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# Drafting Effective Pleadings

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**LegalWise Seminars - The Civil Litigator's Toolkit: Pleadings, Affidavits, Injunctions & Experts**

**Friday, 21 August 2020 at 9.00am to 1.10pm AEST**

**Via ZOOM**

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## A. Introduction

1. A bit about me.

2. My presentation is about pleadings and matters connected to pleadings, such as having a Case Theory, organising and marshalling content, particular types of pleadings, amendment and strike out, drafting effective pleadings and some "dos" and "don'ts" on pleading.

3. A lot of you will already have a good grasp of pleadings. This seminar is meant to revisit some of the crucial issues to consider when pleading a case and will serve as revision. For those of you who are new to the profession, I encourage you to take notes and seek feedback on this Seminar. I am available to take questions after the presentation.

4. My topic is broad and complex. Given the breadth of this first session, my presentation will be necessarily restricted to the salient elements of pleading. Throughout the presentation I will be referring to the Queensland version of the UCPR and to the Federal Court Rules.

5. If you have any questions or thoughts after the presentation, I encourage you to send me an email.

## B. The theory of the case and why we have pleadings

6. Picture this.

7. Your client has just been personally served with a Statement of Claim and rushes to your office to show you. You review the allegations in the pleadings, obtain the necessary and comprehensive instructions from your client and dive into drafting a defence. After all, 28 days is not an awfully long time to file a defence and you want to get a move on to avoid that dreaded event no defendant wants to be put through ….. an application for *default judgment.*

8. Picture also this. An oppressed shareholder rings you up, distraught, that she has no input into the affairs of a company, that the company Director is doing pretty much what he likes without consulting the other shareholders, that the Director has failed to declare a dividend over the past 5 years despite the company turning a profit and that she doesn't know what to do. Your client has tried to reason with the Director and even instructed different lawyers to send him a letter. There has been no response. You form the view there might be an oppression action. The shareholder comes to you for guidance and to prepare pleadings.

9. In both circumstances, you need to think about what has happened. There will be many unanswered questions from your initial attendance with a client.

10. You seek instructions and then you do an important thing before drafting your pleadings. You think.

11. You think about the facts, the people involved and the chronology of events. You reduce your thoughts to a play narrative with people, a *Dramatis Personae.* You write down a narrative, which will be incomplete and subject to revision , but which sufficies at the beginning to give you a general idea of what is going on.

12. A play narrative gives an understanding of what has happened. It is not a legal document, but it is valuable as it focuses our attention and guides us on what to do next. Just like any narrative, our play narrative will have a beginning, a middle and end. It will be short (no more than 2-3 pages), list the main actors, the facts and what has happened to your client.

13. When you write a play narrative, your brain will be automatically primed to look for solutions. I encourage you to write down some possible solutions at the end of the narrative or on a separate piece of paper. The best practice is to physically write out the narrative with a pen and paper, not on a computer.

14. With the play narrative written out, you can now formulate a Case Theory.

15. At its simplest, a Case Theory is the process to guide your client to the final or intended result. Case Theory guides your actions in a claim from beginning to end, focusing your mind on the underlying argument you will present to your opponents and to the Court.

16. It is my practice to consult my solicitors and ask them ‘What is our Case Theory?’. I think about their initial views and form my own. Together we combine our ideas to formulate a Case Theory for our client.

17. Having a Case Theory is extremely important. Without a case theory, your litigation will be haphazard and possibly go nowhere.

18. Case Theories make your work coherent and persuasive. Case Theories are revised and updated. This will happen the more you learn about your client’s case, based on your instructions, the evidence available and acting in line with your ethical duties as practitioners.

19. So, we now have two things – a play narrative with a list of possible solutions for our client and a Case Theory.

20. We now have to plead our case.

21. Why do we have pleadings? As many of you will know, pleadings outline your case before the Court and serve to give your opponent fair notice of your case, so they can respond and not be taken by surprise.

