



Supreme Court of Victoria

Commercial Court

Practice Note SC CC 1

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Practice Note SC CC 1

COMMERCIAL COURT

1 INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note:
- 1.2 This Practice Note is to be read in conjunction with the provisions of the *Civil Procedure Act 2010* (Vic) and supersedes Practice Note 10 of 2011. In particular, it should be read with s 9 of the Act, which requires the Court to further the Overarching Purpose when making orders or giving directions.
- 1.3 The Commercial Court gives effect to the Overarching Purpose by the early identification of the substantial questions of controversy, and the flexible adoption of appropriate and timely procedures for the conduct of each proceeding, including the use of Appropriate Dispute Resolution.
- 1.4 This Practice Note must also be read with the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), and other Practice Notes applying to the Division, including the Conduct of Group Proceedings (Class Actions) Practice Note SC Gen 10 and the Technology in Civil Litigation Practice Note SC Gen 5.
- 1.5 The Commercial Court is a separate Division of the Supreme Court of Victoria. It comprises specialist Judges, Associate Judges and Judicial Registrars. A feature of the Commercial Court is the expertise and experience of its Judges, applied in an environment of continuous and, in varying degrees as appropriate, intensive case management of proceedings.
- 1.6 A list of the judicial officers of the Commercial Court and their Associates' contact details appear on the Supreme Court website: [www.supremecourt.vic.gov.au-contact us-judicial support contacts](http://www.supremecourt.vic.gov.au-contact-us-judicial-support-contacts).
- 1.7 The Commercial Court hears and determines the types and categories of proceedings set out in Practice Note SC Gen 2 - Structure of Trial Division.
- 1.8 Where a party is experiencing difficulties in meeting a timetable, the problem should be immediately notified to the List Judge's associate so that the difficulties can be properly managed and consequential delays avoided or minimised.
- 1.9 Parties should ensure that all material filed in Commercial Court proceedings use size 12 point type and 1.5 spacing.

2 COMMENCEMENT

- 2.1 This Practice Note was reissued on 21 December 2017, replaced the earlier version of this Practice Note which was issued on 30 January 2017 and applies to all proceedings in the Commercial Court.

3 DICTIONARY

- 3.1 In this Practice Note:

Act or *Civil Procedure Act* means the *Civil Procedure Act 2010* (Vic)¹;

Admiralty Proceeding means any proceeding within the admiralty jurisdiction of the Court and to which Practice Note SC CC 4 applies;

Appropriate Dispute Resolution means a process attended, or participated in, by a party for the purposes of negotiating a settlement or resolving or narrowing the issues in dispute, including each of the processes identified in s 3 of the *Civil Procedure Act*;

Arbitration Proceeding means any proceeding to which Practice Note SC CC 3 – Commercial Arbitration Business applies;

Business Hours means between the hours of 9:00am to 5:00pm, Monday to Friday (and excluding weekends and public holidays);

Commercial Court Duty Judge means a judge appointed by the Principal Judge or the Deputy Principal Judge to be the Commercial Court Duty Judge at the relevant time or times;

Commercial Court Registry means the registry of the Commercial Court located at ground floor, Old High Court Building, 450 Little Bourke Street, Melbourne;

Commercial List or *List* is a list of proceedings in the Commercial Court managed by a List Judge, identified as List [name of Judge managing the List] or the name of a Specialist List;

Commercial Proceeding means a proceeding arising out of ordinary commercial transactions, including a Taxation Proceeding and a commercial partnership (urban or rural) dispute, but not including a Corporations Proceeding;

Corporations Proceeding means any proceeding to which the Corporations Rules apply and (without limitation) any proceeding under or relating to the *Cross-Border Insolvency Act 2008* (Cth)²;

Corporations Rules means the *Supreme Court (Corporations) Rules 2013* (Vic);

¹ The *Civil Procedure Act* is available at the www.legislation.vic.gov.au – Victorian Law Today – Acts – Civil Procedure Act 2010.

² See Corporations Rules, r 1.3 and, in relation to the *Cross-Border Insolvency Act 2008* (Cth) see also *Practice Note SC CC 6 Cross-Border Insolvency Applications and Cooperation with Foreign Courts or Foreign Representatives*.

