

Offers of Compromise and ‘Calderbank’ offers in civil litigation

‘It is in the interests of the administration of justice that litigation should be compromised as soon as is reasonably possible. It is in the public interest to do so.’¹

The purpose of settlement offers

1. Both Offers of Compromise² and ‘Calderbank’ offers are offers made by an offeror during civil litigation which, if not accepted, or rejected, carry certain cost consequences for the offeree if the offeree does not better the offer at trial. The former is governed by the various rules of courts, whereas the latter has its origin and operation within caselaw.
2. The Rules for Offers of Compromise are found in Order 26 of the *Supreme Court Rules*³ and Part 25 of the *Federal Court Rules 2011*. Order 26 and Part 25 are extracted in the schedule attached.
3. Shortly after the introduction of Order 26 in 1987, its purpose was expressed by Murphy J in *Henderson v Simon Engineering (Australia) Pty Ltd and Ors*⁴ as:

‘to encourage a party to whom a fair and reasonable offer of compromise has been made, to accept the offer and bring the proceeding to an end. Thus r. 26.08(1), (2) and (3), bring pressure upon a party receiving a fair and reasonable offer, to accept it, by providing an additional cost burden if the proceeding goes to a verdict or judgment which shows that the offer should have been accepted.’

4. Kirby P, Mahoney JA and Samuels AJA detailed the purpose of the cognate New South Wales provisions⁵ in *Maitland Hospital v Fisher (No. 2)*.⁶ These statements have been adopted, with approval, by leading Victorian authorities on Offers of Compromise:⁷

‘1. To encourage the saving of private costs and the avoidance of the inherent risks, delays and uncertainties of litigation by promoting early offers of compromise by

¹ *M T Associates Pty Ltd v Aqua-Max Pty Ltd & Anor (No 3)* [2000] VSC 163 at [72] per Gillard J.

² Also known as ‘Offers to Compromise’ in Part 25 of the *Federal Court Rules 2011*

³ That is, the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

⁴ [1988] VR 867 at 869.

⁵ Then, Part 52, rule 17(4) of the *Supreme Court Rules 1970* (NSW); now Part 42, rules 42.14 to 42.15 of the *Uniform Civil Procedure Rules 2005* (NSW).

⁶ (1992) 27 NSWLR 721 at 724.

⁷ *Hazeldene’s Chicken Farm v Victorian Workcover Authority (No 2)* [2005] VSCA 298 at [21] and *Grbavac v Hart* [1997] 1 VR 154 at 164-165.

defendants which amount to a realistic assessment of the plaintiff's real claim which can be placed before its opponent without risk that its "bottom line" will be revealed to the court;

2. To save the public costs which are necessarily incurred in litigation which events demonstrate to have been unnecessary, having regard to an earlier (and, as found, reasonable) offer of compromise made by a plaintiff to a defendant; and

3. To indemnify the plaintiff who has made the offer of compromise, later found to have been reasonable, against the costs thereafter incurred. This is deemed appropriate because, from the time of the rejection or deemed rejection of the compromise offer, notionally the real cause and occasion of the litigation is the attitude adopted by the defendant which has rejected the compromise. In such circumstances, that party should ordinarily bear the costs of litigation.'

5. The above purposes can be compared with the 'overarching purpose' for civil litigation, as set out in the *Civil Procedure Act 2010* (Vic), which is 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'⁸.

The overarching obligations require parties and their lawyers to, amongst other things, do the following:

- a. Only take steps to resolve or determine the dispute;⁹
- b. Use reasonable endeavours to resolve the dispute;¹⁰ and
- c. Narrow the issues in dispute.¹¹

6. The interaction of the *Civil Procedure Act 2010* and Order 26 is a likely ground for driving reform in the area, which is discussed briefly at the conclusion.

A brief history

7. On 1 January 1987, Order 26 replaced Order 22 (payment into court) of the *Supreme Court Rules*. Order 22 was a procedure permitting a defendant to pay a sum of money into court in compromise of a claim by a plaintiff, and to give notice of what causes of action are being compromised.¹² Payment into court was limited to defendants only. The consequence of the plaintiff not accepting a payment into court was that if the plaintiff proceeded to trial and did not better the amount in court, then the plaintiff was entitled to costs to the date of payment, but

⁸ *Civil Procedure Act 2010* s7.

⁹ *Civil Procedure Act 2010* s19.

¹⁰ *Civil Procedure Act 2010* s22.

¹¹ *Civil Procedure Act 2010* s23.

¹² *Grbavac v Hart* [1997] 1 VR 154 at 159.

the plaintiff would be ordered to pay all the costs of the defendant from that date to the date of judgment.

