

# Commercial Litigation

Assessment Criteria 2021



## Specialist Accreditation

*Distinction in law*



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## 1. INTRODUCTION

The 2021 Specialist Accreditation Commercial Litigation Assessment Criteria is designed to assist practitioners to understand, prepare for and undertake the assessment specific to this area of accreditation.

This document is to be read in conjunction with the Specialist Accreditation Scheme Handbook which contains the policies and procedures relevant to all areas of accreditation.

## 2. CONTACT DETAILS

Please email all enquiries regarding specialist accreditation in commercial litigation to the QLS Specialist Accreditation team at [spec@qls.com.au](mailto:spec@qls.com.au) or (07) 3184 5952.

## 3. ASSESSMENT PROGRAM

### *Learning Outcomes and Objectives*

As part of this program, candidates will undertake practical exercises in:

- Conducting necessary research on relevant law and court procedure;
- Providing advice on causes of action available in commercial litigation;
- Drafting legal process to institute and/or defend claims;
- Drafting documents necessary for interlocutory proceedings;
- Advocacy; and
- Comprehending the ethical rules applicable to the conduct of legal practitioners in the course of commercial litigation.

Candidates must pass the prescribed assessment program set out in this section to be awarded specialist accreditation in this area of accreditation. Candidates wishing to be accredited should demonstrate a high standard of:

- (a) knowledge of the law and procedure which underpins the performance of tasks in this area of practice; and
- (b) oral and written advocacy which is expected of practitioners wishing to hold themselves out as specialists in the area.

“High standard” means the standard expected of a specialist legal practitioner with enhanced skills, superior knowledge, significant experience and a high proficiency in Commercial Litigation, as reflected in the skills set out in this Assessment Criteria. A candidate must demonstrate a “high standard” to meet the standard of accreditation. Details of the knowledge and skills expected are contained in Sections 4 and 5 of this document.

### *Assessment Items*

The assessment process for the specialist accreditation program in commercial litigation is comprised of three assessment types:

1. Take home assignment
2. Written examination
3. Mock court hearing

To gain accreditation, candidates must pass each of the three items of assessment program. Candidates will be advised of what constitutes the standard of accreditation in the assessment instructions. Unless the assessment instructions specify otherwise, candidates will be assessed on the law as it stands on the date of the assessment.

### *Conduct / Delivery of Assessments*

Assessments will be conducted online or in-person at QLS premises in Brisbane. If conducted online, the assessment will be either made accessible on the QLS online learning management system, Canvas, or conducted virtually via Microsoft Teams. All candidates in this program will be provided with student access accounts to Canvas.

**Please Note:** QLS and the Advisory Committee reserve the right to alter or modify any of the assessment conditions, as necessary, with advanced notice to candidates.

### 3.1 Take home assignment

Candidates will be required to complete a take home assignment, which is subject to strict time and length limits and will assess the candidate's ability to handle matters in practice. The assignment will assess a variety of skills which may include preparation of documents, knowledge of procedures, and the identification and application of legal principles.

#### *Conditions*

- Candidates may use the resources of their offices in completing this exercise. However, candidates will face automatic disqualification from the accreditation program if any assessment material is referred to counsel or any other person for opinion or assistance. Candidates will be required to sign the QLS Academic Misconduct Policy before any written submissions will be accepted by QLS for this accreditation program.
- Any assessment received after the due date will not be assessed. For information on the special consideration policy, please see the Specialist Accreditation Scheme Handbook.
- No references or marks which may identify the candidate or their firm or employer should appear anywhere in the candidate's work.
- Candidates will be allotted up to a maximum of 3 weeks to complete this assessment. The QLS Specialist Accreditation Team will inform candidates about the exact assessment duration period in advance of the assessment.
- The take home assignment will be uploaded to Canvas for download by candidates. Candidates will either upload the completed version of the assessment on Canvas, or submit to the QLS Specialist Accreditation Team via email at [spec@qls.com.au](mailto:spec@qls.com.au).

### 3.2 Written examination

<b>Venue:</b>	Queensland Law Society, Law Society House, Level 2, 179 Ann Street, Brisbane
<b>Time:</b>	Individual appointments will be allocated

The written examination will cover a wide range of commercial litigation matters that may be encountered in practice. Candidates will be expected to demonstrate a high standard of knowledge of commercial litigation issues and associated practices and procedures as outlined in Section 4 of this document.

#### *Conditions*

- The duration, including reading time will be up to 3 hours and 30 minutes.
- Candidates may sit the exam by completing an electronic version on their laptop or a hardcopy version by hand.
- **The written examination is an open book exam, but internet access is strictly prohibited and any candidate using the internet will be automatically disqualified from the program.**
- Candidates may take into the examination room any books, notes or other written material. Portable devices like iPads and Tablets may be used for reference purposes on a read-only basis (candidates sitting the exam electronically must complete it using a laptop). Candidates are reminded that access to the internet on laptops and any other portable devices is strictly prohibited.
- Mobile telephones and smart watches are not permitted.
- Candidates will be provided Question and Answer Booklets for the exam. The Question Booklet will be provided in hardcopy only, and candidates will elect to either respond to questions on an electronic or hardcopy version of the Answer Booklet.

