

DRAFTING PLEADINGS AND PARTICULARS TO AVOID UNNECESSARY INTERLOCUTORY APPLICATIONS

A paper presented by Michael Bennett for the Television Education Network

Sunday, 10 February 2019



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1 Overview

In litigation the importance of identifying the elementary legal foundation of the case, and articulating that foundation, is critical. It is equally important to prepare pleadings that shape, structure and build the case to be proven, in due course, on a factual premise able to be established by admissible evidence reliable to the tribunal of fact. Proof of every cause of action requires proof of the elements of that action and thus proof of the material facts relied upon.¹

From that it can be seen that the pleadings set the scene for the case: well drafted pleadings set the case up for success whilst poorly drafted pleadings set the case up for failure. The process involves the choice of cause of action and the choice of material facts underpinning the action: the process of making those choices is intertwined. As set out at heading 2, this process is iterative.

In addition to securing better prospects of success, a persuasive pleading (as opposed to an unpersuasive pleading) is efficient because it reduces confusion, unnecessary costs of challenging pleadings and length of time at trial in seeking to make good the allegations.

Further, the importance of persuasive pleadings is made clear when you consider how many proceedings settle prior to hearing. The more persuasive your claim at the outset the more likely the result on settlement will be beneficial to your client.

This paper will consider the process of pleadings and various ways interlocutory processes can flow from them. It will be convenient to consider specific issues that arise under this general theme. These include:

1. Drafting Pleadings and Particulars, broken into two aspects:
 - a. Choosing the Cause of Action; and
 - b. Understanding Correct Form and Content;
2. The Pleading Process – the Do’s;
3. Pleading Errors;
4. Handling Requests for Further and Better Particulars;
5. Dealing with Interlocutory Applications Over Adequacy of Pleadings;
6. Applications for Summary Dismissal Based on Inadequate Pleadings;
7. Applications for Strike Out Pleadings – How to Respond; and

¹ See the general discussion of this paragraph’s issues by Henry J, *The Agreement and the Pleadings: the Foundations of Successful Commercial Litigation*, Address to the NQLA Conference, 16 May 2014.

8. Case Report: *Creighton v Australian Executor Trustee Ltd* [2017] NSWSC 1406.

Although the above topics will be dealt with separately and in the order discussed above, it is important to keep a wide lens view when considering each of them.

2 Drafting Pleadings and Particulars – Choosing the Cause of Action

The first consideration is what is the cause of action and, as part of that determination, on what facts does it rely. Those facts must be able to be proven by admissible evidence that you consider likely to be acceptable to the tribunal of fact.

The process of determining the cause of action and the facts on which it relies is intertwined and iterative. The following is useful description of how it should be undertaken:²

You may have already formed a view as to what causes of action are available to your client. In your mind you have probably labelled the case as “goods sold and delivered” or “misrepresentation” or “personal injury negligence” or “occupiers liability” or “breach of trust”. Labelling the case helps up to impose some sort of order from the “mess” of information which we have to work with.

Once we have identified an available cause of action, it is tempting to assume that we have found the “answer”, but we should keep our minds open to other possibilities. ... While we are conducting our investigation we should be mindful of this tendency, and ask ourselves:

- What am I *not* noticing because it does not fit the framework I have chosen?
- Am I forcing anything to fit the framework?

The initial choice of cause of action should be regarded simply as a hypothesis. This hypothesis helps us to give initial advice and to make some investigations, but it is no basis for launching a client into litigation. ...

Having formed a hypothesis as to the cause of action available to our client, we should test that hypothesis to see if the information will support it.

That is, continuous testing of the hypothesis as further information or evidence is provided from clients will reduce falling into the error of a very old parable: to the man with a hammer everything looks like a nail.

Although the form of pleadings is addressed in the next section, one way to achieve this is to ensure each aspect of the pleadings is the subject of clear, and separate, allegation. This will reduce the risk of an essential element of the cause of action having been overlooked, as the detailed – step by step – approach will force the drafter to confirm the existence of the necessary integer and how it forms part of the claim.

A further step can be taken to buttress the prospects of success, by creating a detailed draft of the pleading that includes footnotes citing the evidence, material or instructions that support each and every factual allegation. Once the draft is satisfactory a new version would be saved, with footnotes deleted, for filing.

² Dunstone S, *A Practical Guide to Drafting Pleadings*, LBC (1997) at 68-69.

This will show you that you know your own case, have a sound basis for filing it and, upon the Defendant's receipt of the claim, have a greater impact where the Defendant sees allegations they are more likely to know follow the actual course of events between the parties.

3 Drafting Pleadings and Particulars – Understanding Correct Form and Content

It is trite to say, but effective pleadings should define the issues in dispute between the parties and put each party on notice of the case that he or she will have to meet at trial.

As a general proposition, the relief available to a party ought to be founded on the pleadings: *Dare v Pulham* (1982) 148 CLR 658 at 664 per the Court. After discussing the purpose of pleadings their Honours say:

Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings.

Their form and content are therefore important.

3.1 Litigation is not a Game: the Obligation is a Serious One

Courts of high authority have made clear that they view dimly a party that tries to litigate a claim not made clear to the other parties in due course of the path to hearing.

In *Benn v State of New South Wales* [2016] NSWCA 314 at [62] & [63] Gleeson JA said:

Accepting the issue of failure to give a warning had not been specifically pleaded by Mr Benn, it was incumbent upon him, preferably earlier, but at the latest, at the opening of the trial to take steps to ensure the other party to the dispute was cognisant of what the issues sought to be raised were. This follows from the requirements of s 56(3) of the *Civil Procedure Act*, which provides that a party to civil proceedings is under a duty to assist the court to further the “overriding purpose”, as stated above at [56]. The duty mandated by s 56 is not a new phenomenon. It reflects in part what had earlier been described as the “cards on the table” approach to litigation. [citations omitted] That approach applies just as much to proceedings in the Local Court as it does to long and complex trials in the Commercial List in the Supreme Court.

