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CONFINING THE ISSUES IN DISPUTE IN CIVIL LITIGATION

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Introduction

1. This paper on Confining Issues in Dispute in Civil Litigation is one of a series of guides/papers being developed and published by the Western Australian Bar Association on topics of civil litigation practice and procedure in Western Australia. The guides/papers seek to reflect best civil litigation practice in the Supreme Court of Western Australia, although many of the principles expressed in the guides/papers will be of more general application.

2. The purpose of each guide/paper is to improve civil litigation practice by expressing a clear and concise statement of the practices that should be followed in a particular skill area. The guide/paper emphasise the ethical obligations of lawyers as officers of the court:

   - to ensure that they are not a mere mouthpiece for their clients;
   - to confine a dispute to the issues of importance that will determine the outcome in a case;
   - to plead a case for which there is a proper foundation;
   - to refrain from advancing a case for a collateral purpose;
   - to provide disclosure of relevant material; and
   - to present evidence that is frank and free from influence.

3. In modern civil litigation with complex issues, the possibility of alternative causes of action, numerous documents, detailed expert testimony and witness statements where evidence in chief is marshalled outside the courtroom the integrity of the litigation process depends to a great degree upon lawyers adhering to proper standards and principles of litigation practice. The potential for oppression by claim or defence to force a settlement by reason of mounting costs rather than by assessment of merit is a blight upon the administration of the law. It is moderated if lawyers fulfil their duties as officers of the court by using interlocutory processes only where necessary to understand the opponent's case and to present a proper case for their client. The rights of parties depend upon lawyers on both sides performing their duties to the court assiduously.

4. The duties of lawyers are often stated as general principles. The Best Practice Guides/Papers seek to give content to those duties in the context of the particular issues that arise from day to day in civil litigation practice.

5. Before publication, this paper was subjected to scrutiny and discussion at a forum attended by judges and experienced barristers and solicitors.

Lawyers' Duties in the Modern Context

6. The ultimate aim of a court is the attainment of justice[1]. Fundamentally that involves the pursuit of the objective "truth", or at least, the truth based on the evidence and materials placed before the court,[2] and the just resolution of the dispute before the court (in a timely manner without unnecessary costs[3]). Within the limits of the adversarial system, lawyers are duty bound to assist the court in the attainment of justice.

7. The development of the adversarial system of justice has been gradual and piecemeal, with pragmatic ad hoc changes being made in response to changing pressures upon the system[4]. There has been a vast increase in litigation (especially in the 1990's, when there was a substantial backlog in the civil list), but the rate of appointment of new judges has not always matched the increase in demand for the services of the judicial system[5]. At the same time there has been a substantial increase in the cost of legal services, which has had a detrimental effect upon access to justice. That injustice is further compounded when there is a gross imbalance in resources between litigants, particularly where litigants are made to suffer the ordeal of endless pre-trial skirmishes, and technical arguments, about whether there has been compliance with an increasing array of pre-trial procedural requirements.

8. The legal system is adapting to those changing circumstances.[6] The court has made rules governing case management in order to make litigation more efficient, the exchange of witness statements is now the norm, the court encourages conferral and discourages interlocutory skirmishes, and the court is empowered (in some circumstances) to give directions to enable proof without strict compliance with the rules of evidence.[7] Further, Judges no longer sit passively in court and simply listen to the evidence served up to them (and nor should they[8]) and then adjudicate the dispute. Judges in the CMC list manage matters (so called "managerial judging"). Registrars in the general list have case management hearings, and Judges can act as mediators. In trial, Judges are more proactive. They may ask counsel for the defendant to open immediately after the

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1 *Queensland v J L Holdings Pty Ltd* (1996-1997) 189 CLR 147 at 154.

2 D.A. Ipp, "Lawyers' Duties to the Court" (1998) 114 LQR 63 at 69.

3 *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27 at [97], [98]; *Rules of the Supreme Court of Western Australia ("RSC")*, Order 1 Rules 4A and 4B.

4 D.A. Ipp, "Reforms to the Adversarial Process in Civil Litigation: Part I" (1995) 69 ALJ 705 at 711 ("Part I").

5 Part I, supra at 706.

6 D.A. Ipp, "Judicial Intervention in the Trial Process" (1995) ALJ 365; and D.A. Ipp, "Reforms to the Adversarial Process in Civil Litigation: Part II" (1995) 69 ALJ 790 ("Part II").

7 For example, see *RSC* O29 r2(1); *Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 2]* [2007] WASC 244 at [55].

8 *Glover Gibbs Pty Ltd v Laybutt* [2004] NSWCA 45 at [22], [25]-[29].

plaintiff's opening in order to better identify the real issues. They may intervene to limit an unnecessarily long cross examination. The emphasis is upon efficiency both in terms of identifying the real issues in dispute, and, in dealing with them so as to minimise the use of court resources, and the cost to the parties. Further, the court promotes a "cards on the table" approach to litigation.[9]

9. Appropriate conduct by lawyers (who practice a profession, and do not simply run a business), is an essential element of the adversarial system.[10] Attitudes and practices in the profession need to adapt to keep pace with changes in the legal system. Lawyers are, of course, still expected to forcefully represent the interests of their clients and discharge duties owed to those clients. However, lawyers are increasingly required to exercise their judgment to narrow issues in litigation, and to have those issues determined by the court in a way that is more efficient and cost effective.

10. In addition to contractual, tortious, and fiduciary duties which may be owed to clients, and ethical duties which may be owed to clients and the court, lawyers owe separate non delegable legal duties to the court (which, in this context, means the community, which has a vital interest in the administration of justice[11]), which are imposed by the general law.[12] The content of some of the different types of duties overlap. There are five broad categories of duties owed by lawyers to the court, namely general duties:

    - of disclosure to the court;
    - not to abuse the court process;
    - not to corrupt the administration of justice, and
    - to conduct cases efficiently and expeditiously[13];
    - to use their best endeavours to comply with rules and directions of the court.

    The content of those general duties have changed according to changes in social values and pressures upon the legal system.[14] Both barristers and solicitors owe like duties to the court.[15]

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9 *Barclay Mowlem v Dampier Port Authority* [2006] WASC 281; (2006) 33 WAR 82 at [6]; *Boyes v Collins* (2000) 23 WAR 123 at [64]; *Nowlan v Manson* (2001) 53 NSWLR 116 at 127; *Carpathian Resources Ltd v Geological & Corporate Management Pty Ltd* [2005] WASCA 104 at 31-32; *White v Overland* [2001] FCA 1333 at [4]; and *O'Callaghan v Genovese* [2005] WASC 161 at [54].

10 Part I, supra at 725; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [105].

11 *Aon Risk Services Australia Ltd* (supra) at [27], [92], [93], [113] & [137].

12 D.A. Ipp, "Lawyers' Duties to the Court" (1998) 114 LQR 63 ("Lawyers' Duties").

13 Lawyers' Duties, (supra) at 65; *Unioil v Deloitte Touche Tohmatsu* (1997) 18 WAR 190 at 193; *D'Orta-Ekenaike* (supra) at [106] and [111].

