**The New South Wales Court System**

**1. Uniform Civil Procedure Act 2005**

* 1. The *Civil Procedure Act 2005* and *Uniform Civil Procedure Rules* consolidated provisions aboutcivil procedure that were found in a number ofdifferent Acts and rules, into a single Act and setof rules. The Rules introduced common rules andprocedures in civil proceedings in the Supreme,District and Local Courts.
  2. The main changes in terms of structure are moving directions and case management rules to an early position in the CP Act. This step was taken to embody the overriding purpose to give effect to the requirement of a just, quick and cheap disposal of proceedings.
  3. Apart from the above alteration to structure the order of the Supreme Court Rules and the District Court Rules has essentially been maintained, that is, the process from beginning to end. This has been done to keep the rules both logical and familiar to users.
  4. The CP Act gives a statutory basis for the issue of practice notes and regulates the relationship between itself, the CP rules and the remaining balance of the present rules.
  5. A simplified set of common forms are used in all courts. This helps to give effect to cost minimisation. Practitioners will only have to keep one set of forms on their records and fill the required categories depending on which court they are in.
  6. Simple common forms address a number of concerns that have been raised about existing forms and will meet future electronic filing requirements. The forms are available on court websites.
  7. In all three courts there are to be two forms only of originating process, that is, statement of claim and summons. Additionally the rules as to pleadings and discovery and interrogatories are maintained.
  8. The *Civil Procedure Act* *2005* and *Uniform Civil Procedure Rules* *2005* represent an important advance in the conduct of civil litigation in New South Wales. For the first time, one set of rules governs the general run of civil proceedings in the Supreme, District and Local Courts and the Dust Diseases Tribunal.

**2. The Local Court**

As the busiest and largest Court in Australia, the New South Wales Local Court is the primary interface between the community and the legal system in this State.

**2.1 Jurisdiction**

**2.2** The Local Court has a broad civil jurisdiction. The Court deals with civil matters with a monetary value of up to $60,000. The Small Claims Division deals with claims up to the amount of $10,000, whilst the General Division deals with claims between $10,000 and $60,000.

* 1. The Court, in its civil jurisdiction predominately deals with small property damage claims and debt recovery claims. However, these can become costly should a matter continually be adjourned while the Magistrate hears criminal matters. In addition, matters can be delayed as it is not uncommon for litigants to be unrepresented.

**3. District Court**

Jurisdiction

**3.1** The District Court is the intermediate Court in the State’s judicial hierarchy. It is a trial court and has an appellate jurisdiction. In addition, the Judges of the Court preside over a range of tribunals. In its civil jurisdiction the District Court may deal with:

* All motor accident cases, irrespective of the amount claimed;
* Other claims to a maximum amount of $750,000, although it may deal with matters exceeding this amount if the parties consent.

Civil Practice Note 1

* 1. Civil Practice Note 1 provides that parties should expect to be allocated a trial date within 12 months of commencement of proceedings. Parties must plan to meet this time standard.
  2. Briefly, the Practice Note provides:
* The plaintiff must serve a timetable for the conduct of the case on the defendant with the statement of claim;
* Any proposed amendments to the timetable by the defendant must be served on the plaintiff at least 7 days before the Pre-Trial Conference;
* A Pre-trial Conference, which will entail an in depth review of the case, will be held 3 months after commencement;
* Directions and orders will be made at the Pre-Trial Conference, which must be complied with or otherwise it may lead to cost orders;
* A Status Conference will take place 7 months after commencement and parties should be ready to take a trial or arbitration date;
* The trial date allocated will generally be within 1 to 3 months of the Status Conference;
* At any stage a case may be referred to a directions hearing before the List Judge or the Judicial Registrar;
* The Court will only grant adjournment applications where there are very good reasons.

Alternative Dispute Resolution

* 1. Practice Note 1 stresses that the Court proposes to continue to finalise as many matters as possible through alternative dispute resolution systems. In appropriate cases the Court will refer a matter to arbitration or mediation.
  2. The Court’s ideal time standard for civil cases is to achieve a 90% disposition rate within 12 months of commencement, and 100% within 2 years.

**4. Supreme Court**

Jurisdiction

**4.1** The Supreme Court is the highest court in NSW. It operates under the [*Supreme Court Act (1970)*](http://www.legislation.nsw.gov.au/viewtop/inforce/subordleg+01+1970+FIRST+0+N/) and the [*Civil Procedure Act 2005*](http://www.legislation.nsw.gov.au/viewtop/inforce/act+28+2005+FIRST+0+N/)*.* The Court has unlimited civil jurisdiction.

