THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: LLP: JElw1069224

17 December 2015

The Hon Justice James Allsop AO
Chief Justice
Federal Court of Australia
Level 16, Law Courts Building
Queens Square
Sydney NSW 2000

By email: practice.notes@fedcourt.gov.au

Dear Chief Justice,

National Court Framework (NCF) – Draft Practice Notes

The Law Society of New South Wales welcomes the Court's initiative in seeking to create a truly national court and thoughtful, flexible efficiencies in case management and is grateful for the opportunity to provide feedback on the draft practice notes published to date.

The Litigation Law and Practice Committee ("Committee") of the Law Society has provided the following comments:

Summary of key issues

- The Committee agrees that a federal court should adopt a consistent practice across registries and awaits to see how the proposed new practice notes will assist in achieving this.
- It is to be hoped that, in the new National Court Framework ("NCF"), Judges and Registrars, as well as parties and practitioners, will do whatever they can to reduce the time and cost of litigation by the exercise of their judicial case management powers.
- The Committee is disappointed that the central practice note appears to single out solicitors for criticism, and to undermine their proper role in the conduct of litigation in the Court.
- The new NCF should be monitored by the Court and the legal profession. The Committee awaits the Court's indication of how the user group system will be adapted (or replaced) for this purpose.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Comments

Introducing the National Court Framework

The Committee notes the Court's intention, as expressed in this publication, that the new practice notes be "simplified". However, the interaction of practice notes, the docket system and the proposed management structure of which solicitors will need to be mindful is complex:

- The Central Practice Note sets out the "fundamental principles" concerning the NCF and "key principles" of case management principles. The draft runs to 16 pages.

- Individual National Practice Area ("NPA") practice notes, which are also substantial documents, provide "arrangements for the management of [relevant NPA] cases within the NCF" and "guiding principles .. [which are] not intended to be inflexibly applied".

- Parties may seek to adopt any of the practices proposed in respect of one specialist NPA into any other.

- General practice notes (for example regarding expert evidence, survey evidence and class actions) are also being developed. In the meantime, practitioners "may seek to consider" existing practice notes on these topics.

- Individual Judges may have their own practice notes, which themselves may refer practitioners to other existing practice notes (such as the practice note of Justice Perram, which adopts, for interlocutory applications, the procedure set out in the Tax practice note).

- Individual Judges generally have their own ideas about best practice case management in any event.

- Overarching all of these elements are, of course, the *Federal Court Rules 2011,* which should never be viewed as inflexible and "the individual docket system [which] is an integral feature of the management of the Court's work under the NCF".

It remains to be seen whether the matrix outlined above will assist the Court to achieve its desired outcome of a simplified practice and procedure for litigants. It may be that given the "overarching" operation of the docket system, matters will continue to be managed much as they have been to date – that is, in accordance with a particular judge's preference.

The Committee is encouraged by the importance the Court places on consultation with the profession in respect of the operation of the practice notes and looks forward to the Court's proposal for obtaining such feedback under the proposed framework, in particular in terms of achieving national consistency between registries. There is no mention of Court user groups in the current draft documents.

For the purpose of this submission the Committee has considered the draft Central, Commercial and Corporations and Intellectual Property practice notes.

Central Practice Note

Paragraphs 3.5 and 3.6

The Committee understands that the Judges and Registrars who are to be given management roles, together with the Judges in each NPA and sub-area that is foreshadowed in the practice note, will be identified on the website.

Paragraph 5.5

The Committee understands that, once the practice notes are adopted, there will be no further communication for this purpose with "NSWRegistry". Appropriate lines of communication with the Court, to the extent that the current practice is to change with the introduction of the NCF, may need to be clarified in any revised draft.

Paragraph 6.3

The reference to "pre-existing practice notes" is unclear: as set out above, it is understood that certain already existing practice notes are intended to remain.

Also, the Committee is aware of at least one registry-specific practice (if not administrative notice) within the Court, namely mediation practice and procedure, that varies between Registries.

Paragraphs 7.3 and 7.4

The Committee agrees that "parties and practitioners" should be pro-active and take a commonsense and co-operative approach to litigation to reduce its time and cost. The profession would welcome an acknowledgment of the role and responsibility of judicial officers to ensure that the overarching purpose is furthered.

Paragraph 8.4

The Committee notes the intention of the Court to aim to set matters down for the earliest possible hearing date within 6 months of the case management conference "bearing in mind at all times the legitimate interests of all parties to the litigation". The Committee notes that these "legitimate interests" should include:

- The risk of litigation by ambush: An applicant can determine the time needed to prepare their claims and evidence before filing - and then the Court will expect a respondent to take only a few months to investigate and respond to the claim, file their evidence and find time for any interlocutory issues that may arise.

- The mental health of practitioners: The only way things happen overnight is for lawyers to work overnight. If there is pressure on Judges to get matters to trial within 6 months of the first case management hearing, Judges will put pressure on parties and lawyers to meet those timetables. While it is essential that cases be prosecuted vigorously, and in accordance with agreed timetables, requiring everything to happen faster will place additional strains on a profession that is already renowned for its high incidence of depression and other mental health issues.

