Litigation Manual

The purpose of this Manual

1. This Manual explains how all cases in which I am briefed will be conducted.

2. It is written for the solicitors who instruct me, and juniors who are briefed with me.

3. The motivation for the Manual was my observation that all lawyers, including me, often do not manage the time that we spend on our cases very well. We have all experienced the pressure of confronting looming deadlines that we could have foreseen and planned for long before they became urgent. The procedures in the Manual are designed to avoid this.

4. The central idea behind the Manual is that cases can be managed as a project, in which steps from start to finish are usually predictable, and we can make plans that address those steps in an orderly, timely and co-ordinated way.

The application of this Manual

5. Our planning will progressively identify each piece of work that each of us will be doing or creating throughout the case – what project managers call 'the deliverables' – and fix deadlines for finishing each such piece of work. The person to whom that deliverable has been assigned will be accountable for keeping to the target for finishing it.

6. In most cases, there will be enough time to do everything laid down in this Manual. However, I acknowledge that time is sometimes a real issue, rather than one that we have created or allowed to happen: for example, I may be briefed late, or the case comes on urgently. When time is truly short, the precepts in the Manual will need to be adapted. If that has to happen, then we will discuss and agree on the necessary adaptations before we start work.

7. As its name indicates, this Manual applies to actual or possible litigation. Its primary focus is on trials. There is a special section dealing with appeals. The manual does not apply when I am briefed only to advise.

Junior counsel

8. My experience is that any significant litigation is always conducted more efficiently and cheaply when a junior counsel is part of the team. It means that instructors are not distracted from the work they have to do by trying to perform two jobs, and I

am not required to do work that does not justify the level of my fees. For these reasons, my strong preference is usually that a junior counsel be briefed with me.

9. If a brief comes to me without a junior counsel, then one of the first discussions that I will have with my instructors is whether and which junior counsel should be briefed.

10. However, there are some cases in which a junior may not be required: for example, if the brief relates only to a short discrete interlocutory proceeding. This possibility should be discussed when I am first briefed.

The form of my brief

11. I have a strong preference for briefs in an electronic form. If a brief comes to me in a printed form, it should also include some extra tabs in each section of the brief, so that new documents can easily be inserted.

What should be in my brief

12. Putting together a good and thoughtful brief is one of the most important contributions that an instructor can make to any case.

13. In paragraphs 14 to 18 I will set out what I require to be included in each of three different briefs.

<u>A brief for a prospective plaintiff or applicant</u>

14. If I am briefed for a prospective plaintiff or applicant before proceedings are commenced, and the question is whether or what proceedings should be commenced, then my brief must contain:

    (a) My instructors' observations, which must summarise what they consider to be the salient facts, explain their views about the form and merits of any prospective case, and identify clearly their client's objectives (which, as we have all experienced, may be more or different than simply winning the case).

    If a brief comes to me without observations like this, I will immediately ask for them.

    (b) A copy of any relevant written opinion given by my instructors or any other lawyer who has given advice, or a summary of any relevant oral opinions.

    (c) An indication of the evidence that might be given by material witnesses. I prefer that this indication should be in the form of a statement from the outset, at least for important witnesses or evidence. However, in the first instance, something less formal may do, but it must be presented in an organised and coherent way. It is not enough to leave me to work out by reading some other

document, such as solicitors' correspondence, what a witness might say about a material fact.

At this early stage, there is no need to worry about any of the rules about the admissibility of evidence: in fact, it can sometimes be useful at the beginning of the case to include, for example, hearsay and opinion, because evidence of that kind can often illuminate an issue or indicate lines of enquiry. However, in any case in which oral representations might be important, then the effect of those representations should be set out from the beginning in an admissible form, or as close to that form as is possible.

(d) Every document that is material to the advice I am being asked to give. My instructors' observations should identify those documents clearly, and give any context that is needed to properly understand them.

A brief for a prospective defendant or respondent

15. If I am briefed for a defendant or respondent to proceedings that have just been commenced, and the question is whether or how the proceedings should be defended, then my brief must contain:

(a) My instructors' observations, which must summarise what they consider to be the salient facts, explain their views about the form and merits of any prospective defence, and identify clearly their client's objectives.

If a brief comes to me without observations like this, I will immediately ask for them.

(b) A copy of any relevant written opinion given by my instructors or any other lawyer who has given advice, or a summary of any relevant oral opinions.

(c) An indication of the evidence that might be given by material witnesses. Please read paragraph 13(c).