14 Lawyers' Duties, (supra) at 65.

11. Duties owed by lawyers to clients (of confidentiality, and to advance the interests of the client), may at times be inconsistent with duties owed to the court.[16] In those circumstances, the duty to the court is paramount.[17] The proper response to any such conflict (if the client insists upon a course which would cause a lawyer to breach his or her duty to the court) will vary according to the particular circumstances, but would generally not require the lawyer to turn "informer" (except in extreme cases) or to ignore the instructions of the client (who may not be prepared to waive legal professional privilege), but rather would generally require the lawyer to cease to act.[18]

12. Quite apart from the duties mentioned above, lawyers should, of course, always remain dispassionate and act professionally. That allows them to remain objective and maintain a sense of proportion.[19] Rudeness, personal attacks, and emotional exchanges are unhelpful.

13. Obviously, some aspects of the abovementioned general duties, and ethical duties have important ramifications in relation to evolving practices used in narrowing issues in modern litigation.

Lawyers' Obligations to Confine Issues

14. The proper functioning of an adversarial legal system depends on lawyers properly advocating their clients' interests.

15. It is sometimes suggested that the adversarial legal system requires lawyers to take every point on behalf of their clients and that it is for the Court, rather than lawyers, to resolve disputes. For example, in *Johnson* v *Emerson*, Bramwell B said that: [20]

> "*A man's rights are to be determined by the court, not by his attorney or counsel. It is for the want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, "I want your advocacy not your judgment, I prefer that of the court.*"".

16. Such views reflect ideas of how litigation should be conducted that hark back to a time in which litigation was conducted under very different circumstances.[21] Bramwell B was speaking in 1871 (although such views were continuing to be

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15 Lawyers' Duties, (supra) at 66.

16 Lawyers' Duties, (supra) at 66.

17 Lawyers' Duties, (supra) at 67; *D'Orta-Ekenaike* (supra) at [11]; *Gianarelli v Wraith* (1988) 165 CLR 543 at 555-556.

18 Lawyers' Duties, (supra) at 71.

19 As to the importance of proportionality, see paragraph 4.1.2.7 *Consolidated Practice Directions.*

20 (1871) LR 6 Ex 329 at 467.

21 D A Ipp, "*Lawyers' Duties to the Court*" (1998) 114 LQR 63 at 98-102.

echoed in 1987[22]). Nevertheless, consistent with modern duties, a lawyer still has no obligation to assist an opponent to prove a cause of action or defence, or to tell an opponent anything that may assist the opponent's cause, or to assist an opponent to better plead their case.[23]

17. However, in this age of complex civil litigation and an overburdened court system, litigants are no longer entitled to the uncontrolled use of a trial judge's time as other litigants await their turn.[24]

18. Lawyers' obligations to their clients to ensure that their cases are advocated must be considered in light of the obligations that lawyers owe to the Court, (including the traditional obligations of candour and honesty, and duties not to abuse the Court's process by preparing or arguing unmeritorious applications, not to corrupt the administration of justice by using dishonest or unfair means or tactics to hinder an opponent in the conduct of his or her case, and a modern duty to assist in the prompt and economical disposal of litigation).[25]

19. In relation to the breadth of issues canvassed at trial, there has been an increasing emphasis on lawyers' obligations to ensure that Court time is used efficiently. For example, in *Giannarelli* v *Wraith*[26] Mason CJ said:[27]

> "*A barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down every burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of [an] independent judgement in the conduct and management of the case. In such an adversarial system the mode of presentation of each party's case rests with counsel who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court.*".

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22 See the comments of Sir John Donaldson MR in *Orchard* v *South Eastern Electricity Board* [1987] QB 565 at p.572.

23 *D'Orta-Ekenaike* (supra) at [110].

24 *Ashmore* v *Corporation of Lloyds* [1992] 1 WLR 446 at p.448H per Lord Roskill; *Glover Gibbs Pty Ltd* (supra) at [29].

25 D A Ipp, "*Lawyers' Duties to the Court*" at pp.67-102; *D'Orta-Ekenaike* (supra) at [111]; *Unioil* (supra) at 193C; *Glover Gibbs Pty Ltd* (supra) at [21].

26 (1988) 165 CLR 543.

27 At p.556.

20. The views of the kind expressed by Bramwell B do not represent the practice expected of lawyers today. There is now an expectation that lawyers will exercise independent judgment, and do more than act as the mere mouthpiece for their clients.[28] In civil litigation lawyers are obliged to actively seek to confine the matters in dispute to real issues and matters of significance. Lawyers are best able to do that if they make an early assessment of the strengths and weaknesses of the case, identify issues and areas of further enquiry, and develop strategies for the management of the case (what these days are called a "case concept" or "case theory"). That then needs to be kept under review as the case develops and further evidence becomes available. Different techniques are used to achieve that purpose. Some use an advice on evidence which is periodically reviewed and updated. Others use a case summary. Whatever method is used, the case should be kept under review, and if issues are identified which will not be disputed, instructions should be sought to make appropriate concessions.

Pleadings, Pre-Trial Disclosure and Interlocutory Disputes

21. Pleadings continue to play a significant role as a mechanism for arriving at the true issues in dispute.[29] Lawyers have particular obligations to plead a case which has proper foundations.[30] The proper discharge of lawyers' obligations when preparing pleadings assist to confine the matters at trial to factual disputes and matters of significance.

22. Although the Supreme Court's current practice of ordering pre-trial disclosure of parties' lay and expert witness statements may have lessened the significance of the traditional role of pleadings in identifying the issues and notifying an opponent of the case that they will have to meet at trial,[31] pleadings are still important.[32]

23. The Court has signalled a reluctance to allow its resources to be consumed by disputes about pleadings and particulars.[33]

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28 Paragraph 1 Preamble: Western Australian Bar Association Conduct Rules (the "WABA Rules").

29 *Unioil International Pty Ltd* v *Deloitte Touche Tohmatsu (A Firm)* (1997) 18 WAR 190 at p.193E; *Lonsdale Investments v OM (Manganese) Ltd* [2009] WASC 188 at [5] & [7].

30 See paragraph 2.10 below.

31 *Barclay Mowlem Construction Ltd* (supra) at [4] to [7]; *Mammoth Investments Pty Ltd v GIO General Ltd* [2007] WASCA 34 at [27]-[28]; and *Commodore Homes WA Pty Ltd v Goldenland Australia Pty Ltd* [2007] WASC 146 at [45].

32 *Osgood v Wham* [2007] WASCA 178 at [27] & [28]; *Wainter Pty Ltd v Freehills* [2008] FCA 562 at [4] and *EDWF Holdings 1 Pty Ltd* v *EDWF Holdings 2 Pty Ltd* [2010] WASCA 78. Inadequate pleadings increase the risk that the real issues will not be identified until the appeal stage: *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at [4].

33 *Barclay Mowlem Construction Ltd* (supra) at [4] to [7]; *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd* [2006] WASC 161.

24. Lawyers should confine matters in dispute in the litigation by not taking unnecessary points and by limiting interlocutory applications.

