

**MAGISTRATES COURT OF THE
AUSTRALIAN CAPITAL TERRITORY**

PRACTICE DIRECTION NO 4 OF 2007

**PROCEDURES UNDER THE LEASES
(COMMERCIAL AND RETAIL) ACT 2001**

Introduction

The Court recognises that the jurisdiction vested in the Court by the *Leases (Commercial and Retail) Act 2001* (“the Act”) encompasses a wide diversity of matters of varying urgency and complexity. The Court aims to provide flexible mechanisms for identifying and dealing with applications consistent with the urgency of the matter, its complexity and the interests of justice. To that end, less complex matters will be “fast-tracked” and parties will be encouraged to adopt alternative dispute resolution strategies such as mediation.

This Practice Direction applies from 1 August 2007 and replaces Practice Direction No 3 of 2004, which is hereby revoked.

Initiating Process

1. Proceedings to which these procedures apply are to be commenced by an Application in the form of Form 1 (a copy of which is attached to this Practice Direction), and shall contain a brief description of the dispute and the relief sought. The description provided should be sufficient to show the nature of the case i.e. the legal basis upon which the applicant seeks relief but is not intended to be a formal pleading. Upon lodgement of the Application with the Court, a date will be allocated for a case management meeting (“CMM”) with the parties in accordance with section 147 of the Act. The Court will hold the

CMM no later than 10 days after the date of issue of the Application, unless the *Service and Execution of Process Act 1992* (Cth) (“SEPA”) applies.

Where the applicant proposes utilising SEPA to serve the Application interstate, the Application will specify a date for CMM at least 28 days after the date of issue of the Application by the Court. The Application shall be signed by the applicant, by his or her legal practitioner or by his or her agent authorised in writing for that purpose.

Service

2. Unless the Court otherwise orders, the Application, together with a copy of this Practice Direction, must be served on each other party to the Application at least 7 days before the CMM in accordance with rules 6411 or 6431 of the *Court Procedures Rules 2006* (“CPR”) subject to the provisions of SEPA concerning service on corporations. The Application may, however, be served in accordance with any relevant provision of the lease prescribing service of any notices thereunder, in which case the affidavit of service must annex, or refer to, a copy of the relevant lease provisions.

Case Management Meeting (“CMM”)

3. The Registrar or a Deputy Registrar of the Court will conduct the CMM. One of the purposes of the CMM is to assess the likelihood of the parties resolving the dispute before the proceeding is heard by the Court.

The Registrar or Deputy Registrar may, with the consent of the parties, mediate the dispute or refer it for mediation. If agreement is reached at the CMM or any such mediation, the matter may be referred to the Court for consent orders to be made or the parties may sign and file draft consent orders to be made in Chambers.

The Registrar or Deputy Registrar may adjourn the CMM from time to time to allow parties the opportunity to settle a dispute.

4. Persons attending the CMM must have sufficient authority on behalf of the party they appear for to:
 - (a) bind the party to the agreement reached, if any, at the CMM; or
 - (b) provide consent to orders of the Court made by consent.

5. If no resolution of the dispute occurs at the CMM or any ensuing mediation, or if one or more party does not attend Court on the return date for consent orders, the matter will be referred to Court for a Directions Hearing before a Magistrate. In most instances, the Directions Hearing may take place on the day of the CMM, or at the latest, within 7 days of the CMM.

6. If the respondent fails to attend the CMM, the applicant may, within 90 days, or such further period as the Court may order, file an affidavit of service, and:
 - (a) in the case of a liquidated claim: File an affidavit deposing to the claim together with an Application for Default Judgment in the form of Form 2.35 (a copy of which is attached to this Practice Direction), and the Court may enter judgment in Chambers for the applicant; or
 - (b) in the case of any other claim: File appropriate evidence in support of that claim, and the matter will be referred to the Court, and the Court may make final orders.

7. If the applicant does not take the steps referred to in paragraph 6 within 90 days of the CMM or within such further period as the Court orders, the Registrar or Deputy Registrar will re-list the matter for a Directions Hearing.

8. If the applicant fails to attend the CMM, the Registrar or Deputy Registrar may adjourn the CMM or refer the matter to Court for the Application to be struck out.

9. The Court adopts rule 1613, except sub-rule (5), of the CPR in relation to the setting aside of orders entered pursuant to paragraph 6 of this Practice Direction.

