



Creating efficiencies

IT HAS NOW BEEN FIVE YEARS SINCE THE FEDERAL COURT ESTABLISHED CONCISE STATEMENTS AS AN ORTHODOX PROCEDURE.
BY MATTHEW PECKHAM

SNAPSHOT

- The Federal Court's Concise Statement procedure has now been in operation for five years as an orthodox means of commencing proceedings.
- The Concise Statement procedure emphasises case management and relies on cooperation between lawyers to identify the real issues and thereby save money and time.
- In appropriate proceedings, the Concise Statement procedure provides an iterative approach to case management, with a focus on efficiency and flexibility.

It has now been five years since the Concise Statement procedure was established as an orthodox means of commencing commercial and corporations proceedings in the Federal Court (Court), by the Practice Note C&C-1.¹ Previously, a similar procedure was used in the Federal Court's Fast Track List, first piloted in 2008. In that time, the Concise Statement procedure has been adopted by many, not least by Commonwealth regulators, as a means of efficiently commencing complex proceedings.

What is a Concise Statement?

A Concise Statement is a narrative statement of the case, in five pages or less. It must summarise:

- the important facts
- the relief that is sought from the Court (and against whom)
- the primary legal grounds, or causes of action
- the alleged harm, including wherever possible a conservative and realistic estimate of loss, which may be expressed as a range.²

Nature and purpose of Concise Statements

The purpose of a Concise Statement is to enable the applicant to bring to the attention of the respondent and the Court the key issues and key facts at the heart of the dispute and the essential relief sought from the Court.³ Critically, this avoids the need for lengthy or detailed pleadings prior to commencing proceedings, and their associated costs.⁴

The Practice Note anticipates that the majority of commercial and corporations matters will be assisted by commencing with a Concise Statement, and encourages applicants to use them, unless clearly inappropriate.⁵ The procedure is also available in the Court's other practice areas, subject to the guidance in their practice notes.⁶

At the first case management hearing (typically within two to three weeks of filing), the Court will consider whether the matter is better suited to Concise Statements or a more detailed Statement of Claim.⁷ The Court may require a Concise Statement in Response from the respondent, either to proceed without pleadings, or to determine which procedure is most appropriate.⁸

Typically, a Concise Statement in Response will also be in narrative form, rather than a line-by-line series of denials and admissions. However, as with a conventional Defence, its purpose is to engage with and identify the key issues.⁹

Technical requirements and approach to case management

The purpose of the Concise Statement procedure is to identify and give notice of the issues. However, they are typically much shorter than a Statement of Claim, raising the potential for confusion or evasion. In several cases, the Court has considered what is technically required to be set out in a Concise Statement and by what means the issues are to be explored in further detail, if necessary.

As a starting point, the Court has emphasised that the Concise Statement procedure is not merely a short form of pleading – rather, it is intended to be a more narrative and tailored approach, requiring the engagement of the parties and the Court.¹⁰

However, the fundamental purpose remains the same: to give fair notice of the issues and the case that each party must meet.¹¹ Accordingly, the Concise Statement must set out a well-drafted narrative of the facts and circumstances and of the wrong or grievance that constitutes the real substance of the complaint. It must contain all the facts to be proven, concisely but fully expressed, at the appropriate level of generality or specificity to accomplish that task.¹²

Where the issues are detailed or technical, a high-level explanation may be sufficient, with further detail to be provided by particulars, evidence or other means.¹³ Where the case relies on statutory provisions, they should be disclosed in the Concise Statement, so that fair notice is given.¹⁴ Importantly, a Concise Statement is “not an excuse for laziness in analysis or vagueness or imprecision in expression”.¹⁵

Unlike conventional pleadings, however, Concise Statements are not intended to be exhaustive of the issues in dispute. Although they must set out the key facts and claims, they will then form a starting point for the issues to be further articulated through the case management process as a whole, by whatever means are most fitting.¹⁶ This may involve requests for more detailed particulars, targeted interrogatories, disclosure of key documents, joint statements of issues, statements of agreed facts, the oral examination of senior officers or the early provision of an outline of opening submissions.¹⁷

Accordingly, the Court will have regard to the case management process as a whole.¹⁸ However, this is not to say that the case may substantially change as it progresses, or that additional claims can be added without leave. Rather, the issues will be progressively defined and exposed.¹⁹ If there is a claim at the heart of a party's case that is not disclosed in its Concise Statement, then leave should be sought to amend in the ordinary way.²⁰ Similarly, if a party should seek to raise matters at trial (particularly in closing submissions) that should fairly have been disclosed at an earlier stage, it may be prevented from doing so.²¹