- Electronic versions of the approved QLS Answer Booklet will be provided to candidates via USB key and all responses must be saved on the USB key. Candidates completing the exam using laptops will be solely responsible for any technical issues and/or malfunctions experienced during the sitting of the exam. No additional time will be granted to any candidates experiencing any technical issues and/or malfunctions whilst sitting the exam.
- Candidates completing the hardcopy versions of the Answer Booklet must provide legible handwriting.
- All responses to the exam questions must be answered in the QLS approved Answer Booklets.
- The names of candidates will not appear on any material submitted for assessment.

### 3.3 Mock Court Hearing

<b>Venue:</b>	Queensland Law Society, Law Society House, Level 2, 179 Ann Street, Brisbane
<b>Time:</b>	Individual appointments will be allocated

The mock hearing includes a hypothetical scenario to be presented in a mock court. This assessment is designed to test a range of skills, including those dealing with the presentation of a client’s case to the court, identifying the crucial issues of the case and demonstrating knowledge of procedure and advocacy skills.

## 4. KNOWLEDGE

### 4.1 Core areas of knowledge

The list below is not exhaustive but is set as a guide to candidates as to the type of matters that may be raised in the commercial litigation specialist accreditation assessment program. Topics are grouped under headings as a matter of convenience

only. Not all the topics listed will be tested and any matter relevant to practice in commercial litigation may be examined.

- Contract
  - Formation;
  - Agency/authority;
  - Terms;
  - Performance;
  - Breach;
  - Remedies; and
  - Damages.
- Torts
  - Negligence
    - Duty of care;
    - Breach; and
    - Damages.
  - Strict liability and breach of statutory duty
  - Miscellaneous
    - Nuisance;
    - Product liability;
    - Misrepresentation; and
      - Intentional interference with chattels.
- Equity
  - Equitable doctrines
  - Fraud;
    - Trusts;
    - Fiduciary relationships;
  
    - Estoppel;
    - Tracing; and
    - Subrogation and marshalling
  - Equitable remedies
    - Injunctions;

- Equitable compensation;
  - Receivers;
  - Specific performance; and
  - Defences
- Property
  - Sale contracts;
  - Leasing disputes;
  - Caveats; and
  - Joint venture disputes.
- Banking and Securities
  - Mortgages and financing;
  - Recoveries and defences, including unconscionability;
  - Guarantees; and
  - PPSR.
- Insolvency
  - VA;
  - Receiverships;
  - Liquidation;
  - Bankruptcy;
  - Antecedent transactions; and
  - Statutory demands and bankruptcy notices.
- Partnerships
  - Formation/existence;
  - Liabilities;
  - Remedies; and
  - Dissolution.
- Corporations Law
  - Member's rights; and
  - Directors duties.
- Australian Consumer Law
  - Misleading and deceptive conduct;
  - Unconscionability;

- Statutory warranties; and
- Competition law (overview only).
- Practice and procedure
  - UCPR and relevant Practice directions/Federal Court Rules and Practice Notes / Federal Circuit Court Rules/QCAT Rules;
  - Class actions;
  - Costs; and
  - Revenue implications of claims and settlements.
- Alternative dispute resolution
  - Ethics in litigation

## **5. SKILLS**

The skills required to be demonstrated during the commercial litigation specialist accreditation assessment program include the following:

### **5.1 Ascertaining and obtaining facts and instructions**

- listening effectively to the client's description of the problem
- asking appropriate probing questions in order to identify each of the issues, whether factual or legal
- obtaining the client's confirmation of the solicitor's comprehension of the problem
- ascertaining the client's stated objectives and assisting the client to formulate actual and achievable objectives, and
- considering the resources the client is able and willing to allocate and discusses the method of costing any proposed action.
- knowing what public information is available
- selectively instituting searches having regard to relevance and cost effectiveness, including searches of the records of the ASIC, the Australian Stock Exchange, Department of Natural Resources and court records.

- promptly obtaining all relevant documents and critically reading and analysing them
  - pursuing other identified sources for documents, and
  - investigating taxation implications.
- objectively interviewing thoroughly all potential witnesses by listening critically and effectively and asking probing questions including by reference to relevant documents
- assisting each witness to produce a structured and coherent statement, and
- preparing statements which seek to include all relevant information in admissible form.

## **5.2 Developing options to achieve clients stated objectives**

- Considering and assessing the viability of litigation including:
  - whether there is a prima facie cause of action or a defence;
  - the prospects of success whether there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success;
  - the appropriate forum;
  - the time that will be taken prior to a determination;
  - the commitment of the client;
  - the capacity to pay costs;
  - whether any limitation periods have expired,
  - considering and assessing the viability of non-litigious action including all methods of dispute resolution such as early mediation or direct negotiation;
  - explaining clearly all possible options to the client;
  - ensuring the client understands the rights, obligations and risks for each option and the reasons why some options may not be viable;
  - explaining the process required by each option;

- when making recommendations, taking into account the client's objectives, priorities, resources and tax implications;
- obtaining instructions as to whether the client accepts the recommendations;
- confirming the instructions in writing to the client. conducting a mediation having regard to the clients objectives;
- managing the client before the mediation as to process and expectations, and
- documenting any settlement reached at the mediation.