Further, in *White v Overland* [2001] FCA 1333 Allsop J (as the Chief Justice then was) said at [4]:

However, *by way of general principle* I would simply like to make perfectly plain my view that in the efficient and proper conduct of civil litigation, even civil litigation hard fought between parties, it should always be recognised that in the propounding of issues for trial the parties should take steps to *ensure* that all relevant parties to the dispute are cognisant of what the issues are. Any practice of quietly leaving footprints in correspondence or directions hearings to be uncovered some time later in an attempt to reveal that a matter was always in issue should be discouraged firmly. Even if something has been said, where it is evident, or indeed suspected, that the other side is proceeding on the basis of a misconception or has not appreciated something, as a general rule, efficiency, common sense and an appreciation of the costs and resources (both public and private) likely to be wasted by confusion in litigation will mandate that a party through his or her representative *ensure* that the other side is not proceeding on a misconception or that the other side does appreciate some that has been said. Litigation is not a game. It is a costly and stressful, though necessary evil. ... But no one's interests are advanced by litigation proceeding on assumptions which are seen or suspected to be false.

And, for an example where the lawyers were in the firing line for costs incurred because of poor pleadings, see *Steward v Deputy Commissioner of Taxation* [2010] FCA 402 at [34] per Perram J.

Subject to the next heading, therefore, it can be seen how important it is to satisfy yourself the pleaded case is the case to be run at trial and all issues are squarely put in the process.

3.2 The Real Issues in Dispute

There is a caveat on the preceding discussion: the Court's will ensure the real issues to be determined in a case.

At any stage of proceedings, the Court may give leave to a party to amend: s 64 of the *Civil Procedure Act 2005* (NSW) (the 'Act').

It is settled law that a party can amend its pleadings, as late as during the hearing, if doing so facilitates the Courts resolving the real matters between the parties on the evidence led before it: *JR Consulting & Drafting Pty Ltd v Cummings* (2016) 329 ALR 625 at [78] per the Full Court of the Federal Court; and *Betfair Pty Ltd v Racing New South Wales* (2011) 189 FCR 356 at [55] per the Full Court of the Federal Court. The latter Full Court saying at [55]:

In our respectful opinion, the proposition favoured by the primary judge that, from beginning to end, Betfair's case was fatally flawed by a failure to adequately plead that the discrimination it alleged was of a protectionist kind, gave insufficient recognition to the fact that the case was fought out in every other sense on the constitutional issues arising from s 92. Betfair's opponents sought to rely at the trial on the general proposition that Betfair would be "held" to its pleaded case. An announcement of that kind by a party misstates that party's capacity to direct the course of the proceedings. The course of proceedings is in the control of the Court. That control is to be exercised for the attainment of a just outcome. There will obviously be cases where a pleaded case does not raise an important fact for attention. If that remains the position at the end of the case, the case may be lost on that basis, so far as it depends on that fact. Sometimes it would be unfair to allow a party to amend a case, or a pleading, to raise a new matter which could have been, but was not, raised earlier. On the other hand, mere infelicity of drafting will rarely be allowed to defeat a case on its merits if the merits of the case have been made apparent on the evidence without unfairness to the other party.

In fact, the position seems to go further and require the amendments: if there emerges at the conclusion of the evidence facts which, if accepted, establish a cause of action factually different from the cause of action which the plaintiff has sued upon, then such issue must be considered by the tribunal of fact and the pleadings should be amended in order to make the facts alleged and the particulars precisely conform to the evidence which has emerged: *Leotta v Public Transport Commission of NSW* (1976) 50 ALJR 666 at 668 per Barwick CJ who said:

The issues for trial need in every case to be settled, preferably before the trial begins. If they need amendment during the trial in order to allow the matter really in difference between the parties to be litigated, then the necessary amendments should be made so that thereafter it can clearly be seen to what the evidence, thereafter to be given, ought to be addressed.

But this principle is one of fairness, not an excuse for lax pleading on an assumption that any further causes of action or contentions can be made good at or during the trial.

The issues the amendments address have always been present and do not arise because of the proposed amendments. This is relevant, as Gummow, Hayne, Crennan, Kiefel and Bell JJ said in *Aon Risk Services Australia Ltd v ANU* (2009) 239 CLR 175 at [82]:

What needs to be shown for leave to amend to be given, as the cases referred to above illustrate, is that the controversy or issue was in existence prior to the application for amendment being made. It is only then that it is *necessary* for the court to allow it properly to be raised to enable a determination on it.

Matters which may result in refusal of the amendment include:

- that the amendment is so fruitless that it would be struck out if it appeared in an original pleading;
- that it will require a further hearing after judgment has been reserved;

- that the application is made mala fides;
- that an order for costs is not sufficient to cure any prejudice to another party to the proceedings: *Heath v Goodwin* (1986) 8 NSWLR 478; or
- that the application of case management principles – found in ss 56 to 60 of the Act – so requires: see *Hannaford v Commonwealth Bank of Australia* [2014] NSWCA 297 at [14]–[21].

Further, the balancing of any prejudice must be undertaken, such that an opportunity for the non-amending parties to explore the claim and marshal evidence against the allegations is a strong basis to refuse any amendment: *Itek Graphix Pty Ltd v Elliot* (2002) 54 NSWLR 207 per the Court.³

Awareness of these issues is important, but not a reason to reduce the effort and enquiry to ensure the pleadings are thorough and persuasive.

3.3 Statement of Claim or Summons

Under the *Uniform Civil Procedure Rules 2005* (NSW) (the ‘UCPR’), proceedings are usually commenced by Statement of Claim or Summons. There are exceptions to this, which are outlined below. A Statement of Claim or Summons must be drafted using the prescribed form, which can be found on the UCPR website.⁴

3.3.1 *The Difference*

A Summons only sets out the relief sought, whereas a Statement of Claim sets out – by pleading – the material facts forming the basis of the relief sought, as well as that relief itself. The difference is because some matters have issues that can readily be identified from a Summons and affidavit(s) supporting it. In other matters, however, the requirements of procedural fairness, as well as the need for the real issues to be illuminated, require the use of a Statement of Claim.

3.3.2 *When to Use them*

The general position is that any proceedings involving a likely extensive contest as to facts should be commenced by way of Statement of Claim. A common example of this is a claim in which an agreement, its terms and a breach of them are alleged.

Rules 6.3 of the UCPR provides that a Statement of Claim should be used for claims seeking relief for:

³ Special leave to appeal refused: *Elliott v Itek Graphix Pty Ltd* [2002] HCA Trans 485 (15 November 2002) (Gleeson CJ and Hayne J).