(d) Every document that is material to the advice I am being asked to give. My instructors' observations should identify those documents clearly, and give any context that is needed to properly understand them.

A brief in existing proceedings

16. If I am first briefed once proceedings are already under way, then my brief must contain:

    (a) My instructors' observations, which must summarise what they consider to be the salient facts, explain their views about the form and merits of the case, and identify clearly their client's objectives.

        If a brief comes to me without observations like this, I will immediately ask for them.

    (b) A copy of any relevant written opinion given by my instructors or any other lawyer who has given advice, or a summary of any oral opinions.

    (c) If there are pleadings:

        (i) A complete set of any current pleadings and particulars. These should be organised in a way that follows the course of pleading, starting with the current version of the statement of claim, then the current version of the defence, and finishing with the current version of any reply. Any document containing particulars should be placed immediately after the pleading to which it relates.

        (ii) Separately from the current pleadings and particulars, any past versions of pleadings and particulars, arranged in reverse chronological order.

    (d) A complete set of any affidavits or statements that have been filed, arranged in the following order: the plaintiff or applicant's lay evidence; if any, the plaintiff or applicant's expert evidence; the defendant or respondent's lay evidence; and, if any, the defendant or respondent's expert evidence. The brief should clearly distinguish between each of these categories.

    (e) A complete set of any exhibits or bundles of documents that have been filed, arranged so as to clearly distinguish between those that have been filed by the plaintiff or applicant, and those that have been filed by the defendant or respondent.

    (f) A complete set of any orders or directions relating to discovery, any lists of discovered documents, and any subpoenas or notices to produce that have been issued.

(g) If work on the evidence has not yet begun, or has not yet been finalised,

(i) The statement of any person whose evidence might be material to the advice I am being asked to give. Please read paragraph 14(c).

(ii) A copy of every material document. My instructors' observations should identify those documents clearly, and give any context that is needed to properly understand them.

17. In any case in which orders or directions have been made by a court, then my brief should contain a complete set of the orders or directions, including those that no longer operate. My instructors' observations should specifically draw attention to any current orders or directions, particularly those that are imminent.

18. The index to any brief is vital. It should enable me to know exactly what I am looking at, and where I can find what I need. The format of the index should follow a logical order, preferably the order outlined for the relevant type of brief in paragraphs 13 to 16.

19. If a junior counsel has already been briefed, then the junior should be consulted about the contents of my brief before it is delivered. Uniformity between my brief and that of my junior is helpful, because it will enable us to quickly and easily find documents that we are talking about.

What should not be in my brief

20. I do not need to see copies of correspondence between my instructors and their opponents that is not directly relevant to any work that I have to do or issue that I have to consider. However, if there is any possibility that the correspondence might eventually come before a court then it should be included in the brief, with an explanation of its significance if that is not already obvious.

21. My brief should not contain any documents relating to interlocutory proceedings that no longer have any significance.

22. After a brief has been delivered, the only material that should then be sent to me is the material that is relevant to work that I have to do or an issue that I need to consider. For example, I do not need to see every piece of correspondence about a case, or to be copied into every email that my instructors exchange with their opponents.

23. My junior and instructors should not send anything to me unless it is accompanied by their explanation of its significance. In particular, do not forward emails or documents without including a statement of what they are about or what is to be done about them, unless that is obvious.

What I will do on first being briefed

24. As soon as possible after I am first briefed I will send my instructors an offer to make a costs agreement, an estimate of my total fees and an estimate of my fees for the work that I will need to do to prepare for our first 'planning conference', which is discussed in the next section.

25. The terms of my offer will include that it is available for acceptance for seven days, or before the first planning conference if that is earlier, and that it must be accepted in writing. I will send further estimates as the case develops, and I learn more about the work that will be required.

Conferences

<u>The first planning conference</u>

26. The first planning conference is critical.

27. There will be a first planning conference in every case in which I am briefed, no matter how urgently the case is coming on.

28. The agenda for the first planning conference will always include the following:

    (a) Discussion of the initial case theory (see paragraphs 30 and 31);

    (b) Identification of the work that needs to be done in the short, medium and long term (see paragraph 32);

    (c) Allocation of responsibility for each piece of work (see paragraph 33); and

    (d) Date of the next planning conference.

