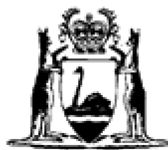

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CPC 1 CASE MANAGEMENT GENERALLY – BEFORE ENTRY FOR TRIAL

Summary: This Circular[1] contains guidance on the Court's requirements and case management approach generally, particularly in the period from commencement to entry for trial. Particular focus is given to areas that require attention from time to time.

1.1 Introduction

1.1.1 The Court has:

a) a broad civil jurisdiction, particularly in personal injuries actions - which may range from non-complex, small-quantum claims to highly complex claims, including those for catastrophic injury; and

b) broad case management powers under DCR r 24 and as an incident of its statutory jurisdiction. Such power is akin to the inherent jurisdiction of the Supreme Court to manage its own procedures (see *Pollard v Endale Pty Ltd (No 2)* [2009] WADC 97 (Pollard) at [10]) and is exercised as a matter of discretion, informed by contemporary case management objectives.

1.1.2 The Court aims to:

a) adopt case management practices that respond to the nature of action at hand, to achieve certain case management objectives, which include: promoting the just determination of litigation, disposing efficiently of the business of the court, maximising the efficient use of available judicial and administrative resources, and facilitating the timely disposal of business;[2]

b) deploy the resources available for case management in accordance with those objectives, particularly where their attainment is at risk; and

c) therefore, so far as is practicable and consistent with the overriding obligation to deal justly with its cases, to deal with proceedings in ways that are proportionate to the:

i) importance of the issues involved;

ii) value of the subject matter involved;

iii) complexity of the issues; and

iv) financial position of each party

1.1.5 A number of case management mechanisms are designed to facilitate the conduct of civil proceedings in a flexible, cost-effective manner. They include:

a) the publication of 'usual orders' in civil proceedings (UOC) to assist parties to draft minutes of proposed orders prior to directions hearings, and to draft memoranda of proposed consent orders, in a manner that minimises the need for amendment;

b) the use of consent orders to make 'usual' case management orders, which may obviate the need for the parties to attend a directions hearing; and

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[1] Formerly CP 12 (Case Management).

[2] See RSC O 1 r 4B. Those objectives are to be viewed in light of the ultimate aim of a court being the attainment of justice (see: *AON Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14; *Qld v JL Holdings Pty Ltd* (1997) 189 CLR 146).

c) e-lodgment of documents and the ability of practitioners to list an application in registrars' chambers via the ECMS.

1.1.6 Parties are encouraged to consider the use of these (and other) mechanisms in line with the case management objectives.

1.2 Electronic filing in civil proceedings

1.2.1 Except as otherwise provided in the Rules of Court, PDs, or by order of the Court, all documents filed / lodged in civil proceedings:

a) where a party is represented by a legal practitioner, must be eLodged via the ECMS; and

b) where a party is a self-represented litigant:

i) should, if the party is a registered user of the ECMS, be eLodged via the ECMS; and

ii) may, if the party is not a registered user of the ECMS, be lodged via email to civildc@justice.wa.gov.au (which is preferred) or in hard copy at the Court registry.

1.2.2 Notable exceptions will usually include:

a) mediation bundles (see CPC 7.3.4); and

b) trial bundles (see UOC 2.5, UOC 2.6).

1.2.3 CPG 4 deals with restricting confidential materials on, and 'uplifting' materials from, the ECMS.

1.3 Summary of steps before entry for trial

1.3.1 The table that follows summarises the stages of case management before entry for trial by reference to significant 'milestones'.[3]

1.3.2 Programming orders will generally not be made for steps dealt with by the DCR unless the standard provisions are to be varied.

Time	Party required to take action	Source	Action required to be taken
Time specified on writ (usually 10 days)	Defendant	RSC O 5 r 11	Enter appearance
After time for appearance	Plaintiff	RSC O 13	**May** seek default judgment
14 days after appearance	Plaintiff	RSC O 20 r 1	Statement of Claim (if generally indorsed writ)
14 days after statement of claim	Defendant	RSC O 20 r 4	Defence (and any counter claim)
14 days after defendant	Plaintiff	RSC O 20 r 5	Reply (and defence to any CC
Within 60 days of first defence	All parties	DCR r 46	Give discovery
Within 60 days of first defence	Plaintiff (party claiming damages)	DCR r 45C	File and serve particulars of damage

[3] The term 'milestone' is not referred to in the DCR – it is merely a useful phrase to identify stages of a litigation.

Within 120 days of first defence After 14 days of notice of default (EFT)	Plaintiff	DCR r 37, r 38	File and serve entry for trial

1.4 Entry for trial and default

1.4.1 If an action is not entered for trial within 120 days of the first defence, the Court will issue a Form 2 notice of default (DCR r 38) specifying a time by which the action must be entered for trial.

1.4.1 If there is further default of the notice, the action is deemed inactive and placed on the Inactive Cases List (DCR r 44, r 44D). The parties will be notified, including as to the consequences (see CPC 1.6.1 and 1.6.3 below).

1.5 Extending the date for entry for trial

1.5.1 Once an action is on the Inactive Cases List, the Court cannot accept a consent order removing the action from the list and/or extending the entry for trial milestone.

1.5.2 The Court may accept a consent order (see FC 1) extending the time within which the action must be entered for trial if:

a) it is filed prior to the date on which the action is placed on the Inactive Cases List;

b) states the reason for the extension sought (in the order or by covering letter); and

c) that reason is accepted by the case managing registrar

1.5.3 A party may, by chamber summons, apply to extend the time by which an action must be entered for trial.

a) Subject to any contrary order, there is no need to file affidavits supporting (or opposing) the extension. If required, the Registrar convening the directions hearing will direct that a party file an affidavit deposing to particular facts relevant to the grant of an extension.

b) The chamber summons should propose orders as to the steps needed to enter the matter for trial. Any other party may also seek orders at the directions hearing, by filing and serving a minute of proposed orders.

c) If, in the usual course, the orders sought by a party would need to be supported by an affidavit (eg. an application for discovery of specific documents), then the party should file and serve an affidavit in support.

d) Parties must comply with DCR r 34 and give at least 2 clear days' notice of any orders sought.

e) Parties must confer about the orders sought prior to the directions hearing and endeavour, in good faith, to have resolve as many of the issues giving rise to the summons as possible (DCR r 22).

f) If an application is contested at the directions hearing, the Registrar hearing the application may, in the directions hearing, list the matter for a special appointment. Parties wishing to have their unavailable dates taken into account should have those dates ready at the hearing.

g) The Court's expectation is that counsel or the solicitor attending on the application will have sufficient familiarity with the case to make submissions on any case management matter likely to arise in order to progress the case through to entry for trial.

1.6 Inactive cases

1.6.1 Pursuant to DCR r 44D, an action may be placed on the inactive cases list (ICL):

a) upon default of entry for trial (following a notice under DCR r 38) (DCR r 44);

b) by order of the Court (DCR r 44C); or

c) if no document has been filed in the action for 12 months (DCR r 44A),

upon which all parties will be notified.

1.6.2 If a case is on the ICL, only the following types of documents may be lodged (DCR r 44E):

a) Form 1AA Memorandum of appearance;

b) Form 1 Entry for Trial (which may be lodged by any party: DCR r 38(2));

c) consent order finalising the action;

d) summons for an order to remove the action from the Inactive Cases List;

e) summons for an order dismissing the action for want of prosecution; or

f) any document that relates to a document listed above.

1.6.3 If an action is on the ICL for 6 months, it is taken to have been dismissed for want of prosecution (DCR r 44G), upon which parties:

a) will be notified of the dismissal (no prior notice is given); and

b) may apply to the Court for consequential orders (such as, in relation to costs or the disposition of a counterclaim).

1.6.4 An application under DCR r 44F(2) to remove an action from the ICL should always be accompanied by an affidavit addressing the matters in DCR r 44F(3) – that is, whether the Court can be satisfied that the action will be conducted in a timely way, or that there is any other good reason.

1.7 Third party proceedings

1.7.1 The case management of third party proceedings aims to balance:

a) facilitating the proper ventilation and resolution of any issues between the defendant and the third party; and

b) minimising prejudice to the plaintiff (in the form of costs and delay that may result from dealing with those issues).

1.7.2 The usual orders made when a party applies to issue third party proceedings are set out in UOC 1.10. They include adjourning the application to a directions hearing around 6 to 8 weeks after the initial hearing. That directions hearing:

a) if the defendant has filed a summons pursuant to RSC O 19 r 4, will serve as the return date of that summons;

b) is directed to reviewing and progressing the third party proceedings in the context of the action as a whole (see UOC 1.11); and

c) should be attended by all parties (and the defendant should notify all parties of the date).

1.7.3 Where a defendant has commenced third party proceedings without leave, and the plaintiff is concerned about the progress of the third party proceedings, the plaintiff may request a directions hearing and any appropriate orders.

1.7.4 Any party seeking orders at any directions hearing in the proceedings must comply with the service requirements in DCR r 34(2).

1.7.5 If a plaintiff is ready to enter an action for trial, and the defendant has instigated third party proceedings which are not ready for trial:

a) the plaintiff may nonetheless enter the action for trial; and if so

b) the defendant can apply to have the entry for trial countermanded pursuant to DCR r 38B(1).

1.8 Special appointments

1.8.1 A chamber summons will ordinarily heard at a special appointment if the matter is contested and its determination is likely to:

a) require more than half an hour to hear oral submissions; and / or

b) benefit from the filing and exchange of written submissions and authorities.

Listing in chambers

1.8.2 At the first return of the chamber summons:

a) the matter may be listed for hearing at a special appointment (see UOC 1.12); and

b) parties should be in a position to advise the Court of any unavailable dates of counsel, if they are to be taken into account.

Written application

1.8.3 If, prior to or after the first return of a chamber summons, the parties confer and agree that a special appointment is required, the applicant should write to the Court to apply for a special appointment, setting out:

a) the parties' agreement that a special appointment will be required;

b) any agreed programming orders;

c) the estimated duration of the special appointment; and

d) the unavailable dates of counsel for both parties.

1.8.4 The application will be reviewed by a registrar who will either list the application for a special appointment with appropriate programming orders or list the application for mention in general chambers.

Adjournment

1.8.5 Any party seeking to adjourn a special appointment, including by consent, must apply to do so in writing no later than 2 working days before the date on which it is listed to be heard.

Default in filing materials

1.8.6 If a party defaults in the obligation to file an outline of submissions or other materials relevant to the hearing by the time required (under DCR 61, or by such other time as may be ordered), the presiding registrar may vacate the special appointment and list the action of a directions hearing to make consequential orders, including as to costs thrown away.

CPC 2 CASE MANAGEMENT GENERALLY – AFTER ENTRY FOR TRIAL

Summary: This Circular[1] contains guidance on the Court's requirements and case management approach in the period after entry for trial but before the trial hearing. It also addresses trial hearing fees.

2.1 Introduction

2.1.1 In addition to the matters identified in CPC 2.1, the object of the Court's case management regime leading up to trial is to ensure that the trial commences on the allocated start date, is not adjourned part-heard by reason of inadequate preparation and is completed within the allocated time.

2.1.2 While the Court retains the discretion to adjourn a trial part heard in appropriate circumstances, this should ordinarily be avoided. Counsel should allow for the possibility of a trial going beyond the allocated dates when accepting a brief.

2.2 Summary of required steps after entry for trial

2.2.1 The table that follows summarises the steps to be taken from the point of entry for trial.[2]

2.2.2 Programming orders will generally not be made for steps dealt with by the DCR unless the standard provisions are to be varied.

