



# Supreme Court of Victoria

## Practice Note SC CC 8

### Oppressive conduct of the affairs of a company

#### 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 describe the procedures to be followed for applications made pursuant to s 233 of the *Corporations Act* 2001 (Cth).

#### 2. COMMENCEMENT

- 2.1 This Practice Note was issued on 30 January 2017 and commences on 30 January 2017 and applies to relevant proceedings commenced in the Corporations List.

#### 3. DEFINITIONS

- 3.1 In this Practice Note:

*Act* means the *Corporations Act* 2001 (Cth)

*ASIC* means the Australian Securities and Investments Commission

*Pilot* means the pilot program referred to in paragraph 5 of this Practice Note

*Rules* means *Supreme Court (Corporations) Rules* 2013

#### 4. BACKGROUND

- 4.1 Many applications each month are issued in the Court seeking relief under s 233 of the Act where it is alleged that the affairs of a company have been conducted in an oppressive manner. Under the Rules, such applications must be commenced by originating process.<sup>1</sup> Unless the Court otherwise directs, the originating process<sup>2</sup> must be supported by an affidavit stating the facts in support of the process and must annexe an ASIC search of the company.<sup>3</sup>

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<sup>1</sup> r 2.2(1)(a) of the Rules

<sup>2</sup> r 2.4(1) of the Rules.

<sup>3</sup> r 2.4(2) of the Rules.

- 4.2 Almost all of the claims seeking relief under s 233 of the Act relate to small businesses, most commonly family businesses. Frequently, the value of the business is not substantial. Nevertheless, applications are often supported by affidavits which run to many pages and considerable detail. At the first return of the originating process, it is common for orders to be made for inspection and copying of the books of the company, for valuation of the shares in the company and for mediation.<sup>4</sup>

## **5. PILOT PROGRAM**

- 5.1 On 1 October 2014, the Court commenced operating a six month pilot programme in respect of oppression applications. The Court embarked on this course with a view to facilitating the just, efficient, timely and cost effective resolution of the real issues in dispute in applications under s 233 Act. In particular, the Pilot sought to trial initiatives aimed at exploring resolution of the dispute at a very early stage of the proceeding before significant costs had been incurred.
- 5.2 The Pilot set out a streamlined procedure for the case management of oppression proceedings in the Court. During the life of the Pilot, a significant number of matters were commenced and subject to the new process. The Pilot resulted in the early resolution of a number of those matters or, where early resolution was not practicable, a significant narrowing of the issues in dispute.
- 5.3 The Pilot ceased its term on 1 April 2015. Following the initial results of the Pilot, the Court has resolved to extend its operation until 1 August 2017. However, in order to improve the efficiency of the Pilot, a number of important changes have been made. The revised procedures for the Pilot are set out below.

## **6. REVISED PILOT**

- 6.1 From 1 September 2015 until 1 August 2017 and subject to any contrary order of the Court, the following procedure will apply in respect of applications under s 233 of the Act (whether or not other relief is also sought).
- 6.2 Applications for relief are to be made by originating process filed via RedCrest<sup>5</sup> and supported by an affidavit which:
- (a) is no more than three pages in length;
  - (b) sets out a clear and succinct summary of the facts alleged to constitute the acts of oppression;
  - (c) sets out a preliminary estimate of the value of the shares in the company (where practicable);
  - (d) exhibits a current ASIC search of the company; and has no other exhibits.

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<sup>4</sup> See Practice Note SC CC 1 – Commercial Court for the form of standard valuation and mediation orders.

<sup>5</sup> See Order 28A of the *Supreme Court (General Civil Procedure) Rules 2015*.

- 6.3 In preparing the affidavit, practitioners should have regard to the relevant authorities which provide examples of the type of conduct that may ground a claim under s 233 of the Act.
- 6.4 Upon initiation, the matter will be entered into the Judge-managed Corporations List and will attract an Entry into List fee in accordance with regulation 8A of the *Supreme Court Fee Regulations 2012* (Vic).
- 6.5 The Corporations List Judge will review the proceeding to decide whether it is a matter which lends itself to management under the Pilot or whether the characteristics of the case suggest it would be more appropriately managed and determined by a Judge. For example, it is unlikely that the procedure will be appropriate if the application concerns a publicly listed company or involves complex trust structures. If the matter is suitable for inclusion in the Pilot, the Corporations List Judge will formally refer the matter on the papers.
- 6.6 Following entry into the Pilot and the filing of a notice of appearance by the Defendant(s), the application will be made returnable for an initial conference before an Associate Judge or a Judicial Registrar. The parties (as well as their practitioners) will be expected to attend that conference. The Associate Judge or Judicial Registrar will explore with the parties whether the matter is ready for referral to mediation or whether any preliminary steps are required to be undertaken, for example, whether:
- 6.6.1 the Defendant(s) should first be afforded an opportunity to file a responding affidavit of no more than three pages;
  - 6.6.2 a valuation of the company should be arranged; or
  - 6.6.3 an order for access and inspection of the books of the company should be made.
- Orders for points of claim, points of defence and more detailed affidavits are unlikely to be made until after the mediation.
- 6.7 A number of matters will be listed for initial conference before an Associate Judge or Judicial Registrar on the same day. Whilst the parties are encouraged to adopt a pragmatic and collaborative approach to identifying any necessary preliminary steps, consent orders will not be made in advance of the initial conference.
- 6.8 If urgent orders are sought at the initial conference that are beyond the jurisdiction of Associate Judges or the Judicial Registrar, or for some other reason the presiding judicial officer forms the view that the application should be referred back to the Corporations List Judge, then that referral will be made.
- 6.9 Matters under the Pilot will generally be mediated by either an Associate Judge or a Judicial Registrar. In some cases, the matter may be considered appropriate for referral to external private mediation.
- 6.10 If a matter does not resolve at the mediation, an Associate Judge or Judicial Registrar may make consent directions for the future conduct of the matter.
- 6.11 Once these steps have been completed, and if the dispute has not resolved, the application may be referred to a judge for further directions and/or hearing.

## **7. REVIEW PROCESS**

- 7.1 This process will be reviewed by the Court after 1 August 2017.

## **AMENDMENT HISTORY**

30 January 2017: This Practice Note was issued on 30 January 2017 and replaced Practice Notes No 13 of 2015 and No 5 of 2014

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30 January 2017