**4.2** The Court’s judicial work is carried out by 48 Judges and 4 Associate Judges. Associate Judges deal with the less complex matters and trials not involving a jury. Limited judicial powers, involving issues that arise as parties progress cases towards a hearing, are exercised by some Registrars, some of whom are qualified mediators.

**4.3** The court hears civil cases involving more than $750 000 and civil matters such as wills, injunctions, Admiralty. The court's work at first instance is divided between the Common Law Division, which hears civil, criminal and administrative law matters and the Equity Division which hears equity, probate, commercial, admiralty and protective matters. The court includes the Court of Appeal and the Court of Criminal Appeal which hear appeals from the [District Court](http://en.wikipedia.org/wiki/District_Court_of_New_South_Wales) and the [Local Court](http://en.wikipedia.org/wiki/Local_Court_of_New_South_Wales) and from single judges sitting in the Common Law or Equity Divisions.

**4.4** Section 23 of the *Supreme Court Act 1970* provides the Court with all jurisdictions necessaryfor the administration of justice in New SouthWales. The Supreme Court has supervisoryjurisdiction over other courts and tribunals in theState. The Court generally exercises itssupervisory jurisdiction through its appellatecourts.

Common Law Division

**4.5** The Division hears both criminal and civil matters. The Division deals with all serious personal injury, and contractual actions, in which the Court has unlimited jurisdiction. The civil business of the Division also comprises:

• Claims for damages;

• Claims of professional negligence;

• Claims relating to the possession of land;

• Claims of defamation;

• Administrative law cases seeking the review of decisions by government and administrative tribunals; and

• Appeals from Local courts.

Equity Division

* 1. The Equity Division exercises the traditional Equity jurisdiction dealing with claims for remedies other than damages and recovery of debts, including contractual claims, rights of property, and disputes relating to partnerships, trusts, and deceased estates. The Division hears applications brought under numerous statutes, including the *Corporations Act 2001 (Commonwealth)*, the *Family Provision Act 1982,* and the P*roperty* *(Relationships) Act 1984*. The Division also handles a diverse range of applications in the areas of Admiralty law, Commercial law, Technology and Construction, Probate and the Court’s Adoption and Protective jurisdictions.
  2. Matters heard in the Supreme Court are generally listed for hearing months in advance. For urgent applications a Duty Judge is available.

Mediation

* 1. Mediation is available for most civil proceedings pursuant to Part 4 of the *Civil Procedure Act 2005.* The role of the mediator is to assist parties in resolving their dispute by alerting them to possible solutions, while allowing the parties to choose which option is the most agreeable. The mediator does not impose a solution on the parties.
  2. Alternatively, parties may use private mediators. A matter may proceed to mediation at the request of the parties, or the Court may refer appropriate cases to mediation, with or without the consent of parties. If the Court orders that a matter be referred to mediation, there are several ways in which a mediator may be appointed. If the parties are in agreement as to a particular mediator, then they can ask the Court to appoint that mediator, who may also be a Registrar of the Court. If parties cannot agree upon a mediator, then they should attempt to agree on how the Court can appoint a qualified mediator. Some options are set out in Practice Note SC Gen 6.
  3. Settlement of disputes by mediation is encouraged. Parties may derive the following benefits from mediation:

• An early resolution to their dispute;

• Lower costs; and

• Greater flexibility in resolving the dispute as the solutions that may be explored through mediation are broader than those open to the Court’s consideration in conventional litigation.

**4.11** Even where mediation fails to resolve a matter entirely and the dispute proceeds to court, the impact of mediation can often become apparent at the subsequent contested hearing. Mediation often helps to define the real issues of the proceedings and this may result in a reduction in eventual court time and, consequently, lower legal costs.

Arbitration

* 1. Arbitration involves the hearing and adjudication of a dispute by an arbitrator, rather than by a Judge or Associate Judge. Determination through arbitration of a dispute regarding recovery of damages is permitted under Part 5 of the *Civil* *Procedure Act 2005.*
  2. The Chief Justice appoints experienced barristers and solicitors as arbitrators following a nomination by their respective professional associations. Arbitrators generally hold their appointment for two years, and they may be reappointed for further periods.
  3. In contrast to a mediator, an arbitrator imposes a solution (an award) on the parties after considering the arguments and evidence presented. An award of an arbitrator becomes a final judgment of the Court 28 days after the award has been given, providing no party to the arbitration has applied within that time for a rehearing. If a party applies for a rehearing, then the dispute is referred for case management, to be heard afresh before a Judge.