8. Payment into court was described in the cognate English Rules at the time as *'simply an offer to dispose of the claim on terms'*¹³, and the Victorian Court of Appeal regarded the new order 26 as *'a modern but improved substitute for a payment into court'*.¹⁴
9. Offers of Compromise first appeared in the *Federal Court Rules* in 1994, and replaced a similar regime to the *Supreme Court Rules* for payment into Court.
10. When Order 26 appeared in the *Supreme Court Rules*, the court considered that its provisions ought to be interpreted in accordance with its spirit, rather than strictly according to its terms:

*'It would seem to me that when O 26 of the new rules was made it was hoped that its terms would remove some, if not all, of the formality which may have been seen in the decisions of this court to attach to the corresponding rules which preceded them. The attempt in the new O 26 to deal but broadly with all contingencies serves to emphasise that the court (when considering the issue of costs as I am now doing) will approach the matter attempting to give effect to the spirit of the rule, rather than slavishly applying its words as a code, within the precise terms of which an applicant must bring himself, before becoming entitled to a favourable exercise of the court's discretion on the issue of costs.'*¹⁵

11. A trend began from around 1965 which *'recognised that offers to compromise not directly authorized by rules of court, if reasonably made but unreasonably ignored, may properly influence the exercise of judicial discretion as to costs.'*¹⁶

The trend appeared around the time of *Schulte-Hordelhoff v Patons Brake Replacements Pty Ltd*¹⁷ which concerned a defective and invalid notice for payment into court which was nevertheless used by the court in the exercise of its discretion in determining the appropriate costs order. Further examples of the trend include *Cutts v Head*¹⁸, *Azzopardi v Netin*¹⁹, *Messiter v Hutchison*²⁰, *Mideco*

¹³ *A. Martin French v Kingswood Hill Ltd* [1961] 1 QB 96 at 103.

¹⁴ *Grbavac v Hart* [1997] 1 VR 154 at 159.

¹⁵ *Henderson v Simon Engineering (Aust) Pty Ltd* [1988] VR 867 at 871 to 872.

¹⁶ *Grbavac v Hart* [1997] 1 VR 154 at 160.

¹⁷ [1965] VR 369.

¹⁸ [1984] Ch. 290.

¹⁹ [1986] VR 593.

²⁰ (1987) 10 NSWLR 525.

*Manufacturing Pty Ltd v Tait*²¹, *Whitehead v Maas*²² and *Mutual Community Ltd v Lorden Holdings Pty Ltd*.²³

12. During this time, informal offers achieved prominence in the frequently cited case of *Calderbank v Calderbank*²⁴ (hence ‘Calderbank’ offers). In that case, a wife served a ‘without prejudice’ offer on her husband, and later deposed in an affidavit to be ready and willing to hand over a house to her husband. The wife was ordered by the Court to pay a sum of money to the husband which was less than the value of the house. The Court of Appeal held that the offer set out in the affidavit was one that the husband should have accepted and the Court of Appeal made a favourable costs order for the wife.²⁵
13. ‘Calderbank’ offers have achieved popularity in civil litigation as an alternative to Offers of Compromise. The current differences between the two forms of offer are explored further below.

What are the differences between the State and Federal Court Rules?

14. The *Federal Court Rules* 2011 commenced in August 2011. They included a new and simplified regime for Offers of Compromise in the Federal Court of Australia. The previous regime set out in Order 23 of the *Federal Court Rules* was not dissimilar to the new regime. Generally, the *Federal Court Rules* have less formal requirements compared with the *Supreme Court Rules*.
15. The following table sets out the differences between the *Supreme Court Rules* and *Federal Court Rules*. The differences are numerous, and significant.

	<i>Order 26 (Victoria)</i>	<i>Part 25 (Federal Court)</i>
<i>Offers expressed to be inclusive of costs.</i>	Prohibited: once an offer is accepted, a defendant is required to pay the plaintiff’s costs, and a term in an Offer of Compromise seeking to negative or limit this is of no effect. ²⁶	Allowed: the notice must state whether the offer is inclusive of costs, or whether costs are in addition to the offer. ²⁷

²¹ [1989] VR 50.
²² (1991) 56 SASR 362.
²³ (unreported, Byrne J., 28 April 1993).
²⁴ [1975] 3 All ER 333.
²⁵ Ibid at 343 per Cairns LJ.
²⁶ *Supreme Court Rules*, rule 26.03(7) and (8).

<i>Acknowledgement of service of offer</i>	A party on whom an offer is served shall within 3 days after service serve a written acknowledgement of service. ²⁸	Not required.
<i>Once accepted, amount is to be paid within...</i>	An offer shall, unless it otherwise provides, be taken to be an offer providing for payment within 14 days after acceptance. ²⁹ Note: 30 days after acceptance for Magistrates' Court. ³⁰	An offer shall, unless it otherwise provides, be taken to be an offer providing for payment within 28 days after acceptance. ³¹
<i>Multiple defendants</i>	If two or more defendants are alleged to be jointly or jointly and severally liable and rights of contribution or indemnity appear to exist between them, the offer must apply in respect of all defendants. ³²	There is no restriction, although if there is failure to comply with the accepted offer, then the consequences for failure to comply only apply where the offer is made in respect of all respondents, rather than in respect of individual respondents. ³³
<i>Offer to contribute made by a defendant against another party</i>	The cost consequences are in the Court's discretion. ³⁴	Same cost consequences as for Offers of Compromise (that is, strict consequences). ³⁵
<i>Costs consequences</i>	If the plaintiff fails to beat the offer at judgment, the defendant	If the applicant fails to beat the offer at judgment, the

²⁷ *Federal Court Rules*, rule 25.03(1).

