

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

PRACTICE DIRECTION NO. 2 OF 2014

Case management in proceedings commenced by originating claim

This Practice Direction replaces the previous version of the Practice Direction which was issued on 16 September 2014

Source of power

1. This practice direction is made pursuant s 20 of the *Supreme Court Act 1933*.

Purpose

2. The purpose of this practice direction is to facilitate the just resolution of the real issues in proceedings with a minimum of delay and expense.

Application

3. This practice direction applies to all proceedings commenced by originating claim filed after 3 November 2014. It does not apply to proceedings commenced by originating application or by Corporations Rules originating process.
4. Despite paragraph 3, this practice direction does not apply to a claim for liquidated damages (a category B matter – see *Court Procedures Rules* r 1322) until a defence is filed. Upon the filing of a defence, the proceedings will be listed for a First Directions Hearing (see paragraph 23 below) and the practice direction will apply to the proceedings from the commencement of that directions hearing.
5. Where the nature of the case is such that the provisions of this practice direction are not appropriate, the Court may depart from some or all of the requirements of the practice direction. While the Court may depart from the provisions of the practice direction on its own motion, if a party contends that the practice direction should not be applied, then the party should raise that issue at the First Directions Hearing (see paragraph 23 below) or other occasion when the proceedings are listed before the Court. If a party submits that an alternative regime will be more conducive to facilitating the just resolution of the real issues in proceedings with a minimum of

delay and expense, it must notify the other parties of the alternative regime that it proposes and be in a position to provide short minutes to the Court to give effect to its proposal.

6. The Court will make directions dispensing with obligations under the *Court Procedures Rules* to the extent necessary to give effect to this practice direction. A party in doubt as to the application of rules which may be inconsistent with the obligations under this practice direction should raise the issue with the Court at the First Directions Hearing (see paragraph 23 below) or, in any event, as soon as possible.

Time Standard

7. The Court aims to have cases completed within 12 months of commencement. Parties to proceedings and the practitioners representing them will be expected to assist the Court to meet this time standard.

Commencing proceedings

8. A party commencing proceedings must be ready to comply with the obligations imposed on it by this practice direction and by the directions of the Court. This means that, except in special circumstances, the plaintiff's preparation for trial must be well advanced before commencement of proceedings.
9. Before commencing proceedings or filing a defence, legal practitioners must give their clients notice in writing about the requirements of this practice direction and of the Court's insistence on compliance with its orders. That notice must state that the Court may dismiss actions or counterclaims or strike out defences if orders are not complied with and that the Court may make costs orders against parties who fail to comply with its orders. This clause may be complied with by giving notice to the client in the terms set out in Schedule 1.
10. If a plaintiff anticipates that the proceedings will not be able to be served on the defendant within 14 days after the commencement of proceedings or it is not

appropriate in the circumstances of the case that the plaintiff be required to do so, the plaintiff should file with the originating claim an affidavit setting out the basis for this belief and a later date may be set. If a matter (other than one in which interlocutory relief is being sought) requires an earlier return date than that provided for by paragraph 23 then the plaintiff should file with the originating claim an affidavit explaining why the matter should have an earlier First Directions Hearing. A copy of any affidavit filed for the purposes of this paragraph must be served on each other party when the originating claim is served.

11. A defendant must commence preparation of its case immediately upon being served with the originating claim. In personal injury proceedings the defendant must commence preparation for trial based upon the information in the statement of claim and any documents required to be served on the defendant pursuant to paragraph 13 of this practice direction. This includes issuing notices for non-party production and the obtaining of expert medical reports.
12. Where it is necessary, counsel's advice should be obtained early. Proceedings will not be delayed by reason of a party's failure to brief counsel at an early stage.

Documents to be served on defendant with originating claim

13. In addition to serving the originating claim and statement of claim, the plaintiff must serve on the defendant, either with the statement of claim or as soon as practicable after service, the following documents:
 - a. a copy of this practice direction;
 - b. a copy of any affidavit filed for the purposes of paragraph 10 of this practice direction;
 - c. a comprehensive set of proposed directions for the preparation of the proceedings up until the matter is ready for a Listing Hearing not more than seven months from the date of service of the originating claim;

- d. in proceedings alleging personal injury, a document setting out the specialisation of each medical expert or the area of specialised knowledge of any other expert from whom the plaintiff proposes to obtain an expert report;
- e. in proceedings alleging medical negligence, a report of a medical expert that supports the plaintiff's allegations of breach of duty; and
- f. a copy of any document mentioned in the originating claim or statement of claim.