Time when action to be taken	Party required to take action	Source	Action required to be taken
At least 14 days before listing conference	Plaintiff	DCR r 45E	File and serve index of reports of expert witnesses.
At least 7 days before the listing conference	Parties other than plaintiff	DCR r 45E	File and serve index of reports of expert witnesses.
At least 2 days before listing conference	All parties	DCR r 43(3a) CPC 2.3.4	File pleadings certificate, with estimated length of trial
At least 42 days before the day listed for trial	Plaintiff	DCR r 45F DCR r 45H	File and serve papers for the Judge; outline of submissions.
At least 28 days before the day listed for trial	All parties	DCR r 45G	Provide opportunity (if not previously provided) to inspect documents / objects to be tendered at trial
At least 28 days before the day listed for trial	Parties other than plaintiff	DCR r 45H	File and serve outline of submissions.
At least 21 days before first day of trial Within 7 days of the request	Any party Other party	DCR r 45E	Request for qualifications of expert witnesses Provide requested qualifications information
At least 14 days prior to the hearing		PDG 3, Use of Video Link Facilities	Send AVL Booking Request to the Court

[1] Formerly CP (Civ) 18 (Payment of Trial Hearing Fee) and CP(Civ) 25 (Trials).
[2] The steps shown in the shaded rows are to be taken before the listing conference.

At least 7 days prior to the hearing	Any party	CPG 2, Use of Technology	Send Courtroom Technology Booking Form to Court
At least 7 days before the day listed for trial	All parties	DCR r 45I	File and serve a list of witnesses.
At least 5 working days before the day listed for trial	All parties	CPC 2	File and serve Trial Bundle (if ordered)

2.3 Listing conference

2.3.1 Both certificates of counsel and indexes of expert reports are to be filed before the first listing conference.

Indexes of expert reports

2.3.2 Of note:

a) before the listing conference (14 days prior for the plaintiff, and 7 days for any other party) each party must file and serve an index of any expert reports the party intends to tender: DCR 45E(3);

b) the Court has prescribed the form of the Index to Experts Reports: PD Annexure 3;

c) there is a continuing obligation to amend the index: DCR 45E (4A);

d) except with the leave of the Court, a party may not tender an expert report that is not in the index: DCR 45E(6); and

e) PD 12 -Expert Witnesses requires notice to any other party before cancelling the attendance at trial of an expert witness.

Certificates of counsel

2.3.3 Following amendments to the DCR commencing in January 2024, at least 2 clear days before a listing conference, each party (whether or not trial counsel attends the listing conference) is required to file and serve a certificate, signed by the legal practitioner who will appear at trial:

a) addressing the matters identified in DCR r 43 (3); and

b) certifying that the practitioner is satisfied that the pleadings adequately define all the issues of fact or law that the party contends will need to be determined at trial or, if not, setting out the pleadings issues in respect of which the legal practitioner is not satisfied: DCR 43(3A).

2.3.4 Pleadings certificates and the estimated length of trial should be carefully considered because:

a) once the matter has been listed for trial, any amendment to the pleadings must be on application to the Court (and supported by an affidavit as to what matters or facts have arisen the certificate was signed that justifies leave to amend being granted): DCR 48A; and

b) once a trial commences, the Court expects that it will proceed to completion without the need for an adjournment. (If a trial runs for longer than the time for which it is listed, counsel will be expected to continue appearing at the trial.)

Counsel unavailability

2.3.5 Whether or not combined unavailable dates are also provided, the unavailability of witnesses should be identified separately to the unavailability of counsel (in the case of expert witnesses, in the 'Notes' section of the Index of Expert Reports).

2.3.6 If counsel unavailability is likely to result in a lengthy delay in listing the trial, the Court:

a) should be satisfied that the relevant party has been advised of the potential delay and its reason, and has given instructions to proceed on that basis; and

b) may list the action for trial in any event, in the expectation that alternative counsel can be briefed to appear.

2.4 Trial listing / hearing fees

2.4.1 In August 2023, the *District Court (Fees) Regulations 2002* (WA) (Fees Regulations) were amended. In keeping with those amendments (and reflected in UOC 2.2):

a) once an action is ready to list for trial, the number of days allocated for trial will be determined at a listing conference (informed by counsels' certificates and submissions) and, at the same conference, the action may be listed for trial;

b) upon the allocation of hearing dates, the hearing fee is fixed and becomes payable, and the Court will issue an invoice accordingly;

c) the date for payment (due date) of the hearing fee may, however, be set by order (and in the absence of such order will be 14 days from the listing order). Except in the case of an expedited hearing, the Court will not ordinarily set the date for payment at a time later than 3 months before the first trial hearing date;

d) if the hearing fee is not paid by the due date, the hearing dates will ordinarily be vacated and the action will be scheduled for a further listing conference;

e) if the parties settle the action before the due date, the hearing fee remains payable and, if it is not paid by the due date, will be recovered as a debt under reg 11;

f) however, if the Court is notified of settlement (or consent orders are filed giving effect to the settlement) at least 28 days before the date provisionally allocated for trial, part of the fee will be refundable: reg 9(7).

2.4.2 If a trial runs beyond the allocated number of days or is adjourned part heard, a further daily fee is payable (Item 8, Sch 1 of the Fees Regulations). Subject to any deferral order under reg 6(2),[3] the fee is payable prior to reconvening the hearing: reg 10.

Reduction and/or deferral, refunds and reviews

2.4.3 Any application to have a party recognised as an eligible person, so as to reduce or defer the payment of a hearing fee, should be made *before* the first listing conference.

2.4.4 CPC 15 deals with applications:

a) to have a party recognised as an eligible person so as to reduce or defer the payment of a hearing fee;

[3] As to which, see CPC 15.4.

b) for a (partial) refund of a hearing fee; and

c) for review of a registrar's decision in relation to the above matters.

2.5 Case management of actions listed for trial

Trial review / special directions

2.5.1 Once trial dates are allocated, the case will continue to be case managed, either by a Judge or a Registrar. Orders for this will be made at the time that the action is listed for trial. Counsel should be prepared to address the listing Registrar on matters relevant to allocating future case management to a Judge or Registrar. Generally:

a) actions that are not expected to involve (non-medical) expert evidence and in which the usual steps to trial are expected to apply (subject to minor variations) will be case managed by a Registrar, and a special directions hearing will be listed no later than 8 weeks before the first day of the trial; and

b) long or complex cases (which may involve complex medical evidence and/or non-medical expert evidence and/or where the usual steps to trial contemplated under the DCR are likely to require significant variation) will be case managed by the Trial List Judge (**TLJ**) until handed over to the trial Judge, with an initial review scheduled immediately following the allocation of hearing dates.

2.5.2 The trial reviews / special directions hearings may be conducted in court or in a hearing room. The object is to ensure that there are no outstanding evidentiary or procedural issues that may necessitate adjournment of the trial. To this end:

a) the presiding Judge or Registrar may make orders / give directions as appropriate;

b) parties may be ordered to attend a mediation conference, including for the purpose of narrowing the issues between them (see CPC 7); and

c) the Court encourages parties to confer before any review and the use of agreed minutes of orders.

2.5.3 Actions will usually be listed for a call-over around 40 days prior to the commencement of the trial in order to ensure compliance with DCR r 45F and 45H and any other special directions.

Interlocutory applications after trial listing

2.5.4 Subject to CPC 2.5.5, chamber summonses filed after a trial listing will ordinarily be listed for initial mention before the case managing Judge or Registrar.

2.5.5 Any interlocutory applications made <u>within 12 weeks</u> of the first date allocated for trial will be dealt by the TLJ or trial Judge. Any party lodging such an application must, upon filing a chamber summons and selecting a hearing date in the ECMS, <u>notify the Court</u> in writing that the application should be listed before a Judge on an urgent basis. The notification to the court should be by a letter lodged in ECMS against the action.

2.6 Trial materials for the Judge

2.6.1 DCR 45F requires the plaintiff to file and serve papers for the judge (a sample index for which is set out in CPC-A4). The time for compliance may be varied by order of the case management Judge or Registrar.

2.6.2 To facilitate efficient trial preparation, parties may also be ordered to:

a) exchange, at the time of filing their written submissions, an index of the documents they intend to tender at trial (UOC 2.3);

b) confer to determine whether, and to what extent, evidence may be tendered by consent (UOC 2.3);

c) file and serve trial bundles – where practicable, as a common bundle (UOC 2.4), but otherwise as individual bundles (UOC 2.5); and

d) bring to trial a duplicate trial bundle for use of the witnesses, and a bundle of the original documents comprising the trial bundle.

2.6.4 Parties should:

a) ensure that any trial bundle contains <u>only those documents</u> that will in fact be tendered at trial (in the course of evidence or for use in cross examination); and

b) produce a common trial bundle wherever practicable.

2.6.5 Where documents are to be tendered by consent, this should be made clear on face of the bundle (or sub-bundle) - examples are given in CPC-A5(a) (agreed bundle - medical reports) and CPC-A5(b) (agreed bundle - economic loss).

2.6.6 Where admissions are intended to be made in connection with any documents:

a) those admissions should be recorded at the commencement of the bundle; and

b) if the proposed admission goes to facts contained in a document:

i) if the relevant contents are *illegible* on the face of the document (eg hospital notes), then the parties should include an agreed typewritten version of the document; and

ii) it would not be appropriate for facts to be admitted by agreement where there is *ambiguity* on the face of the document as to what they are.

2.7 Outlines of submissions

2.7.1 The object of DCR r 45H, reflected in the 10-page limit, is that opening submissions focus on key issues.

2.7.2 The Court does not expect these submissions to canvass every issue in dispute between the parties – that is the function of the pleadings. Rather, an outline of submissions should focus on the key factual or legal disputes on which the case will turn, and identify any legal authorities central to the party's case.

2.7.3 This rule does not limit the ability of the parties to file detailed written closing submissions if they choose (and they may be ordered to do so by the trial judge).

2.8 Chronologies

2.8.1 There is no requirement in the DCR to file a chronology. However:

a) many Judges report that a carefully prepared chronology is of considerable assistance in factually complex cases;

b) a party is permitted to file and serve a chronology as part of their trial bundle: DCR 45H(2)(d);

c) if, during the course of the listing conference or a later call-over, the Court or counsel identifies the need for a chronology, then it may be ordered: DCR r 24(2)(gb); and

d) practitioners can expect that in complex cases, including commercial matters, a chronology will usually be ordered.

2.9 Witnesses and witness statements

2.9.1 Parties must disclose to each other and the Court the witnesses to be called at trial (along with any special arrangements for their giving evidence), and may not call any undisclosed witness without the leave of the Court: DCR r 45I.

2.9.2 There is no presumption under the DCR that parties will exchange witness statements. Orders imposing such a requirement may be, and on occasion have been, made under DCR r 24(2)(j). This will depend on the nature of the case and the issues in dispute. Such orders:

a) should be sought by chamber summons filed no later than the listing conference – at the listing conference, the application will be listed before a judge; and

b) will require witness statements to be prepared having regard to the Best Practice Guide 01/2009-2011 issued by the Western Australian Bar Association entitled 'Preparing witness statements for use in civil cases', with a certificate to that effect signed by the practitioner most responsible for the preparation of the statement

2.9.3 The Court will have regard to par 4.5 of the *Consolidated Practice Directions of the Supreme Court of Western Australia 2009* in managing witness statements at trial.