²⁸ *Supreme Court Rules*, rule 26.03(3.1).

²⁹ *Supreme Court Rules*, rule 26.03.1.

³⁰ *Magistrates' Court Rules*, rule 26.03.1.

³¹ *Federal Court Rules*, rule 25.04.

³² *Supreme Court Rules*, rule 26.09.

³³ *Federal Court Rules*, rule 25.11.

³⁴ *Supreme Court Rules*, rule 26.10(2).

³⁵ *Federal Court Rules*, rule 25.13.

<i>where defendant makes an offer</i>	receives <i>party-party</i> costs from the date of the offer. ³⁶ The rules do not provided what occurs if the defendant succeeds.	respondent receives <i>indemnity</i> costs from the date of the offer. ³⁷ If the respondent wins, the applicant pays party-party costs up to the date of the offer, then <i>indemnity</i> costs after the offer to judgment. ³⁸
<i>Date from which the costs consequences apply.</i>	The day after the offer was served. ³⁹	After 11am on the second business day after the offer was served. ⁴⁰
<i>Death or bodily injury cases</i>	The plaintiff is entitled to all of its costs taxed on an indemnity basis, rather than costs from the date that the offer was served. ⁴¹	No particular rule.
<i>Offers made in appeals</i>	There is a specific regime for appeals which, although more flexible, provides for different formal requirements and different cost consequences. The cost consequences are discretionary. ⁴²	No particular rule.

16. Consider the following facts and ‘parallel universe’ scenarios as an example of the operational differences between the two set of Rules. A sues B for \$100,000. B considers his liability to be \$50,000, so serves an Offer of Compromise on A (expressed as not cost-inclusive). B and A spend \$20,000 each in costs (equating to, say, \$10,000 in party/party costs) to the date of the offer, and a

³⁶ *Supreme Court Rules*, rule 26.08(3)

³⁷ *Federal Court Rules*, rule 25.14 (1).

³⁸ *Federal Court Rules*, rule 25.14 (2).

³⁹ *Supreme Court Rules*, rule 26.08.

⁴⁰ *Federal Court Rules*, rule 25.14.

⁴¹ *Supreme Court Rules*, rule 28.06(2)(a).

⁴² *Supreme Court Rules*, rule 26.12.

further \$40,000 each (equating to, say, \$20,000 in party/party costs) to the date of the trial.

a. Scenario 1: A wins, but is awarded \$30,000.

- i. In the Federal Court of Australia, A must pay to B indemnity costs assessed from 11am on the second business day after the offer was served (being \$40,000), which will exceed the party/party costs that B must pay A up to the date of the offer (being \$10,000). A receives \$0 net (being \$30,000 + \$10,000 - \$40,000).
- ii. In the Supreme Court of Victoria, A is required to pay B party/party costs assessed from the day after the offer was served (being \$20,000), which will exceed the party/party costs that B must pay A up to the date of the offer (being \$10,000). A receives \$20,000 net (being \$30,000 + \$10,000 - \$20,000).

b. Scenario 2: B wins and A's claim is dismissed.

- i. In the Federal Court of Australia, A must pay B party/party costs to the date of the offer, and indemnity costs thereafter. B receives \$50,000 (being \$10,000 + \$40,000).
- ii. In the Supreme Court of Victoria, costs follow the event (usually). A pays B \$30,000 (being \$10,000 + \$20,000).

The differences between Offers of Compromise and 'Calderbank' offers

17. 'Calderbank' offers are informal costs offers usually expressed to be '*without prejudice save as to costs*' and which are relied on by a party at the stage of a proceeding in which the court is considering the exercise of its discretion on costs (usually post-judgment).

18. Byrne J in *Foster v Galea (No.2)*⁴³ contrasted the '*fairly mechanical regime of Rule 26.08*' with the '*more flexible one of discretion as to costs*' which exists with a 'Calderbank' offer. In a similar fashion to the court's decision to use a defective notice for payment into court in *Schulte-Hordelhoff v Patons Brake Replacements Pty Ltd*⁴⁴ above, Byrne J in *Foster* further observed that an Offer of Compromise which fails to satisfy the formal requirements of Rules 26.02 and 26.03, may

⁴³ [2008] VSC 331 at [7].

⁴⁴ [1965] VR 369.

nevertheless be sufficient to be considered as an offer to the effect of a 'Calderbank' offer.

