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Andrew is a barrister with a commercial practice.

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When he came to the Bar, Andrew read with Richard Attiwill QC, and his senior mentor was Mark Derham QC, now Associate Justice Derham of the Supreme Court of Victoria. Immediately prior to coming to the bar, Andrew was a dispute resolution lawyer at MolinoCahill Lawyers, specialising in large-scale construction, mining, infrastructure and defence projects. Prior to being admitted as a solicitor Andrew worked in the chemical sciences field.

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Andrew Downie
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Offers of Compromise and 'Calderbank' offers

Introduction

Content and purpose of offers

1. Both offers of compromise[1] and 'Calderbank' offers are offers made by an offeror which, if not accepted, or rejected, carry certain cost consequences for the offeree if the offeree does not better the offer at trial.
2. An offer of compromise has specified minimum requirements and is governed by the various rules of courts and tribunals, whereas a 'Calderbank' offer has no prescriptions and is governed by flexible rules arising from caselaw. There are important differences between each that inform when either might be useful in any particular matter.
3. Such offers are ordinarily made on a 'without prejudice save as to costs' basis. This means that they are confidential, and cannot be produced in court against a party except on the question of costs. For certain strategic reasons a party may choose to serve an offer on an 'open' basis, which means it can be used in evidence.
4. The purpose of such offers is 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.[2] The rules for offers 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.[3] This purpose is consistent with the 'overarching purpose' for civil litigation, as set out in the *Civil Procedure Act 2010* (Vic) (**CPA**), which is 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'[4].
5. Most jurisdictions encourage and therefore have prescribed rules for an offer of compromise because of the important role such offers play in the administration of justice.

[1] In this paper, the term 'offer of compromise' denotes any offer made pursuant to court or tribunal rules.
[2] Murphy J in *Henderson v Simon Engineering (Australia) Pty Ltd and Ors* [1988] VR 867, 869.
[3] Murphy J in *Henderson v Simon Engineering (Australia) Pty Ltd and Ors* [1988] VR 867, 869. See also *Maitland Hospital v Fisher (No. 2)* (1992) 27 NSWLR 721, 724.
[4] CPA s7.

Strategy for serving offers

6. In the author's view, there are two strategic reasons for issuing offers of compromise and 'Calderbank' offers. In order of importance, these are:
    a. to achieve cost protection for the offeree; and
    b. to attempt to resolve the matter.
7. It important that participants in litigation protect their cost position, particularly in circumstances where the usual cost orders compensate for much less than the actual costs spent, and where proceedings frequently involve claims and counterclaims where there might be cost orders for both sides. The 'rule of thumb' for costs recovery on taxation is said to be around 50% to 60% of actual costs spent. By serving a sensible offer of compromise, the offeror is protecting its cost position as much as possible to maximise recovery.
8. Because of the above, and because it is often the case that litigants will not act reasonably when served with a reasonable offer (hence the need for cost protection) the reason to resolve the matter will be secondary.
9. As such, when preparing an offer it is best to keep in mind the paramountcy of costs protection when selecting the amount to offer. When a defendant is framing a cost offer, that defendant might want to offer as much as possible (more than the defendant would otherwise offer to settle the matter) safe in the knowledge that the plaintiff is likely to not accept the offer. Similarly, when a plaintiff is framing a cost offer, the plaintiff might want to offer to accept as little as possible for the same reason.

