



# Supreme Court of Victoria

## Practice Note SC CA 3

### Civil applications

#### 1. INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note.
- 1.2 The purpose of this Practice Note is to set out the practice to be followed in the Court of Appeal in civil applications (including applications for leave to appeal or to cross-appeal, appeals and cross-appeals as of right, and other applications and notices permitted under the Rules.)
- 1.3 The objectives of this Practice Note are to ensure that applications proceed expeditiously and efficiently, that matters of fact and law in issue are clearly identified and properly ventilated, and that appeal grounds are drawn and argued by reference to what took place at trial.

#### 2. COMMENCEMENT

- 2.1 This Practice Note was issued on 30 January 2017 and applies to all civil applications commenced on or after that date.
- 2.2 This Practice Note replaces Practice Direction No. 7 of 2014, which is hereby revoked.

#### 3. DEFINITIONS

- 3.1 In this Practice Note, unless the context otherwise requires:

*applicant* includes:

- (a) an applicant for leave to appeal;
- (b) a cross-applicant for leave to appeal;
- (c) an appellant; and
- (d) a cross-appellant.

*application* includes:

- (a) an application, or cross-application, for leave to appeal; and

(b) a notice of appeal or cross-appeal.

*application book* includes an appeal book.

*Court* includes the Registrar of the Court of Appeal.

*CPA* means the *Civil Procedure Act 2010 (Vic)*.

*Respondent* includes cross-respondent and cross-appellant.

*Responsible party* means:

(a) generally, the applicant; or

(b) if the applicant is unrepresented, the respondent; or

(c) if the applicant and respondent are both unrepresented, the unrepresented applicant.

*Rule* or *Rules* means the *Supreme Court (General Civil Procedure) Rules 2015*.

#### **4. COMPLIANCE WITH AND GENERAL REQUIREMENTS OF THIS PRACTICE NOTE**

4.1 All parties to civil applications must comply with this Practice Note.

4.2 The Registrar may refuse to accept for filing any document which fails to comply with this Practice Note.<sup>1</sup> Non-compliance may lead to an adjournment and/or costs consequences. It may also result in the dismissal of the application for want of prosecution.<sup>2</sup>

4.3 The Court may, on the request of a party, vary or waive the requirement of this Practice Note and any time limit fixed by the Rules or the Practice Note.<sup>3</sup>

4.4 A document that is required to be filed must be:

a) in 1.5 line spacing;

b) in legible and easily read type;<sup>4</sup> and

c) with 3 cm margins.

4.5 It is the applicant's lawyer's responsibility to ensure that only relevant documents are copied. Where the Rules or this Practice Note require a

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<sup>1</sup> Rule 64.43

<sup>2</sup> Rule 64.46

<sup>3</sup> See Rules 64.05, 64.07, 64.35 and 64.47

<sup>4</sup> Some acceptable fonts include Times New Roman, Book Antiqua, Garamond, Arial, and Calibri (in 12 point type, and no less than 10 point type in footnotes).

party to prepare a document or collection of documents,<sup>5</sup> the costs of unnecessary photocopying may not be considered to be costs of compliance.<sup>6</sup>

## 5. FILING AND SERVICE REQUIREMENTS

- 5.1 All documents required to be filed must be filed electronically, in Word and searchable PDF formats, with the Court of Appeal Registry at [coaregistry@supcourt.vic.gov.au](mailto:coaregistry@supcourt.vic.gov.au). When documents are filed electronically, it is not necessary to file a hard-copy. If a document cannot be filed electronically, the party must file three hard-copies at the Registry.
- 5.2 Applications will not be accepted for filing unless they are accompanied by the applicable fee. Where a party requires a fee waiver, a fee waiver application must be provided at the time of filing of the application.
- 5.3 Where an applicant files an application within the 28 day period referred to in section 6.1, the Registrar may allow a short extension of time within which the applicant can correct deficiencies.<sup>7</sup>
- 5.4 At the time of filing an application, the applicant must notify the Registrar of the following:
- a) any urgency attaching to the application;
  - b) the complexity of the matter;
  - c) whether more than one day is likely to be required for the hearing; and
  - d) any related proceeding that should be taken into account in the management of the application.
- 5.5 At the time of filing a written case in response or notice in response under section 9 or notice of opposition under section 13.5(a)(i), the respondent must:
- a) notify the Registrar whether the respondent agrees with the applicant's assessment of matters under section 5.4; and

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<sup>5</sup> For example, the Combined Folder of Authorities.

<sup>6</sup> Rule 64.23.

<sup>7</sup> Rule 64.05(1)(b).

- b) notify the applicant (and the Court, if so directed)<sup>8</sup> of any proposed changes to the draft Summary served with the applicant's written case (see also section 12 below).
- 5.6 Once the Registrar has accepted the filed documents, the party serving documents must:
- a) within five days after filing, serve the documents; and
  - b) within seven days after service, file a List of Served Parties in accordance with Form 64C.

## **6. APPLICATION FOR LEAVE TO APPEAL OR NOTICE OF APPEAL**

- 6.1 An application must be filed within 28 days after the date of the decision that is sought to be appealed.
- 6.2 An application must be in accordance with Form 64A.<sup>9</sup>
- 6.3 An application must state specifically and concisely the proposed grounds of appeal, and a statement of the reasons why leave should be granted and if an oral hearing is requested.
- 6.4 In addition to any other information required by Rule 64.04, an application must be accompanied by:
- a) a written case<sup>10</sup> that complies with section 9 of this Practice Note, and the Registrar's Note on the Preparation of a Written Case (2017);
  - b) a list of authorities with pinpoint references (to be attached to the written case);
  - c) a copy of the authenticated order sought to be appealed;
  - d) a copy of any written reasons of the court or tribunal in respect of which the application is brought;
  - e) a draft application book index; and
  - f) a draft Summary for the Court of Appeal that complies with section 12 of this Practice Note.

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<sup>8</sup> The expectation is that the parties will be able to agree on a Summary for the Court of Appeal, so it is not necessary for the Court to receive proposed changes. If parties cannot agree to the Summary, see section 12.10.

<sup>9</sup> Rule 64.02(1)(a).