29. The participants in the first planning conference must be at least

    (a) Any junior counsel who is briefed;

    (b) Any instructors who have the conduct of the case, and who are able to provide definitive instructions about our initial case theory;

    (c) Other solicitors who are working on the case; and

    (d) Any other person who can make a contribution to our initial case theory. This will usually include the client, but I encourage thinking widely in order to

identify anyone who might have something useful to contribute. For example, relevant experts can make valuable early contributions to a case theory.

30. We will discuss and decide on our initial case theory. The initial case theory is only provisional. It will constantly be subject to critical review and, if necessary, revision. That process will continue throughout the case until it ends. However, the important point for the first planning conference is that, from the start of our work together, we fix on definite ideas about the lines of attack or defence that we are going to pursue, our points of strength and weakness, the issues in the case, and what we are going to say about them.

31. Everyone who participates in the first planning conference must come prepared to contribute to the development of our initial case theory.

32. We will identify each piece of work that is to be produced in the short, medium and long term. That may include:

    (a) Whether or what statements or affidavits should be prepared;

    (b) Whether or what further documents should be obtained;

    (c) Discovery, subpoenas or notices to produce;

    (d) The preparation of the documents that are described in paragraphs 34 and 35; and

    (e) The identification of particular tasks of factual enquiry or legal research. I have a staff of researchers who can help do the latter quickly and cheaply.

33. For each piece of work that is to be produced in the short and medium term, we will decide who is to be responsible for delivering it, and when it will be delivered.

34. After every planning conference a written report of everything decided in the planning conference will be circulated to each of the participants and to every other person who has been given responsibility for a piece of work. The form of that report, and the responsibility for producing and circulating it, will be one of the deliverables in each planning conference. These reports are important documents, and I will usually be involved in either writing or settling them.

35. In the case of the first planning conference, the initial case theory will be recorded in writing, and circulated to everyone in the team. It will be an important point of reference for all of us throughout the case. This document should be as concise as possible. The theory of even the most complex case should be capable of being explained in no more than three pages. As our case theory changes, the document recording it will be amended, and the new version circulated.

36. Planning conferences will be held as often as the case requires. They will be the principal means by which the case is managed. Each planning conference will conclude by fixing the date for the next planning conference.

37. Planning conferences can be held in person, or over the telephone. I do not have a preference. Efficiency and productivity are the criteria.

38. In most cases there may be many conferences other than 'planning conferences'. However, I want to keep them to a minimum. There must always be an explicit purpose for every conference. That purpose must be identified in advance: in particular, I and every other participant in the conference should be told (preferably in an email) how much time should be reserved for the conference, who will be attending, what subjects are to be discussed, what objectives are intended to be achieved by the conference, and whether and what preparation I or anyone else should make before the conference in order to achieve those objectives.

39. If any preparation is required on my part, then if possible the conference should be appointed with enough time for me to do that work. If it is necessary to confer urgently, please give me as much notice as possible.

40. Again, conferences can be held in person, or over the telephone, as is most efficient and productive.

Documents

Drafting documents

41. Ordinarily, it is not efficient or cost-effective for me to prepare the early drafts of any document, including pleadings, notices of appeal and the like, affidavits or statements, the narrative of salient facts or any submissions.

42. Accordingly, my usual rule is that I will not be involved in preparing early drafts of any of the documents identified in the first sentence of paragraph 41. Of course, the demands of a particular case may occasionally require a departure from this rule.

43. My part in the preparation of the early drafts of these documents will ordinarily be in working closely with the author of the drafts to give direction and guidance, and to consult, about the form, content, style and approach of the drafts. Usually this work will be done in conferences convened with the author of the draft for this express purpose. No member of the team should ever be reluctant to ask me for help with any draft on which they are working. It is more efficient that questions be resolved early, than to make changes at the end.

Settling documents

44. If possible, I prefer to settle every pleading, notice of appeal or the like, affidavit or statement, the final narrative of salient facts, and every written submission, before it is served or filed. However, I want to settle the author's best work. Ordinarily, I should only be given a document to settle once the author of any draft pleading, affidavit, statement, narrative of salient facts or written submission is satisfied either that it is finished or that, having done the best they can, they cannot take the draft any further.

45. My experience is that lawyers - particularly those who are closely associated with the case – are not always the best editors or proof readers. Occasionally I will have important draft documents such as a final submission professionally proof read and edited. The cost of this is substantially less than having it done by any of us, especially by me, and the result is better. Time must be allowed for this process.

A table of admissions and issues

46. One of the first documents that will be prepared in any pleaded case is a table, or some other organised presentation, of the admissions and issues on the pleadings.