⁴ <http://www.ucprforms.justice.nsw.gov.au/>

- debts and other liquidated claims;
- an alleged tort;
- an alleged fraud (pleadings are expressly required for any allegation of fraud);
- damages for breach of duty, where the damages claimed include damages in respect of someone's death, personal injuries or damage to any property;
- in relation to trusts, other than express trusts wholly in writing;
- possession of land;
- under the *Property (Relationships) Act 1984* (NSW); or
- in relation to the publication of defamatory matter.

Rule 6.4 of the UCPR provides the circumstances where proceedings must be initiated by Summons. They are:

- proceedings where there is no defendant;
- proceedings on appeal or application for leave to appeal (other than proceedings assigned to the Court of Appeal);
- proceedings for preliminary discovery or inspection made under Part of the UCPR; or
- proceedings in relation to a state case.

Proceedings wrongly commenced by Statement of Claim are still taken to have been commenced on the date the claim was filed, but the Court may order that the proceedings continue as if they had been commenced by Summons.

Proceedings wrongly commenced by Summons are still taken to have been commenced on the date that the Summons was filed, but the Court may order that the proceedings continue by way of pleadings. This often arises where there is insufficient time to prepare the pleadings, so a Summons is filed to commence the urgent matter to facilitate interim relief (for instance, an injunction).

The following discussion (and the balance of this paper) is focused on pleadings, being a Statement of Claim.

3.4 The Rules of Pleading & Particulars

There are generally accepted rules of pleadings and of particulars.

3.4.1 Pleading

The Dictionary to the UCPR defines “pleading” as including a Statement of Claim, Defence, Reply and any subsequent pleading, and as not including a Summons or notice of motion.

Part 14 of the UCPR deals with pleadings. Of particular relevance is subrule 14.14(1) that provides ‘*In a statement of claim, the plaintiff must plead specifically any matter that, if not pleaded specifically, may take the defendant by surprise.*’

In *McGuirk v The University of New South Wales* [2009] NSWSC 1424 at [21] to [29] Johnson J sets out the principles concerning pleadings, starting with the general proposition that ‘*The function of pleadings is to state with sufficient clarity the case that must be met by a defendant.*’ His Honour said:

Principles Concerning Pleadings

21 The function of pleadings is to state with sufficient clarity the case that must be met by a defendant. In this way, pleadings serve to define the issues for decision and ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her: *Banque Commerciale SA En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279 at 286, 296, 302-3. The issues defined in the pleadings provide the basis upon which evidence may be ruled admissible or inadmissible at trial upon the ground of relevance: *Dare v Pulham* [1982] HCA 70; [1982] 148 CLR 658 at 664; *Banque Commerciale* at 296.

22 In *Perpetual Trustees Victoria Limited v Dunlop* [2009] VSC 331, Forrest J observed at [24] that the rules of pleading are “*the servants of the interests of justice*”, with those interests demanding that a party have every opportunity to plead out an arguable case against other parties, but that those other parties have, at an early point in the proceedings, the opportunity to be properly appraised of the case against them.

23 Pleadings provide the structure upon which interlocutory processes, such as discovery, are governed and they constitute the record of the matters which the Court has resolved and become relevant if, in any subsequent proceedings, any party claims issue estoppel or res judicata: *Australian Competition and Consumer Commission v Fox Symes & Associates Pty Limited* [2005] FCA 1071 at [100]- [103].

24 Proper pleading is of fundamental importance in assisting Courts to achieve the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings: s.56 *Civil Procedure Act 2005*.

25 Where application is made by a party for leave to amend pleadings, the Court should have regard to considerations of case management, cost and delay: *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [111]- [112]; [2009] HCA 27; (2009) 83 ALJR 951. Of course, the present application is made by the Plaintiff at an early stage in the proceedings. A hearing is not imminent. Nevertheless, the orderly progress of litigation requires the Court to apply the letter and spirit of the *Civil Procedure Act 2005*, in accordance with contemporary principles identified in *Aon*, in determining an application such as this.

26 The need for clarity, precision and openness in the conduct of litigation and the responsibility of parties and their legal representatives therefore flows most clearly from the statutory duty of a party and the duty in civil proceedings to assist the Court to further the overriding purpose to facilitate the just, quick and cheap resolution of the real issues in dispute: *Baulderstone Hornibrook Engineering Pty Limited v Gordian Runoff Limited & Ors* [2008] NSWCA 243 at 161. The need for clarity, precision and openness as part of this co-operation has been emphasised in the context of ambush or surprise: *White v Overland* [2001] FCA 1333 at [4].

27 For a Statement of Claim to comply with the rules of Court, a party should plead, in a summary form, a statement of the material facts upon which the party relies, but not the evidence by which those facts are to be proved: Rule 14.7 UCPR. In doing so, the pleadings should be as brief as the nature of the case admits: Rule 14.8 UCPR.

28 In *Kirby v Sanderson Motors Pty Limited* [2002] NSWCA 44; (2001) 54 NSWLR 135, Hodgson JA (Mason P and Handley JA agreeing) said at 142-143 [20]-[21], with respect to the requirement for a pleading to state material facts:

“It might appear that these rules [the Supreme Court Rules] do not require that causes of action be stated in pleadings; the requirement is to have a statement of material facts, and indeed to have only such a statement. However, in my opinion - ‘Material’ means material to the claim, that is, to the cause or causes of action which are relied on. (2) The requirement of a statement of material facts does not exclude the allegation of legal categories, such as duty of care, fiduciary duty, trust and contract. (3) The general requirement to avoid surprise means that material facts must be stated in such a way that the defendant can understand the materiality of the facts, that is, how they are material to a cause of action.

Accordingly, even on the basis of these rules which are common to the District Court and the Supreme Court, I do not take cases such as Konskier as establishing that there is a danger of surprise, which arises particularly where there is lack of precision and clarity in the pleading, it may well be appropriate to require a Plaintiff, either in a statement of claim or in particulars, to explicitly relate the facts it pleads to specific causes of action.”

29 In *Gunns Limited v Marr* [2005] VSC 251, Bongiorno J observed at [57]:

“Not only must the pleading inform the defendants of the case they must meet now, but it must clearly set out the facts which the plaintiffs must assert to make good their claim with sufficient particularity to enable any eventual trial to be conducted fairly to all parties. Vague allegations on very significant matters may conceal claims which are merely speculative. If this be not the case, the plaintiffs must put their allegations clearly.”

It is clear from those “principles”, and from subrule 14.14(1), that the primary function of pleadings is one of fairness: the defendant must know the case it has to meet.