10. The Court adopts Division 2.11.5 of the CPR save for rule 1145 regarding applications for summary judgment.

Directions Hearings

11. Directions Hearings will be conducted before a Magistrate. At the Directions Hearing the Court will determine whether the Application is to be “fast-tracked” as an uncomplicated matter or whether more formal processes are required. Orders made at a Directions Hearing may include orders for formal pleadings to be filed, orders for interlocutory procedures and timetables for those procedures and the preparation of affidavits or statements. Where the Court so directs, the relevant provisions (pleadings and particulars) of the CPR are to apply. Parties to proceedings will be expected to inform the Court whether there are circumstances, such as the issue of witness credibility, which make it inappropriate for the evidence to be taken by affidavit or statement.
12. Parties, or their representatives, appearing at a Directions Hearing will be expected to advise the Court in detail of the nature of the dispute, any factual or legal issues likely to arise and any circumstances likely to affect the orderly disposition of the matter.
13. The parties or their representatives will be expected to have a sufficient knowledge of the matter to appraise the Court in detail of these issues. From the time of the Directions Hearing the presiding Magistrate will actively case-manage the proceedings, and it is not acceptable that parties or their representatives assume that agreement between the parties as to the conduct of the matter prior to hearing will relieve the parties or their representatives of their obligation to be fully conversant with the material referred to above.
14. If the Court considers it appropriate, the Directions Hearing may be adjourned from time to time.
15. When the Court is satisfied that the matter is ready for hearing the matter will be placed in the Call-over List.

16. Where a party to the proceedings fails to comply with directions provided by the Court, the Court or a party to proceedings may re-list the matter before the Court for the Court to make further directions.
17. Any formal pleadings, affidavits or statements filed in a matter pursuant to directions made by the Court are to adopt the format and heading of the attached Form 2.35 and show clearly the Court matter number.

Call-Over

18. At the Call-over the parties or their representatives will be expected to provide the Court with all relevant information about the dispute and the hearing of the dispute. This information may include:
 - (a) the factual and legal issues likely to arise on the hearing of the matter;
 - (b) the number and names of witnesses likely to be called;
 - (c) the likely duration of the hearing;
 - (d) whether there are any prospects for resolution of the dispute, whether by mediation or otherwise, without the necessity of a formal hearing;
 - (e) whether counsel has been briefed; and
 - (f) whether there are any circumstances concerning individual witnesses, that make it inappropriate that the evidence in chief of all or particular witnesses be taken by way of affidavit.
19. If it appears to the Court that it is appropriate to explore the possibility of resolution of the matter further, the Court may adjourn the matter either to a future Call-over or to a Directions Hearing and may give further directions about the conduct of the matter.
20. At the Call-over the matter may be allocated a date for hearing and directions given about the filing of affidavits or documents.

Affidavits

21. The Court adopts Division 6.10.2 of the CPR with respect to the form of affidavits generally.

Exhibits

22. Where it would be convenient for the Magistrate or other judicial officer expected to hear a matter to peruse an exhibit prior to its tender, the exhibit (or a copy thereof) should be delivered to the chambers of the Magistrate or other judicial officer within 2 days prior to the expected hearing.

Adjournments

23. Once an Application has been listed for hearing following a Call-over the hearing date may only be vacated or varied by an order of the Court.

24. An unreasonable failure of a party to be ready to proceed to hearing on the date allocated will not ordinarily be acceptable grounds for the granting of an adjournment. In any such case where an adjournment is granted the Court will entertain an application for costs by the innocent party or parties.

Costs

25. Failure of a party to an Application to comply with orders or directions of the Court and any unreasonable delay by a party are examples of circumstances that may constitute cogent grounds justifying an order for costs in favour of the innocent party or parties.

26. Where the Court makes an order for costs pursuant to s 154, the Court adopts Part 2.17 of the CPR save for rules 1721, 1725, 1726, 1727 and in particular notes rules 1720, 1722, and 1723 regarding the fixing of an amount for the costs of a proceeding before the Court. Where the Court does not make an order for fixed costs, costs are to be assessed in accordance with Part 2.17 as appropriate.