<sup>10</sup> Rule 64.03(1)(b)

- 6.5 Within 28 days after service of an application, a respondent must:
- a) if the application is opposed, file a written case in response;
  - b) if the application is not opposed, file a notice of intention not to respond or contest (in accordance with Form 64E).<sup>11</sup>
- 7. CROSS-APPLICATIONS FOR LEAVE TO APPEAL, CROSS-APPEALS, AND NOTICES OF CONTENTION**
- 7.1 In this section:  
*cross-application* includes a cross-appeal.
- 7.2 The requirements of section 6 apply also to cross-applications and notices of contention.
- 7.3 A respondent may file and serve a cross-application or a notice of contention within 28 days after service of an application.<sup>12</sup>
- 7.4 A cross-application must be in accordance with Form 64A<sup>13</sup> and a notice of contention must be in accordance with Form 64G.<sup>14</sup>
- 7.5 A cross-application or notice of contention must state specifically and concisely the proposed grounds of cross-appeal or the grounds of contention (as the case requires).
- 7.6 A cross-application or notice of contention must be filed with a written case that complies with section 9 of this Practice Note.
- 7.7 A cross-application or notice of contention does not need to be filed with any of the documents outlined at section 6.4(c) to (f) as the applicant should have already filed them.
- 7.8 A respondent to a cross-application ('a cross-respondent') must, within 28 days of service:
- a) if the cross-respondent intends to oppose the cross-application, file and serve a written case in response that complies with section 9 of this Practice Note; or
  - b) if the cross-respondent does not intend to respond to or contest the cross-application, file and serve a notice in accordance with Form

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<sup>11</sup> Rule 64.11(1)(b).

<sup>12</sup> Rules 64.30–64.32.

<sup>13</sup> Rule 64.30.

<sup>14</sup> Rule 64.32(1)(b).

## 8. APPLICATIONS FOR EXTENSION OF TIME FOR FILING OR SERVICE OF APPLICATIONS FOR LEAVE AND APPEALS

8.1 In this section, *EOT application* means an application for extension of time to file or serve an application.

8.2 An EOT application must be in accordance with Form 64B.

8.3 An EOT application must be filed at the same time as the application for leave to appeal or notice of appeal, accompanied with:

- a) an affidavit in support<sup>16</sup> that:
  - i) sets out the reasons for not filing or serving within time; and
  - ii) contains any relevant documents that support the extension of time application;
- b) written submissions that do not exceed five pages.

8.4 The extension of time application will not be accepted for filing without all required documents.<sup>17</sup> The Court will provide notice if any additional documents are required to determine the extension of time application.

8.5 Within 14 days of service of the EOT application, any party upon whom it is served must file:

- a) if the application is opposed:
  - i) a notice of opposition (in accordance with Form 64D);
  - ii) an affidavit in support that states briefly but specifically the reasons for the objection to an extension; and
  - iii) written submissions that do not exceed five pages; or
- b) if the application is not opposed, a notice of intention not to respond or contest (in accordance with Form 64E).

8.6 Ordinarily, an EOT application will be determined by the Registrar without an oral hearing. If the Registrar refuses such an application, the applicant may apply to the Court for reconsideration of that determination.<sup>18</sup>

## 9. WRITTEN CASES

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<sup>15</sup> Rules 64.31(4), 64.11.

<sup>16</sup> Rule 64.08(2)(b), (4)

<sup>17</sup> Rules 64.08(3), 64.43.

<sup>18</sup> Rule 64.42(7) and (8).

- 9.1 In this section,  
*written case* includes:
- (a) a written case in response; and
  - (b) a notice in response.
- 9.2 All written cases must comply with this section of the Practice Note and the Registrar’s Note on the Preparation of a Written Case (2017).<sup>19</sup>
- 9.3 A written case must:
- a) set out specifically and concisely the submissions which are relied on:
    - i) in the case of an applicant, to support each ground or proposed ground of appeal;
    - ii) in the case of a respondent, to oppose the ground(s) or proposed ground(s) of appeal;
  - b) not exceed ten pages, or five pages in respect of a notice of contention; and
  - c) contain a list of authorities; and
  - d) in the case of a written case in response, set out in an attached document the respondent’s position on the draft application book index.

To avoid doubt, the page limit specified at section 9.3(b) does not include the list of authorities or the respondent’s position on the draft application book index.

## **10. AMENDMENT OF APPLICATION FOR LEAVE TO APPEAL, NOTICE OF APPEAL, OR WRITTEN CASE**

- 10.1 An application or written case may only be amended in accordance with Rule 64.12 and this section. It is expected that the application and written case will be prepared carefully so that amendment of the grounds of appeal or revision of the written case will rarely need to be sought.
- 10.2 Amendment will be permitted if it is necessary to enable modification of, substitution of, deletion of or addition to, the original grounds.
- 10.3 The application and the written case may be amended with the leave of

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<sup>19</sup> Rule 64.24.

the Court at any time before the decision is made as to whether or not there will be an oral hearing (“the decision date”).<sup>20</sup> Ordinarily, an application to amend made after the contents of the application book have been settled under section 14 will be referred to the Court to determine.

- 10.4 After the decision date, the application and written case may not be amended except by leave of a Judge.<sup>21</sup>
- 10.5 Wherever possible, parties should confer to see if agreement can be reached about proposed amendments. If agreement is reached, the applicant should provide consent orders for the Court’s consideration. However, consent of the parties is not determinative of whether the application to amend will be allowed.
- 10.6 If an amendment is permitted, the amended document must be filed and served in accordance with the leave granted.
- 10.7 If leave to amend is granted, the party must file:
- a) an amended document which:
    - i) is a fresh document;
    - ii) includes ‘Amended’ in the title;<sup>22</sup>
    - iii) is marked up<sup>23</sup> to show clearly the changes made; and
    - iv) in the case of an amended written case, so far as is practicable, complies with section 9 of this Practice Note and the Registrar’s Note on the Preparation of a Written Case (2017);<sup>24</sup> and
  - b) a separate copy containing the amendments without any mark-ups.
- 10.8 Where an amended document is served on a respondent pursuant to section 10.6, the respondent must, within 28 days after service:
- a) file an amended written case in response that complies with

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<sup>20</sup> Rule 64.12(1).

<sup>21</sup> Rule 64.12(2).