22. When you get to the pointy end of a case, and you are in Court ready to start your five day hearing, the case you present will be confined to your pleadings. It follows that one needs to take great care when drawing pleadings, so they are complete, cogent, and accurate. If a party argues a case in Court that is outside the pleaded case, it is quite proper for your Counsel to argue in closing that the allegations and/or evidence ought not to be considered as they were not raised in the pleadings.

23. The importance of pleadings cannot be underestimated. Pleadings outline your client’s position whether you are making a claim, defending a claim, replying to allegations, or commencing third-party proceedings against a different party.

24. Pleading is part art and part science.

25. Pleading effectively takes years to master.

26. I like to have these documents before drawing a pleading:

    - a signed client statement;
    - a chronology of the events that happened to your client; and
    - a list of the key legal and factual matters that will be critical to your claim (usually these are only a handful).

27. With all of this in hand, you are now ready to organise your content and plead.

## C. Organising content: material facts vs particulars

28. You need to have a firm grasp of the facts of each case. Part of your job is sorting the relevant facts from everything else you hear or read, informed by your knowledge of the law and your own human experience.

29. Once you have the facts, you need to sort those that are material from those that are not.

30. In other words, you need to separate the wheat from the chaff.

31. Material facts are those facts that are relevant to a pleaded cause of action. Sometimes it's not easy knowing which facts are material, and which are not. Not all facts will be relevant, and not all relevant facts will be material facts.

32. I suggest you use a method that works backwards:

    - Start from the relief - what relief is your client seeking? This will be written as orders sought and/or as part of the prayer for relief.
    - Determine the causes of action - what causes of action allow you to claim the relief sought by your client?
    - Determine the elements of each cause of action – what are they?
    - Determine the facts needed to substantiate each element - what relevant facts are needed? These are the material facts.

33. Let us take a simple example. You client instructs you to recover a sum of money from someone else:

    - If we look at the relief sought, we might say "the plaintiff seeks the sum of $X, as a debt due and owing / loan to Y / monies for services rendered / monies mistakenly transferred to Y.

    - Where does the debt / loan / sum of money come from? Was there a contract, an agreement, a promise to pay or a mistaken payment from one person to another?

    - Determine the causes of action that give rise to the entitlement to relief. Was there a breach of contract, a breach of a loan agreement, a breach of a promise that entitles your client to equitable compensation, or an action for monies had and received?

    - Now ask yourselves what facts are needed to plead the cause of action. For example, take an action for breach of contract. You will need to plead these elements:
        - The identity of the parties.
        - The existence and terms of the contract.
        - Performance.
        - Breach.

- The facts that describe these elements will be the *material facts* of the claim.

34. When you draw your pleadings remember the court rules: the UCPR for state-based claims, Federal Court Rules and the Federal Circuit Court Rules for claims in the Federal Courts.

    - Rule 149 of the QLD UCPR is titled “Statements in Pleadings”. It provides that statements in pleadings must be:
        - brief;
        - contain statements of all material facts, but not the evidence on which a party relies on;
        - state all matters so not as to take a person by surprise;
        - state the relief a party seeks; and
        - if a claim or defence under an Act is relied on, identify the provision of the Act.

    - See corresponding R16.02 titled “Contents of Pleadings” and R 16.03 titled “Pleading of Facts” in the *Federal Court Rules.*

    - These rules are fundamental to your pleading.

35. What are particulars?

36. Particulars are details that inform or provide specificity to a material fact. Particulars clarify a pleaded fact to a reader and provide enough specificity for the other party to respond to a fact. Particulars assist your opponent in identifying an alleged fact and responding to it appropriately.

37. The general rule is that you do not need to plead to particulars but drawing the line between a material fact and particulars can be difficult. Sometimes the line is blurred.

38. Keep in mind the following rules (again taken from the QLD UCPR):

    - Rule 157 headed “Particulars in Pleading” which states that a party must include in a pleading the particulars necessary to (a) define the issues for and prevent surprise at trial; (b) enable the opposite party to plead; (c) support any matter that needs to be specifically pleaded.

