



Practice Note No 3 of 2012

PROFESSIONAL LIABILITY LIST

The Chief Justice has authorised the issue of the following Practice Note:

1. INTRODUCTION

- 1.1 The Professional Liability List (**List**) is a list of cases within the Common Law Division of the Trial Division of the Court.
- 1.2 The administration of the List will be undertaken by the List Judge, assisted by the List Associate Judge, each as specified on the Supreme Court website.
- 1.3 The purpose of the List is to provide for the just and efficient determination of eligible professional liability proceedings, by the early identification of the substantial questions in controversy and the flexible adoption of appropriate and timely procedures for the conduct of the proceeding which are best suited to the particular case.
- 1.4 The practices and procedures set out in this Practice Note will apply to relevant proceedings from 1 October 2012.
- 1.5 The filing of documents in the List will initially be governed by Order 28 of the *Supreme Court (General Civil Procedure) Rules 2005* (**Rules**). When announced on the List webpage (refer paragraph 6.2 below), such filing will be governed by the Instruction Manual attached to Practice Note No. 7 of 2011 (RedCrest SCV-CMS Instruction Manual) and any rules which are developed with respect to the content of the Instruction Manual.

- 1.6 No additional fees will be payable for the inclusion of proceedings in the List.

2. ELIGIBILITY FOR ENTRY TO THE LIST

- 2.1 A proceeding is eligible for entry to the List where it involves an eligible professional liability claim. An eligible professional liability claim is a claim for economic loss against a professional for breach of duty in tort or contract, cognate statutory contravention (such as misleading or deceptive conduct), or for breach of equitable duties such as fiduciary duties.
- 2.2 Claims against the following professional practitioners are **excluded** from the List:
- Medical and health practitioners (which may be managed in the general list);
 - Building, construction and engineering practitioners (which may be managed in the TEC List);
 - Taxation professionals or professionals sued in relation to taxation matters (which may be managed in the Taxation List).
- 2.3 Further, the List is not appropriate for:
- Professional disciplinary and regulatory matters; and
 - Professional costs disputes which do not also include an eligible professional liability claim.
- 2.4 Examples of the types of matters which are appropriate for the List are claims for breach of professional duty against:
- Legal practitioners;

- Financial advisers (including accountants, financial planners and finance brokers);
- Stockbrokers;
- Liquidators and other insolvency practitioners;
- Insurance brokers/agents;
- Real estate agents and conveyancers; and
- Valuers.

Relationship between the List and the Commercial Court

- 2.5 An eligible professional liability claim which may appropriately be filed in the Commercial Court or the List may be initiated in either at the election of the parties.
- 2.6 A proceeding which is already being managed in the Commercial Court should remain there and only be transferred into the List, if considered appropriate, by the process set out in paragraphs 3.2 and 3.4 below.
- 2.7 In the case of doubt, parties are advised to address any queries to the Commercial Court Registrar.

3. PROCEDURE FOR ENTRY INTO THE LIST

- 3.1 Proceedings may be entered into the List:
- a) on the Court's own motion;
 - b) at the election of a party initiating a proceeding eligible for entry into the List;
 - c) on application by any party to a proceeding already initiated or existing in the general list or another specialist list within the Court;
- or

- d) upon transfer from another court pursuant to the provisions of the *Courts (Case Transfer) Act 1991 (Vic)* or cross vesting legislation.
- 3.2 Where a proceeding exists in another specialist list or in the general list but, by virtue of an amended claim, counter-claim or third party claim, an eligible professional liability claim is introduced in the proceeding, the proceeding may be transferred into the List either by application by any party to the proceeding or on the Court's own motion.
- 3.3 Further, on the Court's own motion, or on the application of any party, a proceeding may be removed from the List if for any reason a proceeding would be more appropriately managed and tried in another list.
- 3.4 A party may make an application for entry to the List by summons seeking entry and directions. The summons should be made returnable before the List Judge unless the proceeding is already before a judge of the Trial Division in which case, subject to other directions by that judge, a summons should be made returnable before that judge in the first instance.
- 3.5 Once a proceeding is entered in the List, all Court documents should be endorsed in the top left-hand corner, under the name of the Common Law Division, with the words 'Professional Liability List'.
- 3.6 In the case of doubt, practitioners initiating proceedings are advised to commence the proceeding in the Common Law Division and to apply for entry into the List at an early opportunity.

4. FIRST DIRECTIONS HEARINGS

- 4.1 The List Judge will give directions for the management of a proceeding

in the List at a first directions hearing. Within 14 days of the filing of the defence the Court will forward notices as to the date and time of the first directions hearing.

- 4.2 Consent orders will not normally be made on the papers at the first directions hearing. However, practitioners are encouraged to discuss proposed orders with each other prior to the first directions hearing and to prepare draft minutes of proposed orders in advance of the hearing.
- 4.3 Any agreed proposed orders must be in Word format and may be emailed to the Associate to the List Judge by 2.30pm the day prior to the first directions hearing.
- 4.4 Each party should be ready, if requested by the Court, to explain by brief oral outline the nature of the dispute and the substantial questions in controversy, and to assist the Court to determine the course to be followed in order to achieve just and efficient resolution of the dispute.
- 4.5 The Court expects that a party's representative will be properly briefed and familiar with the proceeding, in order to deal fully with all issues that might arise at the hearing. This expectation applies equally to unrepresented litigants. If counsel have been retained to appear in the trial of the proceeding by the time of the first direction hearing, parties are strongly encouraged to brief such counsel to appear at the directions hearing. The Court also expects all parties to cooperate with one another to achieve the just and efficient resolution of the dispute in accordance with the provisions of the *Civil Procedure Act 2010* (Vic).