Informal offers

10. Offers under the court rules have been around for a long time. An earlier incarnation was payment into court by a defendant, where the plaintiff would be at risk if the plaintiff did not accept that amount.
11. A trend began from around 1965 that "recognised that offers to compromise not directly authorised by rules of court, if reasonably made but unreasonably ignored, may properly influence the exercise of judicial discretion as to costs".[5] The trend appeared around the time of *Schulte-Hordelhoff v Patons Brake Replacements Pty Ltd,*[6] which concerned a defective and invalid notice for payment into court that was nevertheless used by the court in the exercise of its discretion in determining the appropriate costs order. Further

[5] *Grbavac v Hart* [1997] 1 VR 154, 160.
[6] [1965] VR 369.

examples of the trend include *Cutts v Head*[7], *Azzopardi v Netin*[8], *Messiter v Hutchison*[9], *Mideco Manufacturing Pty Ltd v Tait*[10], *Whitehead v Maas*[11] and *Mutual Community Ltd v Lorden Holdings Pty Ltd*.[12]

12. During this time, informal offers achieved prominence in the frequently cited case of *Calderbank v Calderbank*[13] (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 (£10,000) to the husband that was less than the value of the house (£12,000). 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 as a result.[14]
13. 'Calderbank' offers have achieved popularity in civil litigation as an alternative to formal offers. They are particularly useful in multi-party and complex proceedings, where the rules on offers of compromise are not adequately sophisticated or broad so as to deal with particular circumstances.
14. There are key differences between offers of compromise and 'Calderbank' offers. The primary one is that the cost consequences for offers of compromise are automatic, whereas the cost consequences for 'Calderbank' offers depends on whether the offeror can convince the court that the non-acceptance of the offer was unreasonable. This difference will be revisited several times through this paper to reinforce its importance.

<u>'Without prejudice', 'without prejudice save as to costs', and 'open' offers</u>

The meaning of 'without prejudice'

15. The term 'without prejudice' means a confidential communication that is intended to be made without prejudice to the position of the author of the communication if the terms the author proposes are not accepted.[15] That is, the proposed offer is not intended to be used as evidence to prejudice the offeror's position.

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[7] [1984] Ch. 290.
[8] [1986] VR 593.
[9] (1987) 10 NSWLR 525.
[10] [1989] VR 50.
[11] (1991) 56 SASR 362.
[12] (unreported, Byrne J., 28 April 1993).
[13] [1975] 3 All ER 333.
[14] Ibid, 343 per Cairns LJ.
[15] *Walker v Wilsher* (1889) 23 QBD 335 at 357.

16. The purpose of the 'without prejudice' rule has been expressed by the High Court of Australia as follows:[16]

> *The purpose is to enable parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. The law relieves them of this embarrassment so that their negotiations to avoid litigation or to settle it may go on unhampered. This form of privilege, however, is directed against the admission in evidence of express or implied admissions. It covers admissions by words or conduct. For example, neither party can use the readiness of the other to negotiate as an implied admission. It is not concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence. But it is concerned with the use of the negotiations or what is said in the course of them as evidence by way of admission.*

17. The 'without prejudice' rule is also incorporated into s131(1) *Evidence Act*, for the purpose of determining the admissibility in evidence of communications made or documents prepared in a 'without prejudice' context, as follows:

> *(1) Evidence is not to be adduced of:*
>
> *(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or*
>
> *(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.*

18. The term 'without prejudice save as to costs' is an exception to the 'without prejudice' rule, which carves out from the 'without prejudice' blanket protection a right of the offeree to produce the communication on the question of costs. As such, under s131(2) *Evidence Act*, there is an exception to the rule that permits a person to adduce that evidence if the communication or document is relevant to determining liability for costs.[17]

19. There are instances where an 'open' offer is advantageous over a 'without prejudice' offer. This is usually where the offeror is not concerned about the disclosure of the offer to the court, and intends to produce the offer to the court at a hearing so as to place pressure on the offeree to settle. This is a bold strategy, but as a calculated risk it can be very effective.

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[16] *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285, 291 – 292.
[17] *Evidence Act 2008* (Vic) s131(2)(h).

Elements and consequences of offers

20. So as to compare the two, I discuss the key elements of each separately below. I have referred to the applicable rules in the Supreme Court of Victoria[18] (Order 26) and the Federal Court of Australia[19] (Part 25). I have separately referred to the Victorian Civil and Administrative Tribunal rules[20] (ss 112 to 114) given the different requirements in that jurisdiction.