### **5.3 Implementing the plan**

- Drafting pleadings, including:
  - analysing the facts and their relevance;
  - preparing pleadings in accordance with the rules of court;
  - ensuring the pleadings reflect the client's instructions;
  - ensuring the pleadings identify all relevant parties;
  - ensuring that the pleadings disclose proper causes of action including heads of damage, proper particulars of damage, defences or cross claims, and claims for interest and costs
  - considering whether the pleadings should be settled by counsel; and
  - when receiving the opponent's pleadings, considering the need to seek further particulars of any issues or requesting copies of documents referred to therein.
- Drafting affidavits and statements, including:
  - considering the evidence of the witnesses, in light of its relevance to the case and its appropriateness;
  - ensuring affidavits and statements are drafted in accordance with the rules of the court; and
  - ensuring affidavits and statements are drafted in admissible form.

## 5.4 Managing interlocutory stages of litigation

- Considering tactics, including:
  - considering what process will best advance the case (such as direction applications, injunctions, Anton Pillar orders, offers of compromise, stays of proceedings, security for costs, Calderbank letters, commercial list applications);
  - litigation funding – is it required?;
  - is there an insurer involved?;
  - security for costs applications;
  - pre-pleading disclosure in the Federal Court; and
  - is able to respond quickly when required.
- Considering an appropriate case management approach, including:
  - identifying whether it is appropriate to seek to have the matter managed on the Commercial List or the Supervised Case List, and the necessary steps to be taken to achieve listing;
  - identifying the orders and directions to be sought when a matter is listed;
  - identifying the timing and conduct of reviews and the orders or directions to be sought on reviews; and
  - identifying the consequences of the case-flow management practice direction.
- Managing disclosure of documents, including:
  - advising the client on obligations imposed by the discovery process;
  - considering all the documents provided by the client in terms of their relevance to the cause of action;
  - considering questions of privilege;
  - submitting the documents of the other parties to the client for instructions;
  - considers the relevance of all discovered documents to the likely outcome of the dispute;
  - identifying when to use electronic disclosure; and

- identifying when to limit the scope of disclosure by Order.
- Using subpoenas and notices to produce, including:
  - considering the information obtained by appropriate subpoenas and notices produce, and
  - drafting precisely the appropriate documents.
- Using notices to admit, including:
  - considering the need for notices to admit;
  - drafting the appropriate documents;
  - upon receipt, taking instructions, considering and preparing appropriate and timely responses; and
  - when answering, considering the relevance of any admissions to the likely outcome of the dispute.
- Obtaining expert reports, including:
  - considering rules of Court and relevant practice directions;
  - considering what issues need to be proved by expert evidence;
  - choosing and fully briefing an appropriately qualified expert;
  - considering whether a joint expert should be used and how to do so;
  - considering the experts report, submit it to the client and advise on its effect;
  - on receipt of the opponent's expert report, submitting the report to the client and the client's expert for comments;
  - considering its impact on the outcome and deciding whether to serve a report in reply; and
  - considering whether a conference between experts is desirable to resolve issues in contention.
- Acting as an advocate, including:
  - preparing letters of advice to clients and corresponding court documents;
  - being well prepared and organised when appearing as an advocate;
  - effectively arguing the client's case based on court documents; and

- employing a knowledge of procedural, evidentiary and substantive law to present the application or the case.
- Acting as instructing solicitor, including:
  - selecting appropriate counsel for the matter having regard to the nature and complexity of the matter;
  - preparing a brief to counsel including incisive observations on procedural, evidentiary and substantive issues;
  - actively participating in the preparation of the case, including attending conferences and making decisions concerning the presentation or conduct of the case;
  - providing good administration support, including managing witnesses, documents and the client;
  - acting as an effective liaison between counsel, the client and witnesses;
  - critically examining counsel's opinion in light of solicitor's own qualifications, experience and expertise; and
  - considering the appropriateness of taking evidence from witnesses by video or telephone link.
- Preparing for an Appeal, including:
  - conducting an appeal cognizant of time limits and procedures;
  - briefing appropriate Counsel;
  - identifying the appealable issues;
  - preparing appeals books;
  - security for Costs; and
  - *Appeals Costs Fund Act 1973 (Qld)*.

## 5.5 Finalising the Matter

- ensuring all court documents, terms of settlement and forms of judgment or orders are properly prepared and filed with the Court
- seeking court approval where necessary.

- notifying the client in writing of all obligations arising from the conclusion of the matters including money to be paid or acts to be performed or refrained from.
- considering an appeal, a stay or a cost application, where appropriate, and
- seeking to agree quantum of monies payable under outstanding costs orders with opposing solicitor based on knowledge of taxation and assessment costing principles or failing that, attend to having costs statements assessed having regard to the rules as to costs.