    - Rule 160 headed “Way to Give Particulars”, which state particulars may be given in a pleading filed in court, or if that is not convenient by correspondence. A party providing particulars must file a copy of the particulars in Court.

    - Rule 161 headed “Application for Particulars”. A party may apply for an order for further and better particulars of the opposite party’s pleading.

- See Division 16.4 --- Particulars in the *Federal Court Rules.* Rule 16.45 provides the rules for an application for particulars in the Federal Court.

- Rule 16.41 of the *Federal Court Rules* states that a party must state in a pleading, or in a document filed and served with the pleading, the necessary particulars of each claim, defence or other matter pleaded by the party.

- The notes in Rule 16.41 state:
  - Note 1 The object of particulars is to limit the generality of the pleadings by:
    (a) informing an opposing party of the nature of the case the party has to meet; and
    (b) preventing an opposing party being taken by surprise at the trial; and
    (c) enabling the opposing party to collect whatever evidence is necessary and available.
  - Note 2 The function of particulars is not to fill a gap in a pleading by providing the material facts that the pleading must contain.
  - Note 3 A party does not plead to the opposite party's particulars.
  - Note 4 Particulars should, if they are necessary, be contained in the pleading but they may be separately stated if sought by the opposite party or ordered by the Court.

39. Particulars are not the facts themselves, nor the evidence tendered at trial to substantiate the fact.

40. Particulars inform and clarify a material fact in a pleading. If you cannot understand or properly respond to a material fact, you can make a request for further and better particulars or obtain an order for particulars from the Court.

## D. Types of Pleadings: claims, defences, replies and counterclaims

41. Some of the pleadings you will encounter are claims, defences, replies and counterclaims (or cross claims in NSW).

42. The various state-based UCPRs and federal court rules provide that different pleadings have to be filed by different times. I will just add that the timeframes for filing pleadings can be varied by agreement with your opponent or by application in Court. You can write to your opponent and ask for a bit more time to draw your defence to a claim. I have never encountered an opponent who has said “no” to such a request. However, it should not be taken as a rule that every time you need to file a defence, you can simply ask for an extension of time. The UCPR provides for specific timeframes in order to expedite litigation and this needs to be kept in mind.

43. Briefly touching on the Rules:

- Matters are started by Claim, Application, Notice of Appeal, or Notice of Appeal Subject to Leave (Rule 8 UCPR QLD). In QLD under Rule 22 a Claim must be attached to a Statement of Claim.

- In the Federal Court, matters are started by Originating Application and Statement of Claim – see Division 8.1 on Originating Applications.

- The usual course is for a Defendant to file a Notice of Intention to Defend and Defence (or Defence and Counterclaim) 28 days after service of the claim – UCPR QLD Rule 137 (NSW R 14.3).

- In the Federal Court the same 28-day rule applies under Rule 16.32 of the *Federal Court Rules.*

- If there are fresh allegations raised in the Defence, the Plaintiff usually has the right to file and serve a Reply (or Reply and Answer) within 14 days – UCPR QLD 164 (NSW UCPR R14.4). See also the equivalent R16.33 of the *Federal Court Rules.*

- After the Reply (or Reply and Answer) the pleadings usually close and the parties do not have a right to file further pleadings. The exception to this is when the parties seek leave from the Court.

44. When you are preparing a Defence:

    - You can admit an allegation – the fact admitted is no longer in issue at trial.
    - Deny the allegation by providing a direct explanation for the denial; or
    - In QLD not-admit the allegation. In NSW, the equivalent mechanism is the joinder of issue.

45. The Defence achieves 2 things – to identify what issues are in dispute; and to identify anything else that might take other side by surprise. The following rules regarding pleadings in a Defence should be borne in mind:

    - Rule 166 UCPR QLD - Denials and non-admissions. (4) A party's denial or non-admission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or cannot be admitted. (5) if a party's denial or non-admission of an allegation does not comply with (4), the party is taken to have admitted the allegation.

    - Rule 16.07 FCR - Admissions, Denials and Non-Admissions. (2) Allegations not specifically denied are taken to be admitted. (3) and (4) A party may state that they do not know and cannot admit a fact; a non-admission is taken as a denial.