The requirements as to form and content of pleadings are to be found in Part 14 Division 3 of the UCPR.

As to their *form*, the following rules apply:

- pleadings to be divided into paragraphs (Rule 14.6);
- party's affidavit verifying the pleading must be filed with or subscribed to the pleading (Rules 14.23 and 14.24);
- pleadings to be as brief as possible (Rule 14.8); and
- pleadings to set out effect of documents or spoken words (rather than their exact terms: Rule 14.9).

As to their *content*, the following rules apply:

- pleadings should contain:
 - (i) a statement in a summary form of the material facts; i.e. those relied upon to establish the plaintiff's cause of action, and not the evidence by which those facts are to be proved (Rule 14.7);
 - (ii) specific pleading of any matter that might otherwise take the defendant by surprise (Rule 14.14);
 - (iii) specific pleading of any claim for relief (including interest) but not an amount of unliquidated damages (Rules 6.12 and 14.13);
- pleadings should not contain:
 - (i) any matter presumed by law or where the burden of disproving falls to the other side, unless to meet a specific denial (Rule 14.10);
 - (ii) the legal effect of the facts, although a point of law that goes to a material fact may be raised (Rule 14.19).

3.4.2 Particulars

As Gleeson CJ said in *Goldsmith v Sandilands* (2002) 190 ALR 370 at [2]:

The facts in issue in a civil action case emerge from the pleadings, which, in turn, are framed in the light of the legal principles governing the case. Facts relevant to facts in issue emerge from the particulars and the evidence. The function of particulars is not to expand the issues defined by the pleadings, but “to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial”. The function of evidence is to advance, or cut down, the case of a party in accordance with the rules of statute or common law that determine the nature of the information a court will receive.

That is, material facts constitute the basis for the cause of action. The particulars explain how the case is put so that the other side is not taken by surprise.

Part 15 of the UCPR deals with particulars. The objective of particulars is to reduce or eliminate surprise and give fair notice of the case the opposing party has to meet and thereby save costs, define the scope of the evidence and define the likely scope of discovery: *Sims v Wran* [1984] 1 NSWLR 317 at 321-322 per Hunt J. However, these objectives are to be balanced against the legitimate interest of the pleading party to have a degree of flexibility in the preparation and presentation of their case.

There is a general requirement on parties to give particulars of any claim, defence or other matter pleaded as are "necessary" to enable the opposite party to know the case it has to meet: r 15.1 of the UCPR. What particulars are "necessary" in any given case depends upon all the circumstances of the case: *Phillips v Phillips* (1878) LR 4 QBD 127.

The UCPR require specific particulars of certain matters:

- (a) any fraud, misrepresentation, breach of trust, wilful default or undue influence that is pleaded (Rule 15.3);
- (b) an allegation as to any condition of mind (Rule 15.4);
- (c) negligence and breach of statutory duty in tort claims (Rule 15.5);
- (d) claims for out of pocket expenses (Rule 15.6);
- (e) claims for exemplary damages (Rule 15.7); and
- (f) claims for aggravated damages (Rule 15.8).

3.5 Fraud

Rule 14.14(3) of the UCPR provides that particulars must be pleaded for certain classes of allegations and, pursuant to r 14.14(2), this includes fraud. For the purposes of this rule fraud includes, but is not limited to, allegations based on a cause of action in the tort of deceit. It further includes allegations that a plaintiff's claim, is in itself, fraudulent because it contains allegations of fact as that are known to be untrue: see *Gaal v GIO (NSW)* (1992) 29 (NSW) LR 336.

The court will not give relief on an issue of fraud unless the allegations have been clearly raised in the pleadings and actively pursued at the hearing.

Rule 15.3 of the UCPR requires a pleading to give particulars of any fraud and mandates that a pleading must include appropriate particulars of the allegations involving specific types of fraudulent, wilful and improper conduct. Rule 15.4 also requires specifics of particulars of any alleged “condition of mind”.

Pleadings of fraud:

- Must specially allege the acts involved;
- The acts were done in a manner that involves fraud, although it is not necessary to use the specific word “fraud”;
- The fraud must involve an explicit allegation of dishonesty;
- The pleader must specify the nature and extent of any misrepresentation relied on;
- The pleader must specify the precise circumstances in which a misrepresentation was made, including identifying any document constituting the misrepresentation; and
- The allegation should not be expressed in general and ambiguous terms that are likely to be embarrassing to the opposing party.

The high bar required in order to properly plead fraud was made clear in *Sgro v Australian Associated Motor Insurers Ltd* [2015] NSWCA 262. The Court of Appeal was critical of the way AAMI pleaded a defence under s 56 of the *Insurance Contracts Act 1984* (Cth) relying on the proper approach under *Brigenshaw v Brigenshaw* (1938) CLR 336.

As practitioners it is necessary to tread carefully on any pleading alleging fraud. It is unethical to plead fraud or serious misconduct against a party unless your client specifically wishes to do so and you are satisfied that there is evidence to support the allegation.

And the person alleging fraud must be mindful of the costs risk associated with making the allegation. Where allegations of fraud are made speculatively, the court’s jurisdiction to award costs or personal costs may be enlivened, notwithstanding that the party may have won the proceedings on other grounds: see *Chen v Chan* [2009] VSCA 233. Despite this, however, the requirement for a proper basis does not mean that the party alleging fraud must have a positive belief and that the allegation will actually succeed at a hearing.

3.6 Withdrawing Admissions

Another reason for ensuring the form of pleadings – in this instance in the Defence – is accurate is the difficulty in withdrawing an admission made therein.

Rule 12.6(1) of the UCPR permits a matter in a defence to be withdrawn but if it is a matter adverse to the admitting party’s case, it can only be withdrawn by consent or with the leave of the Court. A proper basis for allowing the withdrawal must be established. They are not given as a matter of course.

3.6.1 Queensland

This issue is of particular concern if you're litigating in Queensland. To remove the use of "holding defence" the Queensland *Uniform Civil Procedure Rules* provide in:

- rule 165(1) that a party responding to 'a pleading' must plead an admission, a non-admission or a denial;
- rule 166(3) allows the pleading of a non-admission only where the party, despite having made reasonable enquiries, remains uncertain whether the allegation is true;
- rule 166(4) that a denial or non-admission must be accompanied by 'a direct explanation for the party's belief that the allegation is untrue or cannot be admitted'; and
- rule 166(5) provides that if a party's denial or non-admission does not comply with r 166(4), the party 'is taken to have admitted the allegation'.