19. The following general principles can be extracted from the authorities on 'Calderbank' offers:

- a. It is undesirable that 'Calderbank' offers be burdened with technicality.⁴⁵
- b. 'Calderbank' offers may be made on a costs-inclusive basis,⁴⁶ including on the condition that parties bear their own costs.⁴⁷
- c. There is no presumption that the party rejecting a 'Calderbank' offer should pay the offeror's costs on an indemnity basis if the offeree received a less favourable result. The correct approach was to treat the rejection of a 'Calderbank' offer as a matter to which the court should have regard when considering whether to order indemnity costs.⁴⁸
- d. The critical question is whether the rejection of the offer was unreasonable in the circumstances.⁴⁹
- e. It is neither possible nor desirable to give an exhaustive list of relevant circumstances affecting the exercise of the discretion. At the same time, a court considering a submission that the rejection of a 'Calderbank' offer was unreasonable should ordinarily have regard at least to the following matters:
 - i. the stage of the proceeding at which the offer was received;
 - ii. the time allowed to the offeree to consider the offer;
 - iii. the extent of the compromise offered;
 - iv. the offeree's prospects of success, assessed as at the date of the offer;
 - v. the clarity with which the terms of the offer were expressed; and
 - vi. whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.⁵⁰

⁴⁵ *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 441 at [5].

⁴⁶ *M T Associates Pty Ltd v Aqua Max Pty Ltd & Anor (No 3)* [2000] VSC 163 at 126.

⁴⁷ *Re: Will of G G Sitch (deceased) (No 2)* [2005] VSC 383.

⁴⁸ *Hazeldenes Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* [2005] VSCA 298 at [18] to [20].

⁴⁹ *Hazeldenes Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* [2005] VSCA 298 at [20] to [23].

⁵⁰ *Hazeldenes Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* [2005] VSCA 298 at [25].

- f. The offeror bears a persuasive burden of satisfying the court to exercise the costs discretion in the offeror's favour.⁵¹
- g. A 'Calderbank' offer is unlikely to attract an award of indemnity costs unless it contains a statement of the reasons the offeror maintains that the application will fail.⁵² If a party believes that the opponent's case is '*fundamentally flawed*' or has '*poor prospects of success*', then it would be useful for those drafting the letter to elaborate why that is so. By including such a statement in an offer, the recipient of the letter can be informed of why it might be in their interests to accept the offer.⁵³
- h. An offer made at too early a stage of litigation may be held to be capable of reasonable rejection given the state of the pleadings and other relevant matters, including whether or not a mediation has been held and the factual issues in dispute.⁵⁴
- i. A 'Calderbank' offer does not have to refer specifically to the decision in *Calderbank v Calderbank*⁵⁵ and/or expressly seek to claim solicitor-client or indemnity costs if the offer is not accepted for the offer be a 'Calderbank' offer. These issues, however, are relevant to the Court's exercise of its discretion to award costs on a special basis, in that such matters may inform the question of whether it was reasonable to reject the offer.⁵⁶

20. Noting the above principles and the discussion on Offers of Compromise, the following table sets out the operational differences between Offers of Compromise and 'Calderbank' offers.

	Offers of Compromise	'Calderbank' offers
<i>Certainty of outcome in obtaining a special costs</i>	Certain: An Offer of Compromise attracts automatic favourable costs consequences for parties, assuming there are no defects with	Uncertain: 'Calderbank' offers require the offeror to apply to court for a special costs order and the court can exercise its discretion on

⁵¹ Beazley JA, 'Calderbank offers', speech to Hunter Valley Conference, Australian Lawyers Alliance, 14-15 March 2008, page 8 to 9.

⁵² *Dukemaster Pty Ltd v Bluehive Pty Ltd* [2003] FCAFC 1 at [8].

⁵³ *Mediterranean Olives Financial Pty Ltd & Ors v Gita Lederberger & Ors (No 2)* [2011] VSC 333 at [10].

⁵⁴ *Lord Buddha Pty Ltd v Harpur (No 2)* [2011] VSC 568.

⁵⁵ [1975] 3 All ER 333.

⁵⁶ *Love v Roads Corporation* [2011] VSCA 434 at [181] to [185].

<i>order.</i>	the form of the Offer of Compromise. Exceptions are for appeals in Order 26.	the question of costs. This is far more burdensome than the process for an Offer of Compromise.
<i>Onus of proof to get a special costs order.</i>	On the offeree: under Order 26 the costs consequences apply ' <i>unless the Court otherwise orders</i> '. This ' <i>creates a regulatory presumption permitting costs to be awarded in this manner, subject to the Court being satisfied that special circumstances exist which justify the Court's discretion being exercised in a manner which departs from the Rule.</i> ' ⁵⁷	On the offeror: the offeror has the onus of proof to persuade the court to exercise its discretion in favour of the offeror.
<i>Expense in the process of seeking a special costs order.</i>	Low: since the cost consequences are usually automatic the Offer of Compromise can be produced after judgment with little room for argument. This ought to minimize costs, subject to arguments about defects in an Offer of Compromise.	High: Because the onus of proof is on the offeror and the award of costs on a special basis is discretionary, the argument as to costs usually requires a hearing on its own, thus increasing costs and taking up court time.
<i>Minimum time for offer to lapse.</i>	14 days: An Offer of Compromise must be open for no less than 14 days. This could have operational difficulties if a party wishes to make an offer during a trial shorter than 14 days.	None: although this may go to whether or not the rejection of the offer was unreasonable in the circumstances.
<i>Payment of plaintiff's costs on acceptance</i>	Order 26 requires a defendant to pay the costs of the plaintiff if an offer is accepted. Part 25 allows parties to make	No restriction. For instance, an 'each bear own' offer can be made which has no costs element to it, or an offer can be made that the