Court Book means a court book of electronic or hardcopy documents for use at the trial;

Court Documents means current pleadings, requests for particulars and particulars, notices to admit and notices of dispute and any summary of admissions or agreed facts;

Deputy Principal Judge means a Commercial Court Judge appointed to that position from time to time³;

Discovery Conference means a meeting or conferral of the parties or their legal representatives, with or without the assistance of an Associate Judge, Judicial Registrar or other suitably qualified person, at an early stage of the proceeding, to consider and attempt to reach agreement regarding the manner in which discovery is to be conducted, including consideration of whether technology and electronic exchange of documents should be utilised;

Evidentiary Documents means all documents which are not Court Documents which any party intends to tender in evidence in chief or reasonably expects to refer to in cross-examination;

List Judge means a Commercial Court Judge who manages a List, or such other judicial officer who may, from time to time, manage or hear a proceeding in that List;

Miscellaneous Rules means the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic);

Overarching Purpose means to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute having regard to the objects specified in s 9 of the *Civil Procedure Act*;

Preferred Supplier means Victorian Transcription Services Pty Ltd;

Principal Judge means a Commercial Court Judge appointed to that position from time to time⁴;

Relevant Document Test is satisfied when a document strictly satisfies the description of a document any party intends to tender in evidence or reasonably expects to refer to in cross-examination;

Rules means the *Supreme Court (General Civil Procedure) Rules 2015* (Vic);

Specialist List includes any of the Lists in paragraphs 6.1.2 – 6.1.8;

Taxation Appeal means any proceeding to which order 7 of the *Miscellaneous Rules* applies;

³ The name of the Deputy Principal Judge is published on the Supreme Court website: www.supremecourt.vic.gov.au.

⁴ The name of the Principal Judge is published on the Supreme Court website: www.supremecourt.vic.gov.au.

Taxation Proceeding means a Taxation Appeal and any proceeding which raises a substantial issue relating to taxation, including a taxation recovery proceeding and a dispute with respect to goods and services tax;

Witness Outline means a brief written outline of the evidence that a witness will give; and

Witness Statement means a written statement for the purpose of leading evidence in chief.

4 COURT PRACTICES AND PROCEDURES

4.1 The practices and procedures set out in this Practice Note and used by the Commercial Court must be read and understood in light of the Overarching Purpose.

4.2 The Commercial Court aims to bring proceedings not otherwise resolved to trial within nine months of issue. Parties are required to act promptly unless there is good reason to the contrary. Shorter time periods than permitted under the Rules will usually be ordered for interlocutory steps. At trial, time limits may be imposed for the examination and cross-examination of witnesses and for oral submissions. Opening and closing submissions may be written or oral, or both.

4.3 With a view to achieving the Overarching Purpose, the Commercial Court approaches the management and trial of proceedings as follows:

4.3.1 procedures are designed and implemented to ensure that, so far as is practicable, the cost and the work involved will not be disproportionate to the complexity of the issues and the value or importance of the matters in dispute in the proceeding; and

4.3.2 parties are encouraged to consider whether their dispute might be better resolved by methods other than judicial adjudication in an adversarial proceeding.

4.4 Trials in the Commercial Court are normally conducted on Monday to Thursday, reserving Fridays for directions and applications.

5 ENTRY OR REMOVAL OF PROCEEDINGS

5.1 Any party to a Commercial Proceeding filed in the Commercial Court may elect at the time of initiation for the proceeding to be entered into a List and managed by a List Judge.