Two drafting points become obvious:

1. the *only* basis for a non-admission is that, despite reasonable enquiries, the party remains uncertain whether the allegation is true; and
2. a simple denial does not constitute a satisfactory explanation for the purposes of r 166(\$), because for reasons based on a thorough examination of chapter six of the Queensland UCPR, it has been held that the only basis for a denial is that the party believes it to be untrue. That is, something more must be said in order to provide the explanation for that belief: *Cape York Airlines Pty Ltd* [2008] QSC 301 at [21].

Those issues become more significant when you realise the defence must be filed within 28 days of service, creating a temporal problem in doing more than a "holding" defence, and the basis of withdrawing an admission or deemed admission is extremely high: r 188 of the Queensland UCPR and *Rigato Farms Pty Ltd v Ridolfi* [2000] QCA 292 at [20] per the Chief Justice.

4 The Pleading Process – the Do’s

The following are suggestions the write has found helpful in drafting pleadings. Many of the suggestions, however, are inverted as “don’ts” in the next section. So points 4 and 5 should be read together.

4.1 Pre-Pleading

Before commencing the drafting of a pleading it can be helpful to create a spreadsheet to ensure the elements of the cause of action or actions are known. The iterative process discussed above is relevant here.

Obviously an understanding of legal principle is required to know what causes of action are relevant. A spreadsheet can then be prepared with columns for the:

- cause of action;
- elements of the cause of action;
- the material facts applicable to the elements;
- the particulars that would support such material facts;
- evidence available in support of the cause action; and
- evidence needed, but not yet obtained, in support of the cause of action.

4.2 Time to Percolate

A useful tool is to conclude the drafting of a pleading and let it sit for some time. Do other work, or do something other than work, before returning to read the draft with fresh eyes. It always surprises how greater the insight – and ability to spot errors in reasoning, spelling and grammar – becomes on a fresh read of a pleading.

4.3 Practical Guides and Checklist

The following are a broad guide when drafting a Statement of Claim:

- A Statement of Claim must specifically state the relief claimed by the Plaintiff;
- An order for interest up to judgment must be specifically claimed;
- An order for aggravated or extemporaneous damages must be specifically claimed;
- Where several matters are pleaded, each matter should be the subject of a separate paragraph;

- Paragraphs should be consistently, but separately and consecutively, numbered;
- Pleadings must only include material facts, and not the evidence by which such facts are to be proved;
- Pleadings should be as brief as the nature of the claim allows;
- Where a pleading refers to spoken words or a document, the effect of the words or the document is to be pleaded, and not the actual words or document; and
- Conditions precedent to the commencement of litigation (such as having complied with a dispute resolution provision of an agreement) are presumed to be met and therefore do not need to be specifically pleaded.

The following is a useful checklist to apply before deciding a pleading is complete:

1	Have I completed the appropriate forms?
2	Are my pleadings as brief as the nature of the case permits?
3	Have I included all the material facts on which the claim relies?
4	Have I specifically pleaded any matter I am required to plead?
5	Have I clearly stated the relief being sought?
6	Have I stated what sections of any legislation I rely upon?
7	Have I given sufficient information to define the issues at trial?
8	Will the Defendant(s) be able to understand and respond to the claim?
9	If the claim is for liquidated damages, have I included any requisite notices?
10	Does my claim inform the defendant of the date before which they must file a notice of appearance or defence?
11	If necessary, have I signed the documentations concerning reasonable prospects?
12	If necessary, has the client sworn/affirmed an affidavit verifying the pleadings?

It is now necessary to consider examples of what not to do.

5 Pleading Errors

It is convenient to consider some practical considerations for pleading before looking at specific pleading errors.

5.1 Don't Forget Brevity

This is very important. Often pleadings are prepared without sufficient deference to this requirement.

It is not the case that parties must include every little detail about what happened; doing so is a form of laziness.⁵ Allegations can be repeated, sometimes more than once, to seek to ensure the Court understands the case. This does not aid clarity, but rather reduces clarity. For this reason a concise and clear statement of a party's case is beneficial as it adds to the persuasiveness of the claim.

The point of a particular paragraph should be made clearly and simply. Once made it need not be repeated. Detail can be delved into further at trial.

It also risks the point being made inconsistently in two or more places. This not only confuses the other parties, it is liable to confuse the pleading party as well.

A helpful approach on this issue is to plead the chronology or background supporting the claim in such a way that the allegations of causes of action can then refer back to earlier paragraphs in the background. Should a particular fact or facts be required for more than one cause of action in the pleading, there is merely a number of cross-references rather than entire repleading of the points.

5.2 Avoid Lengthy Passages

Too often a pleading will roll up too many thoughts in one passage, or otherwise be verbose as to the issue sought to be made by the passage.

The shorter and sharper the passages within a pleading, the easier it will be for the Court to understand the issues and be able to find the relevant facts necessary to establish the claim. It helps you and the Court focus on the way your case has been made good.

5.3 Do not Plead Points of Law or Conclusions

A pleading may raise a point of law (r 14.19 of the UCPR), but, generally speaking questions of law or legal conclusions should not be pleaded. The prohibition on pleading matters of law is designed to stop parties pleading legal conclusion without also pleading the facts that give rise to those conclusions: see Cairns, *Australian Civil Procedure* (Law Book Co) 7th ed, 2007 at p 163.

5.4 Do not Anticipate the Defence

⁵ As Winston Churchill has said, "I'd have written you a shorter letter but I didn't have the time."

Given you will be thinking through your case, including what may be put against you in due course, it can be easy to anticipate the Defence in the Statement of Claim. Do not do it. You must avoid your thinking forensically about the entire case to infect the pleading of your own case.

A Statement of Claim is to plead the case put forward by the Plaintiff. If the Defence raises something to which you must respond, you can file a Reply. Not only is this proper approach under the rules and Court process, it will enable the Reply to focus on points actually raised by the Defence, rather than trying to anticipate points that may not be raised at all or, if raised, put differently than the way they were anticipated.

5.5 Do not Include Evidence

Following the close of pleadings (which may or may not include a Reply and one or more Cross Claims) there will be discovery, notices to produce or subpoena issued and the serving of evidence. It is here that the “story” told in the pleading is made good. But the pleading remains that, a story, and one in which the facts are to be told and the evidence of the facts left for later in the hearing process.