Enforcement

27. The Court adopts the procedures set out in Part 2.18 of the CPR.

Third-party procedures

28. The Court adopts Part 2.5 of the CPR where appropriate.

Payment into court

29. The Court adopts Part 2.10 of the CPR where appropriate.

Dated 2007

By direction of the Chief Magistrate, and Magistrates

R J CAHILL

Chief Magistrate

2. Is a lawyer or agent person helping you?

Yes No (please tick one)

Name of lawyer or agent:
Organisation:

Address:

Contact numbers:

Phone: []

Fax: []

3. **I would like all documents sent to:** (Please tick your choice)

My home/company address

Postal address

My lawyer's or support person's address

4. **Name and address of respondent:**

Name:

Address:

5. **Has mediation been attempted by the parties?**

Yes.

No. Attach reasons as to why you believe this matter could not be successfully mediated.

6. If no, would you be willing to participate in mediation?

Yes No

GROUND OF APPLICATIONS AND ORDERS SOUGHT

7. **Grounds of application**

What are your reasons for making the application? If you are making a harsh and oppressive or unconscionable conduct claim, you need to specify the conduct that occurred and how it caused you loss or damage. If there is insufficient space you may use attachments.

8. **What orders or relief are you seeking?** – See attached – and include the amount of any monetary claim. If there is insufficient space you may use attachments.

Your signature, or the
Signature of your representative:

Print Name: _____

Date: _____

NOTES FOR PARTIES

Disputes under the Leases (Commercial and Retail) Act 2001

The Act applies to a dispute about a matter mentioned in column 1 in the following table if –

- (a) the lease or proposed lease, or a provision of the lease or proposed lease, to which the dispute relates, was entered into, extended under an option, renewed or, for a provision only, varied, at or after the corresponding time mentioned in column 2 (if applicable); and
- (b) the conduct that caused the dispute complained of happened at or after the corresponding time mentioned in column 3.

Table of disputes to which Act applies

item	column 1 type of disputed matter	column 2 time lease entered etc	column 3 time of conduct
1	key money in relation to a lease or to negotiations for entering into a lease	any time	1 January 1995
2	a discretionary rent review clause of a lease	1 January 1994	(a) for a dispute about a discretionary rent review clause that has the effect of reserving to a party to the lease complete discretion about the rate of rent to apply – commencement date; or (b) in any other case – 1 January 1995
3	a provision of a lease if – (a) the provision was varied or inserted as part of a variation; and (b) the variation happens on or after 1 January 1995; and (c) this Act would apply to the dispute if the lease had been entered into or extended under an option on or after commencement day	any time	1 January 1995

item	column 1 type of disputed matter	column 2 time lease entered etc	column 3 time of conduct
4	a claim by a party to a lease (the first party) that another party to the lease has engaged in unconscionable or harsh and oppressive conduct towards the first party, if the conduct would be a contravention of section 22(1)	any time	1 January 1995
5	a claim by a party to lease for recovery of possession, relief against forfeiture or recovery of rent	any time	any time
6	a claim by a party to a lease that the party is entitled to compensation under section 37, 78, 81, 91 or 136	any time	commencement day
7	a matter in relation to which an application may be made under section 57, 58, 84, 85, 87, 98, 99, 105, 123 or 126	unless this Act states otherwise, any time	unless this Act states otherwise, any time
8	any other dispute about a lease if the disputed matter is of a kind prescribed under the regulations as suitable for resolution under this Act	the date prescribed under the regulations in relation to the kind of dispute or, if prescribed under the regulations, any time	the date prescribed under the regulations in relation to the kind of dispute or, if prescribed under the regulations, any time
9	a claim by a party to lease that another party to the lease has breached or is breaching this Act if the breach does not give rise to a dispute or claim under another item (other than item 10)	1 January 1995	commencement day
10	any other matter not covered in column 1 of items 1 to 9 in relation to a lease or negotiations for entering into a lease or in relation to the use or occupation of premises to which the lease relates	any time	any time

Note for item 6 The sections mentioned in the item deal with the following:

- Section 37 – compensation for negotiation misrepresentations
- Section 78 – demolition
- Section 81 – compensation for disturbance
- Section 91 – compensation for incomplete repair
- Section 136 – relocation clauses

Note for item 7 The sections mentioned in the item deal with the following:

- Section 57 – an application to appoint a new valuer if conflict of interest disclosed
- Section 58 – an application to appoint a new valuer in other cases
- Section 84 – an application about non-payment of rent or outgoings
- Section 85 – an application about payment of rent or outgoings
- Section 87 – an application for a declaration about useability of premises
- Section 98 – an application about an unreasonable refusal of consent
- Section 99 – an application about the lessor presenting the Territory lease to allow endorsement of an assignment or sublease
- Section 105 – an application to vary the terms of a lease extended because it was less than 5 years
- Section 123 – an application for a termination order
- Section 126 – an application for a warrant for eviction

What kind of orders can the Court make?