⁵⁷ *Blackman & Ors v Gant & Anor* (No 2) [2010] VSC 246 at [14].

	offers inclusive of costs.	plaintiff pays the defendant's costs.
<i>Costs inclusiveness</i>	Order 26 prohibits an offer being made which includes costs. Costs are always in addition to the offer. Part 25 allows parties to make offers inclusive of costs.	No restriction. Costs can be either inclusive or in addition to the offer. Assessment of the reasonableness of the offer is easier, of course, when costs are expressed to be in addition to the offer.
<i>Multiple defendants</i>	Order 26 restricts parties to making offers in respect of all defendants. In a multi-party proceeding, one defendant cannot make an offer under Order 26 without including all other defendants, and <i>vice versa</i> for the plaintiff. Part 25 has no restriction, except in the case for enforcement on failure to comply with the accepted offer.	No restriction. 'Calderbank' offers are useful in multi-party proceedings where one of many defendants wants to compromise a claim made against that defendant. For example, this is particularly important in complex multi-party building cases where a party 'wants out'.

Reform is on the cards

21. In its *Civil Justice Review: Report*, the Victorian Law Reform Commission recommended that Order 26 of the *Supreme Court Rules* for Offers of Compromise be reviewed.⁵⁸ The Civil Procedure Advisory Group held a forum in April 2012, attended by members of the Judiciary, the Victorian Bar, Solicitors, the Department of Justice and the insurance industry, to discuss areas for reform.

22. A significant concern is that Offers of Compromise penalise plaintiffs more than defendants. If a plaintiff does not accept an offer, that plaintiff risks, effectively, a double costs order (that is, instead of receiving costs, a plaintiff is ordered to pay costs); whereas a defendant only risks an increased costs order, being indemnity costs over party/party costs.

23. Possible areas for reform of Order 26 which arose from the review include:

⁵⁸ Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

- a. Altering the costs consequences so as to increase the impact on defendants that do not accept plaintiffs' offers, or reduce the impact on plaintiffs that do not accept defendants' offers.
- b. Shortening the minimum time for acceptance of an Offer of Compromise in certain situations, such as during trial.
- c. Greater uniformity with Part 25 of the *Federal Court Rules*, including:
 - i. Allowing cost inclusive offers.
 - ii. Include cost consequences where the defendant makes an offer and wins at trial.
 - iii. Allowing offers to be made in relation to less than all parties in a multi-party proceeding.
- d. Providing for a form of cost disclosure in, or in relation to, an offer.
- e. Mandatory offers.
- f. Aligning the rules for appeals with the rules for trials.

Dated: 9 July 2012

Daryl Williams, S.C.

Andrew P. Downie

Schedule

Supreme Court Rules: Order 26 Offers of Compromise

PART 1—INTERPRETATION

26.01 Definitions

In this Order, unless the context or subject matter otherwise requires—

"claim" includes a counterclaim and any claim made in accordance with Order 11;

"defendant" includes a defendant by counterclaim and a party against whom a claim is made in accordance with Order 11;

"plaintiff" includes a defendant who serves a counterclaim and a party who makes a claim in accordance with Order 11.

PART 2—OFFER OF COMPROMISE

26.02 Application

- (1) The plaintiff and the defendant may in respect of any claim in a proceeding serve on one another an offer of compromise on the terms specified in the offer.
- (2) An offer of compromise in respect of a claim may be on terms that take into account any other claim between the plaintiff and the defendant made in the proceeding.
- (3) An offer of compromise shall—
 - (a) be in writing and prepared in accordance with Rules 27.02 to 27.04; and
 - (b) contain a statement to the effect that it is served in accordance with this Order.

26.03 Time for making, accepting etc. offer

- (1) An offer of compromise may be served at any time before verdict or judgment in respect of the claim to which it relates.
- (2) A party may serve more than one offer of compromise.
- (3) An offer of compromise may be expressed to be limited as to the time the offer is open to be accepted after service on the party to whom it is made, but the time expressed shall not be less than 14 days after such service.
- (3.1) A party on whom an offer of compromise is served shall within three days after service serve a written acknowledgement of service on the party serving the offer.
- (4) A party on whom an offer of compromise is served may accept the offer by serving notice of acceptance in writing on the party who made the offer before—
 - (a) the expiration of the time specified in accordance with paragraph (3) or, if no time is specified, the expiration of 14 days after service of the offer; or
 - (b) verdict or judgment in respect of the claim to which the offer relates—whichever event is the sooner.
- (5) An offer of compromise shall not be withdrawn during the time it is open to be accepted, unless the Court otherwise orders.
- (6) An offer of compromise is open to be accepted within the period referred to in paragraph (4) notwithstanding that during that period the party on whom the offer is served makes an offer of compromise to the party who served the offer of

compromise, whether or not the offer made by the party served is made in accordance with this Part.