5.6 Do not Leave Matters as a Surprise

As stated at paragraph 3.1, litigation is not a game. You should plead all issues relevant to your claim. Do not hold back issues or matters in the knowledge that they will be brought up at some later time. It is contrary to authority, which in some cases may amount to ambush, and otherwise runs a risk of the Court not permitting the matter to be relied upon.

Many a case has been lost where leave to rely on a matter not pleaded, or not sufficiently pleaded, was brought forth at or near the hearing.

5.7 Material Facts and Particulars

Although the difference between a material fact (a necessity to make out the cause of action) and a particular (further detail to put a defendant “on guard”) is real, where uncertainty as to the difference exists in a particular pleading, it is less problematic to plead a particular as a material fact than vice-versa. That is, when in doubt, plead a matter as a material fact rather than a particular.

5.8 Do not Quote from Documents

It is commonly seen that large parts of contracts, agreements, trust deeds or other relevant documents are set out in the pleading. They need not be. The effect of the clauses are to be stated with the reference to them cited as a particular.

If you are concerned that the effect is hard to capture, a common tool is to state “The pleading is to be read as if clause XX is set out here in full”. This shows a lack of thought has gone into the pleading is, in any event, is liable to be struck out: *Hoh v Frosthollow Pty Ltd* [2014] VSC 77 at [39].

5.9 Do not Plead Alternatives Without a Clear Reason for Doing It

Pleading in the alternative is proper when the circumstances justify it. But that does not give licence to plead alternatives, and sometimes multiple alternatives, in the hope that one of them will stick and success be achieved. The High Court said in *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at [27]:

The task of the pleader is to allege the facts said to constitute a cause of action or causes of action supporting claims for relief. Sometimes that task may require facts or characterisations of facts to be pleaded in the alternative. It does not extend to planting a forest of forensic contingencies and waiting until final address or perhaps even an appeal hearing to map a path through it. In this case, there were hundreds, if not thousands, of alternative and cumulative combinations of allegations. As Keane CJ observed in his judgment in the Full Court:

The presentation of a range of alternative argument is not apt to aid comprehension or coherence of analysis and exposition; indeed, this approach may distract attention from the central issue.

By all means plead alternatives, but do so with clarity and a purpose.

5.10 Use First Person and Simple English

Legal drafting has a tendency to verbosity and indirect speech. What could be said as:

The Defendant’s failure to deliver goods to the Plaintiff’s employees caused the Plaintiff loss and damage

is often said as:

The point to be made is this: the failure of the Defendant to deliver, its agents and assigns to provide, in due course, to the Plaintiff, or any agent of the Plaintiff, the goods was causative of loss and damage to the Plaintiff.

One is clear, crisp and easily understood; the other has to be worked at to ensure the true point is not lost in the baggage.

5.11 Don’t Be Inconsistent

Consistency in a pleading is important. Do not change the language unless you mean to change your meaning. This applies to statutory interpretation so it is a principle within which we are all familiar.

5.12 Don't Be Disrespectful

The pleading is no place for disrespectful language and content. Even if you are pleading fraud, do so without pejorative comment or accusation. The facts and the legal consequences that flow from them is all that you need set out.

In this regard defined terms are a tool but are subject to the same rule. A relevant description can be used to your advantage, such as calling certain transactions you seek to impugn the “**Improper Payments**” by way of definition.⁶ But this use of terms should also be subject to the previous paragraph.

5.13 Don't Be Vague

Be careful when pleading that something occurred “at all material times”. It can suit uncontroversial aspects, such as the incorporated status of a party) but most times it will be appropriate to specify the relevant time frame. This can also reduce the burden at hearing to prove a fact for a period longer than is strictly necessary to make good the claim.

⁶ The author thought much of these “poisoning the well” tools initially, though over time has come to doubt the effect, if any, that they have on a judge of any experience.

6 Handling Requests for Further and Better Particulars

If served with a defective Statement of Claim, a request for further and better particulars.

If particulars are not given in accordance with the above UCPR (see paragraph 3.4.2 above) or on request, the party seeking them may make an application to the court for an **order** that they be supplied: r 15.10 of the UCPR.

The court's discretion to make such an order is broad and may be exercised wherever the proper administration of justice requires (*Bailey v FCT* (1977) 136 CLR 214 at [3] per Gibbs J) or where the plaintiff has failed to provide "necessary" particulars as required by the rules.

Although an application for an order that particulars be provided may be made at any time, it should be made promptly and may be refused if there has been undue delay. In NSW it is customary to seek particulars of a pleading before replying to it.

But the breadth of requests has been significantly narrowed in recent time. In *Fregnan v Stanizo* [2016] NSWCA 264 the practice of broad requests for further and better particulars has been brought in. at [15] Macfarlan JA said:

... it is not appropriate for a court to order a plaintiff to provide detailed particulars of allegations that are plainly made merely to provide background or context to the central allegations in a statement of claim. Furthermore, whether the allegations are central or not, a high degree of specificity in allegations is not necessarily warranted. The extent to which it is required in any particular case is to be determined by the relevant legal practitioners and the court by reference to the circumstances of the case and having regard to the real issues between the parties. The "just, quick and cheap resolution of the real issues in the proceedings" is not advanced by permitting defendants to seek unnecessarily detailed particulars.

And at [44]-[45] Leeming JA said:

It is to be recalled that this was an unusual case procedurally. First, in reversal of the usual order of things, the time he dispute about particulars was argued, the pleadings had closed and discovery was complete. Secondly, by reason of the criminal prosecution (during the pendency of which the civil proceedings had been stayed), Mr Stanio had had the benefit of (a) Ms Fregnan's statements to investigating police officers, and (b) cross examination of her(although the transcripts were not included in the appeal materials, I would infer, from the fact that it was only on the eighth day of the trial that the prosecution ended, that the cross-examination was extensive). Thirdly, this was and is at its core essentially a case where on part asserted and the other denied serious misconduct by one of them, unwitnessed by any independent third parties. The adequacy of the particulars provided by Ms Fregnan fell to be determined against that background.

For those reasons, as well as the reasons given by Macfarlane JA, with which I agree, many of Ms Stanio's requests for particulars were not proper requests, and to the extent that they were not adequately answered, there was no sound basis to dismiss the proceeding.

Justice Leeming's analysis shows that context is critical in relation to the request for particulars and, in many circumstances, they will not be proper requests.