2.10 Evidence not in a written form

2.10.1 DCR r 45G supersedes the operation of RSC O 36 r 4, with the effect of increasing the time by which non-documentary evidence (like surveillance videos) must be disclosed if they are to be used at trial. Disclosure is required 28 days prior to trial, unless otherwise ordered.

2.10.2 Practitioners are also directed to CPG 2 which deals with the use of technology.

CPC 3 LIMITED DISCOVERY

Summary: This Circular[1] provides guidance on the wide discretion of the Court to modify the ordinary obligation of discovery, and considerations relevant to its exercise.

3.1 Introduction

3.1.1 DCR r 46 amends the application of RSC O 26 in relation to District Court actions and is itself expressly subject to any order made by the Court.

3.1.2 DCR 24 confers broad case management powers on the Court which, together with the Court's inherent power and residual operation of RSC O 26, allow orders to be made to mould the discovery obligation to suit the facts of a case. The broad discretion to make such orders is exercised in accordance with the objectives of contemporary case management (see CPC 1.1).

3.2 Limited discovery orders

3.2.1 The purpose of a limited discovery order is to tailor the discovery obligation to the requirements of the case.

3.2.2 UOC 3.1 – UOC 3.3 set out a number of orders that the Court could make in order to limit the scope and cost of discovery.[2] These orders are provided by way of example, and should not be seen as limiting the scope of the orders that could be made (see CPG 1.2.7).

3.2.3 Whether such orders should be made, and if so in what terms, will require a balancing of competing interests in the context of the facts of the case. The principal considerations are that the litigation is conducted fairly in the interests of both parties, with care taken to:

a) avoid excessive, unnecessary or wasteful discovery; and

b) balance the costs, time and possible oppression to the producing party against the importance and likely benefits which arise to the requesting party from production of the documents.[3]

3.2.4 It may be that in some cases it is appropriate for the Court to order that discovery be provided in a staged manner.

3.2.5 A party wishing to limit the scope of discovery should:

a) circulate a minute of proposed orders at least 2 clear days prior to a scheduled directions hearing (DCR r 34(2)) - if the orders are contested, programming orders will be made which may include the filing of affidavits and/or listing the application for a special appointment (see CPC 1.8); or

b) bring an application by chamber summons, which will bring the matter on for a mention - the chamber summons should set out the discovery orders sought, and be supported by an affidavit deposing to the facts said to justify the limitation.

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[1] Formerly CP (Civ) 19.
[2] The Court's usual discovery orders are set out at UOC 1.5.
[3] *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [2006] FCA 116, [3] (and authorities cited therein).

CPC 4 SUBPOENAS & INSPECTION

Summary: Parties to a District Court action may seek orders to compel the giving or production of relevant evidence. The procedures and requirements for doing so, and for inspecting and copying evidence produced under such orders, differ from those in Supreme Court and are the subject of this Circular.[1]

4.1 Introduction

4.1.1 DCR Pt 5BA modifies the operation of RSC O 36B in its application to cases in the District Court. In brief, under the DCR:

a) a subpoena to attend to give evidence is distinct from a subpoena to produce documents or things – each has its own prescribed form and requirements, and must be issued separately (so an addressee required to attend to give evidence, and also to produce documents or things, will need to be served with two subpoenas); and

b) the requirements for inspection and copying of documents or things produced under subpoena differ depending on whether or not the subpoena is addressed to a 'health professional'[2] in a personal injuries action.

4.1.2 Subpoenas are issued by the Court upon request by a party (**issuing party**).

a) In each case, the issuing officers of the Court will review a request to determine if a subpoena can be issued under the Rules of Court.[3]

b) By convention or otherwise, subpoenas may not be issued to certain entities. In those instances, alternative procedures may be available to obtain evidence relevant to a District Court action.

4.2 Proposed subpoena – required form

4.2.1 Where a party seeks orders requiring a person[4] to <u>attend to give evidence</u> at a trial or hearing, the issuing party must file (via the ECMS) the proposed subpoena in the form of DCR Form 4A, with a notice in the form of DCR Form 4B.

4.2.2 Where a party seeks orders requiring a person or entity <u>to produce documents or things</u> either at or (with leave) prior to trial, the issuing party must file (via the ECMS) the proposed subpoena in the form of DCR Form 4C, with the applicable notice and declaration form, which:

a) if the if the action is a personal injuries action and the addressee is a health professional, must be in the form of DCR Form 4D; or

b) otherwise, in the form of DCR Form 4E.

4.2.3 If the proposed subpoena is to be served outside of Western Australia, a Notice to Witness in the form of FC 2 must be attached to it.

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[1] Formerly CP (Civ) 23, 24.

[2] In this CP 'health professional' means 'health professional, a hospital, or a person that manages the records of a health professional' within the meaning of the DCR (which in turn refers to *Civil Liability Act 2002* (WA) s 5PA).

[3] See, in particular, RSC O36 r 2(2)-(2B).

[4] Identified by name or by description of office or position: RSC 36B r 3(3).

4.2.4 The Court will treat a proposed subpoena endorsed with a date earlier than the trial as containing a request for the Court to permit a date for production other than the trial date. The Court's issuing officers will ordinarily:

a) exercise the Court's discretion in relation to leave for the purposes of RSC O36B r 3(5); and

b) fix the last date for service for the purposes of RSC O 36B r 3(8).

4.2.5 The proposed subpoena should:

a) identify any party by name rather than by party status (so 'Joe / Jane Blogs' rather than 'plaintiff');

b) if medical records are being sought - include the patient’s date of birth; and

c) if police motor vehicle accident records are being sought - include the date of the accident, the registration numbers of both/all vehicles and any known police reference numbers.

4.2.6 Where documents or things are being sought from:

a) a corporate entity, it is sufficient if the subpoena is addressed to the corporation - it is not necessary to refer to the ‘Proper Officer’ of the corporation, although if the corporation has published guidance as to how it would like subpoenas to be managed, this may be used (for example: 'Smith Pharmaceuticals Limited (Attention General Counsel)'); and

b) a government department or agency, the subpoena may be addressed in accordance with any published guidance from the department or agency as to addresses for service of legal documents.

4.2.7 Before lodging a proposed subpoena, the issuing party should confirm with the proposed addressee their:

a) service details; and

b) possession of the documents or things to be produced.

It is not uncommon, for example, for a subpoena addressed to a medical practitioner to be returned for reissue on the basis that the relevant records are now in the possession of a medical services provider.

4.2.8 If a shorter notice period is sought, the issuing party should lodge, together with the proposed subpoena:

a) a letter to the Principal Registrar setting out the reasons that shorter notice is required; and

b) a copy of confirmation from the proposed addressee that they are willing and able to comply with a date for production on shorter notice.

4.3 Proscribed addressees

4.3.1 The Court will not issue a subpoena to another court:[5] RSC O 36B r 2(2)(b).

[5] For example, the Supreme Court, the Family Court or the Magistrates Court.

a) As a matter of practice and comity, the District Court treats each of the Coroner's Court, the State Administrative Tribunal and the Chief Assessor of Criminal Injuries Compensation as a court for these purposes and will not issue a summons or subpoena to those bodies.

b) A party seeking documents from another court should write to the Principal Registrar to request the District Court to issue a letter of request in accordance with RSC O 36B r 13.

4.3.2 While not wholly proscribed, any proposed subpoena addressed to:

a) the Commissioner of Police must comply with CPG 6; and

b) the Australian Taxation Office (ATO) will be referred to a registrar to review, as there are statutory restrictions on the information which the ATO may disclose.

4.4 Issue and service

4.4.1 Ordinarily, if:

a) the date for production is 35 days or more from the date on which the subpoena is filed;

b) the last date for service is at least 21 days prior to the date for production;

c) the addressee of the subpoena is not to a proscribed addressee (see CPC 4.3 above);

d) if the subpoena is addressed to the Commissioner of Police, it complies with CPG 6; and

e) the issuing officer is otherwise satisfied that the subpoena complies with the Rule of Court,

the issuing officer will issue the subpoena, upon which the Court seal will appear on the electronic document.

4.4.2 If the proposed subpoena does not fall within CPC 4.4.1, the issuing officer may:

a) reject the proposed subpoena – upon which the issuing party will be notified and the document will be inactivated in the ECMS; or

b) refer the proposed subpoena to a registrar for review.

4.4.3 Once a subpoena to produce is issued, the issuing party must serve a sealed copy of it:

a) on the addressee, by the last date for service; and

b) on other parties, as soon as practicable after service on the addressee: RSC O 36B r 4 (2).

4.4.4 Unless otherwise ordered or agreed with the addressee, DCR r 48AH(2) requires the issuing party, when serving a subpoena to produce, to pay to the addressee the sum of $80 for any loss or expense incurred in complying with the subpoena.

a) This requirement does not limit the power of the Court to make orders pursuant to RSC O 36B r 11(1).

b) An issuing party may file an ex parte chamber summons seeking an order for another amount.

c) DCR Forms 4D and 4E provide information (at note 17) to an addressee on how to claim a higher amount.

4.5 Alteration of date for attendance or production

4.5.1 The issuing party may, by written notice to the addressee, alter the date or time specified in the subpoena for attendance or for production to a later date or time (RSC O 36B r 5A). Where this occurs:

a) the subpoena has the effect as if the date or time so notified appeared in the subpoena as issued; and

b) the issuing party must file and serve a copy of the notice as soon as practicable after it is given: DCR r 48AC.

4.6 Compliance – producing copies of documents or things

4.6.1 Following amendments to the DCR and changes to the ECMS functionality, both introduced in January 2024, it is possible in certain circumstances to comply with a subpoena by uploading and electronic copy of a document or thing to the ECMS.

4.6.2 However, from a functional perspective, production via the ECMS will not be available:

a) in relation to subpoenas issued before 15 January 2024 (because a document number for the subpoena, generated by the ECMS, is required); and

b) in relation to items that are either too large (over 400 MB) or in a format that is not supported by the ECMS.

4.6.3 The DCR provide that the Court may make directions in relation to subpoenas (DCR 48AD (1A) and (3)), including by way of:

a) a Practice Direction – see PDC 4[6] (Lodging or Producing Documents or Things) which governs:

i) acceptable formats for the production of electronic copies; and

ii) the manner of production (that is, the media that will be accepted);

or

b) a direction made in relation to a particular matter (on application or otherwise).

4.6.4 PDC 4 contains separate directions for the production of documents under subpoenas issued before and after 15 January 2024.

Production via ECMS – 'objections'

4.6.5 RSC O 36B r 8A provides that an addressee (or other person with a sufficient interest) may request that a subpoena to produce, or part of it, be set aside. RSC O 36B r 8B provides for how such a request is to be made, relevantly including that:

a) a request will ordinarily be by way of letter to the Principal Registrar; and

[6] As amended on 25 January 2024.

b) the request 'cannot be filed electronically' unless the request is made by a party or the Principal Registrar has given approval for the request to be filed electronically: O 36B r 8B(3A).

4.6.6 For the purposes of O 36B r 8B(3A), the Principal Registrar, by this CPC, approves electronic filing of a written request made under O 36B r 8A if:

a) the request is made by an addressee (or their legal representative) of a subpoena issued after 15 January 2024; and

b) each document or thing the subject of the request is produced via the ECMS and, in each case:

i) an 'objection reason' is identified; and

ii) the written request is uploaded as a 'document outlining objection reasons' via the ECMS.

4.6.7 If a request complying with CPC 4.6.6 is made, the document or thing will remain restricted from view in the ECMS until the request / objection has been dealt with by a registrar.