<sup>22</sup> For example, ‘Amended Application for Leave to Appeal’ or ‘Amended Written Case’.

<sup>23</sup> Additions must be underlined (example), and deletions must be struck through (~~example~~).

<sup>24</sup> Rule 64.24.



section 10.7;

- b) in the alternative, file a notice of intention not to respond or contest (in accordance with Form 64E).

## **11. LISTS OF AUTHORITIES**

- 11.1 *Authority* includes extrinsic material pursuant to s 15AB of the *Acts Interpretation Act 1901* (Cth) or s 35 of the *Interpretation of Legislation Act 1984* (Vic).
- 11.2 The list of authorities is to comprise of the three following parts:
  - a) Part A (authorities and legislation from which counsel intends to read); and
  - b) Part B (authorities and legislation to which counsel intends to refer, but from which not read); and
  - c) Part C (textbook and articles which may be of substantial assistance to the Court).
- 11.3 Where a party does not intend to rely on material under a particular part, the party should indicate this by writing 'None' under the respective heading.
- 11.4 Referencing authorities must be in compliance with the *Australian Guide to Legal Citation Edition 3*.

## **12. SUMMARY FOR THE COURT OF APPEAL**

- 12.1 The applicant must prepare a draft Summary which must:
  - a) contain a 'Summary of facts' and a 'Summary of the proceedings and issues';
  - b) not exceed ten pages; and
  - c) not rehearse submissions in the written cases.
- 12.2 The two principal purposes of the Summary are:
  - 1) to assist the Court in its preparation for, and consideration of, the application, so that the Court may quickly understand the issues; and
  - 2) to form the basis of the introductory statement of facts contained in the Court of Appeal's reasons for judgment.
- 12.3 Particular attention should be given to ensuring that the Summary is accurate in all respects, especially in identifying the issues. It is

expected that counsel engaged on the application will be briefed to settle the Summary.

12.4 The 'Summary of facts' component must:

- a) describe, in chronological order, the facts that form the background to the proceeding;
- b) be sufficient to inform the Court of the facts that give rise to the application;
- c) state all of the facts that are material to the issues for determination;
- d) state the facts in a neutral rather than a tendentious manner.

12.5 The 'Summary of proceedings and issues' component must:

- a) briefly describe the nature of the proceeding;
- b) identify each party to the proceeding below, by name and by description below;<sup>25</sup>
- c) set out the chronology relating to the proceeding below;
- d) briefly state the major issues dealt with, and their disposition, in the proceeding below;
- e) briefly state the issues to be raised on the application;
- f) note any relevant interlocutory order of which the Court should be aware.<sup>26</sup> General timetabling orders or directions should not be included.

12.6 Where appropriate, the Summary should include references to conflicting evidence given below and should state the finding which was made on that evidence. The summary of evidence need not follow the order in which evidence was given at the trial.

12.7 Where a respondent notifies an applicant of any proposed changes, the parties must agree on any changes to the Summary. The Court expects the parties to work co-operatively having regard to the overarching obligations of the CPA.<sup>27</sup>

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<sup>25</sup> For example, as plaintiff, defendant and so on.

<sup>26</sup> For example, a stay order pending the determination of the application, any suppression orders, and any security of costs orders.

<sup>27</sup> *Civil Procedure Act 2010*, Chapter 2; see also *Spotlight Pty Ltd v NCON Australia Ltd* [2012] VSCA 232 [3].

- 12.8 The parties must not file separate Summaries.
- 12.9 The agreed Summary must be filed and served within ten days of the applicant receiving the respondent's proposed changes.
- 12.10 If the parties cannot agree on the content of the Summary within ten days of the applicant receiving the respondent's proposed changes, the applicant must:
- a) notify the Registrar that agreement could not be reached (by email at [coaregistry@supcourt.vic.gov.au](mailto:coaregistry@supcourt.vic.gov.au), copied to each other party); and
  - b) file with the Registrar the most recent draft of the Summary, marking up the disputed paragraph(s) and setting out each party's position on each disputed paragraph.
- 12.11 If the agreed Summary is filed prior to the settling of the application book, within 14 days of being notified by the Registrar of the settling of the contents of the application book, the parties may file and serve their written cases amended solely to replace existing references to documents or transcript with references to the application book pages.
- 12.12 Three examples of Summaries for the Court of Appeal are set out in Annexure A to this Practice Note.

### 13. APPLICATIONS OTHER THAN FOR LEAVE TO APPEAL

- 13.1 In this section, *application* means any application other than:<sup>28</sup>
- an application for leave to appeal or notice of appeal (see section 6);
  - an EOT application (see section 8); or
  - an application to set aside or vary the dismissal of an application (see section 20).
- 13.2 An application must be in accordance with Form 64B.<sup>29</sup>
- 13.3 An application must be filed with:
- a) an affidavit in support<sup>30</sup> that complies with section 13.6;

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<sup>28</sup> Such applications may include an application for stay of orders, for security for costs, or to adduce further evidence

<sup>29</sup> Rule 64.03(3).

<sup>30</sup> 64.03(3)(b)

- b) submissions that do not exceed five pages;
  - c) a list of authorities with pinpoint references; and
  - d) an application book index.
- 13.4 The application, affidavit and submissions must be served on the respondent as soon as practicable after they are accepted for filing but not later than five days after that time.<sup>31</sup>
- 13.5 Within 14 days of service of the application, any party upon whom an application is served must file:
- a) if the application is opposed:
    - i) a notice of opposition (in accordance with Form 64D)<sup>32</sup> that states briefly but specifically the reasons for the opposition;
    - ii) any affidavit in support together with the party's submissions that do not exceed five pages;
    - iii) a list of authorities with pinpoint references; and
    - iv) if amendments are sought to the applicant's application book index, a marked-up copy of the applicant's index showing the amendments sought; or
  - b) if the application is not opposed, a notice of intention not to respond or contest (in accordance with Form 64E).<sup>33</sup>
- 13.6 An affidavit in support under sections 13.3(a) and 13.5(a)(ii) may have only one exhibit attached. The exhibit must:
- a) comprise all the documents to which reference is made;
  - b) set out the documents in chronological order;
  - c) be paginated numbered sequentially from 1 onwards in a clear and legible manner.
- 13.7 If the exhibit to an affidavit in support under section 13.3(a) (the 'applicant's affidavit') contains a particular document, that document must not be duplicated in the exhibit to a responding affidavit in support under section 13.5(a)(ii) (the 'respondent's affidavit'). Instead, the document must be referred to in the respondent's affidavit by reference

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<sup>31</sup> Rule 64.07(a)

<sup>32</sup> Rule 64.11(4).