**5. The Appeals Process**

The Court of Appeal

* 1. New appeal cases are initially reviewed for competency and, if necessary, referred back to legal representatives to either substantiate the claim of appeal as of right, or seek leave to appeal. Applications for leave to appeal are examined to ascertain whether they are suitable for hearing concurrently with the argument on appeal.
  2. Appeals are allocated a directions call-over date before the Registrar when a notice of appeal is filed. At that call-over, the appeal may be listed for hearing if the appellant has filed written submissions and the red appeal book. Case management may be ordered with respect to lengthy or complex appeals.
  3. The Registrar case-manages and lists most appeals and applications for leave to appeal, however some cases may be referred to a Judge of Appeal for special case management. Urgent cases are expedited and can be heard at short notice, if appropriate. The Registrar in the Court of Appeal also deals with most interlocutory applications, except applications to stay judgments pending an appeal.
  4. The Court of Appeal is the highest civil court in the State. It hears appeals from civil proceedings before:
* the Supreme Court;
* the District Court;
* the Land and Environment Court; and
* some tribunals.
  1. Any appeal made to an appellate court absent the existence of a statutory right is incompetent. The relevant statute will determine the scope of the right of appeal. The right to appeal from a decision in a Division of the Supreme Court to the Court of Appeal is created, and the jurisdiction conferred on the Court of Appeal, by the Supreme Court Act (SCA) Part 7, (ss 101-110).
  2. The *District Court Act* *1973* No 9 provides the scope of the right of appeal, together with the requirement of leave to appeal in regard to classes of decision including:

127 Right of appeal to Supreme Court

(1) A party who is dissatisfied with a Judge’s or a Judicial Registrar’s judgment or order in an action may appeal to the Supreme Court.

(2) The following appeals lie only by leave of the Supreme Court:

(a) an appeal from an interlocutory judgment or order,

(b) an appeal from a judgment or order as to costs only,

(c) an appeal from a final judgment or order, other than an appeal:

(i) that involves a matter at issue amounting to or of the value of $100,000 or more, or

(ii) that involves (directly or indirectly) any claim, demand or question to or respecting any property or civil right amounting to or of the value of $100,000 or more,

(d) an appeal from a judgment or order on an application for summary judgment under the rules,

(e) an appeal from an order made with the consent of the parties.

(3) In any other case, an appeal lies as of right.

* 1. An appeal may lie from the order, decision or judgement; no appeal lies from the reasons for the decision. The grounds for appeal are that the determination was made in error or that the interests of justice require that the determination be set aside.
  2. Identifying and articulating error in the challenged decision with precision and clarity is the most effective means of conducting an appeal.
  3. Most appeals are heard by three Judges, but some are heard by two and in special cases, they may be heard by more than three. If the Judges cannot agree, the majority view prevails. Matters arising before the appeal can be heard and dealt with by a single Judge of Appeal or the Registrar.
  4. To appeal to the High Court from the Court of Appeal, a special permission must be granted by the High Court.

**6. Offers of Compromise and *Calderbank* letters**

**6.1** In broad terms, these two devices provide a sanction as to costs against a party who unreasonably fails to accept an offer of settlement. Settlement is thereby encouraged and a measure of relief is afforded to the party who incurs costs unnecessarily as a consequence of such unreasonable conduct.

