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Introduction to Pleadings

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Introduction

- ▶ Welcome
- ▶ Objectives & Topics
 - ▶ Bare minimum requirements of the UCPR and FCR
 - ▶ Material facts, particulars and evidence
 - ▶ UCPR: direct explanation
 - ▶ The before and after steps to support a good pleading, or to improve or remove a bad one

The framework: Qld and Cth

- ▶ UCPR: Chapter 6
- ▶ FCR: Division 16.1
- ▶ Common law

What you must plead (overview)

- ▶ **Bare minimum:**

- ▶ r.149 UCPR (rr. 16.02 and 16.03 FCR) requirements

- ▶ Sufficient particulars: r.157 UCPR (r.16.41 FCR)

- ▶ **Going further:** the options for response under the UCPR or FCR, and the direct explanation to satisfy r.166 UCPR

- ▶ **Specific matters:** r.150 UCPR requirements (some similarity with r.16.08, 16.42 and 16.43 FCR)

The bare minimum (r.149 UCPR / rr.16.02 & 16.03 FCR)

- ▶ Material facts, but not evidence
- ▶ Anything that if not stated may take the opposing party by surprise
- ▶ Relief sought (see also : rr.150 and 155 UCPR, + r.16.44 FCR)
- ▶ Any specific legislative provision relied on to support a claim or defence
- ▶ Sufficient particulars to make clear the case, avoid surprise and allow the other party to plead (r.157 UCPR / r.16.41 FCR)
- + Jurisdiction (*Startune Pty Ltd v. Ultra-tune Systems (Aust.) Pty Ltd*)

Going further: responses + direct explanation

1. The **options** for a responsive pleading:

- ▶ FCR: Must expressly admit or deny each allegation of fact (r.16.07)
- ▶ UCPR: May plead an admission, non-admission, denial or “*another matter*” (r.165(1))

2. If **uncertain** as to truth and cannot admit:

- ▶ FCR: state the uncertainty ▶ the allegation is deemed denied (r.16.07(3)&(4));
- ▶ UCPR: plead a non-admission + provide a direct explanation (r.166(3) + consequences (r.165(2))).



- ▶ FCR (see r.16.07(3)):

The defendant does not know and therefore cannot admit the allegation in paragraph 5 of the statement of claim.

- ▶ UCPR (see r.166(3)):

The defendant does not admit the allegation in paragraph 5 of the statement of claim because despite reasonable enquiries it remains uncertain whether the allegation is true.

3. Denying an allegation of fact:

- ▶ FCR: Must expressly admit or deny each allegation of fact (r.16.07(1) and (2))
- ▶ UCPR: Plead the denial and provide a direct explanation (r.166(4) + consequences of a failure to do so (r.166(5)))

- ▶ The **why** and the **how** (and the bonus points for **strategy**):

Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd [2008] QSC 302

▶ The three usual reasons for a denial (per *Daubney J* in *Cape York Airlines*):



▶ **Straightforward**

*The defendant denies the allegations in paragraph 6 of the statement of claim and believes them to be untrue **because no such conversation took place.***

▶ **A different factual matrix**

... because the statements made by the defendant to the plaintiff at the open house were not as alleged, but rather were to the effect that ...

▶ **The allegation is inconsistent with other matters**

... because the plaintiff played touch football every Tuesday night over the period ... to ... without any apparent physical restriction of the sort now alleged.

Specific matters: UCPR

- ▶ Rule 150(1): matters which must be specifically pleaded:
 - ▶ Claim: breach of contract or trust, fraud, misrepresentation, negligence, etc
 - ▶ Defence: limitation, duress, estoppel, undue influence, voluntary assumption of risk, waiver, etc
 - ▶ **Note:** pleading a state of mind (r.150(1)(k) and (m):
“ ... *motive, intention or other condition of mind, including knowledge or notice*” + “*malice or ill will*”
- ▶ Rule 150(2): any fact from which any of the matters at 150(1) is alleged to be an inference.