Offer of compromise under court rules

21. The default position is that costs are in the discretion of the court,[21] but an effective offer of compromise in accordance with the court rules will displace that default position in favour of the offeror.
22. An offer under court rules must be prepared in accordance with the prescriptions of that jurisdiction. A failure to do so might result in the offer not being an offer under the rules, and therefore not having the desired effect of protecting the offeror. The fallback position in such a circumstance is that the offer might be treated as a 'Calderbank' offer, as discussed further below, which provides much less protection to the offeror since the default position of costs being in the discretion of the court is not displaced.
23. Given the number of prescriptions in the court rules, I do not intend to set out each requirements. However, the broad points are:
    a. It must be in writing.[22]
    b. It shall be either expressed to be inclusive of costs, or costs are to be paid or received in addition to the offer.[23]
    c. It must refer to the Order or Form that it is based on. [24]
    d. It may be served at any time before verdict or judgment in respect of the claim to which it relates.[25]
    e. A party may make more than one offer.[26]
    f. It cannot be open for acceptance any less than 14 days after service.[27]

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[18] *Supreme Court (General Civil Procedure) Rules 2015* (**VSC Rules**)
[1919] *Federal Court Rules 2011* (**FCA Rules**).
[20] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**).
[21] *Supreme Court Act 1986* (Vic) s24(1); *Federal Court of Australia Act 1976* (Cth) s43.
[22] VSC Rules R26.02(3); FCA Rules, R25.01(1) and form 45.
[23] VSC Rules R26.02(4); FCA Rules, R25.03(1).
[24] VSC Rules, R26.02(3); FCA Rules, form 45.
[25] VSC Rules, R 26.03(1); FCA Rules, R 25.05.
[26] VSC Rules, R 26.03(2); FCA Rules, R25.05(2).
[27] VSC Rules, R26.03(3); FCA Rules, R25.05(3).

g. Unless it says otherwise, the default time for payment after acceptance is 28 days.[28]

h. It is taken to be without prejudice unless it otherwise says so.[29]

i. An offer shall not be withdrawn during the time it is open to be accepted, unless the court otherwise orders.[30]

24. As for acceptance:

a. An offer may be accepted before its expiry but not after.[31]

b. As to the default of either party after its acceptance, the non-defaulting party has many remedies including the withdrawal of any acceptance,[32] and a non-defaulting party may apply to the court for an order:

i. giving effect to the offer;

ii. staying or dismissing the proceeding if the plaintiff/applicant is in default;

iii. striking out the defence if the defendant/respondent is in default; or

iv. that a claim, not the subject of the offer, shall proceed.[33]

c. Where there are multiple defendants/respondents alleged to be jointly or jointly and severally liable to the plaintiff/applicant, the ability to enforce a default in compliance with the offer is limited to where the offer is made to compromise the claim against all defendants/respondents.[34]

25. As to consequences on non-acceptance of the offer:

a. Put simply, where an offeree fails to accept an offer and the result does not beat the offer, adverse cost consequences apply to the offeree. However, there are nuances to this. A table of cost consequences is attached to this paper. The differences are subtle, but the consequences might be significant depending on choice of jurisdiction.

b. The terminology differs. For instance, where a plaintiff/applicant serves an offer on a defendant/respondent and the judgment is equal to the offer, in the VSC Rules cost consequences follow as the judgment is 'no less favourable' than the offer; however, in the FCA Rules, there are no cost consequences as the judgment is required to be 'more favourable than the offer' for the cost consequences to

[28] VSC Rules, R26.03.1; FCA Rules, R 25.04.
[29] VSC Rules, R 26.04; FCA Rules, R 25.05.
[30] VSC Rules, R26.03(5); FCA Rules, R25.07.
[31] VSC Rules, R 26.03(4); FCA Rules, R25.08(2)
[32] VSC Rules R26.07; FCA Rules R 25.07.
[33] VSC Rules, R26.07.1; FCA Rules, R25.10
[34] VSC Rules, R26.07.2; FCA Rules, R25.11.

