, we are gifted with court rules and judges. You have got to go along and convince somebody to do that. The UCPR rule five, and everything about it, is all geared at proceedings expeditiously. Courts notoriously no longer, if they ever did, no longer love pleading disputes because too often they are a nonsense of practitioners being under the category of what I have described is a bit too clever. They do not love that so you want to be sure you have really got a reason that is going to interest the court. Usually, your best ones are from that list that Salwa has mentioned and has included in the materials, that it is going to prejudice or delay the fair trial. That is almost always the number one thing in which a court and a busy judge is going to be interested. Because if even if it is not a ticketed system, per se, the Federal Court or one of the supervisor's case lists, the judge will have a great deal of empathy looking at a pleading that is

just a mess, a prolix mess…"Oh good god if I had to run this trial"...Maybe it is worth thinking about a strike out. Striking that right out, again, strategic note in the litigation is the key.

SM: Thank you for coming. You are welcome to stay for a drink and ask us anything else.

NP: You are welcome to ask those ones that might pertain to asking for a friend on a confidential matter. We are always open for a little bit of a quiet chat about that. Thank you again for joining us and hoping very much that we have an opportunity to see you for a session two. Thanks.