4.7 Inspection, copying and removal

Subpoenas addressed to health professionals in personal injuries actions

4.7.1 Given the sensitive nature of health information, and the breadth of the information medical records may contain, particular rules and procedures apply to inspecting any documents that:

a) were produced under a subpoena that was:

i) addressed to a health professional;[7] and

ii) issued in a personal injuries action;[8]

and

b) comprise the health information of the plaintiff.[9]

4.7.2 In such cases, DCR r 48AF provides that, unless the Court otherwise directs:

a) the plaintiff may inspect and copy the subpoenaed documents; and

b) <u>after</u> 7 days from the date <u>for</u> production, other parties may:

i) inspect the subpoenaed documents; and

ii) <u>with the approval of a registrar</u> copy the subpoenaed documents.

4.7.3 In practical terms, this means that:

a) the plaintiff may ordinarily inspect and copy the subpoenaed documents at any time after they are produced to the Court. However, the Court directs that:

[7] As to the meaning of this term in this CP, see CPC 4.1.1 (b) above.
[8] As defined in DCR r 3.
[9] DCR 48AF – 'health information' is defined in DCR r 3.

iii) any party, including the plaintiff, is to submit a request form in accordance with CPC 4.7.7 - 4.7.8 below; and

iv) if the subpoenaed documents do not comprise the health information of the plaintiff, approval must be given by a registrar before the plaintiff may copy the documents produced;

b) if the plaintiff, upon inspection, considers that the subpoenaed documents contain health information that is not relevant to the proceedings (or is otherwise subject to proper objection), the plaintiff may:

i) agree with the other parties to discover all relevant documents on the basis that the other parties do not inspect the subpoenaed documents (and, if so, should inform the Court); or

ii) file and serve a chamber summons (or, if appropriate, bring an application ex parte) seeking directions pursuant to DCR r 48AF(2), and at the same time lodge a letter to the Court requesting that the action be listed for a directions hearing at short notice (before the expiration of 7 days following the date for production);

c) if another party does not consider it appropriate that the plaintiff has the first opportunity to inspect any documents to which DCR r 48AF applies, it should file and serve[10] a chamber summons seeking directions pursuant to DCR r 48AF(2); and

d) a party other than the plaintiff should only file a request[11] to inspect and copy the documents after (not on) the expiration of 7 days from the date for production (not the date on which the documents were in fact produced, if earlier).

4.7.4 Except as provided above, the ordinary rules and procedures relating to the inspection and copying of documents or things produced under subpoena apply.

Ordinary rules and procedures

4.7.5 DCR r 48AE provides that, except for documents to which DCR r 48AF applies or as otherwise directed by the Court, a document produced in response to a subpoena:

a) may be inspected by any party; and

b) may, with the approval of a registrar, be copied by a party.

4.7.6 DCR r 48AI provides a party must not disclose or use the document, or any information contained in the document, otherwise than for the purposes of the conduct of the proceedings in respect of which the subpoena was issued or the document was required (non-disclosure obligation).

4.7.7 A legal representative of a party, or an unrepresented party, may apply to inspect and copy documents or things produced in response to a subpoena by submitting a request, containing an acknowledgement of the non-disclosure obligation, in the form of FC 3A.

4.7.8 The legal representative of a party may apply to remove and copy documents or things produced in response to a subpoena by submitting a request and sign an undertaking in the

[10] Or, if there is good reason to do so, make an application on an ex parte basis.
[11] See CPC 4.7.6 – 4.7.8 below.

form of FC 3B. The discretion to permit removal of evidence will be exercised cautiously, and usually only when copying at the Court is impracticable.

4.7.9 The Court has facilities available for parties to inspect documents, including those provided in electronic format.

4.7.10 If a party's request to copy a document (or documents) has been approved:

a) if the document was produced to the Court in electronic format, the Court may make an electronic copy of the document for the requesting party;

b) if the document was produced to the Court in hard copy, the requesting party may make an electronic copy of the document using the photocopier at the Court registry (which has the facility to insert a USB device or SD card); and

c) any materials necessary to take or produce an electronic copy of a document (such as a USB device) must be supplied by the requesting party.

Documents produced on request

4.7.11 Where documents are produced by another court on request (see CPC 4.3.1 above):

a) DCR Pt 5BA does not generally apply; but

b) the non-disclosure obligation in DCR r 48AI does apply.

4.7.12 The District Court ordinarily permits inspection and copying of such documents on the same basis as documents produced under a subpoena (see CPC 4.7 above), and CPC 4.7.7 and 4.7.8 apply *mutatis mutandis* to materials produced on request. However:

a) permission to copy such material will usually be withheld if the producing court has raised an objection to copying; and

b) parties are generally not permitted to remove any materials produced by another court.

Third party access

4.7.13 Third party access to court records is dealt with in CPG 4.3.

4.8 Objections (requests to set aside)

4.8.1 Where, pursuant to RSC O36B r 8B, an addressee or a party (or other person with a sufficient interest) makes a request to set aside a subpoena in whole or in part, the Court will:

a) not permit access to any documents or thing that is the subject of the request (if it has been produced), until the request has been dealt with: RSC O 36B 8A(6); and

b) usually write to the parties and give directions that, if no application is made by the issuing party for alternative orders (usually within 14 days), the subpoena will be set aside; and

c) if the issuing party makes an application, usually direct the parties and objecting addressee to set out their respective positions in writing, together with any supporting affidavit or other material, and indicate whether they seek to be heard or are content for the Court to deal with the matter on the papers. Where necessary, the Court may give further directions before dealing with the application.

4.9 Return or disposal

4.9.1 Where an addressee declares[12] that some or all of the documents produced under a subpoena are originals, then pursuant to RSC O 36B r 10(2):

a) unless the Court otherwise directs, the Court will return the documents after the expiry of 28 days from the date on which production is due; but

b) before doing so, the Court will write to the parties giving them at least 14 days' notice that the documents are to be returned.

4.9.2 Where the addressee declares that documents produced under a subpoena are copies, the Court will destroy the documents after the expiry of 4 months from the conclusion of the proceeding (subject to any appeal): RSC O 36B r 10(4), (6).

[12] On the relevant declaration form served with the subpoena.

CPC 5 EXPERT EVIDENCE

Summary: RSC O 36A does not apply to civil actions in the District Court; rather, DCR Pt 5A applies. This Circular[1] provides guidance on the Court's approach and requirements to those provisions and should be read with PDC 6 – Expert Witnesses.

5.1 Introduction

5.1.1 In broad terms:

a) distinct rules apply to *expert medial evidence* in *personal injuries cases* (as those terms are defined in DCR 47B), such that (subject to a direction of the Court):

i) parties do not require leave or consent to adduce such evidence; and

ii) such evidence must be exchanged at an early stage (usually before entry for trial, or as soon thereafter as the report comes into existence): DCR 47E(5);

b) for other all other expert evidence:

i) leave or consent to adduce such evidence is required; and

ii) such evidence is to be exchanged at or after the time of entry for trial: DCR 47F(4).

5.1.2 The usual orders in relation to expert evidence are set out in UOC 5.1.

5.2 Expert reports and indexes

5.2.1 Persons giving expert evidence in the District Court (other than a medical expert in a personal injuries case) must comply with the Code of Conduct issued by the Court, which is set out in PDC-A1.

5.2.2 Certain experts may be well known to practitioners and provide numerous reports. In those circumstances, the expert may not be asked to provide a full statement of his or her qualifications or experience in each and every report.

a) The Code of Conduct sets out a practice of providing a summary of the expert’s qualifications and experience (paragraph 3.2).

b) However, under DCR r 45E(4)-(5), a party may obtain more detailed information about the qualifications and experience of another party's witness.

5.2.3 In all cases, each party must (before the listing conference) file an index of expert reports (including medical notes) on which that party will rely (DCR r 45E).

a) PDC 6 requires that the index be in the form of PDC-A2 – this in turn requires that the party identify the issue/s to which each report is relevant.

b) The index also provides a 'comments or notes' column – the party should identify in that column:

i) any unavailability of the expert, or any need for the expert to give evidence remotely; and

ii) reports which they consider can be tendered by consent without the need to call the witness.

[1] Formerly CP (Civ) 21.

5.2.4 Practitioners are reminded that:

a) a party may not, without leave, tender an expert report that is not on the index: DCR r45E(6) (see also UOC 5.1); and

b) they must give immediate notice if they decide not to call an expert on their index, before cancelling any arrangements for the witness to attend: PDC 6.

5.3 Conferral between experts

5.3.1 Where experts' reports have been exchanged, it may be apparent that the experts disagree on some material points, and there is often advantage in having the experts confer to see if those differences can be narrowed.

5.3.2 A party can apply to the Court, or the Court on its own motion can make, orders that the experts confer: DCR r 24(2)(f). The usual orders are set out in UOC 5.2.

5.3.3 Parties are encouraged (and may be ordered), for that purpose, to confer and prepare a common bundle for the experts containing:

a) a common set of issues or questions (these will usually combine the questions asked of each expert in their initial brief); and

b) any materials to which the experts should refer (these will usually compile the materials to which each expert referred in formulating their report).

CPC 6 PRE-TRIAL CONFERENCES

Summary: Pre-trial conferences are the primary mechanism by which parties are required to negotiate in good faith to attempt to resolve the action or narrow the issues in dispute. This Circular[1] sets out the Court's approach and requirements in relation to this important step in civil proceedings.

6.1 Introduction

6.1.1 Given the number of civil actions commenced in the District Court, the requirement for parties to negotiate in good faith to attempt to resolve the action or narrow the issues in dispute is a vital case management step.

6.1.2 The Rules provide for every action that is entered for trial to go to a pre-trial conference: DCR r 39.

6.1.3 On occasion, and only if consistent with case management objectives, the Court may in its discretion dispense with this requirement where the parties have attended, or are ordered to attend, a mediation conference early in the proceedings: DCR r 35A.

6.2 Listing

6.2.1 A pre-trial conference will ordinarily be listed within 40 days of the action being entered for trial.

a) If there are no available dates within 40 days from the date of entry for trial, the party entering the matter for trial should provide the list of unavailable dates for each party separately (not just a combined list).

b) If there is a particular reason for the pre-trial conference to be listed more than 40 days from the date of the entry for trial, the party entering the action for trial should give that reason in writing to the Court, and provide a list of unavailable dates for each party (separately).

6.2.2 If there is a particular date within 60 days of the entry for trial which is preferred by all parties, the parties are invited to request the Court to list the pre-trial conference on that date by covering letter. The letter should include a statement that no counsel appearing for any party has another pre-trial conference listed on the preferred date. The same information may appear in the entry for trial notice (as set out in CPC-A2).

6.2.3 Any request and/or unavailable dates and/or reasons provided may be referred to a registrar for review and to determine when the pre-trial conference should be listed. The registrar may:

a) seek further information from the parties or convene a directions hearing to address the proposed deferral of listing the pre-trial conference; and

b) list the pre-trial conference, other than in accordance with any proposed deferral, in any event.

6.3 Mediation in lieu

6.3.1 If the parties have participated in, or wish to participate in, a mediation conference in lieu of a pre-trial conference, the parties (or a party) may apply for orders pursuant to DCR r 35A:

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[1] Formerly CP (Civ) 16.

a) by filing a memorandum of consent orders (FC 1) to that effect, which includes the parties' unavailable dates for mediation;

b) by filing a minute of proposed orders prior to any scheduled directions hearing or listing conference; or

c) by making an application for such orders by chamber summons, which will be listed for mention.