apply. There is a similar difference in terminology where a defendant/respondent serves an offer on a plaintiff/applicant.

c. The consequences of non-acceptance commence at 11am on the second business day after the offer was served.[35]

d. A significant point of difference is where a defendant/respondent makes an offer and the plaintiff/applicant does not better it. In those circumstances, from 11am on the second business day after the offer was served, the defendant under the VSC Rules receives costs on a standard basis,[36] and a respondent under the FCA Rules receives indemnity costs.[37]

e. Further, the VSC Rules have a provision for pre-litigation offers, which is absent from the FCA Rules. A court shall take a pre-litigation offer into account if it is in writing, open to be accepted for a reasonable time but was not accepted and the offeror obtains an order or judgment in respect of the claim no less favourable to the offeror than the terms of the offer.[38] It is fair to say, however, that the Federal Court (and most jurisdictions) would take a good pre-litigation offer into account in exercising discretion as to costs.

f. Finally, in the VSC Rules 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.[39] In the FCA Rules there is no particular rule concerning appeals.

26. Also, where the question in dispute is of liability and not quantum, the costs consequences of an offer of compromise do not apply to a plaintiff unless the Court is satisfied that the offer was a genuine compromise.[40] For instance, a plaintiff might sue a defendant for a fixed commission, and the dispute might be whether the conditions for payment of that commission are satisfied but the amount of the commission payable is not in dispute. In that kind of matter, an offer by the plaintiff that the defendant pay it 100% of the claim will be ineffective. A discounted offer might be ineffective depending on the extent of discount offered.

[35] VSC Rules, R26.08; FCA Rules, R25.14.
[36] VSC Rules, R26.08(3)
[37] VSC Rules, R25.14 (1).
[38] VSC Rules, R26.08.1.
[39] VSC Rules, R26.12.
[40] VSC Rules, R26.08(8).

27. It is noted that although there is an offer of compromise provision relating to appeals to the Court of Appeal, there is none concerning appeals to a single judge under s148 *VCAT Act 1998* (Vic) on a question of law. As such, in these circumstances a 'Calderbank' offer (below) would be appropriate for cost protection.

Differences between the Supreme Court, County Court and Magistrates Court rules

28. On 1 August 2014 the *Magistrates' Court General Civil Procedure Rules 2010* (**MCV Rules**) were amended and became largely uniform with the offer of compromise regime in the VSC Rules. However, there are some differences that remain, including:
    a. the cost consequences for the Magistrates' Court are the applicable scale plus 25%, instead of costs on an indemnity basis; [41]
    b. in the Magistrates' Court an offer of compromise must, unless it otherwise provides, be taken to be an offer providing for payment within 30 days after acceptance of the offer, instead of 28 days in the case of the Supreme Court and County Court;[42]
    c. in the Magistrates' Court, pre-litigation offers are required to be open to be accepted for a period of at least seven days after the offer was made, whereas in the Supreme Court and County Court of Victoria the offer must be open to be accepted for a reasonable time;[43] and
    d. there is no provision in the MCV Rules on cost consequences on appeals, since there is no appeal division.

Offers to settle under the VCAT Act

29. The VCAT Act has a regime permitting parties to serve offers to settle in sections 112 to 115. The regime has a slightly different purpose, since in the Tribunal the presumption that costs follow the event does not apply. Section 109 of the VCAT Act provides that each party is to bear their own costs in the proceeding,[44] unless the Tribunal is satisfied that it is fair for a party to pay all or a specified part of the costs of another party in a proceeding,[45] having regard to factors specified in section 109(3) VCAT Act.
30. Since the threshold for obtaining an order for costs in the Tribunal is higher than in the courts, the offer regime is used as a means by which a party can secure a costs order

[41] MCV Rules R26.08.
[42] MCV Rules R26.03.1.
[43] MCV Rules R26.08.1(1).
[44] VCAT Act, s109(1).
[45] VCAT Act, s109(2).

despite the terms of section 109, rather than a means by which a party can secure a more favourable costs order as a penalty for an unreasonable failure to accept an offer.