5.2 Entry may be refused where the Plaintiff is self-represented.

- 5.3 All Corporations Proceedings, Taxation Proceedings, Arbitration Proceedings and Admiralty Proceedings must be filed in the Commercial Court.
- 5.4 Practitioners should note the following:
- 5.4.1 the heading of all Commercial Court documents should conform with **Schedule 1**;
- 5.4.2 the initiating process should not specify a particular List Judge prior to the allocation of the matter in accordance with paragraphs 6.1 – 6.3 below. However, the initiating process may nominate a particular Specialist List in which the matter is sought to be filed; and
- 5.4.3 once a proceeding has been allocated to a List, all Court documents filed in the proceeding should identify that List in accordance with **Schedule 1**.
- 5.5 Any party to a proceeding that has not been entered in a Commercial List may apply for entry by filing a summons seeking entry and directions. An application for entry must be filed with the Commercial Court Registry, which will nominate a time, date and Commercial Court Judge for hearing the application.
- 5.6 On occasion, the Commercial Court may determine that a proceeding initiated in another Division of the Supreme Court, or managed by an Associate Judge, should be managed and determined by a List Judge. In the absence of any order by a Judge of the Commercial Court confirming the transfer, written notification by the Commercial Court Registry shall be sufficient to effect the transfer.
- 5.7 On application of any party, or upon the Court’s own motion, a proceeding in the Commercial Court, other than a Corporations Proceeding, a Taxation Appeal, an Arbitration Proceeding or an Admiralty Proceeding, may at any time be removed from a Commercial List for good reason, including the nature of the proceeding, its anticipated duration, the conduct of the parties and the identification of a more appropriate court, tribunal or dispute resolution process.
- 5.8 In order to facilitate communications with the Commercial Court, the party entering a proceeding into a Commercial List must provide to the Commercial Court Registry and List Judge’s Associate their contact details (address, telephone **and** email). Where possible, those contact details should also be provided to all other parties. Where a party is represented, only the contact details for their legal practitioners need be provided.
- 5.9 Parties and their solicitors are subject to a continuing obligation to ensure that contact information is current and accurate.
- 5.10 At the time of commencement of a Commercial Proceeding or Corporations Proceeding, or upon application to enter a List or otherwise following allocation to a List, the party filing the material shall complete a signed purchase order directed to the Preferred Supplier for the provision of recording and transcription services for all directions hearings and all other interlocutory hearings in accordance with

Practice Note SC Gen 7. That party shall deliver the purchase order to the Preferred Supplier.

- 5.11 The solicitor, or the litigant if unrepresented, signing the purchase order shall pay the Preferred Supplier the cost of all transcript provided pursuant to a purchase order.

6 ALLOCATION OF PROCEEDINGS

- 6.1 In general, the business of the Commercial Court will be allocated (as the named Lists indicate) as follows:
- 6.1.1 General Commercial Lists – eg: List [name of Judge managing the List] (for matters not falling into any of the Specialist Lists below);
 - 6.1.2 Admiralty List;
 - 6.1.3 Arbitration List;
 - 6.1.4 Corporations List;
 - 6.1.5 Insurance List;
 - 6.1.6 Intellectual Property List;
 - 6.1.7 Taxation List; and
 - 6.1.8 Technology, Engineering and Construction List.
- 6.2 A Judge will be assigned to each List and will manage and usually hear and determine each proceeding within that List.
- 6.3 The formal allocation to a particular List will be made following initiation and a review by the Commercial Court of the features and characteristics of the proceeding. The parties will be notified by the Commercial Court Registry.

7 COMMUNICATIONS WITH THE COMMERCIAL COURT

- 7.1 A practitioner, or litigant in person where no practitioner has been engaged, may only communicate with a Judge, other than in open court, through:
- (a) the List Judge’s Associate; or
 - (b) the Commercial Court Registry; or
 - (c) otherwise to the Associate of the Principal Judge or the Deputy Principal Judge.
- 7.2 All communications with an Associate must be confined to uncontroversial matters. Persons communicating with an Associate must not engage the Associate in a dispute.

- 7.3 It is also not a function of an Associate to give procedural or legal advice. Persons communicating with an Associate should not request such advice.
- 7.4 Wherever possible, communication with an Associate should be in writing, and preferably by email.⁵ Any person writing to an Associate must, except for communications relating to a proposed proceeding or application without notice to any other party, simultaneously send a copy to each other party to the proceeding. Communication by telephone should be avoided unless the circumstances make it absolutely necessary. Except in relation to an urgent application to be made without notice, all other parties should be notified immediately by email of the substance of the telephone communication.
- 7.5 Associates may be contacted in relation to the following:
- 7.5.1 the listing of applications or directions;
 - 7.5.2 whether a summons is required or whether an application can be listed less formally; and
 - 7.5.3 the provision of material for the judicial officer in addition to filing with the Commercial Court Registry.
- 7.6 Before contacting an Associate to obtain a date for a hearing of an application, parties should first consult with other parties on the time for hearing (except applications to be made without notice, or where otherwise unavoidable) and endeavour to reach agreement.
- 7.7 Any issue as to whether a List Judge will fix a proceeding for trial should only be raised in open court and should not be directed to Associates.