- An early hearing does not always mean lower costs: A tight timetable often means having to involve additional lawyers to do the work and this inevitably increases costs. It can also divert parties and practitioners from exploring

settlement options.

- Once a standard expectation is set, it will be difficult to persuade a Judge that a particular matter is 'exceptional'. It will take time and increase costs if the Court requires an application and evidence to be persuaded that a matter will require more than 6 months to get to trial, and it may also require a respondent to show their hand at a stage in the case when they are still settling on strategy and identifying witnesses.

The focus on an early hearing date is inconsistent with the profession's recent experience which is that Judges have very little availability for hearing days, even several months in advance, and that rushing the parties may be ineffective in any event.

Perhaps the Court could reconsider setting an arbitrary time (even as a default position) for efficient disposal of matters and instead encourage all concerned to take responsibility for proper case management by using the various case management tools (and sanctions) that are available to judicial officers.

Paragraphs 11.6, 14.1

These paragraphs carry connotations in respect of the work done by solicitors which are considered to be inapproriate, and have the potential to undermine their proper role as the lawyer on the record. In particular:

- Paragraph 11.6: While the profession welcomes counsels' input into decisions to be made about evidence, counsel often regard evidence preparation to be solicitors' work until affidavits are ready to be settled.

- Paragraph 14.1: If the reference to "the advocate who is to address the Court at the hearing" on the one hand and "supporting lawyers" on the other is a subtle reference to counsel as distinct from solicitors, it is inappropriate. Prolixity is not the province of solicitors. If the intention is to distinguish between "the advocate who is to address the Court at the hearing" and less experienced lawyers on the other, the practice note should say so. The Committee agrees that the advocate who is to address the Court at the hearing should take responsibility for the final version of a party's written submissions.

Further, it is the Committee's experience that counsel are often reluctant to take procedural points (such as to seek costs orders in respect of an opponent's unjustified breach of timetabling directions) for fear of disinterest from judicial officers - and that counsels' reluctance is often well placed. The profession would welcome a more robust approach from the bench in this regard, especially in respect of orders made by consent.

Paragraph 15.2

The Committee suggests that all communication with the Court should be foreshadowed to the other party. Specifically in relation to the final sentence of the paragraph, it is not always clear what is, and what is not, controversial and it is preferable to avoid involving Judges or Registrars in disagreements on the point.

Commercial and Corporations NPA Practice Note

Paragraphs 5.4 to 5.8

The Commercial and Corporations NPA covers commercial and corporations disputes within the federal jurisdiction. The nature of these matters are diverse and the disputes are often complex, factually and legally.

The draft practice note proposes an alternative to the usual manner in which proceedings may be commenced, by the filing of a Concise Statement (being 5 pages in length) rather than a Statement of Claim.

The proposal seems at odds with the nature of the disputes covered by the Commercial and Corporations NPA, and may operate contrary to the statutory overarching purpose.

The Committee accepts that it may assist in particular cases for the Court to have regard to a Concise Statement or list of issues at a later point in proceedings. However, the Committee is concerned that to use such a document as a means of commencing proceedings, or as a substitute for the established practice of an exchange of pleadings, carries the following risks:

- Respondents will not fully understand the case brought against them.
- The parties will not join issue, or will fail to address significant issues until the matter is being determined at trial.
- Parties will be unable to agree on the steps to be taken in proceedings subsequent to the service of the Concise Statement due to the high level nature of the summary document.
- Use of the Concise Statement will result in applications by respondents for properly particularised statements of claim in addition.
- Cases commenced by way of a Concise Statement will require a greater level of case management involvement by the Court.

Intellectual Property NPA Practice Note

Paragraph 2.1

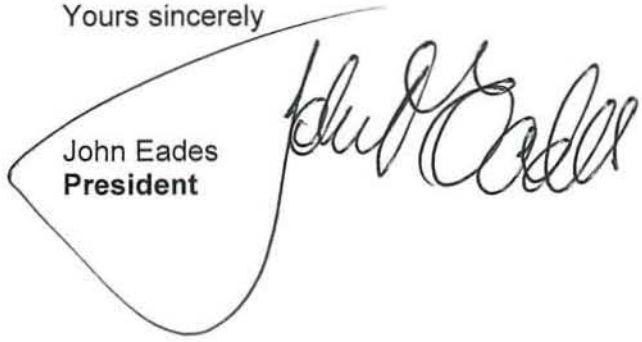
It is not clear what is meant by "Associated Statutes" with regard to the patents sub-area. Industrial designs might be more aptly placed here, rather than with copyright as is currently proposed.

The Committee assumes that the trade marks sub-area will also usually embrace actions in passing off and under the Australian Consumer Law.

The Committee awaits the Court's further deliberations in this commendable project.

If there are any enquiries in relation to this submission, Leonora Wilson, policy lawyer for the Committee can be contacted by phone on (02) 9926 0323 or by email to Leonora.wilson@lawsociety.com.au

Yours sincerely



John Eades
President