Offers of Compromise

* 1. Offers of Compromise are available to all parties in litigation, not just the Defendant. Essentially, there will be a costs penalty against the party who rejects an Offer, proceeds to trial, and then fails to obtain an amount which is greater than the original Offer.
  2. The rules under UCPR Pt 42 Div 3 provide for a formalised offer of compromise and a relatively certain consequence as to costs depending on the outcome of the proceedings.
  3. An offer of compromise under the rules is an alternative to the informal and less predictable *Calderbank* letter.
  4. It is significant that both Plaintiffs and Defendants can use the Offer of Compromise system. An example of a Plaintiff using the system is where a Plaintiff would settle for less than the judgment which it finally obtained. In such a case, the court will award costs on a significantly more generous basis than if the Plaintiff's Offer of Compromise had not been made.
  5. It can be seen that the purpose of the Offer of Compromise rules is to encourage parties to realistically assess their chances of success and then take steps to resolve the proceedings, without unnecessarily dragging the litigation on. Careful consideration of the prospects of success and the likely outcome of the litigation is encouraged by the Offer of Compromise mechanism.
  6. The offer must involve a real element of compromise: *Tickell v Trifleska Pty Ltd* (1990) 25 NSWLR 353; *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358. An offer to accept payment of the claim in full does not ordinarily qualify: *Richardson v Hough* [1999] NSWSC 448. An offer to settle a weak plaintiff’s case need not be substantial: *Leichhardt Municipal Council v Green* [2004] NSWCA 341.
  7. **Rule 42.15** applies where an offer, made by a defendant, is not accepted by the plaintiff, and the plaintiff obtains a result as or less favourable to the plaintiff: r 42.15(1).
  8. The consequence, specified in r 42.15(2), is as follows. Unless the court otherwise orders:

(a)  the plaintiff is entitled to an order against the defendant for the plaintiff’s costs in respect of the claim, to be assessed on the ordinary basis, up to the time from which the defendant becomes entitled to costs under para (b), and

(b)  the defendant is entitled to an order against the plaintiff for the defendant’s costs in respect of the claim, assessed on an indemnity basis:

* 1. if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and
  2. if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.

**6.9** Where a purported offer of compromise is defective under the rules it may be treated as having the force of a *Calderbank* letter: *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 per Rolfe AJA at [84]. [[1]](#footnote-2)

**7. Calderbank offers**

**7.1***Calderbank* offers have been an accepted practice in Australia for some time now and despite the provision for formal offers of compromise under the rules, they continue to offer a flexible means of pursuing settlement.

**7.2 The Form of a Calderbank offer**

A *Calderbank* offer should:

1. be marked ‘without prejudice save as to costs’;
2. be clear, precise and certain in its terms;
3. state clearly the time in which the offer must be accepted;
4. make reference to the offer being one in accordance with the principles enunciated in the decision of *Calderbank v Calderbank*;
5. make some provision for costs separate from the principal offer;
6. state clearly that the offeror reserves its right to tender the offer on an application for costs if the offer is rejected;
7. state the costs advantage i.e. indemnity costs or party/party costs that the offeror has in mind to achieve.

**7.3** *Calderbank* offers are offers which intrinsically do not comply with the *Uniform Civil Procedure Rules 2005 (NSW)* and accordingly do not attract the same costs consequences as offers made in accordance with the rules.[[2]](#footnote-3) While offers of compromise under the rules give rise to a prima facie entitlement to a costs order if the offer is not bettered, *Calderbank* offers are a factor ‘and possibly even a weighty factor’, which may influence the court’s discretion as to costs.’[[3]](#footnote-4)

The unreasonable rejection of a Calderbank offer

* 1. The failure of an offeree to accept a *Calderbank* offer which was not bettered on judgment will not lead to a presumption that the offer was unreasonably rejected.[[4]](#footnote-5) However, in these circumstances it does provide a basis upon which the offeror can seek a costs order in its favour from the date of the offer.
  2. *Calderbank* offers remain an important tool in promoting litigious compromise. They present a flexible alternative to the more formal procedure under the rules, particularly with respect to the making of an “inclusive of costs” offer of settlement.

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1. Judicial Commission of NSW, *Civil Trials Bench Book Procedure Generally,* ”Calderbank letters and offers of Compromise”, at: <http://www.judcom.nsw.gov.au/benchbks/civil/calderbank_letters.html>

   updated December 2008. [↑](#footnote-ref-2)
2. *Jones v Bradley* (No2) [2003] NSWCA 258 at [5]. [↑](#footnote-ref-3)
3. Similar issues arise in relation to appeals. Where a Calderbank offer is made before a trial and rejected, the offer remains relevant for the purposes of an application for costs in the Court of Appeal. However a failure to renew the offer between trial and appeal may militate against an award for indemnity costs: see *Brymount Pty Limited t/as Watson Toyota v Cummins (No2)* [2005] NSWCA 69. [↑](#footnote-ref-4)
4. *MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd* (1996) 70 FCR 236 at 239 per Lingren J. For example a Calderbank letter containing an offer of only $20000 better than the plaintiff’s award at trial was seen as constituting an insufficient basis on which to disturb a costs order in favour of a successful plaintiff in *Humphries v TWT Ltd* (1993) 113 FLR 422. [↑](#footnote-ref-5)