8 PLEADINGS AND PARTICULARS

Pleadings

- 8.1 Pleadings must focus on the real or substantial issues in dispute, supported by proper particulars. Prolix, irrelevant or evasive pleadings (such as denials not containing a substantive allegation) are likely to cause delays and unnecessary costs. Legal practitioners and parties responsible for the filing of pleadings of this nature are not acting in accordance with the Overarching Purpose and may become liable for costs and other sanctions under the *Civil Procedure Act*. A defective pleading may be struck out on the Court's own motion.
- 8.2 Parties will be expected to file a responsive pleading promptly. Holding defences are not acceptable.
- 8.3 Pleadings may be dispensed with where the List Judge considers that this would facilitate the Overarching Purpose.

⁵ Email addresses are published on the Supreme Court website: see par 1.6 above.

8.4 Judgment may only be entered in default of pleading in accordance with paragraph 16.5 below.

Particulars

8.5 Proper particulars should be provided in all pleadings as required by r 13.10 of the Rules, unless there is a proper basis for postponing the provision of the required particulars until discovery has occurred.

8.6 A request for particulars may be made by letter, and so may a response. Directions about particulars are not usually made unless a party unreasonably requests, or refuses to provide, particulars.

9 DISCOVERY AND INTERROGATORIES

Discovery

9.1 Parties are encouraged to agree upon orders for discovery and to consider whether limited categories of discovery should be exchanged.⁶ Where parties cannot agree, a Discovery Conference may be ordered. The process of discovery does not affect the overarching obligation to disclose documents critical to the resolution of the dispute in the proceeding under s 26 of the *Civil Procedure Act*.

9.2 Subject to any directions the List Judge may make, parties to a proceeding in the Commercial Court are required to comply with s 26 of the *Civil Procedure Act* at the earliest reasonable time after becoming aware of the existence of such documents.

9.3 Parties are expected to comply with the following procedures:

9.3.1 discovery is made pursuant to an order of the Court, not by notice for discovery;

9.3.2 discovery is normally made by the filing and service of a list of discoverable documents, not an affidavit;

9.3.3 the list of discoverable documents should include the following descriptive identifying fields:

document discovery number (using numeric, not alphabetical, numbering; and where extra documents are to be inserted in a list, the numeric numbering should read, for example, 10.1, 10.2, 10.3, etc);

document date;

document description (including identifying documents as copies or originals);

document source or provenance (for example, the particular file and from which party a document was discovered or from what person the document was obtained under subpoena); and

⁶ See r 29.05 of the Rules which provides for orders limiting discovery.

- 9.3.4 whenever a claim of privilege is made, the document should be listed and properly described, unless the claim is unlikely to be contentious. Non-contentious privileged documents include draft court documents, solicitor client correspondence and fee agreements.
- 9.4 In appropriate cases, orders may be made for the provision of affidavits by any party as to where relevant documents are stored, what type of documents exist, in what form they are held and the costs of making discovery of documents.

Interrogatories

- 9.5 Service of interrogatories is not permitted other than in exceptional circumstances and, in any event, only with the leave of the List Judge. If an application for leave to serve interrogatories is made, it must be supported by an affidavit setting out the circumstances relied on and exhibiting a draft of the proposed questions. Leave to serve interrogatories will normally only be given if the opposing party has already refused to reveal a fact in response to a reasonable request, which cannot be proved in some other cost effective way.

10 DIRECTIONS HEARINGS

- 10.1 Directions hearings will be conducted by the List Judge, usually on Fridays.
- 10.2 Notwithstanding that most interlocutory steps will be taken pursuant to court order, practitioners are encouraged to be pro-active in taking any appropriate interlocutory steps, without the need for a court order.
- 10.3 To ensure the efficient management of cases, transcript will be required for all directions hearings, subject to any contrary order under s 130 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).