The Court's expectations

In *ASIC v ANZ Banking Group Ltd*, Allsop CJ explained the nature and purpose of the Concise Statement procedure and the Court's expectations of the parties. The Chief Justice said:

“Modern litigation of this kind must be wrenched from the mindset of staged trench warfare, statement and affidavit drafting and document production that makes access to the legal system, even for large and well-resourced litigants, overly costly and slow”.²²

On receiving a Concise Statement, a defendant should engage with the narrative in an appropriate fashion, identifying the points in contention, and the facts to be advanced in their defence.²³ Where a Concise Statement in Response is filed, the two statements should be viewed as a combined narrative. It should be possible, on reviewing both statements, to determine which fundamental facts are agreed, which are in dispute, and the competing legal analyses.²⁴

In *Allianz Australia Insurance Ltd v Delor Vue Apartments*, a Full Court majority linked the Court's expectations with the modern approach to case management and the statutory requirements of the *Federal Court of Australia Act 1976* (Cth):

Federal Court procedure

“The modern approach of courts in Australia emphasises case management and relies upon the performance by lawyers of their duty to work cooperatively to expose the real issues in the case. For some time, the courts have required a cards on the table approach that requires parties to disclose in clear terms the nature of their case and not to insist upon proof of matters not genuinely in issue . . .”²⁵

In particular, the majority observed that:²⁶

- “The Court must conduct proceedings in the Court on the basis of a practice and procedure that facilitates its overarching purpose: the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible: s37M.”
- “[T]he parties themselves must conduct the proceedings in a way that is consistent with that overarching purpose: s37N(1).”
- “Their lawyers must, in the conduct of a civil proceeding, take account of that duty as imposed on their client and assist them to comply with that duty: s37N(2).”
- “In addition, the lawyers have a common law duty to the Court to confine the case to the real issues and present the case as quickly and simply as circumstances permit in a manner that is proportionate to the overall subject matter: *Dyczynski v Gibson*”.²⁷

Given the greater brevity of Concise Statements and the emphasis on cooperative case management, the parties have a duty to proactively expose the real issues at the earliest stage possible. If a party wishes to complain that the case has been too broadly stated, or that a claim is not properly disclosed, that needs to be done at an early opportunity, and must not be “saved up” for trial.²⁸

Suitability for particular cases

Unconscionable conduct, dishonesty and fraud

The Court has observed that the narrative Concise Statement procedure is particularly well-suited to describing unconscionable conduct and other forms of equitable claims.²⁹

Conversely, where the case is one of outright dishonesty or fraud, it may become necessary to revert to conventional pleadings. Conventional pleadings are stricter and less dependent on the cooperation of the parties. The conventional requirements for pleading these matters, with appropriate particulars, are stringent.³⁰ However, this is not to say that such a case should not be commenced by Concise Statement, which may save costs at the outset.

Regulatory and civil penalty proceedings

Regulatory enforcement and civil penalty proceedings are routinely commenced by way of Concise Statement. At least where a corporate defendant is concerned, there is nothing inherent to such proceedings that requires the formality of pleadings.

There is an interesting question about whether a Concise Statement is appropriate in a civil penalty case against a natural person. This has not yet been specifically addressed. However, in *ASIC v Bettles*,³¹ a case against a natural person, Greenwood ACJ ordered that ASIC’s Concise Statement be set aside and replaced by conventional pleadings. In doing so, Greenwood ACJ noted that the penalty was very serious, and that it was essential for ASIC to set out individually each of the material facts giving rise to the alleged contraventions.³²

Notably, because of the privilege against self-exposure to a penalty, a natural person defending a proceeding for civil penalties will be partially or wholly excused from the requirements to:

- file a factually informative defence until after the close of the prosecution case³³
- make discovery or respond to subpoenas³⁴
- file evidence until after the close of the prosecution case.³⁵

This is obviously at odds with the cooperative and proactive approach that has so far been described as fundamental to proceeding by Concise Statements. Even so, this is not to rule out altogether the use of Concise Statements to bring a civil penalty case against a natural person. Such cases may well be brought efficiently by Concise Statement, and then expanded by conventional pleadings, if liability is sought to be contested.