<sup>33</sup> Rule 64.11(5).

to the page number(s) of the exhibit to the applicant's affidavit where the document is found.

- 13.8 In respect of an application for a stay pending determination of an application for leave to appeal, ordinarily the stay application will not be considered before the application for leave to appeal and any accompanying required documents have been filed and served in accordance with the Rules and this Practice Note.

#### **14. APPLICATION BOOKS**

- 14.1 Upon the filing of the written case in response, the Registrar will settle the contents of the application book index and notify the parties.
- 14.2 When settling the application book index, the Registrar may give such directions as the Registrar considers appropriate, such as requiring a party to provide further documents.<sup>34</sup>
- 14.3 Application books must be prepared and filed in accordance with this section, the Registrar's Note on the Preparation of Application Books (2017)<sup>35</sup> and any other directions made under Rule 64.25.
- 14.4 Within 28 days after the Registrar has settled the contents of the application book and notified the parties, the responsible party must prepare and submit to the Registrar one copy of the application book for checking. The Registrar will then approve or require corrections to the application book.
- 14.5 Within 14 days after being notified of the Registrar's approval or required corrections, the responsible party must file three copies of the application book as so corrected (or two copies of the book if no corrections are required), and serve a copy on every other party.
- 14.6 The responsible party must provide, either personally or through their lawyer, a written certification that the copies of the book have been served on every other party and any other directions of the Registrar have been complied with.
- 14.7 An application will be taken to be abandoned if the applicant does not deliver to the Registrar an application book as required.

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<sup>34</sup> Rule 64.22.

<sup>35</sup> Rule 64.24.

## 15. COMBINED FOLDER OF AUTHORITIES

- 15.1 The responsible party must prepare and file three copies of a Combined Folder of Authorities and serve a copy on each other party as directed by the Registrar.
- 15.2 The Combined Folder of Authorities will comprise copies of all authorities in Part A of each party's list of authorities,<sup>36</sup> divided into three components and labelled as follows:
- a) authorities and legislation relied upon both by the applicant and the respondent;
  - b) authorities and legislation relied upon by the applicant only; and
  - c) authorities and legislation relied upon by the respondent only.
- 15.3 All authorities must be numbered from first to last continuously as they appear in the Combined Folder of Authorities (that is, numbers must not be recommenced under each component).
- 15.4 The Court will automatically regard standard authorities on statutory interpretation and the construction of commercial contracts as being relied upon by all parties. Such authorities should not be reproduced in the combined folder. For guidance on which authorities should be regarded as standard authorities, parties are referred to the Court of Appeal section of the Supreme Court of Victoria website.
- 15.5 If so directed by the Registrar, three copies of any authorities and legislation referred to in section 15.3(c) must be served by the respondent on the applicant, with sufficient additional copies for each of the parties, to assist the applicant to prepare the Combined Folder of Authorities.
- 15.6 Copies of authorities and legislation may be enlarged in size, but should not be reduced and should be limited to one page of the authority or legislation per copied page. In many cases, it will be sufficient and preferable to copy only the headnote and relevant pages of authorities and sections of legislation, but some allowance for context should be provided.<sup>37</sup>

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<sup>36</sup> See section 12 above and Registrar's Note on the Preparation of a Written Case (2017).

<sup>37</sup> For example, as well as the substantive provisions to which counsel intends to refer, it

15.7 Where a case is reported that report must be included instead of the unreported version.<sup>38</sup> Authorised reports must be used over unauthorised reports.<sup>39</sup> A list of the most commonly cited Australian authorised report series is included in Annexure B to this Practice Note.

## 16. AGREED LIST OF TRANSCRIPT REFERENCES

16.1 At such time as is specified by the Registrar,<sup>40</sup> the applicant is to file and serve an agreed list of transcript references relied on in respect of each ground of appeal by either party. In cases where neither party relies on transcript references in their written case or submissions, the applicant is not required to file a list.

16.2 The Court requires the parties to confer and work co-operatively to agree on a complete and accurate list, bearing in mind the overarching obligations of the CPA.<sup>41</sup>

16.3 The list must be signed by both parties before filing with the Court.

16.4 An example of a List of Transcript References is set out in Annexure C to this Practice Note.

## 17. MANAGEMENT OF APPLICATIONS

17.1 This section applies to applications under sections 6, 7 and 13.

17.2 The Registrar may give such directions as the case requires.<sup>42</sup> The Court expects all parties to consider the use of technology to ensure that applications are conducted efficiently.<sup>43</sup>

17.3 Once the parties have filed the necessary documents, the Registrar will review the documents and may give directions for the determination of

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is often necessary to provide copies of the interpretation section of a statute.

<sup>38</sup> For example, if referring to *Director of Housing v Sudi* (2011) 33 VR 559, the version found in the Victorian Reports should be provided, not the unreported version of *Director of Housing v Sudi* [2011] VSCA 266.

<sup>39</sup> For example, the Western Australian Reports are to be cited rather than the Australian Corporations and Securities Reports, and the Commonwealth Law Reports and Federal Court Reports are to be cited rather than the Australian Law Reports. Parties are referred to the *Australian Guide to Legal Citation* for guidance on commonly cited Australian authorised report series.

<sup>40</sup> Rule 64.22

<sup>41</sup> *Civil Procedure Act 2010*, Chapter 2; see also *Spotlight Pty Ltd v NCON Australia Ltd* [2012] VSCA 232 [3].

<sup>42</sup> Rules 64.21, 64.42-64.44.