6.3.2 The usual orders these purposes are set out in UOC 7.1.

6.3.3 The case management considerations relevant to making orders facilitating a mediation, including the timing of any mediation and whether a Court based or private mediation may be appropriate, are dealt with in CPC 7. These considerations, applied in the context that pre-trial conferences are the primary mechanism by which parties are expected to negotiate (at least in the first instance), and will guide whether to grant an application.

6.4 Personal attendance

6.4.1 The DCR require that parties attend a pre-trial conference in person and participate in good faith (r 40).

6.4.2 If any party seeks dispensation from personal attendance, the requesting party must:

a) make the request to the Court in writing (lodged via the ECMS and in any event copied to all parties), giving reasons to support the request (and its timing);

b) give an undertaking to be available to participate (by telephone or audio-visual link) in the conference throughout its duration;

c) instruct a legal representative to attend the mediation conference in person and to take all reasonably practicable steps to connect the party via telephone or audio-visual link to the conference;

d) notify all other parties of the outcome of the request for dispensation.

6.4.3 The merits of any request to be excused from personal attendance will be considered on a case-by-case basis. It is not uncommon for the Court to require that a party (or their representatives, including an insurance representative) who is located interstate or overseas attend in person rather than simply being available by telephone or audio-visual link.

6.4.4 It is the Court's usual practice to require that, if a party's legal representative is located interstate or overseas, the party brief local counsel to attend in person at the mediation conference.

6.5 Adjournment

6.5.1 Where the parties seek an adjournment of the pre-trial conference by consent:

a) the parties should, by not later than 2 working days before the listed date, file a memorandum of proposed consent orders (FC 1), giving a reason for the proposed adjournment;

b) if the memorandum of proposed consent orders is not filed at least 2 working days before the listed date, one of the parties will need to attend the Court to request the adjournment and provide reasons for it;

c) any proposed adjournment will be referred to a registrar to case manage the pre-trial conference;

d) if the proposed adjournment is longer than 60 days from the date of entry for trial, or the reason does not adequately support the adjournment sought, the registrar may not make the orders sought and may direct the parties to attend a directions hearing.

6.5.2 Any request to adjourn, made other than by consent, must be made:

a) in writing (lodged via the ECMS and in any event copied to all parties), giving reasons to support the request; and

b) no later than 2 working days before the listed date (or, if that is not possible, then stating reasons why it was not possible).

6.6 Negotiated outcomes

6.6.1 Where parties reach an agreement that will finally dispose of the action:

a) the parties must draw up and sign consent orders to that effect (and, to the extent that the agreement is that judgment be entered or the action be dismissed, the Court has template consent orders available for parties to use for that purpose); and

b) unless the approval of a judge is required, the presiding registrar will make orders giving effect to the agreed disposition: DCR 41(3).

6.6.2 Where a registrar mediates at a pre-trial conference and the parties agree to narrow the issues between them (without finally disposing of the action), the parties may seek orders giving effect to that agreement: DCR 41(3A)-(3B). In that case, the presiding registrar:

a) may, if satisfied that the parties consent, make orders giving effect to the agreement at the mediation conference;

b) may decline to make the orders at the mediation – for example, where the proposed orders would materially impact on the conduct of a trial (eg. that a question be tried as a preliminary issue) or the resources of the Court (eg. that there be a chaired conferral of experts); and

c) may make programming orders to deal with the parties' proposed orders.

6.6.3 Parties are encouraged to bring to the pre-trial conference a laptop and/or a thumb drive with a draft settlement agreement and/or draft heads of agreement to facilitate the resolution of the claim or part/s of the claim which may not be susceptible to the making of orders.

CPC 7 MEDIATION CONFERENCES

Summary: The Court may order parties to confer by way of a mediation conference and may give directions in relation to that process. This Circular[1] sets out the Court's practices and requirements in that regard.

7.1 Introduction

7.1.1 In general terms, mediation is a process in which the parties to the action, with the assistance of a mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.

7.1.2 Under DCR r 24(2)(e), the Court has express power to make a case management order that parties confer on a 'without prejudice' basis in order to settle the case or, failing settlement, to resolve as many of the issues between them as possible, and to identify the issues to be tried. Mediation conferences may be ordered to be conducted:

a) privately, with the consent of the parties; or

b) before a registrar of the Court, whether or not the parties consent.

7.2 Mediation generally

7.2.1 An order directing the parties to a mediation conference can be made at any time in the proceedings, and may give directions in relation to a mediation conference: DCR r 35. Such orders may be made:

a) on the Court's own motion (if the mediation is before a registrar); or

b) on the application of a party or the parties.[2]

7.2.2 The Court adopts a tailored approach to case management and may be guided by the parties in relation to optimal timing and programming, taking the following into account:

a) the allocation of a registrar and hearing rooms for a Court based mediation constitutes the deployment of significant Court resources;

b) similarly, private mediation must be paid for by the parties and can be costly; and

c) in keeping with the objectives of case management, the Court aims to facilitate parties' participation in mediation conferences at a time and in a manner that will make optimal use of those resources.

7.2.3 Parties should confer in relation to the merits and proposed timing of any proposed mediation. Such conferral should explicitly include whether the evidence, including the expert evidence, is sufficiently crystallised for the parties to meaningfully negotiate.

7.2.4 In light of the considerations identified at 7.2.2 above, if mediation orders are made, they will usually be in terms of UOC 7.1 and UOC 7.2. Those orders reflect the expectation that parties:

[1] Formerly CP (Civ) 15.

[2] Who may seek such orders by filing a minute of proposed consent orders, or by filing and serving a minute of proposed orders (before a directions hearing) or a chamber summons.

a) must attend the mediation conference in person (or, if a body corporate, by an agent authorised to conduct settlement negotiations and instruct in relation to conduct): DCR r 35(4), r 40(1); and

b) will usually also be directed to exchange and provide to the mediator (on a 'without prejudice' basis) a bundle of materials.

Personal attendance

7.2.5 The DCR require that parties attend a mediation conference in person (r 35(4)) and participate in good faith (r 35AA(1)).

a) Any issues regarding the attendance of a party, including whether a party may attend by telephone conference, should be raised when the order for the mediation conference is made.

b) If any request for dispensation from personal attendance is made after the time that the mediation conference is ordered, the requesting party must:

i) make the request to the Court in writing (lodged via the ECMS and in any event copied to all parties), giving reasons to support the request (and its timing);

ii) give an undertaking to be available to participate (by telephone or audio-visual link) in the conference throughout its duration; and

iii) instruct a legal representative to attend the mediation conference in person and to take all reasonably practicable steps to connect the party via telephone or audio-visual link to the conference;

iv) notify all other parties of the outcome of the request for dispensation.

7.2.6 The merits of any request to be excused from personal attendance will be considered on a case-by-case basis.

a) It is not uncommon for the Court to require that a party (or their representatives, including an insurance representative) who is located interstate or overseas attend in person rather than simply being available by telephone or audio-visual link.

b) It is the Court's usual practice to require that, if a party's legal representative is located interstate or overseas, the party brief local counsel to attend in person at the mediation conference.

Role of legal representatives

7.2.7 The role and preparation required of lawyers in mediation conferences is addressed in the *Guidelines for Lawyers in Mediations* issued by The Law Council of Australia.

7.2.8 The legal representative/s of a party attending the mediation conference should have discussed the following matters with the party well prior to the mediation conference:

a) the prospects of succeeding in (or successfully defending) the action;

b) the relative strengths of the other parties’ cases;

c) the key issues in dispute in the action and the evidence likely to be led at trial on these issues;

d) the parameters for settlement discussions;

e) the range of case outcomes following trial;

f) the time and effort that will be involved in preparing for a trial and the trial itself; and

g) the legal costs involved in going to trial (noting DCR r 36), including if adverse costs orders are made.

7.2.9 Lawyers should also:

a) consider the form in which any settlement may be recorded and may wish to prepare a draft settlement deed or heads of agreement to take to the mediation;

b) in a personal injuries action, obtain a notice of past benefits from Medicare Australia that will be current as at the date of the mediation; and

c) consider whether issues may arise in any settlement as to capital gains tax, income tax or GST and, where possible, provide advice in that regard prior to the mediation.

Confidentiality

7.2.10 Evidence of anything said, or any admission made, at a pre-trial conference or mediation conference is not admissible at the trial of the case (DCR r 35(10), r 41(1)).

7.2.11 A mediation conference is conducted on a 'without prejudice' basis, and where orders are made in terms of UOC 7.2 then mediation bundles are provided and exchanged on the same basis. Accordingly, without prejudice privilege attaches to those communications and exchanges, imposing a similar obligation of confidentiality: *C v M* [2011] WASC 175, [64].

7.3 Court based mediation

7.3.1 If a Court based mediation is ordered, the mediation conference will usually be listed for a half day at the District Court Building in Perth.[3]

7.3.2 Any application to adjourn the mediation conference, including by proposed consent order, must (except in exceptional circumstances) be made no later than two clear working days before the date on which it is listed. This is to avoid throwing away the mediation resources of the Court.

7.3.3 Whether or not orders are made in terms of UOC 7.2, the presiding registrar may write to the parties to request information that might facilitate the mediation and the registrar's understanding of the issues (for example, a request may be made for the parties to provide position statements or to identify the key issues in dispute).

7.3.4 Any documents provided to the registrar for the purposes of mediation only will not form part of the Court file.

7.3.5 A registrar presiding at a mediation conference:

a) will determine the process for the mediation – no one model is prescribed, and the process adopted is a matter of discretion and judgement for the mediator; and

b) will not provide legal advice to any party and does not determine any outcome of the mediation – any orders made at a mediation, other than consequential programming or costs orders, will only be made with the consent of the parties.

[3] Mediations in 'historical' child sexual abuse actions will usually be conducted in the David Malcolm Justice Centre.

Mediated outcomes

7.3.6 Where parties reach an agreement that will finally dispose of the action:

a) the parties must draw up and sign consent orders to that effect (and, to the extent that the agreement is that judgment be entered or the action be dismissed, the Court has template consent orders available for parties to use for that purpose); and

b) unless the approval of a judge is required, the presiding registrar will make orders giving effect to the agreed disposition: DCR 35AA(5).

7.3.7 Parties may also use a mediation conference to narrow the issues between them by agreement, and may seek orders giving effect to such agreement: DCR 35AA(6)-(7). In that case, the presiding registrar:

a) may, if satisfied that the parties consent, make orders giving effect to the agreement at the mediation conference;

b) may decline to make the orders at the mediation – for example, where the proposed orders would materially impact on the conduct of a trial (eg, that a question be tried as a preliminary issue) or the resources of the Court (eg, that there be a chaired conferral of experts); and

c) may make programming orders to deal with the parties' proposed orders.

7.3.8 Parties are encouraged to bring to the mediation conference a laptop and/or a thumb drive with a draft settlement agreement and/or draft heads of agreement to facilitate the resolution of the claim or part/s of the claim which may not be susceptible to the making of orders.

Costs

7.3.9 The ordinary position, reflected in the court's usual orders (UOC 7.1), is that the costs of a mediation will be in the cause. A presiding registrar may make alternative costs orders if that is warranted.

7.3.10 Without limitation to the discretion of the mediating registrar:

a) the usual basis for making an alternative costs order is a party's failure to attend, or participate in good faith, at the mediation;

b) applications for adverse costs orders will be approached with caution; and

c) the failure of the parties to agree is not of itself indicative of an absence of good faith.