The Court can make orders pursuant to section 144 of the Act. Section 144 provides, inter alia, that

1. The jurisdiction of the Magistrates Court for this Act is **not affected by the amount claimed** in an application and the Magistrates Court is not limited in any amount it can order to be paid in relation to the application.
2. The Magistrates Court may, when acting within the jurisdiction given under this Act -
 - (a) exercise any power that could be exercised by the court under the *Magistrates Court Act 1930* as if the court had this jurisdiction under that Act; and
 - (b) exercise any other power necessary or convenient for the exercise of this jurisdiction, including the power to –
 - (i) make preliminary and procedural orders and give interlocutory directions; and
 - (ii) make orders to enforce relief, redress or a remedy.

Is there a fee?

Yes. There is a fee of \$104.00 in respect to a leases dispute.

Is there a right of appeal?

Yes. Section 155 of the *Leases (Commercial and Retail) Act 2001*:

A party to a proceeding under this Act may appeal to the Supreme Court on a question of law or fact from a decision of the Magistrates Court in the proceeding. The appeal must be begun within 28 days (the appeal period) after notice is given to the person

under section 153 (Notice of orders) or within the further time (the **further time**) allowed by the Supreme Court. The Supreme Court may allow the further time before or after the end of the appeal period.

FORM 2.35
Default Judgment

Court Procedure Rules 2006

(see r 1118 (Default judgment – generally))

In the Magistrates Court of the Australian Capital Territory

No CL of (*year*)

(*name*)

Applicant

(*name*)

Respondent

Date of judgment:

*[Application/counterclaim/third-party notice]: (*insert date*)

How obtained: *either*

in default of filing *[a notice of intention to respond/a defence/an answer to a counterclaim]

or

*[a defence/an answer to a counterclaim] has been ordered to be struck out

Affidavits read: *[affidavit of service dated (*date*)]

Affidavit in support dated (*date*)

Filed for the applicant/respondent by:

AF2006-280

Approved form under
Court Procedures Act 2004, s 8

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The judgment of the Court is that:

*The applicant recover against the respondent \$ (*state amount*) *[together with –

(a) *(*if interest is claimed*) interest; and

(b) * the following costs:

(i) costs for issuing the application;

(ii) costs for obtaining judgment;

(iii) any other fees and payments, to the extent they have been reasonably incurred and paid.

(*for a default judgment for unliquidated damages (see r 1122 (Default judgment – unliquidated damages))*)

*The applicant recover against the defendant damages to be assessed.

(*for a default judgment for detention of goods (see r 1123 (Default judgment – detention of goods))*)

the respondent *[return (*describe goods to be returned*) to the applicant, or pay the applicant \$ (*state amount*) for the value of the goods and costs/pay the applicant \$ (*state amount*) for the value of (*described goods*) and costs].

*The return of the goods to the applicant must take place before (*date*).

(*for a default judgment for recovery of possession of land (see r 1124 (Default judgment – recovery of possession of land))*)

*The applicant –

(a) recover possession of the land described in the
*[application/counterclaim/third-party notice], and known as (*state block and section numbers*) of (*suburb*) contained in certificate of title volume (*number*), folio (*number*) *[and known as (*street address*)], as against the respondent;
and

(b) the following costs:

- (i) costs for issuing the *[application/counterclaim];
- (ii) costs for obtaining judgment;
- (iii) any other fees and payments, to the extent they have been reasonably incurred and paid.

(for a default judgment for other claims (see r 1126 (Default judgment – other claims))

**The applicant recover against the respondent (state relief plaintiff claims for).*

(for a default judgment for costs only (see r 1127 (Default judgment – costs only))

**The applicant recover against the respondent *[costs of \$ (state amount)/costs as agreed or assessed].*

Date entered: *(date to be inserted by Court)*

Registrar

(signature of Registrar)

**omit if, or whichever is, inapplicable*