<sup>43</sup> See s 10 Practice Note SC Gen 5: Technology in Civil Litigation.

the application. The Registrar may refer the application to a single Judge of Appeal,<sup>44</sup> or to two or more Judges of Appeal.<sup>45</sup>

- 17.4 Where it is considered necessary, the Registrar may refer the application to the Court, prior to the filing of all the necessary documents.
- 17.5 Upon an application being referred to the Court for determination, the Court will decide whether an oral hearing is required.
- 17.6 The Registrar will notify each party of the Court's decision under section 17.5. If the application is to proceed with an oral hearing, the Registrar will also list the application for hearing when satisfied that it is ready for hearing, and give notice of the hearing date to each party.
- 17.7 Where an application is listed for hearing, the applicant, after consulting with the respondent, is to file no later than seven days before the hearing<sup>46</sup>an agreed proposed timetable for oral submissions for the hearing.
- 17.8 Subject to any contrary direction by the Court, the time for oral argument on an application will follow the parties' agreed timetable per section 17.7.<sup>47</sup>

## **18. HEARING OF APPLICATIONS AND APPEALS**

- 18.1 The aim of the Court is to dispose of applications in a timely and efficient manner, subject always to allowing sufficient time for complex cases. Accordingly, oral argument should elucidate rather than repeat the submissions in the written case.
- 18.2 Despite any agreement reached between the parties, the time for oral argument may be limited by direction of the Court.

## **19. PARTIES' POSITION ON COSTS**

- 19.1 Ordinarily, parties should be in a position to argue the question of costs

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<sup>44</sup> *Supreme Court Act 1986* s11(1C) and Rule 64.15

<sup>45</sup> A determination of the President of the Court of Appeal approving a referral to two Judges of Appeal is required before the referral can be made: *Supreme Court Act 1986* s11(1A)

<sup>46</sup> Parties must comply with the overarching obligations of the CPA. *Civil Procedure Act 2010*, Chapter 2; see also *Spotlight Pty Ltd v NCON Australia Ltd* [2012] VSCA 232 [3].

<sup>47</sup> Under rule 64.15(4) and 64.16(1)(b), if no agreement is reached, the default time for oral argument on an application is 15 minutes for the applicant and 10 minutes for any other party who appears.



immediately upon the delivery of judgment. Parties should not expect the matter will be adjourned to allow for the preparation of submissions on costs.

## **20. APPLICATION TO SET ASIDE OR VARY DISMISSAL OF APPLICATION FOR LEAVE TO APPEAL**

- 20.1 If the Court dismisses an application without an oral hearing, the applicant may apply to have the dismissal set aside or varied,<sup>48</sup> except where the Court determines that the application is totally without merit.<sup>49</sup>
- 20.2 An application to set aside or vary must be in accordance with Form 64F.
- 20.3 The application to set aside or vary will be determined by two or more Judges of Appeal<sup>50</sup> on the basis of documents filed prior to the dismissal.
- 20.4 Notwithstanding 20.3, the Court may order the parties to file additional documents.<sup>51</sup> In particular, an applicant may be ordered to file submissions setting out why there would be error if the dismissal of the application was allowed to stand. The respondent may be ordered to file a submission in response. Further material may not be relied on without leave of the Court.<sup>52</sup>
- 20.5 The Registrar will fix a hearing date for the application to set aside or vary and advise the parties.
- 20.6 The time for oral argument on the hearing of such an application will be limited to:
- a) in the case of the applicant, 15 minutes; and
  - b) in the case of each other party (if appearing), 10 minutes.

## **21. DISCONTINUANCE AND ABANDONMENT OF APPLICATIONS OR GROUNDS**

- 21.1 Counsel briefed to appear on the hearing of an application should review the grounds well in advance of any listed date and advise the Registrar promptly if any ground will not be maintained.

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<sup>48</sup> *Supreme Court Act 1986*, s14D(2)

<sup>49</sup> *Supreme Court Act 1986* s14D(3)

<sup>50</sup> Rule 64.18.

<sup>51</sup> Rule 64.18(4)(b).

<sup>52</sup> Rule 64.18(5).

- 21.2 An application may be discontinued in whole or part, by filing a Notice of Discontinuance.<sup>53</sup>
- 21.3 A Notice of Discontinuance is not effective until it is accepted by the Court. In some circumstances, the Court may order that the application not be discontinued and may make any order as to costs it thinks fit.<sup>54</sup>
- 21.4 An example of a Notice of Discontinuance is set out in Annexure D to this Practice Note.
- 21.5 A Notice of Discontinuance must be filed and served on all parties to an application on the same day.
- 21.6 Costs consequences for filing the Notice of Discontinuance will be determined by Rule 64.29, subject to the Court's order or agreement of the relevant parties.
- 21.7 An application will be taken to have been abandoned if the applicant fails to:
- a) comply with any order or direction of the Court within 30 days after the expiry of the time fixed or allowed by the order or direction; or
  - b) take a step required by Order 64 within 30 days after the expiry of the time fixed or allowed by or under Order 64 of the Rules.<sup>55</sup>
- 21.8 An application will be taken to be abandoned if the applicant fails to:
- (a) deliver to the Registrar an application book as required or directed under Rule 64.25; or
  - (b) serve copies of the application book within the time fixed or allowed by the Registrar.
- 21.9 Where an application is taken to be abandoned, the applicant shall pay each respondent's costs on an indemnity basis unless the Court otherwise orders.<sup>56</sup>
- 21.10 The Court may order at any time that an application is not taken to be abandoned. Within 28 days after the day the application is taken to be

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<sup>53</sup> Rule 64.29

<sup>54</sup> Rule 64.29(7).

<sup>55</sup> Rule 64.45.

<sup>56</sup> Rule 64.45(3).

abandoned, the Registrar may order by consent of all parties that the application is not taken to be abandoned.<sup>57</sup>

**22. CEASING TO ACT**

22.1 After an application has been filed, a solicitor may not file a notice pursuant to Rule 20.03 except by leave of the Court.

22.2 An application for leave of the Court to file a notice ceasing to act must be in accordance with Form 64B and should be accompanied by a short affidavit in support of the application.

Vivienne Macgillivray

Executive Associate to the Chief Justice

30 January 2017

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<sup>57</sup> Rule 64.45(4).

## ANNEXURE A

### Summary in a Personal Injury Case

IN THE SUPREME COURT OF VICTORIA

AT MELBOURNE

IN THE COURT OF APPEAL

File No.