Proposed directions

14. The directions proposed by the plaintiff (see paragraph 13(c) above) should be drafted to address the particular requirements of the case. They should generally provide a timetable including the following:

- a. the filing and service of pleadings (the times specified in rules 102 and 480 will usually be appropriate);
- b. the issue of any third party notices (the time prescribed by rule 306 will usually be appropriate);
- c. any orders necessary to permit the early issuing and return of subpoenas;
- d. admissions, disclosure and interrogatories;
- e. service of expert reports (in personal injury cases the timetable should, when appropriate, distinguish between expert reports going to liability and those going to quantum);
- f. identification of a two week period during which a Listing Hearing will be set no later than seven months after the commencement of proceedings; and

- g. the filing of a statement of particulars under rule 1304 not later than 14 days prior to the commencement of the period during which the Listing Hearing will be set.

15. If a defendant does not agree with the directions proposed by the plaintiff it must serve an amended set of proposed directions not later than seven days prior to the First Directions Hearing. Prior to doing so the defendant should consult with the plaintiff to see if agreement can be reached on appropriate directions.

16. Prior to the First Directions Hearing, the parties should assume that they will be required to comply with the timetable set out in the *Court Procedures Rules* for the filing of a defence. This will mean that a defence will generally be required to be filed before the First Directions Hearing.

Representation

17. The Court requires proper representation whenever proceedings are listed before the Court. If a party is legally represented then a legal practitioner with adequate knowledge of the case must represent that party whenever the case is listed before the Court.

18. On any occasion the proceedings are before the Court the representatives of the parties are to communicate with each other in advance with a view to reaching agreement on directions to propose to the Court and are to reduce to writing agreed or competing short minutes recording the proposed directions.

19. Proceedings should not be mentioned by consent other than in circumstances where the proceedings have settled.

20. If the parties propose orders by consent those orders should be emailed to the Registrar (SCDR@act.gov.au) or the docket judge's associate no later than 4pm one clear day prior to the date on which the matter is listed (for example, if the matter is listed on Monday the proposed consent orders must be emailed by 4pm on the preceding Thursday). The email must identify the case and the date and time of

listing, state that it is sent pursuant to this paragraph and state that each party consents to the orders. It must be copied to each other party. The Registrar or docket judge will give consideration to making the proposed orders in chambers. The parties are not excused from attending at the listed time unless notified by the Registrar or docket judge's associate that the listing has been vacated.

21. If a party chooses to be represented by an agent then the agent must have adequate instructions to deal with any questions asked by the Court or any issue that might arise at the directions hearing. The issues raised by the Court may not be limited to the matters immediately the subject of directions but may include any aspect of the party's claim or defence, any aspect of the preparation of the case or a party's position in relation to issues in the case.
22. If a party's representative is not in a position to provide appropriate assistance to the Court or is otherwise inadequate, the case will either be stood down or stood over to allow proper representation. The Court will make appropriate costs orders and will consider making orders against the party's legal representative.

First Directions Hearing

23. A First Directions Hearing will generally be listed before the Registrar or the docket judge approximately six weeks after the commencement of the proceedings.
24. Parties are expected at the First Directions Hearing to have realistically appraised, to the fullest extent possible in the circumstances, the nature of the case and the likely requirements for its preparation. The Court expects that by the time of the First Directions Hearing the parties will have obtained any necessary advice from counsel as to appropriate orders or other matters affecting preparation of the proceedings for hearing.
25. At the First Directions Hearing:

- a. the parties should provide to the Registrar or docket judge the proposed directions for the preparation of proceedings for hearing or, if there is not agreement between the parties, their competing versions of the required directions;
- b. the parties shall provide the Registrar or docket judge with their First Directions Hearing questionnaires (see Schedule 2);
- c. the Registrar or docket judge will make appropriate directions including setting a Listing Hearing date;
- d. the Registrar or docket judge will consider whether any departure from the requirements of this practice direction is appropriate (see clause 5 above);
- e. the Registrar or docket judge will also endeavour to identify any interlocutory disputes that may affect the ability of the parties to meet the timetable; and
- f. if the matter has not been docketed the Registrar will consider whether the proceedings should be docketed at an early stage.