First directions hearing

- 10.4 Where a proceeding is entered into a Commercial List, the Commercial Court Registry will appoint a date for the first directions hearing.
- 10.5 Plaintiffs must ensure, as far as practicable, that all other parties are served with the originating process a reasonable time before the first directions hearing.
- 10.6 Unless the List Judge agrees to make orders on the papers, parties are expected to appear by their legal practitioner who should be ready to briefly explain 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 the Overarching Purpose.
- 10.7 In shareholder oppression proceedings, partnership disputes and other proceedings where the value of a business is likely to be in issue, the Commercial Court will usually direct the immediate appointment of a valuer. A standard valuation order appears in **Schedule 2**.

Matters for consideration at the first directions hearing

- 10.8 At the first directions hearing, parties are expected to have considered whether directions should be made relating to:
- 10.8.1 the filing and service of pleadings;
 - 10.8.2 the provision of proper particulars;
 - 10.8.3 the joinder of any further parties or making of any further claims between parties;
 - 10.8.4 whether an order should be made for the separate trial of any question;
 - 10.8.5 whether the proceeding or any matter arising in the proceeding should be managed by an Associate Judge or a Judicial Registrar;
 - 10.8.6 whether the matter should be referred to mediation, or to some other Appropriate Dispute Resolution process;
 - 10.8.7 the use of technology in preparing the matter for trial and what further directions and protocols may be necessary⁷; and
 - 10.8.8 the application of any international conventions, for example, the *United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980)* (also known as the *Vienna Sales Convention*)⁸.

Further directions hearings

- 10.9 Further directions hearings will usually be heard by the List Judge. The parties should endeavour to keep the number of directions hearings to a minimum to avoid unnecessary costs.
- 10.10 Depending on the nature of the case, a proceeding may be fixed for trial at the first or any subsequent directions hearing. Trial directions may include some or all of the matters set out in **Schedule 3**.⁹

Taxation Appeals

- 10.11 The List Judge will usually set the appeal down for hearing at the first directions hearing and give the appropriate directions for the hearing, including outlines of argument.
- 10.12 In an application for leave to appeal from the Victorian Civil and Administrative Tribunal, the List Judge will normally set the application down to be heard with the appeal. It should not be assumed that this will always occur and the applicant

⁷ Practitioners are directed to the Technology in Civil Litigation Practice Note SC Gen 5.

⁸ For guidance, see the online resources hosted by Pace University, New York and coordinated by the Institute of International Commercial Law www.cisg.law.pace.edu/

⁹ See also schedules 7 and 8.

should be prepared to state in summary form at the directions hearing why the application for leave should proceed.¹⁰

11 APPLICATIONS

11.1 Interlocutory applications:

11.1.1 are usually made returnable before the List Judge;

11.1.2 should not be brought unless the parties have already made appropriate endeavours to resolve their disputes. Where the parties cannot resolve a dispute, they should cooperate in listing the application and agree on a timetable for the preparation of material evidence and submissions for hearing; and

11.1.3 will usually be made returnable on a directions day.

11.2 Where this is permitted,¹¹ an application may be referred by a List Judge for hearing and determination to an Associate Judge or a Judicial Registrar.

Applications on notice and not by summons

11.3 Except in the circumstances described in paragraph 11.5, routine applications may be made on notice without the need to file a summons. As a general guide, the Commercial Court considers the following to be routine:

11.3.1 directions as to the timing of interlocutory steps;

11.3.2 applications for extensions of time; and

11.3.3 applications for the minor amendment of pleadings or other documents.

11.4 The Court will be flexible as to the form of notice, provided the applicant has made a clear and unambiguous statement of the nature of the application, the basis upon which it is made and the orders sought. This may be achieved by email, with or without the use of attached correspondence or other documentation.

Application by summons

11.5 Applications must be made by summons in the following circumstances, unless the List Judge orders otherwise:

- where a respondent to the application is not legally represented;
- where a respondent to the application is not a party to the proceeding;
- applications to enter a proceeding in a Commercial List;

¹⁰ See *De Simone v Bevnol Constructions and Developments Pty Ltd* [2011] VSCA 54, [13]-[15]; *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331, 335-337 [8]-[17].

¹¹ See rr 77.05 and 84.03 of the Rules, rr 16.1(3) and 16B.2(3) of the Corporations Rules and rr 1.11-1.12 of the Miscellaneous Rules.

