



Supreme Court of Victoria

Common Law Division

Practice Note No. 5 of 2015

Professional Liability List

1. INTRODUCTION

- 1.1 This Practice Note replaces *Practice Note No. 3 of 2012*, and provides updated guidance on the operation of the Professional Liability List (*List*), a specialist case management list within the Common Law Division of the Supreme Court of Victoria (*Court*). The procedures set out in this Practice Note will apply from 1 January 2015 to relevant proceedings commenced in the Trial Division of the Court.
- 1.2 The purpose of the List is to provide for the just and efficient determination of eligible proceedings, through early identification of the substantial questions in controversy and flexible adoption of appropriate procedures.
- 1.3 The Judge in Charge of the List (*Judge in Charge*) is Justice Macaulay. His Honour is assisted by Associate Justice Daly.
- 1.4 References in this Practice Note to *Associate Judge* are to be read as references to the Associate Judge assisting in the management of the List.
- 1.5 References in this Practice Note to *Associate* are to be read as references to the Associate to the Judge in Charge.

2. PROCEEDINGS SUITABLE FOR INCLUSION IN THE LIST

2.1 Proceedings involving a claim for economic loss against a professional for breach of duty in tort or contract, related statutory contravention (e.g. misleading or deceptive conduct), or for breach of equitable duties should be initiated in the List.

2.2 Without limiting the generality of paragraph 2.1, claims for breach of duty against the following professionals are suitable for inclusion in the List:

- a) Legal practitioners;
- b) Financial advisers (including accountants, financial planners and finance brokers);
- c) Stockbrokers;
- d) Insurance brokers and agents;
- e) Real estate agents and conveyancers; and
- f) Valuers.

2.3 However, where the cause of action arose in regional Victoria, or where the majority of witnesses or parties reside in regional Victoria, proceedings of the nature set out in paragraph 2.1 should be initiated in the **Civil Circuit List** (see *Practice Note No. 1 of 2015*).

2.4 Claims against the following professionals are excluded from the List:

- a) Health practitioners (managed in the **Personal Injuries List** or **Major Torts List**);
- b) Building, construction and engineering practitioners (managed in the **Commercial Court**); and
- c) Taxation professionals (managed in the **Commercial Court**).

3. PROCEDURE FOR ENTRY INTO THE LIST

3.1 Proceedings of the nature set out in paragraph 2.1 should be initiated in the List by endorsing the heading of the originating process “Professional

Liability List”. The heading of all subsequent documents filed in the proceeding should also be endorsed “Professional Liability List”.

- 3.2 If at any time after the initiation of a proceeding it appears to the Court that it is appropriate to have the proceeding managed in the List, the proceeding may be transferred into the List on the Court’s own motion. This may occur where, by virtue of an amended claim, counter-claim or third party claim, an eligible professional liability claim is introduced into the proceeding.
- 3.3 Conversely, a proceeding initiated in the List may be transferred out of the List on the Court’s own motion if it appears to the Court that it is appropriate to have the proceeding managed in a different list.
- 3.4 No additional fees will be payable for the inclusion of a proceeding in the List.

4. FIRST DIRECTIONS HEARING

- 4.1 The Judge in Charge will give directions for the management of a proceeding in the List at a first directions hearing. The Court will generally notify the parties of the date and time of the first directions hearing within 14 days of the filing of the first defence. Directions hearings are held at 9.30am on the third Friday of each month during the Court sitting terms.
- 4.2 At the first directions hearing, the Court expects that each party's representative will be properly briefed and familiar with the proceeding, and will be able to deal fully with all issues that might arise. This expectation applies equally to self-represented 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.
- 4.3 At the first directions hearing, all 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 understand the principal questions in issue;
- c) Their compliance with section 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;
- 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 experts have been or are expected to be retained for the purposes of the proceeding, and whether a common expert might be jointly retained;
- m) The timing for the filing and service of any evidence or affidavits; and
- n) Whether an order should be made for the separate trial of any question.

4.4 In considering the matters set out in paragraph 4.3, and any other directions required to progress the matter, parties should note that:

- a) Leave is required for the filing and service of interrogatories, notwithstanding any consent minutes filed by the parties providing for them; and
- b) Generally, orders will not be made for witness statements and all witnesses will be required to give oral evidence at trial.

4.5 Consent orders will not usually be made on the papers prior to the first directions hearing.

5. MANAGEMENT OF PROCEEDINGS FOLLOWING THE FIRST DIRECTIONS HEARING

- 5.1 The Court expects all parties to cooperate with one another to achieve the just and efficient resolution of the proceeding in accordance with the *Civil Procedure Act 2010*.
- 5.2 The Judge in Charge may refer the management of a proceeding, or a specific matter arising in the course of a proceeding, to the Associate Judge.
- 5.3 The following matters will not be dealt with at a directions hearing before the Judge in Charge and should be determined by the Associate Judge (unless the Judge in Charge 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 to strike out proceedings or for summary judgment; and
 - f) Disputes concerning subpoenas.
- 5.4 Parties seeking to arrange a hearing of an application set out in paragraph 5.3 should contact the Associate to the Associate Judge in the first instance. Parties will be advised of the time and date that the summons should be made returnable.

Joinder applications

- 5.5 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.

- 5.6 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.
- 5.7 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

- 5.8 The Judge in Charge may give further directions from time to time in proceedings in 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 rule 44.06 of the *Supreme Court (General Civil Procedure) Rules 2005*;
 - 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.

Final directions hearing

- 5.9 The Associate Judge or Judge in Charge may convene a final directions hearing, to be held shortly before the date fixed for trial.
- 5.10 At a final directions hearing, each party's representative should be in a position to deal with the following matters:
- a) Whether the trial is ready to proceed 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

6. COURT ORDERS

- 6.1 The plaintiff's solicitors are encouraged to deliver proposed consent orders to all other parties in advance of all directions hearings. The parties should email minutes of consent to the Associate, in both Word and signed PDF format, by 2.30pm on the day prior to the directions hearing.
- 6.2 Liberty to apply will be implied into all orders.
- 6.3 The Court will authenticate orders on the papers where appropriate. However, notwithstanding that the parties may have submitted proposed consent orders, the Court may decide not to make the proposed orders and may require the attendance of practitioners at a hearing. Parties are required to appear at all scheduled directions hearings unless otherwise advised by the Associate.
- 6.4 Parties should notify the Associate as soon as it becomes apparent that there are difficulties in complying with orders, so that a further directions hearing can be scheduled.

7. COMMUNICATIONS WITH THE COURT

- 7.1 At all stages of the proceeding, communications with the Court should be by email with a copy to all other parties, and should be confined to uncontroversial matters. Contact details for all associates are on the Court website.

Vivienne Macgillivray
Executive Associate to the Chief Justice
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