Non-compliance

26. Directions made by the Court must be strictly complied with.

27. A failure by one party to comply with the Court's directions will not be considered an adequate excuse for any failure to comply by another party.

28. In the event of a party being unable to comply with directions of the Court the party should, prior to defaulting but in any event as soon as possible, consult with the other parties in order to determine whether appropriate adjustments may be made to the timetable by consent. In determining whether to consent to a variation of directions parties must bear in mind their obligations under s 5A of the *Court Procedures Act 2004*.

- a. If all parties consent to orders varying directions previously made, the amendments should be drafted and provided by email to the Registrar or docket judge's associate. The email should state that it is sent pursuant to this paragraph and include the name of the case, the file number, the date on which the existing directions were made and the terms of the variations to directions that are sought. The Registrar or docket judge will consider whether to make consent orders in chambers. If the Registrar or docket judge declines to make the proposed orders the proceedings will be listed for the making of directions and the party unable to comply with the directions may be required to file an affidavit providing full disclosure of the reasons for its inability to comply. Cross-examination on the affidavit will only be permitted by leave of the Court.
 - b. If not all parties consent to orders varying directions previously made the party unable to comply with the existing directions must file an application in proceedings seeking amendment of the directions so as to avoid or remedy the breach. The application must be supported by an affidavit setting out the factual basis for the application for amendment of the directions. The affidavit must provide full disclosure of the factual basis for the application. The affidavit should also disclose whether any other party or parties have consented to the amendment applied for. Cross-examination on the affidavit will only be permitted by leave of the Court.
29. In the event that a party has failed to take a step required by any direction in the time required and has not made an application for amendment of the directions within seven days after the time specified for the taking of the step, the other party must arrange to have the matter listed. This may be done by sending an email to the Registrar (SCDR@act.gov.au) or to the associate of the docket judge and copying in each other party to the proceeding. The email should state that it is sent pursuant to this paragraph and include the name of the case, the file number, the date on which

the direction was made and the terms of the direction which has not been complied with.

30. Where the proceedings are listed pursuant to the procedure in paragraph 29 the party in default must file and serve an affidavit not later than one (clear) day prior to the date the matter is listed providing full disclosure of the facts relating to its non-compliance with the orders of the Court. Cross-examination on the affidavit will only be permitted by leave of the Court.
31. The procedure in paragraph 29 applies where there has been frank non-compliance with a direction. If there is likely to be a contest over whether a direction has been complied with (for example, as to the adequacy of disclosure) then the other party should proceed in the ordinary manner by application in proceedings. The procedure under paragraph 29 is not intended to limit the entitlement of a party not in default to make any other application permitted by the *Court Procedures Rules* relating to the default.
32. Without limiting the range of orders that the Court might make, a party that has failed to comply with directions of the Court will generally be subject to an adverse costs order. In appropriate cases the court will consider making costs orders against the legal practitioners for the defaulting party.

Applications in proceedings

33. Interlocutory disputes between the parties should be dealt with by way of an application in proceedings. Applications are to be made in accordance with the Rules and the relevant practice direction.
34. Parties should ensure that applications are filed as soon as possible so as to allow the application to be determined as early in the proceedings as possible.
35. The availability or convenience of counsel will not generally be a reason for giving a later date for the hearing of an application when a more appropriate earlier date is available to the Court.