47. The preparation of this document will be one of the tasks discussed and assigned in the first planning conference. The format of this document is not important, provided that it clearly states each admission and issue, and references each admission and issue to the pleadings.

A chronology and *dramatis personae*

48. One of the first steps that I will undertake in every case is to thoroughly and deeply read the brief from beginning to end. My ideal is to do this only once. I will expressly set time aside for this purpose, and identify that to my instructors by no later than the first planning conference. In most cases I will begin this task by preparing a skeleton chronology. The junior or instructors may be involved in this process, in which case I will work closely with them to settle the format and content.

49. As I read the material in my brief I will add content to fill out the skeleton, thereby eventually creating a complete chronology, referenced to the evidence we then have, that both captures the result of my reading, and becomes the foundation for all our subsequent work. In some cases I will ask my junior or instructors to become involved in filling out the chronology. As more material becomes available, it will be progressively added to the chronology.

50. A *dramatis personae* will be prepared and maintained in the same way.

A ‘narrative of salient facts’ and our final written submissions

51. Once the initial version of the chronology has been completed, the next steps will *always* include the preparation of the first drafts of:

    (a) A narrative of salient facts; and

    (b) Our final written submissions.

52. The narrative of salient facts and the draft final submissions are two different documents. They should be prepared separately, although in the end we may amalgamate them.

53. As its name suggests, the first of these documents is an account of the salient, or relevant, facts, arranged in a strictly chronological order, with each fact referenced to the evidence. It will be, in effect, a statement of all the facts that we will ultimately ask the court to find. If there are competing versions of any fact, the draft narrative will identify each version, and then state which should be preferred and why. That is the only analysis that should be in the narrative. In particular, the narrative does not contain any legal argument. That work is done in the draft final submissions.

54. The draft final submission will not repeat the content of the narrative of salient facts, but will refer back to the narrative to support the ultimate findings of fact for which we will contend. Of course, the draft final submissions will also contain our analysis of the legal issues, and our contentions about the legal consequences of the facts.

55. It is critical that work begin on these two documents at the earliest opportunity. This is the most important feature of the system laid down in this Manual.

56. The early preparation of the narrative of salient facts and the draft final submissions enables us to identify the factual and legal issues, to ensure that our pleadings are accurate and complete, and to identify our strengths and weaknesses. It alerts us to gaps in our evidence or to factual or legal problems on which we need to do more work. They take the place of the old advices on evidence.

57. Once the first drafts of these documents have been prepared, they will be revised and added to progressively, as more evidence is obtained or more work is done on the factual and legal issues. It is a way of capturing all of our work and thinking, so that it never has to be done more than once.

58. In the final preparations for a trial these documents will be adapted to become our opening submissions. Their content will inform our preparations for leading evidence during the trial, and for our cross-examination. During the trial, we will progressively add to both documents by reference to the transcript and exhibits. In following this

procedure we will always be ready to deliver a complete set of final submissions, effectively at a moment's notice.

59. One of the matters that will be discussed in the first planning conference will be the responsibility for preparing the narrative of salient facts and the draft final submissions in the first instance. Ordinarily, my expectation is that my junior will primarily have that responsibility, working together with my instructors.

The 'Style Guide'

60. I acknowledge that this manual requires the preparation of certain documents that may be unfamiliar to those who are new to working with me.

61. It is therefore essential that this manual be read together with my *Style Guide*. The chronology, *dramatis personae*, narrative of salient facts and any written submissions *must* be prepared, from the start, strictly in accordance with the *Style Guide*.

62. The intention of this rule is to ensure that no lawyer on the team will ever waste time on questions of formatting and style. Equally, the written work of each of us can seamlessly be integrated. The only exception to this rule will be if my instructors have their own format, from which they cannot readily depart, in which case that is the style that will be employed by everyone from the outset. If this is the case, it must be raised and agreed in the first planning conference.

63. Anyone who is preparing the early draft of any submissions must read the *Style Guide* before starting work, as it discusses the way in which submissions should be structured and prepared.

Appeals

64. If we are working on an actual or possible appeal, there will be no need for a chronology or a narrative of salient facts.

65. Instead, the focus of our preparation will be on the notice of appeal or cross appeal, any notice of contentions, and on our written submissions.

66. There will always be a first planning conference.

67. If we are acting for the appellant, and the questions are whether there should be an appeal or on what grounds, then the agenda for the first planning conference will be to discuss those questions. If the appeal is already on foot, then the agenda will include reviewing the grounds of appeal to ensure that we are satisfied that they are correct and complete. If necessary, we will also discuss the possibility of a cross appeal, or review the grounds of any cross appeal that has already been filed.