25. In the modern context, the necessity of many of the interlocutory applications that might traditionally have been pursued are open to question. When advising whether to pursue such applications, lawyers must be mindful of their duty to the Court to ensure that cases are conducted so as to avoid unnecessary expense and wastage of court time.

26. The current practice in the Supreme Court is to emphasize the importance of conferral between lawyers to attempt to narrow or resolve issues without consuming Court time.

27. Order 59 Rule 9 of the *Supreme Court Rules* requires conferral between lawyers prior to the making of an interlocutory application. Matters will be referred to mediation at which the possibility of resolving or narrowing issues will be considered before being listed for trial. The usual pre-trial orders require parties' lawyers to confer to identify any agreement or dispute about the admissibility of documentary evidence or witness' evidence. The usual orders may also require direct conferral between experts.

28. The Court's processes therefore actively encourage conferral in order to narrow the issues in dispute in litigation.

29. Conferral between lawyers to attempt to narrow the issues to those of significance is not only consistent with lawyers' obligations to the Court, it is also likely to be in the interests of lawyers' clients as it is likely to reduce legal costs and delays.

30. Conversely, failure to properly confine issues may expose parties and lawyers themselves to adverse costs consequences.

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"[Counsel's duty] is to do right by their clients and right by the court... In this context, 'right' includes taking all legal points deserving of consideration and not taking points not so deserving. The reason is simple. Counsel must assist the court in doing justice according to law": *Lougheed Enterprises Ltd* v *Armbruster* (1992) 63 BCLR (2d) 317 (CA) at pp. 324-325.

1. Is there a duty upon lawyers to confine issues? If so, to what extent?

1.1 It is sometimes suggested that lawyers are obliged to take all available points on behalf of their clients, subject only to the lawyer not knowingly misleading the Court about the evidence or the law.[34] It has also been suggested that a party's rights "*are to be determined by the court, not by his attorney or counsel*"[35] and that lawyers should not "*impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the court*".[36]

1.2 Certainly, lawyers owe a duty to their clients to ensure that they act so as to protect and advance their clients' interests[37] and are obliged to conduct each case in the manner that the lawyer considers will be most advantageous to the client.[38] However, lawyers are also under an important obligation to exercise independent judgment about how to best protect and advance their clients' interests. In exercising that judgment, lawyers are required to have

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[34] D Pannick, *Advocates*, Oxford University Press, 1993 at pp.92-93, *Tombling* v *Universal Bulb Co Ltd* [1951] 2 TLR 289 at p.297.

[35] *Johnson* v *Emerson* at 467.

[36] *Orchard* v *South Eastern Electricity Board* at p.572.

[37] Rule 5.3 of the *Law Society of Western Australia Professional Conduct Rules* ("*Professional Conduct Rules*").

[38] Rule 14.1 of the *Professional Conduct Rules*.

in mind not only the interests of their clients but also the speedy and efficient administration of justice.[39]

1.3 In that context, lawyers owe ethical duties[40] to their clients and general duties to the court[41] to ensure that cases are conducted so as to avoid unnecessary expense and wastage of court time.[42]

1.4 The WABA Rules expressly require barristers to ensure that any work that the barrister is briefed to do in relation to a case is done so as to confine the case to identified issues which are genuinely in dispute, to limit evidence (including cross examination), and to occupy as short a time in court as is reasonably necessary to advance or protect the client's interest.[43]

1.5 Any notion that lawyers should argue every point indiscriminately is inconsistent with lawyers' duties to the court to only advance those points that are reasonably arguable. Such a duty is paramount.[44]

1.6 Given the complexity of modern civil litigation and the resulting overburdening of the legal system, the proper administration of justice depends on lawyers properly discharging their duties by taking a critical view of the strength of their client's case.[45] Lawyers are obliged "*to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of 10 bad points the judge will be capable of fashioning a winner*".[46] Lawyers are obliged to co-operate to avoid needless disputes.[47]

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39 *Giannarelli* v *Wraith* (supra) at 556-557; and Rule 2.2(a) of the *Professional Conduct Rules.*

40 See rules 5.8 and 14.1 of the *Professional Conduct Rules*.

41 D A Ipp, "*Lawyers' Duties to the Court*" at pp.85, 95; *Ashmore* v *Corporation of Lloyds* at p.453.

42 *Giannarelli* v *Wraith* (1988) 165 CLR 543 at 556, D A Ipp, "*Lawyers' Duties to the Court*" at p.99

43 Rule 42(a), (b) & (e) WABA Rules.

44 D A Ipp, "*Lawyers' Duties to the Court*" at p.99; *D'Orta-Ekenaike* (supra) at [111].

45 D A Ipp, "*Lawyers' Duties to the Court*" at p.99.

46 *Ashmore & Ors* (supra) at p.453.

47 *Unioil International Pty Ltd*(supra) at p.194C.

1.7 The limitation of litigation to the issues of importance that will determine the outcome of a dispute facilitates the efficient and timely resolution of litigation. Not only is that in the interests of the administration of justice, it is also consistent with lawyers' obligations to their clients.

2. How does any duty to confine issues relate to the duty to act on instructions?

2.1 Lawyers' duties to the court are paramount and, in some circumstances, may oblige lawyers to decline to follow their clients' instructions.[48] Client instructions cannot overcome ethical considerations.

2.2 It is improper to present a case that a lawyer considers is bound to fail, even where a lawyer had been expressly instructed to present that case by his or her client.[49] It is also improper to pursue a superfluous or irrelevant point for an ulterior motive. That would involve abuse of the court processes. The appropriate action for lawyers in such circumstances is clear.

2.3 More difficult judgment considerations may arise where a lawyer is instructed to press an issue that the lawyer considers arguable but which in the lawyer's forensic judgement should not be pressed.

2.4 In such circumstances, lawyers may be concerned about their relationship with the client. There could be a temptation to manage the risk of damaging the lawyer's relationship with their client by pressing issues despite the lawyer's reservations. That approach would involve a failure of the lawyer's duty to his client and to the court.

2.5 Such an approach to litigation would have a tendency to multiply the matters in issue in litigation, to create confusion, and increase the risks of judicial error, and thereby increase costs and consume Court time unnecessarily. It is a particular concern in the context of litigation of large commercial disputes.

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[48] *Giannarelli* v *Wraith* (supra) at p.556; *D'Orta-Ekenaike* (supra) at [111].

[49] *Steindl Nominees Pty Ltd* v *Laghaifar* at paragraph [24], D A Ipp, "*Lawyers' Duties to the Court*" at p.86.

2.6 Lawyers are required to apply their expertise and form an independent judgment about the various issues in the litigation, and what should be maintained as live issues. Where a lawyer has reservations about pressing a particular issue, the lawyer is obliged to advise his or her client accordingly. The client should be clearly advised about the possible forensic and cost consequences of pursuing weak arguments.

2.7 Where a lawyer has formed the view that a particular issue is unlikely to affect the outcome of the case and pressing that issue will consume significant resources, then the lawyer should firmly advise his or her client not the press the issue.