Listing Hearing

36. The date for the Listing Hearing will be set at the First Directions Hearing and will usually be approximately seven months after the commencement of proceedings.
37. The Listing Hearing will be conducted by the Registrar or the docket judge.
38. The plaintiff must file its Listing Hearing Questionnaire (see Schedule 3) not later than 14 days prior to date of the Listing Hearing and any defendant must file its questionnaire not later than 7 days prior to the date of that hearing.
39. Matters may be listed for hearing notwithstanding that there are some aspects of preparation yet to be completed.
40. The Court will endeavour to list matters for hearing between 9 and 11 months after commencement. Counsel's availability may not be able to be accommodated in determining the date of the hearing.
41. Unless the parties have already exhausted alternative dispute resolution processes or made their own arrangements, the Court will usually make orders to compel an appropriate form of alternative dispute resolution at the Listing Hearing (see paragraphs 43-45 below).
42. At the Listing Hearing the Court may also make procedural directions in relation to the hearing such as directions relating to the filing of submissions, the preparation of bundles of documents or the conduct of the hearing.

Alternative dispute resolution

43. Parties to matters allocated a hearing date will generally be required to participate in formal alternative dispute resolution processes unless the parties can satisfy the Court that such procedures have been completed or are not appropriate. Parties are encouraged to agree between themselves to participate in a mediation or other appropriate alternative dispute resolution procedures. However if they do not then the Court is likely to compel it.

44. Where a case is estimated to take three or more days the Court will generally make a direction requiring the parties to participate in a mediation unless the parties have made arrangements to do so.

45. In cases estimated to take less than three days the Court will generally make a direction requiring participation in a form of alternative dispute resolution unless the parties have exhausted alternative mechanisms for settling their dispute. This may take the form of a settlement conference, neutral evaluation or mediation. Where the Court directs a settlement conference it will direct that it be attended by the parties as well as lawyers representing each party.

Settled matters

46. If a matter is settled prior to being listed for hearing parties should file any court documents necessary to give effect to the settlement in the registry.

47. If a matter settles after it has been listed for hearing, practitioners are required to notify the associate of the judicial officer before whom it has been listed by email. If proceedings have not been listed before a particular judicial officer, practitioners should notify the Registrar that the proceedings have settled. If documents to give effect to the settlement have not already been filed, the Registrar or judicial officer will generally make a direction requiring settlement documents to be filed within a fixed period and will list the proceedings to ensure that any necessary documents have been filed.

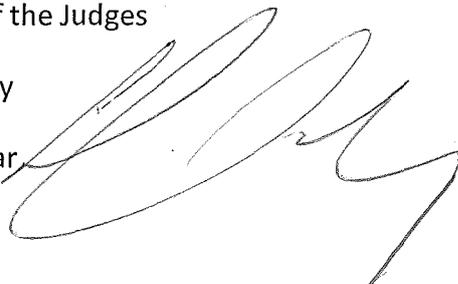
48. Until final orders are made or proceedings discontinued, the parties must attend Court on any occasion on which the proceedings are listed.

By direction of the Judges

Grant Kennealy

Acting Registrar

10 May 2016



Amendment history

10 May 2016: Paragraph 28 and Schedule 2 item 10 amended to reflect enactment of s 5A of the *Court Procedures Act 2004* and repeal of rule 21 of the *Court Procedures Rules* by the *Courts Legislation Amendment Act 2015 (No 2)*.

Schedule 1 Notice that will comply with the obligations in paragraph 9.

IMPORTANT NOTICE

Practice Direction 2 of 2014 ("the Practice Direction") requires that the legal practitioners acting for you give you notice of some important matters.

The Supreme Court of the Australian Capital Territory aims to deal with cases quickly and fairly. It aims to have cases completed within 12 months. The manner in which cases will usually be managed is set out in the Practice Direction. The Court will usually make orders that set a timetable for the preparation of each case for hearing.

The Court considers that compliance with those orders is very important. If Court orders are not complied with the Court may dismiss actions or counterclaims or strike out defences. It may also make costs orders against parties to the proceedings. This means that if you fail to comply with the orders of the Court in relation to preparation of your case for hearing there may be serious adverse consequences for you.

Your lawyers act on your behalf. If your lawyers do not conduct your case in accordance with the orders of the Court then you are responsible. This may have significant consequences for you. You should ensure that you discuss with your lawyers what they will do to ensure that you comply with the orders of the Court relating to the preparation of your case.