In some penalty proceedings the contravention itself will be admitted, and the real contest is solely about the quantum of penalty. In that case, a Concise Statement may be analogous to the procedure for a “plea brief”, under ss116 and 117 the *Criminal Procedure Act 2009* (Vic). In criminal cases, those provisions allow the service of a condensed version of the prosecution brief, which is served on the accused with their consent, typically as a prelude to a guilty plea.

Similarly, in civil penalty cases where the contravention is admitted, proceedings are regularly commenced by Concise Statement, and then followed by a Statement of Agreed Facts. Together, these will form the basis for the Court to declare that a contravention has occurred, and the starting point for a subsequent penalty hearing. This procedure applies just as well to individuals as it does to a corporate defendant, subject to the commentary above.

Conclusion

In summary:

- In the Federal Court, Concise Statements should be used for all commercial and corporations matters, unless clearly inappropriate, and may also be used in some other practice areas.
- As with conventional pleadings, the purpose remains to identify and give notice of the issues. However, this is done in a more tailored fashion, requiring the engagement of the parties and the Court. Ideally, the benefits include saving costs and time.
- Arguably, the cases where the Concise Statement procedure may not be sufficient, or may need to be fleshed out by conventional pleadings, include those concerning dishonesty or fraud, and those which seek penalties against a natural person.
- However, even in those cases, the procedure may be valuable as a starting point, allowing complex matters to be brought before the Court efficiently and with minimum delay. ■

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1. Commercial and Corporations Practice Note (C&C-1), issued 25 October 2016.
2. Note 1 above, [5.6].
3. Note 1 above, [5.4]; see also *Allianz Australia v Delor Vue Apartments* CTS 39788 (2021) 153 ACSR 522 (*Allianz Australia*), at [140].
4. See eg Note 1 above, at [5.4]; *MLC Ltd v Crickitt (No 2)* [2017] FCA 937, at [4]; *ASIC v ANZ Banking Group* (2019) 139 ACSR 52 (*ASIC v ANZ*), at [8].
5. Note 1 above, [5.8].
6. See eg Intellectual Property Practice Note (IP-1), issued 20 December 2019 [4.2].
7. Note 1 above, [6.7].
8. Note 3 above (*Allianz Australia*), at [143].
9. Note 3 above (*Allianz Australia*), at [144] and [148].
10. See eg Note 1 above, [5.4]; Note 3 above (*Allianz Australia*), at [140] and [148].
11. See eg *ACCC v Jayco Corporation Pty Ltd* [2020] FCA 1672 (*ACCC v Jayco*), at [97]; Note 3 above (*Allianz Australia*), at [140].
12. Note 4 above (*ASIC v ANZ*), at [3].
13. *ACCC v Apple Pty Ltd (No 2)* [2017] FCA 1329, at [8]-[9].
14. Note 11 above (*ACCC v Jayco*), at [97].
15. Note 3 above (*Allianz Australia*), at [153].
16. Note 3 above (*Allianz Australia*), at [143], [150] and [151].
17. See *ASIC v ANZ*, at [9]; *Allianz Australia*, at [144].
18. Note 3 above (*Allianz Australia*), at [150] and [151].
19. Note 3 above (*Allianz Australia*), at [143], [144] and [149].
20. Note 3 above (*Allianz Australia*), at [149].
21. Note 3 above (*Allianz Australia*), at [194] and [197].
22. Note 4 above (*ASIC v ANZ*), at [12].
23. Note 4 above (*ASIC v ANZ*), at [6].
24. Note 4 above (*ASIC v ANZ*), at [6]-[7].
25. Note 3 above (*Allianz Australia*), at [146].
26. Note 3 above (*Allianz Australia*), at [147].
27. *Dyczynski v Gibson* (2020) 280 FCR 583 at [214]-[219].
28. Note 3 above (*Allianz Australia*), at [149].
29. Note 4 above (*ASIC v ANZ*), at [2].
30. See *Federal Court Rules 2011* (Cth), r16.42.
31. *ASIC v Bettles* [2020] FCA 1568.
32. Note 31 above, at [82] and [85].
33. *Anderson v ASIC* [2013] 2 Qd R 401, at [42]-[43].
34. *Rich v ASIC* (2004) 220 CLR 129, at [39].
35. *ACCC v FFE Building Services Ltd* (2003) 130 FCR 37, at [27]-[30].



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