46. A Counterclaim is technically a separate action to the main action. So, if you are acting for a defendant and the defendant has a claim against the plaintiff, you can

either claim an offsetting claim, or if you wish to raise a separate cause of action this is drafted in the Counterclaim.

47. The rules of pleading a Counterclaim are the same as those for pleading a Statement of Claim.

    - You can file a separate Counterclaim against the plaintiff – see Part 5, Division 2 of QLD UCPR; Part 9 – Cross Claims of UCPR NSW.

    - See also Division 15.1 – Making a Cross-Claim in the *Federal Court Rules.*

    - Take care with the allegations pleaded in a Counterclaim, by determining the relief sought, the causes of action that give rise to the relief, the elements of each cause of action and finally the material facts needed to be pleaded.

48. When you a pleading a Reply, remember the following:

    - You don't always need a Reply. In fact, if you don't plead one, the allegations in the defence are taken to be not admitted (or your client joins issue with them).

    - If you plead a Reply, respond to the new allegations that you say are incorrect, because you have evidence supporting your version of the events and provide a direct explanation for this. By doing so you can lead evidence at the hearing. If you don't respond to an allegation, there is an implied non-admission and you cannot lead any evidence.

    - If you are replying and responding to a Counterclaim that response can come as an Answer.

    - See generally UCPR QLD 164 on Replies; R16.33 *Federal Court Rules.*

49. Lastly, and just to make your lives easier and that of the Judge, when you are pleading try to use parallel numbering, so you and your opponents don't get mixed up. One way of keeping the numbering the same is by doing the following. If there are 15 paragraphs in the SOC, you should respond to the 15 paragraphs in order. If you want to raise fresh allegations, do so from paragraph 16 onwards.

## E. Amendments and strike out: the when, the why and the how

50. Amendment of pleadings are allowed at any time before the request for trial date is filed. However, after the close of pleadings you usually have to ask for leave to amend. Some of the salient rules regarding amendments are the following:

    - Part 3 – Amendment of the QLD UCPR.
        - Rule 375 QLD UCPR – at any stage of a proceeding the court may allow or direct a party to amend a claim, pleading, an application, or any other document.

- Rule 378 QLD UCPR - 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.

- If you are amending a pleading outside to these two scenarios usually you will apply to the Court for leave to amend a pleading. Once leave is given, you will present your pleading to the Registry and mark the first page with the relevant rule and the date of the order allowing the amendment.

- Division 8.3 of *Federal Court Rules*
  - R 8.21 Amendment generally. An applicant may apply to the Court for amendment for any reason including (a) to correct a defect; (b) to avoid multiplicity of proceedings etc. I would draw your attention to sub (g) to add a new claim for relief arising out of the same facts. This section applies to orders to amend the originating application. While you are applying, you should also make an application to amend the statement of claim at the same time.
  - R 8.23 Procedure for Amendment. The applicant given leave to amend must make the alterations and write on the originating application the date on which the amendment was made and the date on which the order permitting amendment was made.
  - R 8.24 Time Limits for Making Amendment – within time, or within 14 days after leave is granted.

- Also consider Division 16.5 Amendment of Pleadings of *Federal Court Rules*
  - 16.51 Amendment without needing leave. A party may amend a pleading once, at any time before the pleadings close, without the leave of the court.
  - R16.52 Disallowance of Amendment.
  - R 16.53 Application for Leave to Amend – this is done by way of interlocutory application within 14 days after the amended pleading is served on the party.
  - R16.55 Consequential amendment of Defence.
  - R16.56 Consequential amendment of Reply.
  - 16.57 Implied Joinder of Issue after amendment.

51. Speaking more generally about amendment, I know some practitioners draft claims that are tenuous, thinking they can brief Counsel to amend pleadings at a later date or apply to the Court for an order to amend.

52. Please avoid this mindset. Do not use amendment as a fall-back option when you are pleading.

53. Instead:

- Prepare your pleadings as best as you can the first time around.