Matters for consideration at first directions hearing

- 4.6 At the first directions hearing parties are expected to have considered:

- a) the nature of the claim, and the key legal and factual issues which may arise;
- b) whether the parties have given each other sufficient information to enable the other to understand the principal questions in issue;
- c) their compliance with s 26 of the *Civil Procedure Act 2010*;
- d) the likely duration and the mode of the trial;
- e) the utility of early mediation or other form of alternative dispute resolution;
- f) joinder of any further parties and/or claims between parties;
- g) whether apportionment is sought against any party or other person;
- h) the filing and service of any further pleadings;
- i) the provision of proper particulars;
- j) the scope of discovery, service of lists of documents, and the provision of copy documents;
- k) whether expert evidence is appropriate for the resolution of the issues in dispute and, if so, the nature and scope of any likely expert evidence;
- l) whether any, and if so, what experts have been or are expected to be retained for the purposes of the proceedings and whether a common expert might be jointly retained;
- m) the timing for the filing and service of any evidence, affidavits or witness statements; and
- n) whether an order should be made for the separate trial of any question.

5. MANAGEMENT OF PROCEEDINGS FOLLOWING FIRST DIRECTIONS HEARING

5.1 The List Associate Judge and the other Associate Judges of the

Common Law Division may assist the List Judge in the management of cases in the List. The List Judge may refer the management of a matter arising in the proceeding to the List Associate Judge or another Associate Judge. Parties to a List proceeding are expected to assist the Court by identifying matters suitable to be determined by the List Associate Judge.

5.2 The following matters ordinarily should be determined by an Associate Judge unless the List Judge orders otherwise:

- a) discovery disputes;
- b) disputes concerning the giving or adequacy of pleadings and particulars;
- c) applications for security for costs;
- d) the joinder of any parties;
- e) applications for strike out of proceedings or for summary judgment; and
- f) disputes concerning subpoenas.

Mediation

5.3 All proceedings will be referred to mediation unless there is a good reason to the contrary.

Applications to join Third Parties or Other Parties

5.4 An application for leave to join a third party or another party should be brought by summons supported by an affidavit setting out the basis for the joinder and including a proposed statement of claim against the party to be joined.

5.5 Parties should make any application for joinder at the earliest opportunity. The Court will take into account any unnecessary delay on the part of a party in making any application for joinder when

exercising its discretion as to whether to allow the application, and in determining the question of costs.

- 5.6 The summons and supporting affidavit must be filed and served on all existing parties and the proposed third party or other party within sufficient time to permit the third party or other party to file a notice of appearance and otherwise to determine whether to appear on the hearing of the application, and to enable the party, if joined, to seek or to be subject to directions.

Further directions hearings

- 5.7 Without limiting the directions that may be given, the List Judge may give directions from time to time which further the purpose of the List including:
- a) fixing a time after which no further party may be joined;
 - b) directions for mediation or other form of appropriate alternative dispute resolution;
 - c) directions for the preparation of the proceeding for trial;
 - d) that the issues in dispute be reduced to a statement of issues to assist the process of clarifying the real questions for resolution;
 - e) directions with respect to the preparation of any expert reports and the manner in which evidence will be given by experts including directions under r 44.06 of the Rules;
 - f) that certain questions be heard and determined in a preliminary way;
 - g) that the evidence and submissions of the parties upon a particular question be heard in a preliminary way;
 - h) that the evidence of all parties upon a particular question be given before the evidence upon other questions;
 - i) that the parties provide an estimate of the likely duration of the trial and a timetable for the conduct of the trial; and

j) directions for the conduct of the trial.

5.8 Directions hearings will be held on the third Friday of each month at 9.30am in accordance with the directions hearing schedule published on the List webpage, or at such other time as may be necessary. The dates and times of the directions hearings will be published in the Court's daily list.

Final Directions Hearing

5.9 Shortly before the date fixed for the commencement of the trial, the List Judge may convene a final directions hearing. At the final directions hearing the parties should be represented by a legal practitioner able to deal with the following matters:

- a) whether the matter is ready to proceed to trial on the proposed commencement date;
- b) whether any applicable timetable is still appropriate;
- c) whether the estimates previously provided with respect to the length of the trial remain accurate; and
- d) whether a mediation or a further mediation would be likely to achieve a settlement of some or all of the questions in issue.

Orders and liberty to apply

5.10 Practitioners should prepare draft orders for all hearings in the List where orders are sought. Liberty to apply will be implied in all orders. The parties are encouraged to communicate with the Associate to the List Judge as soon as it becomes clear that there are any difficulties with compliance with orders so that a further directions hearing can be scheduled and such other action taken as the List Judge may decide.

5.11 The Court will authenticate orders on the papers where appropriate, however, notwithstanding that the parties may have agreed to and

submitted proposed consent orders, the Court may decide not to make the proposed consent orders and may require the attendance of practitioners at a hearing. The Associate to the List Judge will notify the parties if they are required to attend a hearing following the submission of signed minutes of consent orders. The Court will seek to keep the number of directions hearings to a minimum in order to avoid unnecessary costs.

6. COMMUNICATIONS WITH THE COURT

- 6.1 Communications with the Court should be by email and must be copied to all other parties to the proceeding. Communications should be directed to the Associate to the List Judge or List Associate Judge managing the proceeding.
- 6.2 Contact details for the Associates to the List Judge and the List Associate Judge can be found on the List webpage of the Supreme Court website: www.supremecourt.vic.gov.au. The List webpage itself may be found by navigating from the Court homepage to *Lists and Sittings*, then to *Specialist Lists*, and then to *Professional Liability List*.

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