68. If we are acting for a respondent, the agenda for the first planning conference will be to discuss and resolve our response to the grounds of appeal, and, if necessary, to consider or settle on a notice of contention.

69. In most cases I will prepare the first draft of any notice of appeal or cross appeal, and of any notice of contention, and then have it settled in conference with my instructors and junior. This helps me to focus my thinking on the arguments we will run.

70. Written submissions are particularly important in any appeal. Written submissions now make as much, and sometimes more, contribution to success in an appeal than does oral argument. In most cases, the early drafts of the written submissions will be prepared by junior counsel, working in consultation with my instructors. However, before any work begins on a draft of any written submission for an appeal, I will be closely involved in identifying and sequencing the issues. These concepts are discussed in more detail in the *Style Guide.*

71. Because written submissions are so important, it is essential that drafts be prepared in enough time for everyone to reflect on and re-draft them, and to have them carefully edited. Planning for this, and setting the necessary deadlines, will be a part of every planning conference in an appeal.

Deadlines

72. The essential element of the system described in this Manual is that each of us will be personally responsible and accountable for meeting the deadline for any deliverable that has been assigned to us. That includes me. Whenever a case allows it, deadlines will be fixed by agreement, taking into account our other professional commitments and, equally importantly, our personal lives.

73. So far as I am concerned, no one should ever be reluctant to say that a proposed deadline is unrealistic or unfair. I will never criticise anyone for doing so. However, once any one of us takes on a deadline, then I will regard that person as having assumed two serious obligations. The primary and overriding obligation is to meet the deadline.

74. That said, if anyone feels that they may not be able to meet a deadline for any reason, then their secondary obligation is to let me know of this *immediately*, and always in good time to give us the best chance to adjust our plans. We have all had the experience that embarrassment or optimism delays a realistic assessment of when we can or will finish a job. Please do not do this.

75. Naturally, if a court has made directions, then deadlines will initially be set with the object of complying with those directions. If it looks like a deadline may not be met, and there is a risk that we will therefore not be able to comply with a direction, then our professional obligations require that we bring that risk to the court's attention as soon as possible. Courts now take this requirement more seriously than they may have done in the past.

76. Unless there is a very good reason for doing so, my position will always be that a proceeding should be re-listed as soon as a potential problem emerges. Unless we have otherwise agreed, everyone should proceed on that basis. Please bring problems of this kind to my attention as soon as possible.

Communicating with me

77. If you want to appoint a conference, book time in court or otherwise, or ask about my rates, then please go first to my Clerk, Ms Sharon Verhagen. Asking me is a guarantee of confusion. My Clerk's email address is chambers@ianneil.com, and her telephone number is 0404 828 245. She is in charge of my diary, and has authority to make commitments about my working time. Any emails about arrangements of this kind, or that ask me to do any work that will require appreciable time, should be copied to her.

78. Unless by prior arrangement, telephone calls to me should be directed in the first instance to my chambers in Sydney, on 02 9223 4316. That is the most reliable number on which to speak with me or to leave a message for me. Please do not use my mobile telephone number in the first resort during working hours.

79. You should not assume that I am generally available to look at emails whenever they are sent. If your email requires a response by a particular time, then you should also forward it to my Clerk, and tell her when you need my response.

Working as a team and sharing ideas

80. As I have explained, this Manual provides a framework for project managing the case we are working on. Of necessity it is prescriptive. However, I do not want it to obscure two important points. First, we are a team. Our success depends on working harmoniously, co-operatively and with respect and courtesy towards one another. If any member of our team feels that I have fallen short of any of these essential requirements, then I would like to be reminded of them. I will do the same. Second, my experience has been that good ideas, and valuable insights, can come from any member of a team, however junior they may be.

81. In every planning conference, there will be an explicit opportunity for anyone to put forward any idea, without constraint or embarrassment, and to critically comment on our case theory or any other aspect of our approach to the case. Email is another good way to circulate ideas and comments of this kind. All are welcome; even if they are not ultimately adopted, I will actively think about all of them. In particular, I explicitly invite debate and critical review by every member of the team of my opinions and recommendations. However, there will always come a time when debate has to conclude, and a decision has to be made and implemented.

82. If possible, at the end of each case, we will review what worked well, and what could be improved.