10. *In January 2018, the plaintiff spoke and understood little English.*
11. *The defendant was aware of the matters at 10 above, as may be inferred from the following:*
 - a. *At the first meeting, the plaintiff was accompanied by her daughter;*
 - b. *At the commencement of that meeting, the plaintiff's daughter said to the defendant words to the effect that she was attending to assist her mother, who spoke and understood very little English; and*
 - c. *During the meeting, the plaintiff provided the vast majority of her communications in Greek to her daughter, who then spoke in English to the defendant.*



Specific matters: FCR

- ▶ Rules 16.42 and 16.43: a party who pleads:
 - ▶ Fraud, misrepresentation, unconscionable conduct, breach of trust, wilful default or undue influence; or
 - ▶ A “*condition of mind*” or “*that another party ought to have known something*”,

must plead:

- ▶ “*particulars of the facts on which the party relies ...*”
- ▶ “*particulars of the facts and circumstances from which the other party ought to have acquired the knowledge ...*”.



Before/after

Before – identifying parties

- ▶ FCR Division 7.3—Preliminary discovery
 - ▶ 7.22 Order for discovery to ascertain description of respondent
 - ▶ 7.23 Discovery from prospective respondent
- ▶ UCPR r 229 Leave to interrogate to help decide whether a person is an appropriate party

Before – basis to plead

- ▶ Documents
- ▶ Statements
- ▶ Instructions?
- ▶ Remember requirement to certify and ethical obligations

Before – commencement - FCR

▶ 8.01 Starting proceeding—application

(1) A person who wants to start a proceeding in the Court's original jurisdiction must file an originating application, in accordance with Form 15.

Before – commencement - FCR

▶ 8.05 Accompanying document for originating application

(1) An originating application seeking relief that includes damages must be accompanied by:

(a) unless paragraph (b) or (c) applies—a statement of claim; or

(b) if a practice note issued by the Chief Justice requires the originating application to be accompanied by an alternative accompanying document—the alternative accompanying document; or

(c) if a practice note issued by the Chief Justice permits the originating application to be accompanied by an alternative accompanying document—the alternative accompanying document or a statement of claim.

Before – commencement - FCR

▶ 8.05 Accompanying document for originating application

(2) An originating application seeking relief that does not include damages must be accompanied by:

(a) unless paragraph (b) or (c) applies—a statement of claim or an affidavit; or

(b) if a practice note issued by the Chief Justice requires the originating application to be accompanied by an alternative accompanying document—the alternative accompanying document; or

(c) if a practice note issued by the Chief Justice permits the originating application to be accompanied by an alternative accompanying document—the alternative accompanying document, a statement of claim or an affidavit.

...

(4) An affidavit mentioned in subrule (2) must state the material facts on which the applicant relies that are necessary to give the respondent fair notice of the case to be made against the respondent at trial.

Before – commencement - FCR

- ▶ Concise Statement method
- ▶ Central Practice Note: National Court Framework and Case Management (CPN-1)
- ▶ *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284 (Allsop CJ);

Before – commencement - UCPR

▶ 8 Starting proceedings

(1) A proceeding starts when the originating process is issued by the court.

(2) These rules provide for the following types of originating process—

- claim
- application
- notice of appeal
- notice of appeal subject to leave.

Before – commencement - UCPR

▶ 9 Claim compulsory

A proceeding must be started by claim unless these rules require or permit the proceeding to be started by application.

▶ 10 Application compulsory

A proceeding must be started by application if an Act or these rules require or permit a person to apply to a court for an order or another kind of relief and—

(a) the Act or rules do not state the type of originating process to be used; or

(b) a type of originating process (other than a claim or application) is required or permitted under a law.