7.4 Private mediation

7.4.1 If the parties consent, the Court may direct the parties to participate in a private mediation. When such orders are sought:

a) if the proposed mediator is accredited under the National Mediator Accreditation System (NMAS), then that should be stated in a letter accompanying the application or proposed consent order; and

b) a) if the proposed mediator is accredited under NMAS, then a brief written statement setting out the mediator's name, qualifications and experience should be provided in support of the application or proposed consent order.

7.4.2 In addition to the orders at UOC 7.1 and 7.2, orders will usually be made to the effect that:

a) the relevant provisions of the DCR are brought to the mediator's attention (which include that, despite confidentiality, the mediator may notify the Court of any failure by a party to cooperate in the mediation conference); and

b) the parties report to the Court when the mediation conference has taken place.

CPC 8 LEAVE TO COMPROMISE CLAIMS BY PERSONS UNDER A DISABILITY

Summary: This Circular*[1] *deals with the procedures the Court has adopted in relation to claims requiring Court approval to settle (claims by persons under a disability within the meaning of RSC O 70 r 1).

8.1 Introduction

8.1.1 The Court's procedure for dealing with applications for approval of compromise pursuant to RSC O 70 r 10 is aimed at finalising the application within 6 weeks of lodgement. A claimant may apply for an expedited hearing in appropriate circumstances.

8.2 Power to approve

8.2.1 Pursuant to a direction of the Chief Judge under DCR r 8(1)(e), applications for leave to compromise an action pursuant to RSC O 70 r 10 and O 70 r 11:

a) must be dealt with by a judge if the damages sum proposed to be awarded is over $250,000; and

b) may otherwise be dealt with by a registrar.

8.2.2 The usual appeal provisions in the DCR apply to the decisions of registrars in this regard.

8.3 Form of the application

8.3.1 Where an action to be compromised has been commenced by writ, the application is by chamber summons: RSC O 70 r 10.

a) Ordinarily the application is for leave to compromise, judgment for the plaintiff (UOC 8.1) and the usual orders with respect to the court-appointed trustee (UOC 8.3). Where judgment is entered, there is no need for an order discharging the defendant from further liability (because judgment has this effect).

b) Where the terms of a compromise are contained in a deed (or proposed deed), the application will be for approval of the terms of a deed (UOC 8.2) and the subsequent discontinuance or dismissal of the action (UOC 8.2.4(b)). The orders sought should be consistent with any terms relating to release and discharge agreed between the parties.

8.3.2 Where no action has been commenced, the application is by originating summons: RSC O 70 r 11.

b) Ordinarily, the application is for an order for leave to compromise the claim pursuant to a sum of damages under an order (UOC 8.1) or a deed (UOC 8.2), the usual orders with respect to the court-appointed trustee (UOC 8.3) and an order that the defendant be discharged from further liability upon payment (UOC 8.2.4(a)).

c) The orders need to specify the claim in sufficient detail so that the claim covered by the discharge is clearly identifiable.

d) Where there is a deed (or proposed deed) the application will be for the approval of the terms of the deed, and any discharge orders should be consistent with any terms relating to release and discharge agreed between the parties.

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[1] Formerly CP (Civ) 17.

8.3.2 In either case, consideration should be given to whether application has been made, or needs to be made, to appoint a next friend as an antecedent step to any approval of the proposed compromise (see RSC O 70 r 3).

8.4 Contents of the application

8.4.1 Part 4.2.2 of the *Consolidated Practice Directions of the Supreme Court of Western Australia 2009* applies to applications for leave to compromise in the District Court: PD 4.1.1(c). All the materials required by that Practice Direction are to be lodged with the application. Practitioners should not file the application until this can be done. For ease of reference, it is relevantly set out below:

> *1. …*
>
> *2. Where counsel's opinion is not dispensed with, it must be obtained, filed and identified, and the court will normally be required to be satisfied:*
>
> *(a) that the next friend, (or guardian appointed by a court to be the representative in a particular lawsuit as the case may be) has perused counsel's opinion, has discussed it with the solicitor and approved of or consents to the proposed compromise;*
>
> *(b) that the facts on which counsel's opinion is based are correct and complete so far as can be ascertained;*
>
> *(c) that sufficient facts are identified to enable the court to form an opinion in respect of the matter to be approved, and that grounds for any apportionment of liability are stated; and*
>
> *(d) that in the opinion of both counsel and solicitor, the proposed compromise would be beneficial to the person under disability.*
>
> *3. Where counsel's opinion is dispensed with, the court will normally require an affidavit by the next friend's solicitor setting out the relevant facts (as above, so far as applicable) and stating in effect that he had discussed the case with the next friend who approved of or consents to the proposed compromise, and that the solicitor considers the proposed compromise to be beneficial to the person under disability.*

8.4.2 Counsel's opinion should be supported by copies of all relevant documents, including medical reports, witness statements (in particular, if liability is in issue) and schedules of calculations.[2] These materials can be filed as a separate bundle (if there is no confidential or privileged material) or attached to counsel's opinion.

8.4.3 Even if the parties agree to a costs-inclusive settlement sum, it must be discernible on the application precisely what amount is proposed to be paid to the claimant as damages, and what will be paid for costs and disbursements.

8.4.4 Where the terms of a compromise are contained in a deed, the deed or draft proposed deed must be filed with the application.

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[2] *Trout v Minister for Health* [2012] WADC 172 [17].

8.5 Confidentiality

8.5.1 Conventionally, the opinion of counsel in support of a compromise is treated as confidential so as not to disadvantage the plaintiff in the event that the compromise is not approved.

a) The ECMS system will automatically restrict access to counsel's opinion if it lodged as document type 'Counsel's Opinion'. If lodged as this document type, only the plaintiff and the court will be able to view this document.

b) The compromise orders should contain an order to this effect, restricting access to counsel's opinion on the court record to the plaintiff and their representatives (DCR r 71(3) and see UOC 8.4).

8.5.2 Where the parties have compromised on confidential terms (eg. by deed of release containing confidentiality provisions), an order can be sought restricting access to any document that contains the amount or terms of the compromise (UOC 8.4(f)).

8.5.3 An order restricting access under DCR r 71(3) applies to documents 'on the court record' (relevantly, the ECMS). It does not, for example, prevent the plaintiff's next friend from authorising the plaintiff's lawyer to provide a copy of counsel's opinion to the court appointed trustee.

CPC 9 EXTRACTION OF ORDERS

Summary: The Court will generally extract all orders made by Registrars.
If extraction by a party is required, draft orders for extraction should be submitted via the ECMS.

9.1 Extraction of orders

9.1.1 The Court's general practice is to extract any orders made:

a) by registrars (including in chambers); and

b) in all directions hearings.

9.1.2 If a party is required to extract an order, the draft order should (unless the party is unable to do so) be filed through the court's eLodgment system (**ECMS**) - select document type: *'Order before Registrar in Chambers – in for settling*' or *'Order before Judge in Chambers – in for settling'*. (As to the form of orders, see 9.2.2-9.2.3 below).

9.1.3 Orders as extracted will be issued as a folioed document via ECMS. If a party is not a registered user on ECMS, a printed copy will be sent to them by the Court.

9.2 Draft and proposed orders

9.2.1 Where orders are to be made in chambers, parties are encouraged, and may be required, to file a minute of proposed orders. This should be done via ECMS - select document type: '*Minute of Proposed Orders'*.

9.2.2 The Court has published a series of Usual Orders – Civil (**UOC**). Practitioners are encouraged to use the UOC wherever practicable.

9.2.3 The Court has observed that common mistakes made in draft orders include:

a) the use of incorrect preambles –the correct preambles for various civil proceedings are set out at UOC 0.1 – 0.3; and

b) unnecessary differentiation between the Principal Registrar, a Registrar or a Deputy Registrar - a reference to a 'Registrar' will suffice.

9.3 Consent orders

9.3.1 If orders are sought to be made by consent pursuant to *Rules of the Supreme Court 1971* (WA) (**RSC**) O 43 r 16, a minute of consent orders must be lodged via ECMS - select document type: '*Consent Orders Pursuant to O43 R16 - in for Settling'*.

9.3.2 A minute of consent orders should be in a form substantially the same as that in FC 1, and must be signed by all parties.

9.3.3 Where the orders sought by consent are to grant leave, extend time or vary a previous order, the parties must provide a reason (or reasons) supporting the orders. If the matter is to be heard in chambers, reasons may be given orally. If they are sought to be made administratively, the reasons must be indorsed on the minute of consent orders.

9.3.3 If satisfied that the orders should be made, a judge or registrar will settle and confirm them. The resulting orders will be issued in line with 9.1 above.

9.4 Duplicate orders

9.4.1 Once the Court issues an order via ECMS, an authorised user may print one or more copies of the order. The printed copy may be treated as a duplicate of the order for the purposes of RSC O 43 r 4. If a party is not a registered user on ECMS, a printed copy can be sent to them by the Court.

CPC 10 COMMERCIAL LIST

Summary: The Commercial List is designed to facilitate the resolution of commercial disputes in a timely and cost-effective manner. This Circular[1] outlines procedures and practices adopted to that end by the Court, with guidance on tailoring those procedures to the requirements of a case.

10.1 Introduction

10.1.1 This Circular provides particular guidance in relation to the Court's Commercial List; it does not preclude the application of other relevant CPCs. Notably:

a) since commercial cases are, of course, civil proceedings, all CPGs and CPC 1- CPC 9 apply to them; and

b) CPC 11 will also apply to commercial cases involving building and engineering claims.

10.1.2 In this Circular:

a) a 'commercial case' is any action commenced by writ where the remedy sought is other than damages for personal injury; and

b) a 'routine' commercial case is a broad, flexible description of commercial cases that generally:

i) do not involve a third party claim;

ii) do not involve the use of experts; and

iii) are not expected to take more than 3 days at trial.

10.2 Cost effective litigation

10.2.1 In addition to the usual case management objectives (see CPC 1.1), the Court aims in its case management to achieve the following in 'routine' commercial cases:

a) the parties should ordinarily attend a mediation conference before a registrar within 3 months of filing of the first memorandum of appearance;

b) by the time of the mediation conference, the parties should have spent no more than 10% of the amount in issue in legal fees (including the cost of attending the conference); and

c) a case which does not settle at a mediation conference should ordinarily go to trial within 9 months of commencement.

10.2.2 Some particular mechanisms designed to facilitate the conduct of commercial cases in a cost-effective manner include:

a) a dedicated commercial list, with a single registrar ordinarily allocated to case manage the action up to the listing conference;

b) the publication of usual case management orders for commercial cases (UOC 10.1), facilitating the parties seeking orders by consent, which:

i) obviate the need to attend the initial directions hearing;

[1] Formerly CP (Civ) 14.

ii) provide a timetable for pleadings;

iii) allocate a mediation conference, with directions to facilitate it; and

iv) extend the time within which to make a summary judgment application or to apply to strike out the pleadings until after the mediation conference, reserving these rights pending the settlement discussions;

v) provide a timetable for informal discovery, including the provision of copies of documents with costs in the cause (obviating the need for inspection or conferral on costs);

vi) allocates a directions hearing after the mediation conference if the action does not settle.

10.2.3 In may be that the usual orders are sought or made in stages / tranches, depending on the circumstances of the case at hand.

10.3 Initial directions hearing

10.3.1 As a general rule, once the first memorandum of appearance is filed in a commercial case:

a) the parties will be summoned to attend a case management hearing: DCR r 31; and

b) the Court endeavours to list the initial directions hearing within 4 weeks of the first memorandum of appearance being filed.