- (7) Upon the acceptance of an offer of compromise in accordance with paragraph (4), unless the Court otherwise orders, the defendant shall pay the costs of the plaintiff in respect of the claim up to and including the day the offer was served.
- (8) If an offer of compromise contains a term which purports to negative or limit the operation of paragraph (7), that term shall be of no effect for any purpose under this Part.

26.03.1 Time for payment

An offer of compromise providing for payment of a sum of money to a plaintiff shall, unless it otherwise provides, be taken to be an offer providing for payment of that sum within 14 days after acceptance of the offer.

26.04 Effect of offer

An offer of compromise made in accordance with this Part shall be taken to be an offer of compromise made without prejudice, unless the offer otherwise provides.

26.05 Disclosure of offer to Court

- (1) No statement of the fact that an offer of compromise has been made shall be contained in any pleading or affidavit.
- (2) Where an offer of compromise has not been accepted, then, except as provided by Rule 26.08(6), no communication with respect to the offer shall be made to the Court on the trial of the proceeding until after all questions of liability and the relief to be granted have been determined.
- (3) Paragraphs (1) and (2) shall not apply where an offer of compromise provides that the offer is not made without prejudice.

26.06 Party under disability

A person under disability may make or accept an offer of compromise, but no acceptance of an offer made by him or her and no acceptance by that person of an offer shall be binding until the Court has approved the compromise.

26.07 Failure to comply with accepted offer

- (1) Where a party to an accepted offer of compromise fails to comply with the terms of the offer, then, unless for special cause the Court shall otherwise order, the other party shall be entitled, as that other party may elect, to—
 - (a) judgment in the terms of the accepted offer; or
 - (b) where the party in default is—
 - (i) the plaintiff, an order that the proceeding be dismissed; and
 - (ii) the defendant, an order that the defendant's defence be struck out—and in either case to judgment accordingly.
- (2) Where a party to an accepted offer of compromise fails to comply with the terms of the offer, and a defendant in the proceeding has made a claim by counterclaim or third party notice which is not the subject of the accepted offer, the Court may make such order or give such judgment under paragraph (1) and make such order that the proceeding, counterclaim or claim by third party notice be continued as it thinks fit.

26.08 Costs consequences of failure to accept

- (1) This Rule applies to an offer of compromise which has not been accepted at the time of verdict or judgment.
- (2) Where an offer of compromise is made by a plaintiff and not accepted by the defendant, and the plaintiff obtains a judgment on the claim to which the offer relates no less favourable to the plaintiff than the terms of the offer, then, unless the Court otherwise orders, the plaintiff shall be entitled—
 - (a) if the claim of the plaintiff is for damages for or arising out of death or bodily injury, to an order against the defendant for the plaintiff's costs in respect of the claim taxed on an indemnity basis;
 - (b) in the case of any other claim of the plaintiff, to an order against the defendant for the plaintiff's costs in respect of the claim up to and including the day the offer was served taxed on a party and party basis and for the plaintiff's costs thereafter taxed on an indemnity basis.
- (3) Where an offer of compromise is made by a defendant and not accepted by the plaintiff, and the plaintiff obtains a judgment on the claim to which the offer relates not more favourable to the plaintiff than the terms of the offer, then, unless the Court otherwise orders—
 - (a) the plaintiff shall be entitled to an order against the defendant for the plaintiff's costs in respect of the claim up to and including the day the offer was served taxed on a party and party basis; and
 - (b) the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim thereafter taxed on a party and party basis.
- (4) For the purpose of paragraph (3), where the offer of compromise was served on the first or a later day of the trial of the proceeding, then, unless the Court otherwise orders—
 - (a) the plaintiff shall be entitled to the plaintiff's costs in respect of the claim to the opening of the court next after the day on which the offer was served taxed on a party and party basis; and
 - (b) the defendant shall be entitled to the defendant's costs in respect of the claim thereafter taxed on a party and party basis.
- (5) Where a plaintiff obtains judgment for the recovery of a debt or damages and—
 - (a) the amount for which the Court pronounces judgment includes an amount for interest or damages in the nature of interest; or
 - (b) by or under any Act the Court awards the plaintiff interest or damages in the nature of interest in respect of the judgment amount—for the purpose of determining the consequences as to costs referred to in paragraphs (2) and (3) the Court shall disregard so much of the amount recovered by or awarded to the plaintiff for interest or damages in the nature of interest as relates to the period after the day the offer of compromise was served.
- (6) For the purpose only of paragraph (5), the Court may be informed of the fact that the offer of compromise was served, and of the date of service, but shall not be informed of its terms.
- (7) Paragraphs (2) and (3) shall not apply unless the Court is satisfied by the party serving the offer of compromise that that party was at all material times willing and able to carry out the party's part of what was proposed in the offer.