31. The offer regime in sections 112 to 115 VCAT Act applies to entitle an offeror to an order that an offeree pay 'all costs incurred' by the offeree where:
    a. an offeror makes an offer to an offeree;
    b. that offeree does not accept the offer; and
    c. the orders made by the Tribunal are not more favourable to the offeree than the offer.[46]
32. The term 'all costs incurred' has been construed by the Court of Appeal to mean costs on the normal applicable basis,[47] but the Tribunal would be empowered to allow costs on a more favourable basis.
33. In determining whether its orders are or are not more favourable to a party than an offer, the Tribunal:
    a. must take into account any costs it would have ordered on the date the offer was made; and
    b. must disregard any interest or costs it ordered in respect of any period after the date the offer was received.[48]
34. This provision is particularly apposite to an 'all in' offer, which would require the Tribunal to consider what it would have ordered as to the quantum of costs at the time of the offer to determine its favourability. Where an offer for a monetary amount is expressed to be costs exclusive, then there is very little difficulty in determining its favourability when comparing it to an order for a monetary amount. As to 'all in' offers, offers of compromise in the VSC Rules previously were not permitted, until the VSC Rules were amended to permit costs inclusive offers in 2013. This position was recently changed, to align the VSC Rules more with the FCA Rules.
35. As for the requirements of the section, the following are the main points, which are similar to those in the courts:
    a. an offer must be in writing;[49]
    b. an offer must comply with sections 113 and 114 of the VCAT Act;[50]

[46] VCAT Act, s112.
[47] *Velardo v Andonov* (2010) 24 VR 240.
[48] VCAT Act, s112(3).
[49] VCAT Act, s112(1)(a).
[50] VCAT Act, s102(1).

c. an offer can be without prejudice or with prejudice, and if the order does not specify which it is, it is to be treated as having been made 'without prejudice';[51]

d. if it provides for the payment of money, it must specify when that money is to be paid;[52]

e. it must be open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute, or until the expiry of a specified period after the offer is made, whichever is the shorter period;[53]

f. the minimum period for acceptance is 14 days; [54]

g. an offer cannot be withdrawn while it is open for acceptance without the permission of the Tribunal, and in deciding whether to give permission, the Tribunal may examine the offer, even if it was served without prejudice; [55]

h. a party can only accept an offer by giving the party who made it a signed notice of acceptance; [56]

i. a party can accept an offer even though it has made a counter-offer. [57]

j. If an offer is accepted, but the party who made the offer does not comply with its terms, the Tribunal, at the request of the party who accepted the offer, may:

    i. make an order giving effect to the terms of the offer; or

    ii. if the party making the offer was the applicant, dismiss the proceeding or award a counterclaim if one was made before the offer; or

    iii. if the party accepting the offer is the applicant, make an order awarding the applicant any or all of the things in the application. [58]

Requirements in different jurisdictions

36. The above are the principles relating to offers of compromise under the rules of the Supreme Court of Victoria, the Federal Court of Australia and VCAT.

37. The following is a table of other jurisdictions and the rules they have (if any) relating to offers of compromise.

[51] VCAT Act, s113.
[52] VCAT Act, s113(4).
[53] VCAT Act, s114(1).
[54] VCAT Act, s114(2).
[55] VCAT Act, s114(3) & (4).
[56] VCAT Act, s114(6).
[57] VCAT Act, s114(7).
[58] VCAT Act, s115.