10.3.2 At the initial directions hearing, the registrar will discuss with the parties the appropriate case management approach, which will generally result in one of the following:

a) the usual commercial case management orders will be made;

b) the action will be listed for an early mediation conference; or

c) no, or minimal, orders will be made (meaning that the DCR have their usual application).

10.3.3 Parties are encouraged, prior to the initial directions hearing, to confer to agree:

a) the most appropriate case management approach; and

b) a minute of proposed orders for the initial directions hearing (with any of the usual orders being tailored if necessary),

to meet the requirements of the case at hand.

10.3.4 If directions are sought by way of a chamber summons, the usual obligation to confer apply and a certificate of conferral should be lodged: DCR r 22, r 34(2).

10.4 Mediation (including early mediation)

10.4.1 As part of the tailored approach to case management in the Commercial List, the registrar will discuss with the parties during case management hearings the optimal time for a Court ordered mediation to take place. In the absence of any other order, the usual practice in the Court will apply, and a pre-trial conference will be held following the action being entered for trial: DCR r 39(1).

10.4.2 In cases where the issues are not complex, it may be appropriate to list the matter for a mediation conference as early as practicable in the proceedings. In a case of this type:

a) the Court endeavours to list a mediation conference within 3 months of the filing of the first memorandum of appearance; and

b) the aim of the mediation is for the parties to explore a negotiated outcome before significant costs have been incurred in the proceedings.

10.4.3 A mediation conference of this type may be listed upon the parties filing a memorandum of consent orders seeking orders in terms of UOC 10.1, para 8-14. If the registrar makes orders in terms of the memorandum the Court will advise the parties of the date of the mediation conference and the subsequent directions hearing by letter.

10.4.4 CPC 7 applies to any mediation of a commercial case.

10.4.5 If an action that is suitable for early mediation does not settle at the mediation conference:

a) the parties should use the mediation conference to narrow the issues in dispute between them in readiness for a listing conference (which will be listed by the registrar presiding at the mediation);

b) the expectation will be that the action should be set down for trial as soon as practicable after the mediation conference, with a view to the trial being concluded within 12 months of commencement of the action; and

c) at the listing conference, orders may be sought and made that program a routine commercial case for trial on affidavits.

10.5 Trials of commercial cases

10.5.1 The Court endeavours to list a routine commercial case for trial within 12 months of the action being commenced.

10.5.2 For some routine commercial cases, it may appropriate for the trial to take place on affidavit evidence.

10.5.3 A party seeking a trial on affidavit evidence should identify that position at the listing conference, and the action will be listed for special directions before a judge for consideration of that issue.

CPC 11 BUILDING / ENGINEERING CLAIMS - SCOTT SCHEDULES

Summary: Parties to actions on building and engineering contracts must apply for directions in relation to the filing of Scott Schedules: DCR r 45D. This Circular[1] provides guidance on the requirements for and use of Scott Schedules in the Court.

11.1 Introduction

11.1.1 A Scott Schedule:

a) is a form of particulars usually ordered in actions where a party's case is made up of a number of claims; and

b) is a convenient form for the Court to have a full description of each claim and the contention of each party with respect to it.

11.2 Obligation to seek directions

11.2.1 In an action on a building or engineering contract:

a) under DCR r 45D, the plaintiff must, 75 days after the first defence is filed, apply for directions as to whether a Scott Schedule is required;

b) there may be circumstances in which it would be appropriate to direct the defendant to file and serve the Scott Schedule (for example, where a plaintiff builder sues on the contract, and the defendant home owner defends or counterclaims on the basis of defective workmanship); and

c) it is open to the parties to submit that no Scott Schedule be ordered.

11.2.2 The Court's general case management powers under DCR r 24(1) are sufficiently broad to order that a Scott Schedule be filed in any proceeding. For example, a Scott Schedule may be beneficial is an action for breach of the covenant to repair in a lease where multiple instances of breach are alleged.

11.2.3 The terms of the usual orders are set out in UOC 11.1, and various forms of Scott Schedule are set out in FC 4.

11.3 Case management considerations

11.3.1 In addition to the usual case management objectives, directions made in relation to Scott Schedules are aimed at ensuring that, when the action is entered for trial:

a) in relation to each item:

i) the item is particularised in a manner that allows it to be conveniently identified by the Court, parties and any witnesses;

ii) the value (quantum) asserted by each party is identified; and

iii) areas of agreement and contention between the parties relating to description and quantum are identified;

and

b) the aggregate of the claims and admissions of each party are known.

[1] Formerly CP (Civ) 20.

11.3.2 The Court is concerned to ensure that the parties do not have to file with the Court multiple documents containing the same particulars. To that end (without limiting the discretion of the Court to make such orders as to particulars as it sees fit):

a) a party may foreshadow in a pleading that full particulars will be provided by way of Scott Schedule in accordance with DCR r 45D; and / or

b) the party pleading the damages claim to which the Scott Schedule relates may seek an order that the Scott Schedule stand as that party's schedule of damages for the purpose of DCR r 45C (either in whole or in part).

11.4 Expert evidence

11.4.1 In some cases, it may be appropriate to incorporate or refer to expert evidence into the Scott Schedule.

11.4.2 Where the substance of the Scott Schedule is likely to be based on expert evidence (for example, the report of a builder), the parties should seek to align the drafting of the Scott Schedule with the exchange of expert's reports.

CPC 12 APPEALS – DECISIONS OF REGISTRARS AND OTHER COURTS

Summary: The procedure for appeals from the decision of a registrar of this Court differ from appeals brought in the District Court from decisions in other courts. This Circular*[1] *provides guidance on those differences.

12.1 Introduction

12.1.1 Any party dissatisfied with a decision of a registrar may appeal the decision to a judge: DCR r 15(1). The appeal is by way of a new hearing of the matter that was before the registrar: DCR r 15(6).

12.1.2 The District Court also has appellate jurisdiction in relation certain decisions in other courts and tribunals, which must usually be by way of a reconsideration of the evidence that was before the primary court: DCR r 50.

12.2 Commencement and form of notice

Appeals other than from a decision of a registrar

12.2.1 For appeals other than from:

a) the decision of a registrar; or

b) under the *Workers' Compensation and Injury Management Act 1981* (WA),[2]

the appellant must file a notice in the form prescribed by the DCR r 51(1) (DCR Form 6).

12.2.2 Unless otherwise provided in legislation, an appeal must be commenced within 21 days of the date of the decision: DCR r 51A.

Appeals from a decision of a registrar

12.2.3 DCR r 15(3) (as amended) provides that an appeal from a decision of a registrar is to be commenced by filing and serving a notice (DCR Form 6A) that sets out:

a) the particulars of the Registrar's decision or that part of it to which the appeal relates; and

b) the final orders that it is proposed the Court should make on the appeal.

12.2.4 As an appeal from the decision of a registrar is a new hearing:

a) there is no need for the notice of appeal to identify error the registrar's decision; and

b) if, as part of the appeal, the appellant wishes to address any reasoning on which the registrar relied, this can be done in submissions (see CPC 12.6 below).

12.2.5 An appeal must be commenced within 10 days after the date of the decision, or such longer period as a judge or legally qualified registrar may direct: DCR r 15(2).

12.3 Extending time

12.3.1 Where leave to appeal is sought, this should be the first proposed order in the notice of appeal.

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[1] Formerly CP (Civ) 9.2 and 10.

[2] In respect of which, the appellant must file prescribed Form 8A: DCR r 51(4A).

12.4 Listing

12.4.1 Under the DCR, a directions hearing is held in each appeal initiated in the Court. In the ordinary course:

a) for appeals from decisions of registrars, the Court will set a hearing date for the appeal at the initial directions hearing. Parties wishing to have the dates of counsel taken into account should be in a position to advise the Court of unavailable dates at the first mention; and

b) for other appeals, a hearing date will not be set at the initial directions hearing. This is because, routinely, in other appeals there are preliminary matters that need to be attended to before the appeal can be listed. For example, the Court may have to obtain the relevant Magistrates Court file.

12.5 Fees

12.5.1 A fee is payable:

a) upon filing of a notice of appeal; and

b) for each day / half day allocated for the hearing of the appeal.

12.5.2 The relevant fees payable are set out in Schedule 1, item 5 of the *District Court Fees Regulations 2002* (WA).

See further: CPC 15 – Fees.

12.6 Submissions and documents

12.6.1 For any appeal, unless otherwise ordered:

a) at least 7 clear working days prior to the of an appeal hearing, each party must file and serve a list of documents, including any affidavits, which the party intends to rely on, or refer to: DCR 61(4); and

b) at least 2 clear working days prior to the hearing of an appeal, each party must file and serve an outline of submissions: DCR r 61(2).

CPC 13 APPLICATIONS UNDER THE CIVIL JUDGMENTS ENFORCEMENT ACT 2004

Summary: Enforcement of civil judgments in the Court is governed by the Civil Judgments Enforcement Act 2004 (WA) (CJEA) and Civil Judgments Enforcement Regulations 2005 (WA) (CJER). This Circular[1] deals with the Court's procedures to streamline the way in which it deals with applications under this legislation.

13.1 Introduction

13.1.1 Most applications under the CJEA are dealt with by registrars: DCR r 62 to r 64. The principal exceptions are:

a) default inquiry hearings: CJEA s 89;

b) applications for the issue of an arrest warrant: CJEA s 29 (4) and s 89(4).

13.2 Forms

13.2.1 The CJER prescribes forms for applications and orders under the CJEA.

13.2.2 In addition, the Department of Justice has issued further forms.

13.2.3 The requisite forms can be obtained online from the District Court website (www.districtcourt.wa.gov.au) under the 'Civil Procedure' then 'Forms' tab.

13.3 Ex parte applications

13.3.1 Noting the time of lodgement with the Sheriff's office determines priority, the Court aims to deal with applications under the CJEA in a timely manner.

13.3.2 Most ex parte applications will be dealt with on the papers. Specifically, the Court will endeavour to deal with applications for the following types of order on the papers in the first instance:

a) Property (Seizure and Sale);

b) Property (Seizure and Delivery); and

c) Debt Appropriation.

13.3.3 Notwithstanding the above, applications will be listed in general chambers if:

a) a party wishes to have the notice of motion dealt with in general chambers and has lodged, with the notice, a covering letter with a request to that effect;

b) the application is by an unrepresented litigant;

c) a party is entitled to be heard (see s 69(3) CJEA); or

d) the registrar has any queries about the order, or is not prepared to grant it.

13.4 Service of a means inquiry summons

13.4.1 The notice to attend the means inquiry must be personally served: CJEA s 29(3). CJER reg 78 provides that this may occur under either:

a) CJER Pt 6 Div 2; or

[1] Formerly CP (Civ) 27.

b) CJER Pt 6 Div 4 deals (service by email or fax).- this can only be done with the consent of the person being served: CJER reg 93.

13.4.2 The Court has no discretion to vary the requirements for service.

13.5 Documents produced at a means inquiry

13.5.1 If, pursuant to a means inquiry summons, a witness produces documents at the means inquiry, it is open to the judgment creditor to request the Court to:

a) stand the matter down for a short period; or

b) adjourn the means inquiry,

to allow Counsel to review the documents and, if necessary, take further instructions.

13.6 Arrest warrants

13.6.1 The Court may issue an arrest warrant if a person, who has been properly served with a summons to attend to give oral evidence or produce any record or thing at a means enquiry (s 29) or a default enquiry (s 89), fails to attend.