2.8 Where the client refuses to follow a lawyer's advice, then the lawyer should give consideration to whether following his or her client's instructions would be consistent with the lawyer's obligations to the court. If following a client's instructions would be inconsistent with a lawyer's obligations to the court, then the lawyer must decline to follow those instructions. That should be communicated to the client in a timely fashion to give the client the option of engaging alternative representation (if they so wish).

2.9 The client should never be allowed to dictate forensic style or technique, or forensic judgments during the trial.[50] In this regard, the WABA Rules provide that a barrister will not have breached the barrister's duty to his or her client, and will not have failed to give reasonable consideration to the client's or instructing solicitor's desires by choosing, contrary to those desires, to exercise the forensic judgments called for during the case so as to confine any hearing to those issues which the barrister believes to be the real issues.[51]

2.10 The duties owed by lawyers are evident in the obligations that lawyers have when drafting pleadings. Lawyers owe a duty to the court to be satisfied that there is some credible material to support matters pleaded.[52] That duty is a

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50 *D'Orta-Ekenaike* (supra) at [111] & [112]; *Giannarelli v Wraith* (supra) at 556-557.

51 Rule 18(a) of the WABA Rules.

52 *Hall Chadwick Corp Finance (WA) Pty Ltd* v *Axiom Properties Ltd* [2002] WASC 197 at [22] and [27]; Rule 36 of the WABA Rules.

reflection of the duties of honesty and candour that lawyers owe to the Court.[53]

2.11 Pleadings have particular significance in civil litigation because they define the matters in issue in the proceedings. The failure to properly plead so as to identify the matters truly in issue will result in unnecessary expense in preparing matters for trial, unnecessary delays in the progress of matters to trial and unnecessarily lengthy trials. [54]

2.12 A lawyer who files or maintains a pleading that the lawyer knows contains a false allegation will breach both their ethical duty and general duty to the court.[55]

3. How are issues to be identified?

This heading refers to identifying and limiting the issues that will need to be determined by the Court (and not how parties are to collate evidence and identify issues they wish to raise).

Settlement

3.1 The ultimate narrowing of issues is a settlement. Lawyers should advise the acceptance of reasonable offers to settle, and should advise against proceeding with a case on the chance of getting more.[56] The possible adverse consequences of not settling, and proceeding to trial, should be made clear to the client.

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53 See e.g. *Unioil International Pty Ltd* (supra) at p.193C.

54 *Unioil International Pty Ltd* (supra) at p.193F.

55 *Kyle* v *Legal Practitioners' Complaints Committee* (1999) 21 WAR 56 at 60, 62.

56 D A Ipp, "*Lawyers' Duties to the Court*" at p.86; *Kelly* v *London Transport Executive* [1982] 1 WLR 1055 at pp.1064-1065.

Pleadings

3.2 In civil litigation pleadings are still usually the means by which the factual matters in issue are defined.[57] The pleadings will determine the scope of the parties' obligations to provide discovery[58] and delimit the issues at trial.[59] Properly prepared, pleadings are a means for arriving at the true issues in dispute.[60]

3.3 The issues that will determine the outcome of the litigation, and what will need to be pleaded, will be identified from an analysis of a client's instructions, the evidence available and the relevant legal principles.

3.4 Care should be taken when preparing pleadings to ensure that the disputed issues on the pleadings truly reflect the outstanding matters in issue in the proceedings. A lawyer's professional obligations require him or her to exercise an independent judgment when considering whether particular issues are to be kept live in pleadings.

3.5 When drawing pleadings lawyers are obliged to assist the judge by the simplification and concentration of issues and are under a duty to co-operate with the court by preparing consistent pleadings that define the issues and leave the judge to draw his or her own conclusions about the merits of the case.[61] Pleadings should be a mechanism for arriving at the true issues in dispute.[62]

3.6 It would be improper for a lawyer to pursue or present a case which a lawyer considers is bound to fail (even if instructed to do so).[63] Although in

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57 *Dare* v *Pulham* (1982) 148 CLR 658 at 664 per Toohey J and *Unioil International Pty Ltd* (supra) at p.193E.

58 *Mulley v Manifold* (1959) 103 CLR 341 at 345.

59 *Cameron* v *Troy & Co* [2001] WASCA 400 and *EDWF Holdings 1 Pty Ltd* v *EDWF Holdings 2 Pty Ltd* [2010] WASCA 78.

60 *Unioil International Pty Ltd* (supra) at p.193E; *Barclay Mowlem Construction Ltd* (supra) at [4].

61 *Ashmore & Ors* v *Corporation of Lloyds* (supra) at p.453.

62 *Unioil International Pty Ltd* (supra) at p.193E.

63 *Steindl Nominees Pty Ltd* v *Laghaifar* [2003] QCA 157 at paragraph[24].

deciding whether a factual matter is arguable, it is not for a lawyer to sit in judgment on the reliability of his or her client's witnesses, if the lawyer considers that the case is bound to fail, the lawyer has then concluded that the case is unarguable.[64]

3.7 Lawyers should make a critical assessment of the evidence available to their client to prove a particular fact, and consider whether a particular point can and should be pressed. A critical assessment of the evidence will only be possible if a lawyer has made sufficient investigation of his or her client's case at an early stage.

3.8 At the least, a lawyer's obligation to be satisfied that there is some credible material to support matters pleaded[65] would require a lawyer to obtain sufficiently detailed instructions from which the lawyer can be satisfied that there is substance to the matters pleaded. Best practice is to first obtain a detailed account of the relevant events from the relevant witnesses (ideally in the form of a signed witness statement or proof of evidence) and all of the key relevant documents. In practice, it is in this manner that the issues to be raised will be properly identified.

3.9 There are different views about whether a pleader should always admit a fact alleged by the other side which he or she knows to be true.

3.10 On one view, a lawyer's traditional duty of honesty and candour to the court, and the modern duty to reduce unnecessary issues and costs, make tactical denials inappropriate.[66]

3.11 On another view, under the adversarial system of justice, as long as the lawyer does not mislead the court, he or she is entitled to make the opponent prove that person's case even though the lawyer knows that the facts alleged by the opponent are true.[67]

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64 *Steindl Nominees Pty Ltd* v *Laghaifar* (supra) at paragraph [27].

65 *Hall Chadwick Corp Finance (WA) Pty Ltd Ltd* (supra) at [22] and [27].

66 *Unioil v Deloitte Touche Tohmatsu* (1997) 18 WAR 190 at 193 per Ipp J.

67 *D'Orta-Ekenaike v Victoria Legal Aid* (supra) at [110] per McHugh J.

3.12 Lawyers are not the agents of the Court in some inquisitorial role. They owe duties to their clients. Information obtained by a lawyer may be covered by legal professional privilege.[68] Only the client can waive that privilege.

3.13 Ultimately, the correct approach is a matter of degree depending upon the circumstances of the particular case. If it is apparent that an opponent will be able to prove a fact, but it will be time consuming and costly, then a tactical denial in order to gain a forensic advantage would be inappropriate. However, if a judgment is made that an opponent will not, or is unlikely to, be able to prove a critical aspect of the claim that the lawyer knows to be true, then putting the opponent to proof would not be inappropriate. It is the nature of the adversarial system.