- applications for security for costs;
- applications to strike out any part of a pleading, for summary judgment, for summary stay, or for dismissal of a claim, or similar applications;
- applications to join a party;¹²
- applications for significant amendments to pleadings or other documents;
- applications for further and better particulars;
- applications for further, particular or non-party discovery;
- applications to challenge privilege or confidentiality claims;
- applications to vacate a trial date;
- applications for injunctive relief;
- cross-vesting and other forum-related applications;
- applications concerning subpoenas; and
- applications for leave to proceed against a person, whether by reason of liquidation, bankruptcy or for any other reason.

Filing and service of interlocutory applications between parties

- 11.6 Applications and supporting material should be filed and served as early as possible to enable the respondent to prepare for the hearing and file and serve responsive material in a timely manner, and to provide sufficient time for the List Judge to read the material before the hearing.
- 11.7 Oral submissions must be confined to the real issues in dispute to ensure the List Judge is not unduly delayed in completing all business of the Court.
- 11.8 Subject to any directions of the List Judge, where an application is to be made on a Friday:
- 11.8.1 the applicant's material should be filed and served by 4.00 pm on the previous Monday;
- 11.8.2 the respondent's material should be filed and served by 4.00 pm on Wednesday;
- 11.8.3 the parties should exchange written outlines of submissions, limited (save for exceptional circumstances) to five A4 pages with normal font size and formatting, and forward them by email to the List Judge's associate **no later than 2.00 pm on Thursday**.
- 11.9 Where an application is listed for hearing on a day other than Friday, material should be filed and served on a corresponding timetable.

¹² See paras 11.22–11.24 below.

- 11.10 Where a failure by a party to observe the timetable is the cause of an adjournment, an order for costs may be made.
- 11.11 Exhibits are to be filed with all affidavits.
- 11.12 Correspondence between practitioners to be relied on for the purpose of an application need not be exhibited to an affidavit. Where the applicant intends to rely on such correspondence, the applicant should email to the List Judge's Associate a paginated bundle of all relevant correspondence between the practitioners in chronological order.
- 11.13 Parties may contact the List Judge's Associate for instructions as to whether material should be filed at the Commercial Court Registry or with the Associate.
- 11.14 In substantial contested applications, the applicant should provide the Court in advance of the hearing with an application book containing working copies of key documents.

Transcript for interlocutory applications

- 11.15 To ensure the efficient management of cases, transcript will be required for all interlocutory hearings, subject to any contrary order under s 130 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).

Orders on the papers

- 11.16 Subject to any direction of the List Judge, consent orders may be submitted to the Court and may be made on the papers without an appearance.
- 11.17 Consent orders, signed by each party, should be emailed to the List Judge's Associate by **2.00 pm** on the **day before** the directions hearing. Where consent orders are not received by 2.00 pm on the day before the directions hearing, parties should assume that they will be required to appear unless notified otherwise by the Court.
- 11.18 Notwithstanding that the parties have agreed to and submitted proposed consent orders, the List Judge may require the attendance of practitioners, and may decline to make the proposed orders.
- 11.19 In addition to applications disposed of by consent, the List Judge may determine any other application on the papers and may give directions for that purpose.

Usual undertaking as to damages

- 11.20 Where an applicant for an interlocutory order offers, or the Court accepts, or an order or other court document records the giving of "the usual undertaking as to damages", this will be taken to mean the following undertaking given to the Court:

To abide by any order the Court may make as to damages, in case the Court shall hereafter be of the opinion that any person shall have sustained any

*loss, by reason of this order, which the party giving the undertaking ought to pay.*¹³

Costs

11.21 The Commercial Court may fix the costs awarded on an interlocutory application.

Applications to join additional parties

11.22 An application for leave to join a party should be made 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.

11.23 Any such application must be made as soon as practicable. The List Judge may fix a date by which an application must be initiated and made. The List Judge may make costs orders against a party which unnecessarily delays making such an application.