13.6.2 The power to issue an arrest warrant under the CJEA is reserved to the judges of the Court: DCR r 63.

Means inquiries

13.6.3 Means inquiries are listed before a registrar.

13.6.4 If a judgment debtor does not attend the means inquiry, and the judgment creditor wishes to apply for the issue of an arrest warrant, then:

a) the registrar will adjourn the means inquiry to the next available date before a judge in chambers. Before doing so, the Registrar will need to be satisfied that

i) the summons to attend the means inquiry was issued on a date which was not less than 7 clear days before the date on which the person was required to attend the means inquiry: CJER reg 15;

ii) an affidavit of service of has been filed confirming personal service pursuant to CJER Pt 6 Div 2 or Pt 6 Div 4; and

iii) the summons to attend the means inquiry was served not less than 5 clear days before the date on which the person was required to attend the means inquiry: CJER reg 15;

and

b) the judgment creditor should be in a position to tender the affidavit of service in order for the Registrar to consider whether service has been validly effected.

13.6.5 Alternatively, the judgment creditor may seek an adjournment of the means inquiry to either consider its position or attempt informally to have the judgment debtor attend the adjourned means inquiry.

a) If the means inquiry is adjourned, it is open for the judgment creditor to make an application for the issue of an arrest warrant.

b) This application will be listed before a judge in chambers. In this case, the judgment creditor must file an application for an arrest warrant in the form of CJER Form 6.

Default inquiries

13.6.6 Default inquiries are listed before a judge.

13.6.7 If the judgment creditor does not attend the default inquiry, then it is open to the judgment creditor to request the judge to issue an arrest warrant at the default inquiry hearing.

13.6.8 PDC 10 requires counsel, on an application for a default inquiry, to hand to the presiding judge a certificate in the form of PDC-A3.

Determination of application

13.6.9 The application for the arrest warrant will inevitably proceed ex parte. The judgement creditor is thus under an obligation to place before the Court all facts material to the question of whether an arrest warrant will issue. This includes facts which the person summoned would have brought forward had they been present. Examples include:

a) a letter which the judgment creditor has received from the person summoned setting out why they did not attend the means inquiry or default inquiry or making an offer of a payment arrangement; or

b) a payment arrangement entered into between the judgment creditor and the judgment debtor following the means inquiry.

13.6.10 Where an arrest warrant is issued, and executed, the judgment debtor must be brought before the Court as soon as practicable: CJER reg 96.

a) The Registry will endeavour to contact the judgment creditor so that the judgment creditor can attend when the judgment debtor is brought before the Court.

b) It is important that, where a judgment creditor has obtained an arrest warrant, arrangements are made for counsel for the judgment creditor to be able to attend the Court at very short notice upon the execution of the arrest warrant.

13.6.11 Upon the return of the arrest warrant, the options open to the judge include:

a) releasing the judgment debtor on his or her own undertaking, with or without a surety (CJER reg 96) and adjourning the means or default inquiry to a fixed date;

b) remanding the judgment debtor in custody and adjourning the inquiry to a fixed date; and

c) proceeding with the means inquiry or default inquiry (though this is unlikely to be practical given listing considerations).

d)

13.7 Provisions for country registries

13.7.1 Where an application under the CJEA:

a) is issued from a country registry of the Court; and

b) is to be determined by a judge,

the application will be listed in the next sittings of the Court in that location.

13.7.2 If there are particular reasons for urgency:

a) the Court may list the application to be dealt with by video conference; and

b) a party requesting that an application be dealt with by video conference should forward to the relevant Registry, at the time of making the application, a letter setting out the relevant circumstances of the case.

CPC 14 ABUSE CLAIMS LIST

Summary: The District Court has established a dedicated list to case manage claims for historical child sexual abuse and under the National Redress Scheme (collectively 'abuse claims')). This Circular provides guidance on the approach to be taken in tailoring procedures to the requirements of a case.

14.1 Introduction

14.1.1 In October 2023 the District Court hosted a round table forum to consult with members of the profession who regularly act in abuse claims. The outcomes of that consultation included the creation of a dedicated case management list for abuse claims, commencing in February 2024.

14.1.2 The abuse claims list will, in the first instance, be listed fortnightly. That frequency may be revised from time to time.

14.1.3 In addition to the usual case management objectives (see CPC 1.1), the Court aims in its management of abuse claims to advance the following objectives:

a) a tailored approach to case management, promoting greater certainty in relation to important milestones; and

b) working with counsel to set, at an early stage in the action, a date for a mediation conference and the steps needed to promote effective negotiation at the mediation conference.

14.2 Initial directions hearing

14.2.1 The Court will call on an initial directions hearing, to be held around 6 weeks from the commencement of an abuse claim.

14.2.2 The aim of the initial directions hearing will be to program the action to a mediation conference, with the date of the mediation conference to be scheduled at a time suited to the parties being in a position to engage in effective and informed negotiations.

14.2.3 The parties' legal representatives are encouraged to confer about, and to be in a position to address the presiding registrar in relation to, the following matters:

a) whether an application is to be made to anonymise party names (see PDC 9)[1] and, if so, whether the application is consented to;

b) whether there are any special circumstances that would require expedition (see PDC 9);

c) the principal issues likely to be in dispute;

d) whether any interlocutory applications or disputes are contemplated;

e) the steps needed to best position the parties to engage in effective and informed negotiations (for example, obtaining medical and/or other expert evidence, and obtaining counsel's advice), and the time needed to take each of those steps;

f) the composition of, and the time to file, mediation bundles; and

[1] Note that the usual orders in a directions hearing before a registrar (without the need for formal application) extend only to anonymisation of the plaintiff's name. An application would be required to anonymise a party other than the plaintiff, or to restrict access to the court record (see PDC 9; UOG 4.1).

g) the availability of parties and their legal representatives to attend the mediation conference in person.

14.2.4 Parties are encouraged to prepare minutes of proposed orders, to be filed at least one clear day before the initial directions hearing (see, for example, UOC 14.1).

14.3 Mediation

14.3.1 Mediations for abuse claims will usually be held at the David Malcolm Justice Centre.

14.3.2 CPC 7 applies to mediations in abuse claims.

14.4 Interlocutory disputes

14.4.1 Interlocutory disputes in abuse claims will usually be listed to a special appointment before a judge.

14.5 Preparing for trial

14.5.1 If the claim does not resolve at mediation, the action will be programmed to a listing conference (and CPC 2.3 applies).

14.5.2 After trial dates are allocated, case management and any interlocutory disputes will be dealt with by a judge.

CPC 15 FEES

Summary: This Circular addresses some common issues that arise in relation to Court fees.

15.1 Introduction

15.1.1 Most fees charged by the Court are issued under and in accordance with the District Court (Fees) Regulations 2002 (Fees Regs). However, some fees are prescribed under, or modified by, other legislative instruments.

15.1.2 Unless otherwise specified, any reference to a regulation in this CP is a reference to the Fees Regs.

15.2 Listing / hearing fees

15.2.1 Pursuant to the Fees Regs, a fee is payable in relation to:

a) listing a cause or matter (other than an appeal) for hearing (Sch 1, item 6); and

b) allocating hearing dates (by number of days or additional days allocated) (Sch1, items 7, 8, 10).

15.2.2 For the Court's practices in relation to the listing actions for trial, and the payment of trial hearing fees, see CPC 2.4.

15.3 Waiver and refunds

15.3.1 There is no general discretion to waive or refund fees payable under the Fees Regs.

15.3.2 The only fees that may be *waived* by the Court or a registrar are those referred to in Sch 1 item 15(a) or 16 (per-page charges of copying a transcript or record) (reg 8D).

15.3.3 Refunds, other than of hearing fees, may only be made where:

a) a person has paid more than the fee that they were entitled to be charged under the Fees Regs; or

b) a person has paid a fee, or part of a fee, in error.

15.3.4 Hearing fees may only be refunded in accordance with, and should not be requested other than in accordance with, reg 9(6).

15.3.5 Hearing fee refund requests may be made by writing to the Court. Where a request is made pursuant to reg 9(7) or 9(8), the requesting party *must identify*:

a) the first date allocated for the hearing; and

b) the number of days between first date allocated for the hearing and the relevant notice (reg 9(7)) or adjournment (reg 9(8)).

15.4 Applications to reduce or defer payment of fees

15.4.1 Application may be made:

a) under regs 7 - 8A, to reduce the fees payable (on the basis of being an eligible person or entity); or

b) under reg 6(2), to defer payment of a fee *in respect of a claim for personal injuries*.

15.4.2 An application for recognition as eligible individual or eligible entity under reg 8, is to be in the form of Sch 3 Form 2 of the Fees Regs. The application may be emailed to districtcourt@justice.wa.gov.au.

15.4.3 An application to defer the payment of a fee in respect of a claim for personal injuries fees under reg 6(2):

a) will not ordinarily be granted unless the party applying is an eligible person under reg 7 and, accordingly, should be supported by a form substantially the same as Sch 3 Form 2 of the Fees Regs (with the header duly marked / amended);

b) may be made by submitting the form in Sch 3 Form 2 of the Fees Regs, with the heading amended to reflect that the application is for deferral and/or deferral and reduction of fees; and

c) if granted, will usually result in orders in terms of UOC 15.1 (trial hearing fee) or UOC15.2 (any other fee).

15.4.4 Once an application under reg 6(2) has been granted, any subsequent request for an extension of the time allowed for deferred payment (eg, pending the outcome of an appeal) may be made by writing to the Court. The Court may, however, require the applicant to provide further information or evidence in support of that request.

15.5 Disputes regarding fees and review of decisions

15.5.1 A 'dispute regarding fees' within the meaning of reg 5A (and under s 89A of the District Court of Western Australia Act 1669):

a) is an application for a determination of 'a question as to the fee payable or applicable' – which goes to fees charged administratively; and

b) does not extend to the review of a decision made by a judge or registrar in relation to an application under reg 8(1) to be recognised as an eligible person, or in relation to the deferral (reg 6(2)) or refund (reg 9) of a hearing fee.

15.5.2 A person dissatisfied with a decision made by a registrar in relation to an application under reg 8(1) to be recognised as an eligible person, or in relation to the deferral or refund of a hearing fee, may seek review of that decision by a judge. Application for review should be made using FC 6.

15.5.3 A decision of a judge in relation to relation to an application under reg 8(1) to be recognised as an eligible person, or in relation to the deferral or refund of a hearing fee, is not subject to appeal under s 79 of the *District Court of Western Australia Act 1669* (WA).

15.6 Child sexual abuse actions and National Redress Scheme claims

15.6.1 The Criminal Procedure Rules 2005 (WA) (CPR), r 51 provides that:

a) if a person (who has leave to do so) wants to obtain a copy of a transcript or record of a criminal proceeding, the person must pay, or make arrangements to pay, the cost of the court supplying the copy, unless the court orders otherwise (sub-rule (6B)); but

b) sub-rule (6B) does not apply in relation to an application that is made *for the purposes of* a child sexual abuse action or a claim under the National Redress Scheme (sub-rule (6C)).

15.6.2 CPR r 51(6C):

a) has the effect of waiving the fee that would otherwise be payable under Sch 1 item 15(a) or item16(b) of the Fees Regs – that is, the cost of 'supplying a copy' of the record or transcript; but

b) does not apply to any other associated costs, such as redacting or certifying a transcript or record. Those measures, even where they are necessary, are separate from the supply of a copy and are not therefore caught.

15.7 Video links

15.7.1 The fees applicable to video links are dealt with in CPG 2.8.