Jurisdiction	Applicable Rules	Summary
Magistrates' Court of Victoria – Civil Proceedings	Magistrates' Court General Civil Procedure Rules 2020 Order 26	Similar to VSC Rules above except with above noted differences.
County Court of Victoria	County Court Civil Procedure Rules 2018 Order 26	Identical to VSC Rules except for appeals
Family Court of Australia	Family Law Rules 2004 Part 10.1	Similar to FCA Rules. There is an obligation, in a property case, to make a genuine offer to settle in a proceeding (R 10.06).
Federal Circuit Court	Federal Circuit Court Rules 2001 schedule 3 and Federal Court Rules 2011 Part 25	The Federal Circuit Court Rules 2001 apply the Federal Court Rules 2011 as to offers to settle.
Arbitration	*Commercial Arbitration Act 2011* s41(1)(c)	Provides rules of court may be made with respect to rules of offers of compromise, but no rules have been made in Victoria. As such, parties to an arbitration will be required to serve 'Calderbank' offers for cost protection.

'Calderbank' offers

38. '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).
39. Byrne J in *Foster v Galea (No.2)*[59] 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.[60] 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*[61] above, Byrne J in *Foster* further observed that an offer of compromise that fails to satisfy

[59] [2008] VSC 331.
[60] *Foster*, [7].
[61] [1965] VR 369.

the formal requirements of the relevant rules may nevertheless be sufficient to be considered as an offer to the effect of a 'Calderbank' offer.[62]

40. The following general principles can be extracted from the authorities on 'Calderbank' offers:
    a. It is undesirable that 'Calderbank' offers be burdened with technicality.[63]
    b. 'Calderbank' offers are often made on a costs-inclusive basis,[64] including on the condition that parties bear their own costs.[65]
    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 receives a less favourable result. The correct approach is 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.[66]
    d. The critical question is whether the rejection of the offer was unreasonable in the circumstances.[67]
    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.[68]
    f. The offeror bears a persuasive burden of satisfying the court to exercise the costs discretion in the offeror's favour.[69]

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[62] *Foster*, [7].
[63] *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 441, [5].
[64] *M T Associates Pty Ltd v Aqua Max Pty Ltd & Anor (No 3)* [2000] VSC 163, 126.
[65] *Re: Will of G G Sitch (deceased) (No 2)* [2005] VSC 383.
[66] *Hazeldenes*, [18] to [20].
[67] *Hazeldenes*, [20] to [23].
[68] *Hazeldenes*, [25].
[69] Beazley JA, 'Calderbank offers', speech to Hunter Valley Conference, Australian Lawyers Alliance, 14-15 March 2008, page 8 to 9.

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.[70] 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.[71]

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.[72]

i. A 'Calderbank' offer does not have to refer specifically to the decision in *Calderbank v Calderbank*[73] 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.[74]

Comparing formal offers and "Calderbank" offers

41. Noting the above principles and the discussion on formal offers (that is, offers made under court rules or the VCAT Act), the following table sets out the operational differences between formal offers and "Calderbank" offers.

	Formal offers	***'Calderbank' offers***
Content	Minimal: there are a short number of items that the offer must contain so as to be effective, for instance, a reference to the relevant provision, the amount of the offer, the timing of when acceptance is due, etc.	Maximal: so as to be an effective offer, it needs to communicate as much about the claim or defence as is possible (amongst other things) so that a court or tribunal can assess whether the failure to accept it was unreasonable in the circumstances.

[70] *Dukemaster Pty Ltd v Bluehive Pty Ltd* [2003] FCAFC 1, [8].
[71] *Mediterranean Olives Financial Pty Ltd & Ors v Gita Lederberger & Ors (No 2)* [2011] VSC 333, [10].
[72] *Lord Buddha Pty Ltd v Harpur (No 2)* [2011] VSC 568.
[73] [1975] 3 All ER 333.
[74] *Love v Roads Corporation* [2011] VSCA 434, [181] to [185].