- Have the first draft of the pleadings settled by Counsel – it is cheaper in the long run to have pleadings settled, rather than drafting various iterations of a pleading and then briefing Counsel to amend. Sometimes Counsel will need to start the pleading afresh.

- Be aware of cost implications – generally the costs of the first set of pleadings are allowed, but not the costs of the amendments.

- Make sure your allegations are backed up by evidence. One way I do this when drawing pleadings is by sending my solicitor two copies. The first is a word copy with tracked changes and footnotes referring to the evidence for each allegation; the second is a clean copy ready to file. Make sure you have the evidence for each fact alleged in your pleading.

- Make sure you specifically plead matters that need to be pleaded under the rules. Here I draw your attention to:
  - UCPR QLD Rule 150 - Matters to be specifically pleaded. This includes breach of contract; damages; Limitations of Actions; duress; estoppel; fraud; illegality etc.
  - R16.08 of the *Federal Court Rules* - Matters that must be expressly pleaded. This includes justification or excuse; fraud; misleading or deceptive conduct; estoppel; statute of limitations; statutory presumption; want of authority; infringement of trademark; etc.

54. You should be aware that Courts are becoming more restrictive on allowing parties to amend their pleadings. This is especially true in the later stages of a case.

55. Applications for late amendment can occur. In this case you should:

- Go to court with an amended pleading already drawn and ready to file in the Registry should the Court give you with an order for amendment. Remember to exhibit your draft pleading to the affidavit supporting your Application.

- Give your opponent as much notice as possible.

- Be prepared to pay the costs wasted for the late amendment.

- You will need to show there is little prejudice on the other side. This can be difficult to argue especially if your case changes radically.

- Know the rules.
  - Rule 5 UCPR QLD - Overriding obligations requires parties to facilitate the just and expeditious resolution of the real issues at a minimum of expense; avoid undue delay, expense, and technicality; party impliedly undertakes to proceed expeditiously; court may impose sanctions.
  - Section 37M to P of *Federal Court of Australia Act*
    - Section 37 M - The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of

disputes (a) according to law; (b) as quickly, inexpensively, and efficiently as possible.

- Parties must conduct the proceedings in a way consistent with the overarching purpose in s37M.

- I also refer you to the High Court case of *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27. 239 CLR 175. In this case the High Court took a very dim view of late amendment.

56. Briefly on Strike Out Applications.

57. Strike outs are permitted under the rules and inherent jurisdiction of the Court (in the State Courts) and implied jurisdiction of the Court (in the Federal Courts).

58. Consider these rules:

    - Rule 171 of the QLD UCPR states that the Court may strike out pleadings that disclose no cause of action; have a tendency to prejudice or delay a fair trial; is unnecessary or scandalous; is frivolous or vexatious; or is an abuse of process.

    - The Court can also make a costs order on an indemnity basis.

    - The Court can summarily terminate proceedings on this basis under the jurisdiction to govern its own processes. The test is whether bringing the action or pleading the defence, the matter is frivolous, vexatious or an abuse of process of the Court.

    - R 16.21 of the *Federal Court Rules* - Application to Strike Out. A party may apply to the Court for an order to strike out where the pleadings contains scandalous material; is frivolous or vexatious; is evasive or ambiguous; is likely to cause prejudice embarrassment or delay; fails to disclose a reasonable cause of action or defence; is otherwise an abuse of process of the court.

    - The Court's power to strike out a pleading is discretionary. It should be employed sparingly and only in clear cases depending on the interests of justice: *John Holland Pty Ltd v The Maritime Union of Australia* [2009] FCA 437

59. Solicitors often threaten Strike Out Applications in letters or indeed in pleadings themselves. These threats have little value.

60. Unless pleadings are absolutely woeful, they are unlikely to get struck out completely by a Court. Instead a Court usually allows a party to amend and replead.

61. Here I would like to make a general comment about strike out applications.

62. Why would you want to bring an application in court that alerts your opponent about the defects in their pleadings before a trial? Strike outs provide an opportunity to the other side to *improve* their case against you.