3.14 If that judgment is wrong, there may well be cost consequences. Those consequences should be properly explained to the client and relevant instructions obtained.

3.15 Further, in making that judgment a lawyer will need to take into account the real possibility of early intervention by a proactive Judge seeking to identify the real issues, and the possibility that that Judge will make orders as to the mode of proof of particular matters.

Amendment to Pleadings

3.16 Timely amendments to the pleadings to better identify the issues may be unlikely to be problematical. Leave to amend pleadings may no longer be required any time up to 7 weeks prior to the date fixed for trial.[69] However, difficulties may still arise when applications are made late (without an adequate explanation for the delay), or cause undue prejudice to other

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68 *Carter v Northmore Hale Davy & Leake* (1994-1995) 183 CLR 121 at 133, 163.

69 See Order 21 Rule 3 of the *Rules of the Supreme Court* and the Hon Wayne Martin CJ, "New Case Management Rules for the Supreme Court" (2010) 37 Brief 11.

parties, or the legal system.[70] Difficulties may also arise if the application involves withdrawal of an admission of fact, or liability.[71]

Further & Better Particulars/Strike Out Applications

3.17 Where a party requires further and better particulars to properly understand a pleading, and the matters in issue, a party may apply for further and better particulars. If the pleading does not adequately reveal the cause(s) of action, a strike out application may be made. Such applications have plagued commercial litigation (despite the requirement for conferral to avoid such disputes) and not infrequently involve a narrow and pedantic view of a pleading which is otherwise adequate to identify the substance of the claim and the relevant issues, and all too often are made for tactical reasons.

3.18 They delay the progress of the matter. In the meantime, substantial costs are often incurred, and a great deal of court time is used, which is often out of proportion to any real benefit in properly identifying the issues.

3.19 As mentioned earlier, the court now discourages such applications. Lawyers should carefully weigh the potential benefits against the cost and court time that would be involved before embarking upon that course of action.

3.20 It should go without saying that proper compliance with Order 59 rule 9 *RSC* is essential. However, if a pleading is really so muddled and obscure that it has a significant impact upon the proper preparation of the case and its presentation at trial and, after conferral, the pleader is not prepared to remedy the situation, then an application should be made.[72] In the long run it is more efficient and cost effective to have a pleading that meets the basic requirement of identifying the substance of the relevant issues in the proceedings.

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[70] *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 147; *Wiltrading v Lumley General* (2005) 30 WAR 290 at 315; and (importantly) *AON Risk Services Australia Ltd* (supra) at [30], [35], [98], [99], [102], [103], [112] and [156].

[71] *Hutton v Meston* [2004] WASCA 178; see para 8.2 below.

[72] *Barclay v Mowlem Construction Ltd* (supra) at [8].

Statement of Issues

3.21 Where a matter does not involve pleadings, consideration should be given to agreeing a statement of issues in the proceedings.

Trial Directions

3.22 The practice in the Supreme Court is now to make standard pre-trial orders that have the effect of requiring parties to disclose more evidence than was traditionally the case. The standard pre-trial directions made by the Supreme Court will usually include directions for:

- the preparation of a trial bundle identifying the documents that are to be adduced in evidence in the court of trial;
- the exchange of non-expert witness statements;
- the exchange of expert reports;
- experts to confer;
- exchange of chronologies; and
- exchange of written submissions.

3.23 These procedures give the parties an ability to clearly identify the issues being advanced by an opponent and the evidence available in relation to those issues. It also gives the parties an opportunity to revisit the matter of what issues are, or should be, kept as live issues for the trial.

Conferral

3.24 The procedures of the Supreme Court require the parties to confer at various stages of the litigation process in order to better identify the matters in issue.

3.25 Most civil disputes will not be listed for trial until the possibility of mediation has been exhausted.[73] Mediation affords the parties a confidential process by which the parties may attempt to resolve a dispute. It is also an

[73] Paragraph 4.2.1 of the *Consolidated Practice Directions*.

opportunity to narrow issues. Where it is not possible to finally resolve a dispute, the opportunity to attempt to narrow issues should be taken.

3.26 As mentioned, the standard pre-trial directions made by the Supreme Court may require experts to confer. The conferral between the experts will identify those issues that remain outstanding between the experts. Although it may be appropriate in some cases, care should be exercised in agreeing to experts conferring in the absence of lawyers. Rather than being persuaded about the merits of the opposing view, experts (such as valuers) may take the opportunity to reach a compromise (unrelated to the merits). Such a compromise is the prerogative of the parties, not expert witnesses.

3.27 The Court also encourages (in appropriate cases) the leading of evidence from expert witnesses who hold contrary views concurrently ("hot tubbing") based upon an agreed list of issues.[74] Consideration should be given to the application of that approach in any case involving divergent expert opinions.

3.28 The standard pre-trial directions also require the parties to confer about whether the documents to be tendered in the trial bundle can be tendered by consent and if not, to identify the nature of the dispute about the authenticity of the documents.[75] By this process, lawyers should be able to identify the issues about the admissibility of documentary evidence prior to trial.

3.29 Further, the standard pre-trial directions also require parties to notify each other of any objections to the admissibility of any witness statements and to confer to attempt to resolve those disputes.[76] This process should therefore identify whether there are any issues about the admissibility of witnesses' evidence prior to trial. Conferral should be utilised to resolve such disputes. The observations in relation to applications to strike out pleadings also apply to applications to strike out witness statements.

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74 *Wall v Cooper* [2008] WASCA 53 at [6]-[8].

75 See order 28 of the *CMC List - Usual Orders*; Form 78 Supreme Court Common Forms.

76 See orders 40 and 41 of the *CMC List - Usual Orders*; Form 78 Supreme Court Common Forms. Compliance with Best Practice Guide 01/2009: Preparing Witness Statements for Use in Civil Cases should minimise such disputes.

3.30 Finally, the standard orders require the exchange of submissions, lists of authorities, and chronologies. The exchange of those documents should further assist in identifying the matters in issue. In order to achieve that, the submissions should be clear and succinct. Lists of authorities (which should list both favourable and unfavourable authorities[77]) should be limited to relevant (and primary authorities), and care should be taken to ensure that the authority does stand for the proposition claimed. Long rambling submissions and unduly long lists of authorities (many of which are irrelevant or do not stand for the proposition cited) are not only inconsistent with the lawyer's duty to assist the Court, but also involve bad advocacy.

3.31 The practice of making these orders reflects the view of the Court that issues in proceedings are often best identified through direct conferral and co-operation between the lawyers for the parties. Irrespective of whether a lawyer may have been ordered to do so or not, such conferral should normally take place. If approached in the right spirit, it obviously has benefits for the clients and the legal system, and is consistent with the duties owed by lawyers to the Court. If a lawyer develops a reputation of being uncooperative, difficult and deliberately obtuse, then the prospects of ongoing conferral are reduced. Unfortunately, the clients and the legal system suffer. In extreme cases, a personal costs order against an unreasonable lawyer may be a possibility.[78]

4. **How can issues be confined?**

Proper Consideration Before Taking Issues

4.1 Issues can be confined by lawyers limiting the issues that they press to only those issues that are likely to affect the outcome of the case.