A request for further and better particulars cannot seek evidence of the material facts or particulars, only the material facts and particulars not disclosed – but necessary to be disclosed – to understand the Plaintiff's case.

7 Dealing with Interlocutory Applications Over Adequacy of Pleadings

The two main interlocutory applications that will arise in the context of pleadings are a summary disposal of the proceedings and an application to strike them out. They are considered below.

7.1 Summary Disposal

The courts have power to terminate proceedings at an early stage where either the Plaintiff or the Defendant has no prospect of success, without putting the other party to the expense and delay of a full trial of the proceedings or the preliminary steps involved in preparing for such a trial such as discovery, interrogatories and inspection of property.

These powers, which apply in all courts except the Small Claims Division of the Local Court, may be summarised as follows:

- The power to enter judgment for a Plaintiff pursuant to r 13.1;
- The power to summarily dismiss proceedings pursuant to r 13.4;
- The power to dismiss proceedings for non-appearance of the Plaintiff at the hearing pursuant to r 13.6;
- The power to strike out pleadings pursuant to r 14.8 (to which see the next heading); and
- The court's inherent power to prevent an abuse of its process.

See, generally, *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 940-944.

Summary judgement and summary dismissal are discretionary remedies and although detailed argument may be necessary to determine the hopelessness of the other party's case, the more complex and arguable the legal point, or the more dependent it may be on debatable factual premises, the less likely that summary disposal will be appropriate, particularly if the relevant law is in a state of development: *NRMA Insurance Ltd v AW Edwards Pty Ltd* (1995) 11 BCL 200. Where there are multiple parties, the desirability of proceedings against all parties being heard before removing one party may constitute a reason for refusing summary judgment: *NRMA Insurance Ltd v AW Edwards*.

Rule 13.4(1) provides that, if it appears to the court that in relation to the proceedings generally or to any claim for relief:

- the proceedings are frivolous or vexatious; or
- no reasonable cause of action is disclosed; or
- the proceedings are an abuse of process,

the court may order that the proceedings be dismissed generally or in relation to that particular claim.

7.1.1 Frivolous

Neither the Act nor the UCPR contain a definition of “frivolous”. It is defined in the Shorter Oxford Dictionary as ‘of little or no value or importance, paltry; (of a claim, charge, etc) having no reasonable grounds; lacking seriousness or sense’.

7.1.2 Vexatious

As to vexatious proceedings, Roden J said in *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 491:

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;
2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise; and
3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

For an examination of the relevant principles see *Teoh v Hunters Hill Council (No 8)* [2014] NSWCA 125 at [41] and [67].

7.1.3 No Reasonable Cause of Action

Unlike applications to strike out pleadings (discussed next), where the court is concerned solely with the form of the pleading and where, if the application is successful, leave may be granted to amend to plead in proper form, in applications under this rule the court is not limited to a consideration of the form of the pleading but receives evidence to determine whether the plaintiff’s claim has any prospect of success. If it has, but the claim is not adequately expressed in the pleading, the court should not dismiss the proceedings or the particular claim, but should grant leave to the plaintiff to file an amended statement of claim or cross-claim: see, generally, *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 943-944.

The test for determining whether a reasonable cause of action is disclosed is that set forth in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128-129.

Where the facts are peculiarly within the defendant’s knowledge, the plaintiff’s claim should not be summarily dismissed because of gaps in the plaintiff’s case if the necessary evidence might be obtained as a result of discovery or interrogatories: *Wickstead v Browne* (1992) 30 NSWLR 1 at 11.

7.2 Application to Strike Out Pleadings

A pleading (or any part of it) may be struck out under r 14.28(1) of the UCPR if it:

- (a) discloses no reasonable cause of action or defence;
- (b) tends to cause prejudice, embarrassment or delay; or
- (c) is otherwise an abuse of process.

Some examples of proceedings that constitute an abuse of process are where they:

- (a) are doomed to fail;
- (b) cannot be properly and fairly determined (for example, by reason of delay);
- (c) are brought for a collateral or improper purpose;
- (d) involve claims that are subject to the doctrine of res judicata.

A court will only exercise a power to strike out in plain and obvious cases: *General Steel Industries Inc v Cmr for Railways (NSW)* (1964) 112 CLR 125. It has held as the manifestly groundless threshold.

The manifestly groundless threshold is exacting. In *New South Wales v Williams* [2014] NSWCA 177 at [71] Emmett JA said:

The requirement for establishing that there is no triable issue is a demanding one and the power to strike out a pleading on the basis that it discloses no reasonable defence [here a cause of action], or is an abuse of process, should be exercised only in plain and obvious cases. The power should not be exercised in cases of doubt or difficulty or where the pleadings raises a debatable question of law, and that the rights of the parties depend upon it, a court should not dismiss a defence raising such an issue, either on the basis that no reasonable defence is disclosed or as an abuse of process [citations omitted].

The question asked is whether the case “manifestly groundless” or “so obviously untenable that it cannot possibly succeed”: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129 per Barwick CJ. This assessment is made taking the plaintiff’s case at its highest – the defendant must accept the truth of the allegations in the pleadings and the ranges of meaning the assertions of fact in the pleadings are reasonably capable of bearing: *Penthouse Publications Ltd v McWilliam* (unreported, NSWCCA, Priestley & Meagher JJA and Waddell AJA, 15 March 1991). As soon as it appears that there is a “real question”, taking the plaintiff’s case at its highest, of either fact or law, and the rights of a party depend on it, it is not open for the court to intervene summarily: *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J.

The concepts in r 14.28(1)(b) of the UCPR were succinctly described by Johnson J in *McGuirk v University of New South Wales* [2009] NSWSC 1424 at [30]-[32]. His Honour said there:

30 A pleading is embarrassing where it is “*unintelligible, ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against him*”: *Meckiff v Simpson* [1968] VicRp 7; [1968] VR 62 at 70; *Gunns Limited v Marr* at [14]-[15].