63. I don't like strike outs, unless:

    - the other party's pleading is dreadful such that you don't understand the case against your client and can't properly respond to it.

    - you want to gain some tactical advantage.

    - it is worth bringing the application to strike out the whole defence and then applying for summary judgment.

64. Please consider whether brining a strike out is worthwhile for your client, instead of leaving the pleadings as they are, going to a hearing and having the other party lose their case.

## F. Drafting effective pleadings and some things to avoid

65. The last topic I wish to canvass is drafting techniques for effective pleadings and some "dos" and "don'ts" in what can be arguably called the art of pleading.

66. Effective pleading takes a long time to develop and master. Don't be in a rush. It can be learnt.

67. Develop your own style. Mine is "short and sharp" and that works for me and for my clients.

68. Some "Do" tips:

    - Stand back and ask yourself what are you trying to achieve? What is the Case Theory? What are the real issues and material facts? Configure the pleadings that way. Remember the aim of a good pleading is to be persuasive with the Court.

    - As a Plaintiff be clear, concise, and uncontroversial. You had best get as many admissions as possible. Plan your pleadings as though crossing a river and put all the stepping stones in a row. Everything that is admitted need not be raised further in the proceedings. Your Counsel should refer to admissions in the opening and closing of the case.

    - As a Defendant try to put obstacles everywhere, if you can, where there is a controversial issue. If something is not controversial you can admit the allegation, but be careful.

    - Language - use the active voice.

- Plead logically.
- Plead chronologically.
- Plead succinctly.

69. Some “Don’t” tips:

- Don’t copy and paste a pleading precedent from your own precedents or from the library. Even if you have acted in similar matter before, there will be differences.
- Don’t draw long-winded pleadings that go nowhere.
- Don’t overcomplicate your pleadings.
- Don’t draw pleadings that cascade on one another. It is better to have a linear reasoning. I have been involved in some financial services litigation where one party pleaded every section under the sun of the ASIC Act and Corporations Act and then interlocked the pleadings by saying: “*By reason of paragraphs 23, 45, 68, 101, 182,* the plaintiff breached section X, Y, Z, etc. of the Act”. That doesn’t impress anyone and in my view makes it hard for the Judge to understand your case.
- Don’t overcomplicate alternative pleadings. If you are setting up alternative factual scenarios, plead in the alternative. The best word to use is “alternatively,” and then continue from there.
- Don’t plead conclusions of law and list the material facts as “particulars”. That is simply wrong.
- Don’t use the subheading Particulars. Neither the UCPR nor the FCR require a response to the particulars, as opposed to the allegations contained in the numbered paragraphs of the pleading. If you want to be answered, plead without using this heading.
- Don’t plead to allegations not in a pleading, in order to correct your opponent. It is better to deny the allegation and give a reason for the denial.
- Avoid the expression “at all material times”. This wording is useful to set the scene, but not for contentious issues. If in doubt avoid it.
- Don’t use the expression “repeats and relies on”. It is not necessary. Just plead the material facts to support your causes of action.
- Don’t overuse subparagraphs and sub-sub-paragraphs. I would suggest limiting yourself to three levels of paragraph only, a number, a letter and a roman numeral.

- Don’t use expressions like “the plaintiff will rely on a document for its full meaning and effect”. First, the statement discloses no material fact in support of your claim. Secondly, any party can rely on a document for its full meaning and effect once it is in evidence. This type of pleading is liable to be struck out.

- If you want to refer to a document you can either plead the effect of a document (Rule 152 UCPR and equivalent FCR rule is R16.04); you can set out verbatim the relevant part or section of the document; or you can incorporate the whole of the document as an annexure to the pleading.

- See Tony Morris QC, *The Seven Deadly Sins of Pleading*.

**Conclusion**

70. Ladies and gentlemen, I hope my brief overview of these interesting topics has been useful for you.

71. Thank you for your attendance this morning. I wish you all the best in your pleading endeavours.

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21 August 2020