4.2 When drafting pleadings, there is sometimes a temptation to plead every conceivable point on behalf of their client, even when the lawyer suspects

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77 *D'Orta-Ekenaike* (supra) at [112].

78 *Unioil International* (supra) at 194.

that some of those points, whilst arguable, may only have limited prospects of success. The result is that the matters in issue in the proceedings are multiplied.

4.3 There may also be a perception that as pleadings are prepared at an early stage of litigation, before all of the evidence that might be available at trial is known, the prudent approach is to plead all conceivable causes of action or defence.

4.4 As mentioned previously, arguing every point indiscriminately may be inconsistent with a lawyer's obligations to the Court. It is incumbent on lawyers to exercise independent judgement when considering what issues should be raised as part of a client's case.

4.5 At the pleadings stage careful consideration should be given to whether taking the particular point is necessary to properly protect a client's interests, and to the likelihood of the point succeeding, particularly where it is likely to result in significant delay and cost. Consideration should be given to whether a client's interests are better served by limiting the matters pleaded to the strongest parts of the client's case. If further evidence or information becomes available later, amendment to the pleadings can be considered.

4.6 When preparing witnesses statements and affidavits, ensuring that the contents of the witnesses' statements and affidavits are limited to those matters that are admissible and relevant to the matters in issue will avoid unnecessary disputes, and reduce the length of time required for trial.

4.7 Lawyers should also exercise careful judgment before pursuing interlocutory applications. If there is a real issue, it may be possible to resolve issues through direct oral conferral with the lawyer for the other party. Lawyers are required to engage in such conferral by Order 59 Rule 9 of the *Supreme Court Rules* before making any application in any event.

4.8 Where it is not possible to resolve an issue through conferral, careful consideration should be given to whether making an interlocutory

application in relation to the issue is likely to have a significant effect in confining issues, and upon the outcome of the case.

4.9 More broadly, lawyers should also give consideration to whether to advise their clients not to insist on the strict observance of the traditional rules and procedures that apply in litigation.

4.10 For example, although the Rules of the Supreme Court continue to require parties to provide general discovery of documents in relation to all matters in issue in the proceedings, the Supreme Court's *Civil Case Management Usual Orders* also contemplate limiting discovery to discovery by category.[79] In complex civil litigation, the cost of providing general discovery may be very significant. In such cases lawyers should give serious consideration to limiting the parties' discovery obligations (for example, by excluding discovery of classes of documents in relation to matters that are not controversial).

4.11 Further, in many instances, relevant facts which are not expressly addressed in the pleadings and which need to be proved at trial may be uncontroversial. However, the rules of evidence may make proving those facts difficult and, therefore, costly. Lawyers should consider limiting the issues that must formally be proved to those which are genuinely controversial. Lawyers should also carefully consider whether objection should be taken to evidence contained in witness statements where that evidence does not comply with the rules of evidence if that evidence is uncontroversial.

Strike Out Applications

4.12 A successful application to strike out parts or all of a pleading can confine the matters in issue in the proceedings by removing those issues from the proceedings. More frequently however, a party will be given leave to re-plead and it may only be after repeated strike out applications (if at all) that any order to finally strike out is made.

[79] See Order 26 of the *RSC*, and order 6 of the *CMC List - Usual Orders*.

4.13 As discussed earlier, such applications are discouraged by the Court. In practice, making an application to strike out parts of a pleading is only likely to prove to be a useful procedure for reducing the matters in issue in the proceedings in the clearest of cases.

Requests for Further and Better Particulars

4.14 It has been suggested that the material facts should appear with clarity and appropriate particularity on the face of the pleadings and an application to strike out the whole or part of an embarrassing pleading is often preferred to an attempt to remedy it by a request for further and better particulars.[80]

4.15 As mentioned, however, modern practice is that applications to strike out pleadings will only be entertained where resolution of the disputes would significantly impact on the proper presentation of the case and its presentation at trial.

4.16 Consideration should therefore be given to requesting further and better particulars (in preference, or prior, to applying to strike out paragraphs of a pleading).

4.17 Protracted disputes about the adequacy of particulars provided or excessive or unreasonable requests for further and better particulars have the same potential to consume a significant amount of resources (both of litigants and the Court) as making applications to strike out pleadings. In framing applications for further and better particulars lawyers need to be mindful of their obligations to the court to ensure that cases are conducted so as to avoid unnecessary expense and the waste of court time.

Notices to Admit

4.18 Order 30 of the *Supreme Court Rules* provides for a procedure whereby a party may serve a notice on another party to the proceeding inviting them to admit facts or the authenticity of documents for the purposes of the proceedings.

[80] See commentary in *Civil Procedure (WA),* Kendall & Curthoys, at paragraph [20.19.5].

4.19 Obtaining formal admissions in relation to issues may assist to confine the matters in issue by rendering proof of those matters unnecessary.

4.20 The benefit of the procedure offered by Order 30 of the *Supreme Court Rules* is that there may be costs consequences for refusing to admit matters. Those consequences are discussed more fully under question 10 below.

4.21 Any admissions made pursuant to a notice to admit facts can only be used against the party who makes the admissions in the action in which the admissions are made.[81]

4.22 Where a notice to admit documents is served and the recipient does not within 7 days after the time limited for the inspection of the documents serve a notice disputing the authenticity of the documents, the authenticity of the documents is deemed to be admitted by the recipient of the notice.[82]

4.23 Order 30 Rule 4 of the *Supreme Court Rules* provides that in the absence of written objection disputing the accuracy of certain descriptions of documents given in list of discovered documents, a party may be taken to have admitted the accuracy of those descriptions. Taking care to fully describe documents when preparing a list of discoverable documents may therefore provide a simple means of procuring admissions.

4.24 In considering whether a party wishes to issue a notice to admit documents, lawyers should be mindful that the standard pre-trial directions issued by the Courts require a degree of conferral about the authenticity of the documents to be included in the trial bundle in any event.

Interrogatories

4.25 A short set of interrogatories may assist in confining issues. Interrogatories should be concise, otherwise the Court will not grant leave to administer interrogatories. "The enthusiasm of the courts for the administration of interrogatories has diminished significantly in recent years".[83]

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81 Order 30 Rule 2(2) of the *RSC*.

82 Order 30 Rule 5(2) of the *RSC*.

83 *International Land Developments Pty Ltd v Diamo Nominees Pty Ltd* [2008] WASC 152 at [3].

Conferral Between Experts

4.26 Direct conferral between experts may often assist to reduce the matters in dispute between the experts.

4.27 A lawyer's ability to critically evaluate their own expert's evidence is limited by the lawyer's understanding of the expert's area of expertise (which will almost never be as broad as the expert's understanding). It may only be when an expert's opinion is tested against another expert's opinion that that opinion can be properly evaluated.

4.28 Various court procedures exist for direct conferral between experts. Consideration needs to be given to utilising those procedures in appropriate cases. As mentioned already,[84] care should be exercised in agreeing to experts conferring in the absence of lawyers.