BETWEEN

Applicant/Appellant

and

Respondent

### SUMMARY FOR COURT OF APPEAL

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Date of Document:

Filed on behalf of:

Party's or lawyer's name and address:

Solicitor Code:

Tel:

Fax:

Ref:

Email:

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#### A. Summary of Facts

1. On 13 April 2007, the appellant, Ms X was struck by a motor vehicle whilst crossing the road at a pedestrian crossing. She landed on the bonnet of the car and then fell to the pavement.
2. She was taken by ambulance to the Monash Medical Centre where she was admitted for one night and underwent a series of tests. The Ambulance notes recorded: "thoracic region pain dull, denies radiation." The Monash Medical Centre notes recorded: "struck on right side by motor vehicle. Fell onto bonnet of car then onto road, striking left side. Pain middle and upper back. No neurological symptoms."

3. Ms X was given intravenous morphine but no other analgesics. She was discharged the following day to the care of her General Practitioner and on his referral she also consulted a general physician, Mr Z, who ordered an MRI of her thoracic and cervical spine.

4. The MRI scan dated 16 May 2007 noted:

There is mild compression fracture through the superior aspects of the vertebral body of T2 and T3 with less than ten per cent loss of vertebral height. No traumatic disc protrusion is present. The other vertebral bodies are normal. Facet joints are congruent. Ligaments are intact. There is no epidural haematoma and the cervical cord is normal. Flow void in both vertebral arteries are present.

5. Mr Z concluded that Ms X's pain and restriction resulted from an aggravation of pre-existing degenerative changes in the cervical region and upper thoracic crush fractures.

6. The respondent, the Transport Accident Commission („TAC“) arranged for Ms X to be assessed by an orthopaedic surgeon, Ms B, who commented:

[T]he patient presents describing constant neck and upper back pain accompanied by minor signs of mild restriction of cervical movement. The extensive distribution of pain and tenderness would be in keeping with residual soft tissue injury, which has now apparently progressed to an extensive area of chronic pain. There is some suggestion the problem is influenced by psychosocial factors.

## **B. Summary of Proceedings and Issues**

7. By an originating motion filed in the County Court on 12 April 2010, Ms X sought leave pursuant to s 93(4)(d) of the *Transport Accident Act 1986* to bring proceedings at common law against the TAC for a serious injury sustained in the motor vehicle accident on 13 April 2007.

8. The application was heard by Judge Y on 15 and 16 March 2011. The principal issue before his Honour was whether Ms X had suffered a serious injury within the meaning s 93(17) of the Act. Ms X relied upon paragraph (a) of the definition which

states a ‘serious injury’ is “a serious long-term impairment or loss of a body function.”

9. His Honour found that Ms X continues to suffer pain and restrictions which are marked and significant but he could not accept that these restrictions were “very considerable” according to the test set out in *Humphries v Poljak*.<sup>3</sup> Further, he noted “the fact that after a fairly brief time Ms X has been fit and available to continue her pre-accident work also points away from her injuries being serious” [see paras [...] – [...] of his Honour’s reasons for judgment].
10. His Honour concluded that the aggravation of pre-existing degenerative changes in her spine, which occurred due to the accident, did not constitute a serious injury within the meaning of the Act. His Honour also found that the appellant suffered compression fractures to her spine in the accident, as noted by Mr Z, but that the evidence showed that five years after the accident and despite the injury, Ms X continued to lead a moderately active lifestyle and her employment was unaffected.
11. His Honour dismissed Ms X’s application for leave to bring proceedings on 6 June 2012
12. Ms X filed a Notice of Appeal on 11 October 2012 against the whole of the judgment and orders of Judge Y.<sup>4</sup> She contends that because Mr Z described her pain and restrictions as the result of an aggravation of pre-existing degenerative change in the cervical region and upper thoracic crush fractures, his Honour erred in failing to find that hers was not a serious long term impairment or loss of spinal function within the meaning of s 93(17) of the Act.
13. Ms X also asserts that the judge erred by finding that her emotional and psychological issues were not, at least in part, secondary to physical pain and restriction from the injuries.
14. She further contends that the judge failed to have regard to uncontradicted medical

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<sup>3</sup> [1992] 2 VR 129.

<sup>4</sup> The Court of Appeal granted leave to appeal to Ms X on .../.../....

evidence of her psychological response to the injuries in determining the seriousness and longevity of her spinal injury.

**Summary in a contractual case**

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
IN THE COURT OF APPEAL

File No.

BETWEEN

Applicant/Appellant

and

Respondent

**SUMMARY FOR COURT OF APPEAL**

---

Date of Document:

Filed on behalf of:

Party's or lawyer's name and address:

Solicitor Code:

Tel:

Fax:

Ref:

Email:

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**A. Summary of Facts**

1. By contract dated 10 September 2009 between Company A (as builder) and Company B (as principal/developer), Company B agreed to construct a multi-level apartment complex which consisted of 60 residential apartments, with basement car parks in Elwood Victoria („the development“).
2. The price was \$ 2 million and the Contract required that the project be completed by .../.../..... with stages 1-4 completed by ..../...../..... whilst the remaining stages be completed by .../.../.....
3. The terms of the Contract provided that Company A would proceed with due expedition and would comply with all relevant statutory requirements. It was also required to provide high standards of workmanship.



4. By .../.../.... relations between the parties were under pressure as there was some concern about the rate of the progress, but more particularly the quality of workmanship provided by Company A. These issues had been raised with Company A on numerous occasions but it was unresponsive.
5. On .../.../....Company A issued a draft progress payment for works for practical completion of.....
6. Company B refused to make the draft progress payment due to a number of alleged defects with ... and .... Accordingly, Company B deemed that Company A had breached a number of the contractual terms under clauses ....., ..... and .....
7. Company B engaged the ‘show cause’ processes set out in clauses .... and ..... of the Contract to seek Company A’s rectification. Company A did not complete any rectification works within the time prescribed under clauses ..... and .....
8. Company B then terminated the contract after Company A’s repudiation of the building contract. Company B engaged the services of Construction and Co at a cost of \$..... to complete the restoration works required on the building so as to ensure that individual occupancy permits for each of the affected apartments were issued.