- (8) Where the plaintiff obtains judgment for the recovery of a debt or damages, and the amount of the debt or the damages was not in dispute, but only the question of liability, paragraph (2) shall not apply unless the Court is satisfied that the plaintiff's offer was of a genuine compromise.

26.09 Multiple defendants

Where two or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a debt or damages and rights of contribution or indemnity appear to exist between the defendants, the consequences as to costs referred to in Rule 26.08 shall not apply to an offer of compromise unless—

- (a) in the case of an offer made by the plaintiff, the offer is made to all the defendants, and is an offer of compromise of the claim against all of them;
- (b) in the case of an offer made to the plaintiff—
 - (i) the offer is to compromise the claim against all defendants; and
 - (ii) where the offer is made by two or more defendants, by the terms of the offer the defendants who made the offer are jointly or jointly and severally liable to the plaintiff for the whole amount of the offer.

26.10 Offer to contribute

- (1) Where in any proceeding a defendant makes a claim (in this Rule called "a contribution claim") to recover contribution or indemnity against any person, whether a defendant to the proceeding or not, in respect of any claim for a debt or damages made by the plaintiff in the proceeding, any party to the contribution claim may serve on any other party to the contribution claim an offer to contribute toward a compromise of the claim made by the plaintiff on the terms specified in the offer.
- (2) The Court may take an offer to contribute into account in determining whether it should order that the party on whom the offer to contribute was served should pay the whole or part of—
 - (a) the costs of the party who made the offer;
 - (b) any costs which that party is liable to pay to the plaintiff.
- (3) Rules 26.04 and 26.05, with any necessary modification, shall apply to an offer to contribute as if it were an offer of compromise.

26.11 Transitional

This Order as in force immediately before 1 September 1999 continues to apply to—

- (a) an offer of compromise served under Part 2 of this Order; and
- (b) an offer to compromise served under Part 3 of this Order—

before that date.

PART 3—OFFER TO COMPROMISE ON APPEAL

26.12 Appeal to Court of Appeal

- (1) Where notice of appeal to the Court of Appeal has been served, a party may serve on another party an offer to compromise the appeal on the terms specified in the offer.
- (2) The offer to compromise may be on terms that take into account any cross-appeal.
- (3) Where on an appeal—

- (a) a party has made an offer in writing to the other party (whether or not expressed to be without prejudice) to compromise the appeal on the terms specified in the offer;
- (b) the offer was open to be accepted for a reasonable time, but was not accepted; and
- (c) the party making the offer obtains an order on the appeal no less favourable to that party than the terms of the offer—

the Court of Appeal shall take those matters, and also the stage of the appeal at which the offer was made, into account in determining what order for costs to make in respect of the appeal.

- (4) The Court of Appeal, in exercising its discretion as to costs in accordance with paragraph (3), may order that the party on whom the offer was served pay the costs of the party who made the offer, taxed on a solicitor and client basis, from the commencement of the appeal, from the day the offer was served or from any other time that the Court thinks fit.
- (5) Unless the offer to compromise provides that the offer is not made without prejudice, no statement of the fact that an offer to compromise has been made shall be contained in any affidavit and no communication with respect to the offer shall be made to the Court of Appeal until the appeal has been determined save as to costs.

Federal Court Rules: Part 25 Offers to settle

25.01 Offer to compromise

- (1) A party (the **offeror**) may make an offer to compromise by serving a notice, in accordance with Form 45, on another party (the **offeree**).
- (2) The notice must not be filed in the Court.

25.02 Notice to be signed

The notice must be signed by the offeror.

Note A lawyer may do any act or thing that the party is required to do — see rule 4.02.

25.03 Offer to compromise — content

- (1) The notice must state whether:
 - (a) the offer is inclusive of costs; or
 - (b) costs are in addition to the offer.
- (2) If the offer is of a sum of money, the notice may separately specify the amount that represents:
 - (a) the offer in respect to the claim; and
 - (b) interest (if any).

25.04 Offer to be paid within 28 days

An offer to pay a sum of money is, unless the notice provides otherwise, taken to be an offer that the sum will be paid within 28 days after acceptance of the offer.

25.05 Timing of offer

- (1) An offer may be made at any time before judgment is given.
- (2) A party may make more than one offer.
- (3) An offer may be limited in time for which it is open to be accepted, however the time must not be less than 14 days after the offer is made.
- (4) Unless the notice provides otherwise, an offer is taken to have been made without prejudice.