4.29 As part of its power in relation to ordering mediations, the Court can order a mediation between parties' experts with a view to narrowing any points of difference between them and identifying any remaining points of difference.[85]

4.30 In any event, as mentioned earlier, the usual pre-trial directions also provide that where there are differences between the opinions of the respective expert witnesses, a conference shall be held between the witnesses in the presence of the solicitors for the parties for the purpose of narrowing or removing the differences.[86]

4.31 The orders also provide for a report to be lodged recording the substance of any resolution or narrowing of the points of difference between the experts resulting from the conference.[87]

4.32 As mentioned earlier, in appropriate circumstances the Court will give consideration to ordering that the various experts give evidence

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[84] See paragraph 3.26 above.

[85] Paragraph 4.2.1 of the *Consolidated Practice Directions*.

[86] See order 50 of the *CMC - Usual Orders*; Form 80 Supreme Court Common Forms.

[87] See order 50 of the *CMC - Usual Orders*; Form 80 Supreme Court Common Forms.

concurrently. This facilitates a direct comparison between the experts' evidence on each point.

Agreement Between Lawyers

4.33 Issues may be confined by lawyers agreeing between themselves to confine the issues. This is a common means by which many issues that may arise in relation to the trial of a matter may be resolved without the need to occupy Court time.

4.34 As mentioned earlier, the Supreme Court's procedures require lawyers to confer directly in relation to a number of matters in various contexts as a matter progresses to trial to confine the matters in issue. Parties themselves may be directly involved in conferral through the mediation process.

4.35 Even where not expressly required to do so by a particular Court order or rule of procedure, it is appropriate for lawyers to confer between themselves to attempt to confine issues. Such conferral will usually be most effective when it takes place in the form of direct oral communication between the lawyers with the conduct of the matter and/or the lawyers who will appear at trial.

5. How should a confined range of issues be recorded?

5.1 Properly prepared pleadings should reflect the matters in issue in the litigation.

5.2 Where a pleading alleges a matter which a party later decides not to press, an amendment should be made to the pleading to remove the allegation.

5.3 Similarly, where a defence denies an allegation which a party later decides to admit, then the defence should be amended to admit the allegation.

5.4 Where an agreement has been reached to confine issues that do not expressly arise on the pleadings, then it is prudent for the lawyers involved to record that in writing. Reducing the agreement to writing avoids any possible confusion about the matters agreed.

5.5 Where a matter proceeds to trial on the basis of agreed issues not otherwise apparent from the pleadings, it will be necessary for the parties at some point to advise the Court of any matters agreed. That may be addressed in submissions or in a party's opening addresses.

5.6 Where a significant number of factual issues have been agreed it is useful for the Court to be provided with a document listing the facts agreed. An agreed statement of facts should be prepared.

6. When should issues be confined?

6.1 Lawyers should give careful consideration as to what issues to raise before commencement of proceedings. This has been discussed above in the context of pleadings, interlocutory applications and the strict insistence on the observance of rules of evidence and the procedures of Court above.

6.2 Where issues have been raised, lawyers should be careful to consider whether those issues should continue to be pressed as further information and evidence becomes available. However, facts should not be admitted unless they are true.[88]

6.3 Where the availability of further evidence results in a lawyer perceiving that an issue can no longer be pressed, the lawyer should notify the opposing lawyer. Notification should occur as soon as possible so to avoid costs being incurred unnecessarily.

6.4 Where the concession of an issue might affect the allocation of Court time, the lawyers involved should notify the Court of the concession made after they have conferred about the likely effect of the concession.

6.5 Whether a lawyer should advise his or her client to cease to press a particular issue is a matter for the professional judgment of the lawyer concerned in all of the circumstances of the particular case. A lawyer must also be mindful of his or her obligation to the Court to ensure that cases are conducted so as to avoid unnecessary expense and wastage of court time.

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[88] *Damberg* v *Damberg* (2001) 52 NSWLR 492 at 494, 520, 522.

6.6 It is possible that once a concession is made it will not be possible to withdraw that concession. An issue should therefore only be conceded once a lawyer has satisfied himself or herself that the evidence then available is substantially complete, and allows the lawyer to properly assess the merits of the client's case in relation to that particular issue and to advise their client accordingly.

6.7 Premature admissions are to be discouraged. Accordingly, if a lawyer has concerns about the merit of a particular issue but knows that further evidence is likely to become available following the exchange of expert reports which would be likely to affect the prospects of his or her client's case on a particular issue, it will be prudent for the lawyer to await the delivery of that evidence before advising his or her client to abandon the issue. If the precise terms of the evidence will be critical, it may well not be prudent to simply rely upon the terms of the opponent's witness statements. It may well be appropriate to test that evidence under cross examination.

6.8 Such situations are to be contrasted with a situation in which a lawyer does not anticipate any further evidence on a matter but has simply decided to wait and see how matters develop in the hope that some further evidence might become available from some unknown source. Where such an approach would result in either the lawyer's client or the other parties incurring unnecessary costs or would be likely to consume Court time, the lawyer involved should give careful consideration to whether the issue should be conceded at that stage. A lawyer can expect to be quizzed by the trial Judge at the commencement of the trial as to what matters are really in issue.

6.9 As mentioned earlier, the usual pre-trial orders may require the parties to confer about objections to the admissibility of documents and witnesses' statements. Lawyers should also use that opportunity to confer about any other matters that may result in an agreement about outstanding issues.

6.10 Lawyers should continue to attempt to distil the matters that are to occupy the time allocated for the trial to only those important matters that they have been unable to resolve. It is never too late to resolve issues by agreement.

7. **Why should issues be confined?**

7.1 Confining the issues in dispute to the issues of importance is consistent with the duties that lawyers owe to their clients, because it will be in the interests of those clients. That will limit costs, promote the speedy resolution of disputes, avoid wastage of Court time, and reduce the risk of judicial error.

7.2 Reducing the number of issues (including avoiding unnecessary interlocutory disputes) is likely to reduce legal costs and result in the matter progressing to trial more rapidly.

7.3 Further, a client's case may be more compelling when it is limited to strong arguments with good prospects of success. The case is then more likely to result in settlement, or to succeed at trial if settlement is not possible.

7.4 Some lawyers may perceive a tactical advantage in multiplying the matters in issue to attempt to overwhelm an opponent or to pursue interlocutory disputes for tactical advantage. Such an approach is inconsistent with a lawyer's modern duties to the Court. Further, lawyers should be mindful, that *"[l]itigation is not a game, played for the amusement of the lawyers engaged to conduct it... [r]ather, it is a process which is ordinarily of vital importance to the parties who have the misfortune to become caught up in it...*".[89]

7.5 Failing to properly confine the dispute to the issues of importance that will determine the outcome of a case may be inconsistent with a lawyers obligations to the Court and to the client to ensure that cases are conducted so as to avoid unnecessary expense and the waste of court time.

7.6 A lawyer's failure to discharge his or her obligations may result in adverse judicial comment and have costs consequences.[90] It may also constitute unprofessional conduct.