**B. Summary of Proceedings and Issues**

9. Company A commenced the proceedings below by way of Writ, filed in the County Court on 20 January 2012 against Company B for monies it allegedly owed as a progress payment under the Contract.
10. Company A claimed that Company B had failed to pay it a progress payment for work it completed on the development. Company A also claimed that Company B had wrongfully terminated the building contract between the parties. It sought damages in the sum of \$..... for these claims.
11. By way of its counterclaim, Company B alleged that Company A was not entitled to receive any payment under the progress claim because it had committed numerous substantial breaches of the contract, including defective workmanship. In support of its claims Company B alleged that Company A had contravened its statutory duties in

the *Building Act 1993*, the *Building Regulations 1994* and the *Building Code of Australia* together with other relevant regulatory requirements. Company B claimed that it validly terminated and repudiated the contract after Company A had failed to remediate its defective building works. Company B also sought monies for the restoration work it undertook to rectify the building works.

12. The trial of the County Court proceedings lasted 7 days before Judge T who delivered her judgement on 30 November 2012. Her Honour dismissed Company A's claims but upheld Company B's counterclaim in the sum of \$.....,..... Authenticated orders were made on 2 December 2012 .
13. The major matters dealt with at the County Court were as follows:
  - (a) Whether the builder's (Company A) works were defective, and if so whether these breaches constituted a substantial breach entitling the principal/developer (Company B) to serve defect notices under the building contract.
  - (b) Whether Company B acted reasonably in terminating the contract.
14. Her Honour examined the terms of the Contract and determined that it required the building works to be fully complete by .../.../....., with stages 1-4 completed by ..../.../... whilst the remaining stages were to be completed by .../.../.... (see paragraphs [...]-[.....] of the her Honour's reasons for judgment).
15. Pursuant to clause .... of the Contract, Company A was required to ensure that its work was compliant with all of the contract specifications and met all relevant statutory requirements under the Act, Regulations and Code (see paragraphs [.....]-[.....] of the her Honour's reasons for judgment).
16. Provisions ..... and .... of the Contract dealt with the procedures that Company B was obliged to undertake if it was not satisfied with the building quality or disputed the items claimed in a progress payment. These provisions required it to issue a defects

lists together with a ‘show cause’ notice which required Company A to rectify the specified substantial defects in ..... days and to show cause in writing why the Contract should not be terminated by Company B under clause .... (see paragraphs [.....]-[...] of the her Honour’s reasons for judgment).

17. Her Honour held that Company A had followed the correct procedures when seeking progress payments for stages ..... and .... (see paras [...] – [...] of her Honour’s reasons for judgment). She further found that if the building works met all of the contract and statutory specifications, then Company A would be entitled to the progress payment.
18. In relation to the issue of defective workmanship, which was alleged to constitute a substantial contractual breach, Company B pleaded that the structural framework and plumbing works were unsatisfactory and the fire ratings for each of the apartments were not in accordance with ss... of the Act, rr .., ... and of the Regulations and industry codes and standards. It further contended this threatened the issuance of occupancy permits for a number of apartments in the building. Company A denied these claims and contended the works were reasonable and in accordance with the Contract specifications.
19. Each company relied extensively on expert evidence. Company B relied on the expert evidence provided by Mr Expert (a building consultant and structural engineer) who opined that the structural frameworks were defective because ..... (see AB .....). Company B also relied upon the evidence provided by Mr Expert II (a fire services engineer) who stated that Company A had used inadequate fire rated plasterboards in the stairwells and apartments ....., ....., and ..... and this was contrary to the specifications in the Code (see AB.....).
20. Conversely, Ms Expert (a building consultant) engaged by Company A opined that framework and plumbing works were in accordance with the contract specifications and the works were of a reasonable standard as they .....(see AB.....). Ms Expert also stated that a number of the defects provided by Company B in its defects lists and „show cause“ notice were inadequately identified which made rectification by Company A impossible.

21. Her Honour preferred the evidence provided by Mr Expert and Mr Expert II on behalf of Company B because ..... (see paras [...] – [...] of the reasons for judgment). Her Honour determined that there were defective workmanship issues in relation to the plasterboards, structural and plumbing works and these works failed to meet the standards required by Act, Regulations and Code as they ..... (see paras [...] – [...] of her Honour’s reasons for judgment).
22. Her Honour determined that these failings constituted a substantial breach of the Contract by Company A and so it was not entitled to a progress payment under cl... (see paras [...] – [...] of her Honour’s reasons for judgment). Her Honour also found this substantial breach warranted Company B’s issuance of a ‘show cause’ notice on Company A.
23. Her Honour relied on the decision of *ABC v XYZ* [2000] VSC ... which held that defects in a defects list only need to be identified with some level of particularity rather than absolute precision. Accordingly, her Honour dismissed Company A’s claim that the ‘show cause’ notice (that listed defects) was confusing, inadequate and caused it prejudice.
24. Her Honour observed that Company A had not rectified a number of defects within the prescribed time allowed by cl ... of the Contract. Her Honour also determined that Company B had acted reasonably in assessing Company A’s show cause responses and acted properly when it terminated the contract. Her Honour lastly found that Company B’s costs for the restoration works it undertook to rectify the building works were reasonable and necessary in the circumstances to enable occupancy permits to be issued for the apartments (see paras [...] – [...] of her Honour’s reasons for judgment). Company B’s counterclaim was upheld.
25. Company A filed a Notice of Appeal on 21 March 2012 against orders 1 and 2 made on ..... which are as follows:
  1. Company A’s claims against Company B were dismissed; and
  2. Judgment on the counterclaim is made in favour of Company B in the sum of \$.....

26. Company A claims that her Honour erred in dismissing its claims against Company B as this was against the evidence which disclosed that the building works were reasonable and not in breach of the Contract because .....
  
27. Company A further claimed that her Honour erred by not considering the expert evidence provided by Ms Expert who testified that the works were not defective because .....

**Summary in a judicial review**

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
IN THE COURT OF APPEAL

File No.

BETWEEN

Applicant/Appellant

and

Respondent

**SUMMARY FOR COURT OF APPEAL**

---

Date of Document:

Filed on behalf of:

Party's or lawyer's name and address:

Solicitor Code:

Tel:

Fax:

Ref:

Email:

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**A. Summary of Facts**

1. Mr L was compelled to attend and give evidence in a compulsory examination under s 56A of the *Magistrates' Court Act 1989* (Vic) ('the Act') in the committal proceeding against Mr A who was accused of unlawfully assaulting Mr C on ..../..../.....
2. Mr L was compelled to give evidence because he witnessed all or part of the assault on Mr C. Mr L was also a close friend of Mr A and there had been some communications between them regarding the assault on Mr C.
3. On ../.../... Mr L was sworn to give evidence. Mr L repeatedly refused to give evidence in relation to the assault or communications on the basis that he feared for his safety and was concerned that that Mr A would retaliate against him.
4. Magistrate Y made a ruling that there was no sound basis for Mr L's fears of

retaliation because.....