Certainty of outcome in obtaining a special costs order.	Certain: A formal offer attracts automatic favourable costs consequences for parties, assuming there are no defects with the form of the formal offer. Exceptions are for pre-litigation offers, offers by a defendant/respondent where the plaintiff/applicant's claim is dismissed, and appeals in Order 26.	Uncertain: 'Calderbank' offers require the offeror to apply to court for a special costs order and the court can exercise its discretion on the question of costs. This is far more burdensome than the process for a formal offer.
Onus of proof to get a special costs order.	On the offeree: the costs consequences apply "unless the Court otherwise orders". This "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."[75]	On the offeror: the offeror has the onus of proof to persuade the court to exercise its discretion in favour of the offeror.
Expense in the process of seeking a special costs order.	Low: since the cost consequences are usually automatic the formal offer can be produced after judgment with little room for argument. This ought to minimize costs, subject to arguments about defects in a formal offer and whether the court ought "otherwise order".	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.
Minimum time for offer to lapse.	14 days: A formal offer must be open for no less than 14 days. This could have operational difficulties if a party wishes to make an offer which lasted for a shorter time frame, such as in	None: although this may go to whether or not the rejection of the offer was unreasonable in the circumstances.

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

	urgent circumstances.	
Multiple defendants	The provisions for formal offers allow enforcement of offers where there is failure to comply with an accepted offer.[76] Order 26 and Part 25 have specific rules applicable as between "contributor parties".[77] Formal offers are often ill-equipped to deal with the kinds of offers preferred in multi-party proceedings where there are issues of apportionment and contribution between concurrent wrongdoers.	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'.

Costs inclusive vs cost plus offers

42. Offers of compromise or 'Calderbank' offers permit either a 'cost inclusive' or a 'plus costs' offer to be made.
43. There is a significant benefit in making an offer 'plus costs', because where an offer is made 'plus costs' it is much easier for the court or tribunal to assess whether the result is more or less favourable than the offer. This is because where an offer is made 'plus costs' there doesn't need to be an assessment of what the costs would have been at the date of the offer. The downside of this, of course, is that when making an offer 'plus costs' a defendant offeree is usually unaware of what those costs are likely to be in value.
44. As to the benefit 'cost inclusive' offers, Garde J said of them as follows:

> *One of the distinct advantages of an "all-in offer" is that the offeror party knows exactly how much will have to be paid to the other party to settle the case, if the offer is accepted. Likewise, the offeree party knows exactly how much will be received if the offer is accepted. While a party's own legal costs may have to be added to, or deducted from the settlement amount to determine the total amount to be expended or received, the amount to be added or deducted is capable of quantification by an enquiry of that party's own legal adviser, and is not dependent on the costs charged by the opposing party's legal adviser as assessed by the*

[76] VSC Rules R26.07.1, FCA Rules, R25.11.
[77] VSC Rules, R26.10; FCA Rules, R25.13

Costs Court. In this way, the use of "all-in" offers may simplify the settlement of proceedings, not least where there is a litigant in person who may not understand or may distrust the costs assessment and taxation process.[78]

45. Recently in *Smith v Jovanoska & Anor (No. 2)*,[79] the Supreme Court of Victoria held that the considerations for 'Calderbank' offers set out in the matter of *Hazeldenes* are applicable to an offer of compromise under R26.04(4), which provides for cost consequences on a dismissal of a claim where an offer was served by a defendant and the plaintiff unreasonably fails to accept the offer.

Avoiding the cost consequences

46. The downside to an offeror of a 'Calderbank' offer is that, for an offeree, it is easier to avoid the cost consequences of a 'Calderbank' offers by relying on favourable factors in the *Hazeldenes* matter. It is a lot harder to avoid the cost consequences of an offer of compromise when the judgment has not 'beaten' the offer.
47. However, there is scope for ousting an offer of compromise where there are special circumstances justifying that the Court 'otherwise order'. This includes a change in the case ('change in landscape') between the offer and judgment, and lack of certainty.
48. An instance of the 'change in landscape' is *Davis v Robek Australia Pty Ltd and Anor.*[80] Amendments were made to a claim after an offer was served making the case materially different to that before the offer of compromise.[81] Because the amendments created a substantially stronger claim, and the defendants accepted that they were likely to be liable for the claim (which was higher than the offer) and the plaintiff did not want to accept an offer that did not include an amount for indemnity costs, the defendant applied to have judgment against itself. By reason of the 'change in landscape' after the offer was made, the Court 'otherwise ordered' despite the plaintiff bettering the offer.
49. An offer of compromise that lacks certainty is likely to be ineffective. For instance, not articulating the position on GST liability sufficiently,[82] imposing a condition that could not be evaluated on money terms where the judgment sought was monetary,[83] and not specifying the scope of the coverage of the release in the offer including whether it is