25.06 No communication to Court of offer

- (1) A pleading or affidavit must not contain a statement that an offer has been made.
- (2) No communication about the existence or terms of an offer is to be made to the Court until:
 - (a) the offer is accepted; or
 - (b) judgment is given; or
 - (c) an application is made under rule 25.07, 25.09 or 25.10.
- (3) However, subrule (2) applies only if the offer is made without prejudice.

25.07 Withdrawal of offer

An offer may be withdrawn within 14 days after it is made only if:

- (a) the Court, on an application by the offeror, gives leave; or
- (b) the offer is superseded by an offer in more favourable terms to the offeree.

25.08 Acceptance of offer

- (1) An offer is open to be accepted within the time stated in the notice, which must not be less than 14 days after the offer has been made.
- (2) If no time for acceptance is stated in the notice, an offeree may accept the offer at any time before judgment is given.
- (3) An offeree may accept the offer by serving a notice of acceptance, in accordance with Form 46 on the offeror, at any time while the offer is open.

25.09 Withdrawal of acceptance

- (1) An offeree who has accepted an offer for a sum of money may withdraw the acceptance if:
 - (a) the sum of money is not paid within 28 days after acceptance of the offer or within the time provided by the offer; and
 - (b) the Court, on the application of the party who accepted the offer, gives leave.
- (2) An offeree seeking the leave of the Court under paragraph (1) (b) may also seek orders:
 - (a) to restore the parties as nearly as may be to each party's position in the proceeding at the time of acceptance; and
 - (b) as to the further conduct of the proceeding.

25.10 Failure to comply with offer

If, after acceptance of an offer by an offeree, an offeror fails to comply with the offer's terms, the offeree may apply to the Court for an order:

- (a) giving effect to the accepted offer; or
- (b) staying or dismissing the proceeding if the applicant is in default; or
- (c) striking out the respondent's defence if the respondent is in default; or
- (d) that a cross-claim, not the subject of the offer, proceed.

25.11 Multiple respondents

- (1) Rule 25.10 does not apply if:
 - (a) 2 or more respondents are alleged to be jointly, or jointly and severally, liable to the applicant for a debt or damages; and
 - (b) rights of contribution or indemnity appear to exist between the respondents.
- (2) However, rule 25.10 applies if:
 - (a) for an offer made by the applicant — the offer:
 - (i) is made to all respondents; and
 - (ii) is an offer to compromise the claim against all of them; or
 - (b) for an offer made to the applicant:
 - (i) the offer is to compromise the claim against all respondents; and
 - (ii) if the offer is made by 2 or more respondents — those respondents offer to be jointly, or jointly and severally, liable to the applicant for the whole amount of the offer.

25.12 Taxation of costs where offer accepted

If an offer does not include the offeree's costs of the proceeding and the offeree accepts the offer, the offeree may tax costs on a party and party basis against the offeror up to and including 14 days after the offer was made.

Note 1 **Costs as between party and party** is defined in the Dictionary.

Note 2 For taxation of costs, see Division 40.2.

25.13 Contributor parties

- (1) If 2 or more parties (the **contributor parties**) may be held liable to contribute towards an amount of debt or damages that may be recovered from the contributor parties, any of those contributor parties may, without prejudice to that contributor party's defence, make an offer to another contributor party, to contribute, to a specified extent, to the amount of the debt or damages.
- (2) If an offer is made by a contributor party (the **first contributor party**) and not accepted by another contributor party, and the first contributor party obtains a judgment against the other contributor party more favourable than the terms of the offer, the first contributor party is entitled to an order that the contributor party who did not accept the offer pay the costs incurred by the first contributor party:
 - (a) before 11.00 am on the second business day after the offer was served — on a party and party basis; and
 - (b) after the time mentioned in paragraph (a) — on an indemnity basis.

25.14 Costs where offer not accepted

- (1) If an offer is made by a respondent and not accepted by an applicant, and the applicant obtains a judgment that is less favourable than the terms of the offer:
 - (a) the applicant is not entitled to any costs after 11.00 am on the second business day after the offer was served; and
 - (b) the respondent is entitled to an order that the applicant pay the respondent's costs after that time on an indemnity basis.
- (2) If an offer is made by a respondent and an applicant unreasonably fails to accept the offer and the applicant's proceeding is dismissed, the respondent is entitled to an order that the applicant pay the respondent's costs:
 - (a) before 11.00 am on the second business day after the offer was served — on a party and party basis; and
 - (b) after the time mentioned in paragraph (a) — on an indemnity basis.
- (3) If an offer is made by an applicant and not accepted by a respondent, and the applicant obtains a judgment that is more favourable than the terms of the offer, the applicant is entitled to an order that the respondent pay the applicant's costs:
 - (a) before 11.00 am on the second business day after the offer was served — on a party and party basis; and
 - (b) after the time mentioned in paragraph (a) — on an indemnity basis.

Note 1 **Costs on an indemnity basis** is defined in the Dictionary.

Note 2 The Court may make an order inconsistent with these rules — see rule 1.35.