5. Magistrate Y then summarily determined that Mr L was guilty of contempt on the basis that he failed to answer a number of questions about the assault on Mr C and a penalty of 5 days' imprisonment was imposed.<sup>1</sup>

## **B. Summary of Proceedings and Issues**

8. Mr L made an application by way of Originating Motion to the Trial Division for an order in the nature of certiorari and judicial review under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* against the decision made by Magistrate Y finding him in contempt of court and imposing a sentence of imprisonment for 5 days.
9. The basis of the application for judicial review was that Magistrate Y had committed an error of law on the face of the record,<sup>2</sup> that there was a jurisdictional error and that Mr L had been denied procedural fairness. The Magistrates' Court (as 1<sup>st</sup> defendant did not make any submissions or take an active part in the proceedings).
11. In relation to the first ground of challenge, Mr L claimed that Magistrate Y's decision was flawed because he failed to adopt the steps that were detailed in the matter of *XYZ v Magistrates' Court of Victoria* which dealt with a statutory contempt finding under the Act. In that case Mr L noted that a direction to arrest must first be made, followed by a formal charge being laid. The accused then had to be given an opportunity to plead once details of the charge had been provided.
12. His Honour Justice M determined that whilst the Magistrate had mentioned the charge he had not clearly articulated it as a separate step in the proceedings to be able to allow Mr L to have a considered opportunity to address and provide submissions to the charge (see paras [.....] – [...] in the reasons for judgment). His Honour held a process incorporating these steps needed to take place given the seriousness of the contempt charge (see paras [.....] – [...] in the reasons for judgment).

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<sup>1</sup> Section 134 of the *Magistrates' Court Act*.

<sup>2</sup> For these purposes the records constitutes the transcript of oral statements made by Magistrate Y.

13. In relation to the issue of whether the Magistrate had committed a jurisdictional error when dealing with the process of the contempt charge, his Honour referred to the decision of *Craig v South Australia*<sup>3</sup> and noted that whilst the Magistrate had the power to deal with a contempt charge he nevertheless misapprehended the limits and functions of the power by not properly articulating a separate charge and the adjourning the matter as was required by XYZ case when dealing with contempt charges under the Act. His Honour was satisfied that the process involved in the contempt charge constituted a jurisdictional error on the face of the record (see paras [.....] – [.....] in the reasons for judgment).
14. His Honour was also satisfied that the failure to articulate a separate charge and then adjourn the matter for Mr L to properly plead and make submissions constituted a breach of procedural fairness.
15. Accordingly, Justice M on .../.../.... upheld Mr L’s application for Judicial Review by quashing the contempt penalty and remitting the matter back to the Magistrates’ Court for a re-determination.
16. The Director filed a Notice of Appeal on .../.../.... from the orders made by Justice M to allow Mr L’s application for judicial review and the quashing of the contempt finding and penalty.
17. The Director claims that his Honour was in error in determining that that there was an error on the face of the record because.....
18. The Director also claims that his Honour was wrong in finding a jurisdictional error and that there was a breach of procedural fairness on the basis of the conduct of Magistrate Y because .....

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<sup>3</sup> (1995) 184 CLR 163.



## ANNEXURE B

### Commonly cited Australian authorised or preferred report series

| <b>Court/Jurisdiction</b>    | <b>Report series</b> | <b>Years</b> |
|------------------------------|----------------------|--------------|
| High Court of Australia      | CLR                  | 1903-        |
| Federal Court of Australia   | FCR                  | 1984-        |
| Australian Capital Territory | ACTR (in ALR)        | 1973-2008    |
|                              | ACTLR                | 2007-        |
| New South Wales              | SR (NSW)             | 1901-59      |
|                              | NSWR                 | 1960-70      |
|                              | NSWLR                | 1971-        |
| Northern Territory           | NTR (in ALR)         | 1979-91      |
|                              | NTLR                 | 1990-        |
| Queensland                   | St R Qd              | 1902-57      |
|                              | Qd R                 | 1958-        |
| South Australia              | SALR                 | 1899-1920    |
|                              | SASR                 | 1921-        |
| Tasmania                     | Tas LR               | 1904-40      |
|                              | Tas SR               | 1941-78      |
|                              | Tas R                | 1979-        |
| Victoria                     | VLR                  | 1875-1956    |
|                              | VR                   | 1957-        |
| Western Australia            | WALR                 | 1898-1958    |
|                              | WAR                  | 1958-        |

**ANNEXURE C**

IN THE SUPREME COURT OF VICTORIA

AT MELBOURNE

IN THE COURT OF APPEAL

File

No.

BETWEEN

Applicant/Appellant

and

Respondent

**AGREED LIST OF TRANSCRIPT REFERENCES**

| <b>Ground</b> | <b>Applicant/Appellant</b> | <b>Respondent</b> | <b>All parties</b> |
|---------------|----------------------------|-------------------|--------------------|
| 1             | 4                          | 8                 | 10-12              |
|               |                            |                   |                    |
|               |                            |                   |                    |

Date:

Signed

*[Name of the lawyer  
/self-represented party]*

Date:

Signed

*[Name of the lawyer  
/self-represented party]*

**ANNEXURE D**

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
IN THE COURT OF APPEAL

File No.

BETWEEN

Applicant/Appellant

and

Respondent

**NOTICE OF DISCONTINUANCE**

---

Date of

Document: Filed

on behalf of:

Party's or lawyer's name and

address: Solicitor Code:

Tel: Fax: Ref: Email:

Details of additional parties (if any) are attached:

\*YES/\*NO

---

TO: the Registrar

AND TO the respondent

TAKE NOTICE that the \*applicant/\*appellant \*hereby wholly discontinues this  
[\*application/\*appeal].

Date:

Signed  
*[Name of lawyer  
/self-represented party]*

\*delete if inapplicable.