31 In *Shelton v National Roads & Motorists Association Limited* [2004] FCA 1393 at [18], Tamberlin J explained the concept of “*embarrassment*” with respect to pleadings:

“*Embarrassment in this context refers to a pleading that is susceptible to various meanings, or contains inconsistent allegations, or in which alternatives are confusingly intermixed, or in which irrelevant allegations are made that tend to increase expense. This is not an exhaustive list of situations in which a pleading may be embarrassing: see Bartlett v Swan Television & Radio Broadcasters Pty Ltd [1995] FCA 1429; (1995) ATPR 41-434.*”

32 A pleading may be embarrassing even though it contains allegations of material facts sufficient to constitute a cause of action, if the material facts alleged are couched in expressions which leave difficulties or doubts about recognising or piecing together what is referred to: *Northam v Favelle Favco Holdings Pty Limited* (Bryson J, 7 March 1995, BC9504276 at 5-6).

It is harder to obtain a strike out in the Commercial List. As a general rule in that List, the Court will not entertain a strike out application and will apply strictness in declining such applications: *Supreme Court Practice Note No. SC Eq 3* at [62]. The significant bar applied under r 14.28 of the UCPR is that much higher in the Commercial List, but the hurdle set by r 14.28 of the UCPR is high in its own right.

7.2.1 Don’t bring Such An Application

In my view there is rarely, if ever, a good reason to bring a strike out application. As stated in the previous heading, the court is concerned solely with the form of the pleading and where, if the application is successful, leave may be granted to amend to plead in proper form.

Therefore, should you fail on your motion your client pays costs for no real outcome. Should you succeed on your motion the other side has just received judicial advice on how to fix their claim.

As a reader I experienced this where I was asked to appear on a motion to strike out pleadings. It was in the Federal Court where the docket system applies. We won the motion. The judge gave an example of what the pleadings should say to be effective. The respondents took out a copy of the transcript and fixed the pleadings exactly that way. When the judge later heard the final hearing, he was attracted (as you would expect) to that part of the pleading on which he had given guidance. They won.

Therefore, unless there is a clear risk that the unintelligible pleadings may succeed without you properly meeting them, the better option may be to allow the Plaintiff to proceed to final hearing on inadequate or unpersuasive pleadings.

7.2.2 Responding to An Application

For the reasons above, it may be an opportunity to be the respondent on an application to strike out pleadings. Care should be taken to absorb any hints or suggestions from the judicial officer as to what can make your pleadings stronger.

Otherwise, in responding to an application to strike out your pleadings the significant advantages the principles above give should be placed front and centre of your submissions, then the pleadings walked through to show how – taking the factual allegations at their highest – the relevant thresholds are not met.

8 *Creighton v Australian Executor Trustees Ltd* [2017] NSWSC 1406

These proceedings were two representative actions to run concurrently, arising out of the collapse of Provident Capital Limited, a company that carried on the business of fixed rate mortgage lending.

In this decision Ward CJ in Eq was determining applications for summary dismissal under r 13.4 and, in the alternative, strike out of parts of the pleading under r 14.28 of the UCPR. That is, the usual approach of dismissal and, if that does not succeed strike out, was made.

There were a number of matters of interest in the decision.

8.1.1 *When to Determine the Applications*

The Plaintiff submitted that PWC's motions ought be adjourned to the commencement of the hearing rather than being heard as an interlocutory, and prior, application (at [57]-[66]). The basis for doing so was (a) PWC delayed in bringing the application and had breached timetables along the way, (b) any success PWC had on its motion would involve appellate proceedings, which should wait the further hearing of the matter.

In contract Her Honour noted PWC would otherwise be put to further costs if the motion was not then dealt with. She declined the application to adjourn.

8.1.2 *The Principles*

As Ward CJ in Eq does, there is a helpful and extensive analysis of the legal principles of summary dismissal and strike out applications: at [67]-[76].

8.1.3 *Summary Dismissal*

Her Honour was not persuaded to summarily dismiss those parts of the claim that PWC impugned: at [100]. She was not persuaded the *General Steel* test was met and, in view of the pending trial, declined to make further comment on the merits of the claims.

8.1.4 *Pleadings Issues*

Her articulated PWC's claims in detail (at [102]-[176]). The significance of this case is the detailed consideration of how the adequacy of pleadings can be approached. But, after the detailed analysis, the outcome that often arises occurred here. Her Honour said at [177] to [180]:

In light of the above, I am of the view that the pleading in relation to the allegations of breach of duty, audit wrongdoing and causation of loss, (including those allegations forming part of the contribution claims) is defective. Those paragraphs of the second cross claim should be struck out. It is not appropriate for leave to be granted at this stage for the filing of the proposed amended second cross claim insofar as it repeats the pleading deficiencies identified above and, in any event, it is a document that AET has already indicated it will wish to amend following service of its expert evidence. The question then arises as to whether leave should be granted at this stage for AET to re-plead.

Should leave to re-plead be granted

PwC argues that AET should not be granted leave to amend its second statement of cross claim as proposed. I agree. But, as I understand it, PwC would resist any grant of leave at this stage for the filing of a further amended second cross claim on the basis that it says the pleading inadequacies cannot be cured (referring to *Young Investments Group* at [60]). To the extent that this submission assumes an answer as to the summary dismissal points that have not yet been decided, it cannot be accepted at this stage.

The *cri de coeur* in AET's written submissions, as to the difficulty in articulating its claim without discovery, ignores the fact that there are procedures of which it could have availed itself in order to obviate that difficulty (including the issuance of subpoenas – as was done in relation to the audit files of HLB Mann Judd – and an application for preliminary discovery). In permitting AET a further opportunity to plead its claims against PwC, I do not condone the course AET appears to have adopted (of bringing claims without properly pleading the material facts on which those claims based and, in at least one instance – relating to the allegation necessary to satisfy the jurisdictional gateway for the Trade Practices Act claims – seemingly based on no more than an assumption as to what occurred, apparently in the anticipation, or hope, as to what might later emerge on discovery). That is not consistent with the obligations of litigants in this Court.

That said, I am not persuaded that the pleading deficiencies cannot be cured. Therefore, I propose to strike out the paragraphs indicated above but to give AET an opportunity to serve a further proposed amended pleading rectifying the defects identified in the present pleading. If PwC maintains that there remain pleading deficiencies in any such further proposed amended second cross claim (other than as relate to the summary dismissal arguments dealt with on the present applications) and on that basis refuses consent to the filing of such a document then AET's application for leave would perhaps most conveniently be determined by the trial judge (particularly having regard to the submissions made by PwC as to the likelihood that part of the cross claim relating to contribution in respect of group members' claims may not be able to be determined at the July 2018 hearing in the absence of a plaintiff representative of the group).

This is a common outcome in these kinds of applications.