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89 *Tremeer* v *City of Stirling* [2002] WASC 281 at paragraph [33]; The "sporting theory of justice" (which creates vested rights in errors of procedure is not acceptable): *Jackamarra v Krakouer* [1998] HCA 27; 195 CLR 516 at [30]; *First Trade Consulting Pty Ltd v GRD Kirfield Ltd* [2005] WASCA 158.

90 See e.g. *Ashmore & Ors* v *Corporation of Lloyds* and *Steindl Nominees Pty Ltd* v *Laghaifar* (supra).

8. **What are the consequences of confining issues?**

8.1 The confined set of issues arrived at by the parties will limit the case that the parties may put at trial.

8.2 An agreement to confine issues may often involve one party admitting allegations made by another party. However, once admissions have been made, leave may be required to withdraw those admissions. Such leave will only be granted when justice requires.[91]

8.3 Where a pleaded allegation of fact has been admitted, the truth of the fact is no longer in issue and evidence to prove the fact is unnecessary.

8.4 A Court is not bound to act on an admission, where contradictory evidence called at trial demonstrates that the admission is wrong.[92] Courts are averse to pronouncing judgment on hypotheses which are incorrect, as to do so is tantamount to giving an advisory opinion.[93]

8.5 An admission of a matter of law or of mixed fact and law will not necessarily be decisive if other evidence in the case shows that the admission was made in error, and the circumstances are such that the party who made the error can advance the true position consistently with procedural fairness to the other party.[94]

8.6 When making admissions lawyers should be mindful that where admissions of fact have been made, a party may at any stage of the action apply for judgment on the basis of those admissions, without awaiting the determination of any other questions between the parties (if the admissions have the effect of admitting liability).[95]

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91 *Cooper Brewery Ltd* v *Panfida Foods Ltd* (1992) 26 NSWLR 738 at 742, 746, 750; *Shine* v *Williams* [2007] WASCA 194 at paragraph [17].

92 *Damberg* v *Damberg* at pp.519-523; *Holdway* v *Acuri Lawyers (a firm)* [2008] QCA 281 at paragraph [5].

93 *Damberg* v *Damberg* at paragraphs [1], [2], [156] and [160].

94 *Holdway* v *Acuri Lawyers (a firm)* at paragraphs [64] to [65].

95 *RSC* Order 30 Rule 3.

9. **What if another party refuses to confine issues?**

9.1 Lawyers should be careful to ensure that all reasonable efforts have been made to reach agreement about confining issues.

9.2 The Supreme Court's case flow management powers give it the power to make orders and give directions for the efficient and timely disposal of matters including the power, *inter alia*, to: [96]

- order that evidence of any particular fact shall be given at trial by statement on oath of information and belief, or by production of documents or entries in books or by copies of documents or entries or otherwise as the Court may direct;
- require parties or counsel to file and exchange memoranda before the hearing of any interlocutory proceeding in order to clarify the matters in issue before the hearing;
- on any terms suitable, direct that the parties confer on a "without prejudice" basis for the purpose of resolving or narrowing the points of difference between them; and
- direct that experts, whose reports have been exchanged consult on a without prejudice basis, for the purpose of narrowing any points of difference between the experts and identifying any remaining points of difference.

9.3 As mentioned, the usual pre-trial directions require a process of conferral to narrow the issues between party's experts and between the parties' lawyers about the documents to be tendered at trial and about the parties' witness statements. However, where conferral to confine issues at an earlier stage would be useful but another party refuses to confer, consideration should be given to obtaining an order for a formal process of conferral about the issue, for example, through mediation.

[96] *RSC* Order 29 Rule 2(1).

9.4 Where it has not been possible to confine the issues at trial through a process of conferral, consideration should be given to whether any order might be sought from the Court to confine the issues. For example, consideration might be given to whether an order should be sought about the manner of proof of factual matters that are not central to the matters in issue.[97]

9.5 Where a party to litigation refuses to confine an issue of fact, lawyers should also consider issuing notices to admit facts pursuant to Order 30 Rule 2 of the *Supreme Court Rules*.

9.6 Where a party's conduct in refusing to confine issues is unreasonable, consideration could be given to writing to the other party explaining why that conduct is unreasonable and foreshadowing an appropriate application for costs following trial. To the extent that the letter might include any admissions, the letter might be marked 'without prejudice save as to costs'.[98] The possible costs consequences of unreasonable conduct on the part of a party may also have costs consequences as discussed below.

10. What (cost) consequences flow from a failure to confine issues?

10.1 A failure to confine issues, or unreasonable conduct, may be grounds to award a successful party costs on an indemnity basis.[99] For example, indemnity costs have been awarded where there has been a failure to admit matters not truly in issue and that has resulted in unnecessary discovery and the calling of unnecessary witnesses.[100]

10.2 An unreasonable failure to confine issues could be conduct which may also result in an order depriving an otherwise successful party of its costs. Order 66 Rule 1(2) of the *Supreme Court Rules* provides that if the Court is of the opinion that the conduct of a party has resulted in costs being unnecessarily

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97 *RSC* Order 29 Rule 2(1)(c); *Clambake Pty Ltd* v *Tipperary Projects Pty Ltd (No 2)* (supra) at [55].

98 *Calderbank v Calderbank* [1975] 3 All ER 333.

99 *Tranchita v Danehill Nominees Pty Ltd (No 2)* [2007] WASC 248; *Fazio v Fazio* [2008] WASC 161; and *New Resources Holdings Pty Ltd v Lunt (No 3)* [2008] WASC 221.

100 *Unioil International Pty Ltd* (supra) at 194; *Stewart v Biodiesel Producers Ltd* [2009] WASC 145(S).

incurred, it may deprive that party of costs wholly or in part and may order the payment of the other parties' costs.

10.3 Where a notice to admit facts has been served, but the facts have not been admitted, the costs of proving the non admitted facts (if proved) will usually be paid by the person who failed to admit the facts irrespective of who succeeds at trial.[101]

10.4 The Supreme Court has the power (in exceptional cases[102]) to order that lawyers personally pay costs that have been incurred as a result of improper conduct on the part of a lawyer. [103]

10.5 A failure to confine issues that breaches a lawyer's obligation to the Court to ensure that cases are conducted so as to avoid unnecessary expense and wastage of court time (in circumstances involving serious dereliction of duty or an abuse of process of the court) might be improper conduct that may expose the lawyer to such an order.

10.6 Similarly, where it is shown that a failure to admit matters not truly in issue is the result of advice provided by a lawyer for no good reason, an order might be made that the lawyer pay costs personally. Non compliance with *RSC* Order 59 rule 9 may also result in such an order.[104]

10.7 Presenting a case which a lawyer considered doomed to fail would also be improper conduct that might expose the lawyer to an order to pay costs personally.[105]

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101 *RSC* Order 66 Rule 3(2).

102 *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169 at 229-231, 239 (affirmed (1999) 87 FCR 134).

103 *RSC* Order 66 Rule 5; *Naso v Danehill Nominees Pty Ltd & Ors* [2006] WASC 265.

104 *Youlden Enterprises Pty Ltd* (supra) at [5].

105 See e.g. *Steindl Nominees Pty Ltd* v *Laghaifar; White Industries (Qld) Pty Ltd* (supra) at 231, 239-240.