[78] *Metricon Homes Pty Ltd v Sawyer* [2013] VSC 518, [21]
[79] [2013] VSC 714.
[80] [2014] VSC 360.
[81] Ibid, [21].
[82] *AJ Lucas Drilling Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd (No 2)* [2010] VSCA 128.
[83] *White v Director of Housing* [2003] VSC 124.

intended to dispose of claims for contribution and indemnity between the parties,[84] are all examples where the terms are insufficiently clear so as to render the offer ineffective.

50. The take-home message is that if you can serve an offer of compromise under the rules, then do so, but if you cannot, then serve a 'Calderbank' offer. Either way, the client must be adequately protected on costs from an early stage so as to maximise cost recovery.

Dated: 22 July 2020

Andrew Downie

Chancery Chambers

Melbourne TEC Chambers

[84] *Duncan & Weller Pty Ltd v Mendelson* [1989] VR 386.

SCHEDULE – TABLE OF COST CONSEQUENCES

TABLE OF COST CONSEQUENCES FOR OFFERS UNDER O26 VSC AND Pt 25 FCA

Context	**Offeror**	**Offeree**	**Judgment is…**	**Offeree's costs to offer[1]**	**Offeree's costs after offer[2]**	**Rule**
VSC only for death or bodily injury cases	P	D	No less favourable[3] than offer	Indemnity basis	Indemnity basis	26.08(2)(a)
VSC only for pre-litigation offers	A party	Another party	To the offeror, no less favourable (i.e. equal or better) than the terms of the offer	Discretion of the court	Discretion of the court	26.08.1 (VSC)
VSC and FCA	P/A	D/R	No less favourable (VSC) / more favourable[4] (FCA) than offer	Ordinary applicable basis	Indemnity basis	26.08(2)(b) (VSC) / 25.14(1) (FCA)
VSC and FCA	D/R	P/A	Not more favourable[5] (VSC) / less favourable[6] (FCA) than offer	Ordinary applicable basis	Ordinary applicable basis (VSC) / Indemnity basis (FCA)	26.08(3) (VSC) / 25.14(1) (FCA)
VSC and FCA where the offeree unreasonably fails to accept the offer	D/R	P/A	That claim dismissed (VSC / FCA) or judgment entered in favour of defendant (VSC only)	Ordinary applicable basis	Indemnity basis	26.08(4) (VSC) / 25.14(2) (FCA)
VSC and FCA and between contributor parties	First contributor party	Another contributor party	More favourable (VSC/FCA) than offer	Ordinary applicable basis	Indemnity basis	26.10 (VSC) / 25.13 (FCA)

[1] I.e. to 11am on the second business day after the offer was served.
[2] I.e. after 11am on the second business day after the offer was served.
[3] Means equal or better – for instance, an offer is made by a plaintiff to accept $100,000 and the plaintiff obtains an award of (a) $98,000; (b) $100,000; or (b) $110,000: (a) is less favourable, (b) is no less favourable and (c) is no less favourable.
[4] Means better – taking the example above, only (c) would be more favourable.
[5] Means equal or worse – for instance, an offer is made by a defendant to pay $100,000 and the plaintiff obtains an award of (a) $98,000; (b) $100,000; or (b) $110,000: (a) and (b) are not more favourable and (c) is more favourable.
[6] Means worse - taking the example in ft 3 above, only (a) would be less favourable.