Schedule 2 First Directions Hearing Questionnaire

1. Has the party been advised in writing of its obligations under paragraph 9 of Practice Direction 2 of 2014. (Yes/No)
2. Has the party has obtained any advice from counsel that it considers necessary (see paragraph 24 of Practice Direction 2 of 2014). (Yes/No)
3. Is it appropriate for the proceedings to be transferred to the Magistrates Court (see rule 1430, *Magistrates Court Act 1930 s 268*)? (Yes/No)
4. Has the plaintiff complied with its obligations under paragraph 13 of Practice Direction 2 of 2014 in relation to identification of expert witness specialisations and/or service of expert reports? (Yes/No/Not applicable)
5. Have any requested further and better particulars been provided? (Yes/No)
6. Does the party consider disclosure is likely to be required? (Yes/No)
7. Does the party consider that it is likely to administer interrogatories? (Yes/No)
8. Does the party consider that the following interlocutory issues are likely to arise?
 - a. Security for costs; (Yes/No)
 - b. Joinder of additional parties; (Yes/No)
 - c. Application in relation to the pleadings; (Yes/No)
 - d. Other (specify)
9. Has the party made an assessment of what notices for non-party production or subpoenas are required? (Yes/No)
10. Has the party consulted with the other party or parties in a manner consistent with *Court Procedures Act 2004 s 5A* to resolve any differences about the directions for the preparation of the proceedings? (Yes/No)

11. If the proceedings involve an allegation of personal injury, has the plaintiff briefed its medical experts to obtain reports? (Yes/No/Not applicable)

12. The name of the lawyer with responsibility for the matter and an email address for that lawyer which may be used for correspondence from the Court is: Name:

..... Email address:

Schedule 3 Listing Hearing Questionnaire

1. Have all pleadings been completed and filed, and pleadings closed?(Yes/No)
2. Have all particulars requested been provided? (Yes/No)
3. Has disclosure of documents been made? (Yes/No)
4. Has inspection of documents taken place? (Yes/No)
5. If no discovery has occurred have the parties obtained from each other the documents that they wish to obtain prior to the trial? (Yes/No/NA)
6. Have any required interrogatories been served? (Yes/No)
7. Have all required answers to interrogatories been provided? (Yes/No/NA)
8. Have all necessary medical examinations taken place? (Yes/No/NA)
9. Are further medical examinations required before the trial? (Yes/No/NA)
10. Have all medical reports been served? (Yes/No/NA)
11. Have expert reports on liability been served? (Yes/No/NA)
12. Has counsel been briefed? (Yes/No/Counsel will not be briefed)
13. Has counsel's advice on evidence been obtained?(Yes/Party does not require)
14. Have any required notices under the *Evidence Act 2011* been given? (None required/Yes/No)
15. What is the estimated length of the hearing? (Specify number of hearing days)
16. Have offers of compromise under the Rules been made (Yes/No)
17. What are the prospects of the matter settling prior to commencement of the hearing? (Good/reasonable/poor)
18. The parties have participated in the following alternative dispute resolution procedures:
 - a. Settlement conference attended by lawyers for both parties (Yes-Date/No)
 - b. Neutral evaluation by agreement or court order (Yes-Date/No)
 - c. Mediation by agreement between the parties (Yes-Date/No)
 - d. Mediation ordered by the Court (Yes-Date/No)
 - e. Other (Provide details)

- f. The parties have made the following arrangements for alternative dispute resolution in the future: [set out nature of process, date the process will occur and mediator or neutral evaluator if applicable].

19. Details of witnesses in the ACT proposed to be called by the party—

(a) number of experts:

- to give evidence in person:
- to give evidence by telephone:

(b) number of non-experts:

20. Details of witnesses outside the ACT proposed to be called by the party—

(a) number of experts:

- to give evidence in person:
- to give evidence by telephone:

(b) number of non-experts:

21. Does the party object to the author of any expert report that has been served by another party giving evidence by telephone? (Yes – identify which/No/Not applicable)
22. Apart from directions relating to alternative dispute resolution and standard trial directions, what (if any) further directions does the party consider necessary for the purposes of the hearing? (None/Specify)
23. Are there any other matters that the party considers relevant to the setting the hearing date? (Specify)
24. What are the issues to be determined at trial? (Liability/Quantum/Both/Other-specify)