Before – commencement - UCPR

▶ 11 Application permitted

A proceeding may be started by application if—

- (a) the only or main issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely; or
- (b) there is no opposing party to the proceeding or it is not intended to serve any person with the originating process; or
- (c) there is insufficient time to prepare a claim because of the urgent nature of the relief sought.

After – other constitutive documents

- ▶ *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284 (Allsop CJ)
- ▶ 7 ...*(a) the fundamentally agreed narrative of relevant facts, even if their legal significance is to be debated; (b) a body of agreed facts the relevance of which may be debated; (c) such facts as are contested and the nature of that contest; and (d) the competing legal analysis of all the above.*
- ▶ Statements of agreed facts (s 191 CEA)
- ▶ Statements of facts, issues and contentions
- ▶ Agreed list of issues in dispute

After – strike out (FCR, 16.21)

16.21 Application to strike out pleadings

(1) A party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading:

- (a) contains scandalous material; or
- (b) contains frivolous or vexatious material; or
- (c) is evasive or ambiguous; or
- (d) is likely to cause prejudice, embarrassment or delay in the proceeding; or
- (e) fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading; or
- (f) is otherwise an abuse of the process of the Court.

After – strike out (UCPR, r 171)

171 Striking out pleadings

(1) This rule applies if a pleading or part of a pleading—

(a) discloses no reasonable cause of action or defence; or

(b) has a tendency to prejudice or delay the fair trial of the proceeding; or

(c) is unnecessary or scandalous; or

(d) is frivolous or vexatious; or

(e) is otherwise an abuse of the process of the court.

(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.

(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading.

After – amendment (FCR)

8.21 Amendment generally

(1) An applicant may apply to the Court for leave to amend an originating application for any reason, including...

16.51 Amendment without needing the leave of the Court

(1) A party may amend a pleading once, at any time before the pleadings close, without the leave of the Court.

(2) However, a party may not amend a pleading if the pleading has previously been amended in accordance with the leave of the Court.

(3) A party may further amend a pleading at any time before the pleadings close if each other party consents to the amendment.

(4) An amendment may be made to plead a fact or matter that has occurred or arisen since the proceeding started.

After – amendment (FCR)

16.52 Disallowance of amendment of pleading

- (1) If a party amends a pleading under rule 16.51(1), another party may apply to the Court for an order disallowing the amendment.*
- (2) If a party purports to amend a pleading under rule 16.51(3) without obtaining the consent of another party, any other party may apply to the Court for an order disallowing the amendment.*
- (3) A party applying for an order under subrule (1) or (2) must apply by interlocutory application within 14 days after the date on which the amended pleading was served on the party.*

After – amendment (UCPR)

377 Amendment of originating process

(1) An originating process may not be amended except—

(a) if the amendment is a technical matter—with the leave of the registrar or the court; or

(b) if the originating process has not been served and all sealed copies of the originating process, and other documents filed with the originating process, are returned to the court that issued the originating process—with the leave of the registrar or the court; or

(c) otherwise—with the leave of the court.

(2) Subrule (1) does not apply to a pleading or particular included in an originating process.

After – amendment (UCPR)

378 Amendment before request for trial date

Before the filing of the request for trial date, a party may, as often as necessary, make an amendment for which leave from the court is not required under these rules.

379 Disallowance of amendment

(1) If a party makes an amendment without leave before the filing of the request for trial date, another party may, within 8 days after service on the party of the amendment, apply to the court to disallow all or part of the amendment.

(2) On the application, the court may make an order it considers appropriate.

Summary + takeaway

- ▶ **Refer to the rules:** Chapter 6 and Div 16.1
- ▶ The **bare minimum:** material facts, relief sought, legislative provisions, sufficient particulars and avoiding surprise
- ▶ Going further: **responses** and **the direct explanation** – avoiding a deemed admission, and garnering the strategic advantage
- ▶ **Specific matters:** especially, states of mind including knowledge
- ▶ Supporting the pleading with “*before and after*” steps



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