



SUPREME COURT OF WESTERN AUSTRALIA

NOTICE TO PRACTITIONERS

Amendment to Consolidated Practice Directions

Witness Statements, Witness Outlines and Costs Disclosure

Effective from 1 February 2019, significant changes to the Supreme Court's Practice Directions in relation to its civil jurisdiction will come into effect. Those changes will affect the standard orders made by Case Managers (both Judges and Registrars) in relation to the preparation of civil matters for trial.

The changes broadly fall into two categories:

1. Witness outlines and witness statements; and
2. Costs disclosure.

Witness Statements and Witness Outlines

For some time the usual practice in relation to civil actions in the Court, reflected in standard case management directions, has been that witness statements are exchanged prior to trial and stand as the witnesses' evidence in chief. The standard directions also include a process of conferral in relation to objections to those witness statements.

The use of witness statements is not the uniform practice throughout Australia. In the Commercial Court of the Supreme Court of Victoria, for example, the parties are generally directed to file and serve written outlines of the substance of the evidence that a witness will give and the evidence is given orally at trial. Written statements as evidence in chief are the exception rather than the rule.

While the use of witness statements in this Court is intended to promote the efficient and just determination of civil disputes, in practice their use has not always met those objectives.

In this regard, the preparation of witness statements and the process of objections can add significantly to the cost of preparation for trial, often without significant benefit to the just determination of the matter. This is particularly so where

witness statements do not reflect the witnesses own words or where they consist largely of the recitation of the documentary record. The inclusion of extraneous material in witness statements also has the potential to lead to unnecessary and lengthy cross-examination.

For this reason, Practice Direction 4.5 will be substantially amended (with consequential amendments to PD 4.1.2 and 4.4).

Practice Direction 4.5 will now provide that, ordinarily, evidence of chief at trial will be given orally, without the use of witness statements. In those circumstances, ordinarily, the Case Manager will order that the parties exchange witness outlines. Witness outlines must identify the topics in respect of which evidence will be given and the substance of that evidence, including the substance of each important conversation. The purpose of the outline is to provide notice of a witness' evidence in chief to the Court and other parties. They are not, and do not become, evidence.

Orders for the exchange of witness statements and for witness statements to stand as evidence in chief are to be the exception, and will only be made where a party satisfies the Court that this course will better achieve the objects of efficiency, just determination of litigation and proportionality than if evidence were to be given orally in the usual way.

Ordinarily, the use of a witness statement will not be appropriate where contentious evidence is to be given of facts dependent on the recollection of the witness or where the credit of the witness is likely to be challenged on the topic.

Nor is the fact that a matter is "document heavy", on its own, generally a reason to order the use of witness statements. Where a party's case depends substantially on documents, there is an expectation - already reflected in PD 4.1.2 (paragraph 24(b)) - that documents the authenticity of which is not in dispute will be tendered in opening.

Costs Disclosure

The second change to the Practice Directions is the inclusion, in the standard directions in managed cases, for each party, and the Court, to be provided with a memorandum setting out:

- (a) the legal costs and disbursements (including any expert fees) that the party has incurred to the date of the memorandum;
- (b) the future legal costs and disbursements (including any expert fees) that it is estimated that the party will incur to the end of trial (setting out the estimated duration of trial); and

- (c) the estimated party and party costs recoverable by, or payable by, the party in the respective cases of success or failure at trial.

The memorandum of costs is a confidential document, to enable the Case Manager to make an assessment of matters of proportionality required by Order 1 rule 4B of the *Rules of the Supreme Court*. The memorandum is to be filed and the Court advised that the memorandum is a sensitive document containing "restricted information" within the meaning of Order 67A rules 9 to 11. The memorandum is not provided for the purposes of costs assessment or taxation of costs.

While such costs disclosure is primarily intended to be provided at the first strategic conference in managed cases, orders for such costs disclosure may be made by the Case Manager in their discretion, at any stage of a matter.

Dated 29th January 2019.



The Hon Justice Peter Quinlan
Chief Justice of Western Australia