11.24 The summons and supporting affidavit must be filed and served on all existing parties.

12 URGENT APPLICATIONS

12.1 Commercial Court judges are ordinarily available to hear all urgent applications.

12.2 During **Business Hours**, an application for genuinely urgent relief may be made as follows:

12.2.1 where a proceeding has not yet been commenced or, if commenced, is not yet under management of a List Judge, by contacting the Commercial Court Registry on (03) 9603 4105. The application may, depending on the nature of the matter and judicial availability, either be referred to the Commercial Court Duty Judge or a Corporations List Judge; or

12.2.2 where a proceeding is under management by a List Judge, by contacting the Associate to the List Judge and then informing the Commercial Court Registry of the allocated return date. If the Associate to the List Judge is unavailable, practitioners should contact the Commercial Court Registry on the above number.

12.3 An application for urgent relief before the Commercial Court Duty Judge may be initiated **outside Business Hours** by calling the “urgent applications” telephone number notified at the start of this Practice Note (page ii) and on the Commercial Court page of the Supreme Court website. The protocols for making urgent applications in the Arbitration List and Admiralty List as set out in Practice Note SC CC 3 and Practice Note SC CC 4, respectively continue to apply.

¹³ In relation to the form of the usual undertaking as to damages see Williams, *Civil Procedure Victoria*, para 38.01.320 and *Love v Thwaites* (No 4) [2014] VSCA 56, [1], [55].

- 12.4 If the application is one that is properly made without notice to any other party, this should be clearly stated in all communications with any of the individuals specified in the preceding paragraphs and such communications need not be copied to the respondent until the interim determination of the application or as the List Judge otherwise directs.
- 12.5 The requirements for transcript as outlined in paragraph 11.15 above apply to the extent appropriate or possible.

13 APPROPRIATE DISPUTE RESOLUTION

- 13.1 At any stage of a proceeding (including during trial), the Court may order or direct that the proceeding be referred for Appropriate Dispute Resolution.
- 13.2 All proceedings will be referred to mediation or other Appropriate Dispute Resolution, unless the List Judge decides that there is a good reason not to do so.
- 13.3 The List Judge may refer the proceeding or any question or application arising in a proceeding to an Associate Judge or Judicial Registrar for judicial mediation, or to a private mediator.
- 13.4 A standard mediation order appears in **Schedule 4**.
- 13.5 Practitioners are encouraged to identify whether questions in the proceeding should be referred to a special referee pursuant to order 50 of the Rules or to a court appointed expert under s 65M of the *Civil Procedure Act*, and, if so, at what stage.
- 13.6 A standard order for reference to a special referee appears in **Schedule 5**.
- 13.7 A standard order for appointing an expert to assist the Court appears in **Schedule 6**.
- 13.8 In the appropriate case, a specially qualified assessor may be appointed pursuant to s 77 of the *Supreme Court Act 1986* (Vic) to assist the Court. The role of the assessor may include consulting with the List Judge during the course of a trial and preparing any report, advice or opinion.

14 SETTING DOWN FOR TRIAL AND CONDUCT OF TRIAL

- 14.1 A proceeding is set down for trial by order of a List Judge. A typical form of trial order is set out in **Schedule 7** [Witness Outlines Ordered] and **Schedule 8** [Witness Statements Ordered].
- 14.2 Before the Plaintiff files and serves a chronology in accordance with trial orders, it must confer with the other parties to ensure that the chronology identifies agreed facts and facts in dispute.

- 14.3 The quantum of damages may be assessed after all other questions in the proceeding have been determined. Parties must, however, ensure that full particulars of loss and damage are given and may be required to file evidence concerning quantum of loss before mediation or trial.
- 14.4 In order to facilitate early hearings, a List Judge may place a trial on standby for a particular date when time might become available. While the List Judge will usually manage and hear the trial, the Commercial Court may re-allocate a trial to another Commercial Court Judge.
- 14.5 Parties are required to immediately notify the List Judge and the Commercial Court Registry upon becoming aware of any matters which may result in a hearing date being vacated, including the settlement of the proceeding. Similarly, parties are required to immediately notify the List Judge if it appears that the estimated duration of trial no longer remains accurate.
- 14.6 Any application by a solicitor for leave to cease acting for a party¹⁴ will not ordinarily be entertained by the List Judge any later than 21 days from the date the matter is set down for trial.
- 14.7 Parties should expect that a trial fixed for hearing will commence on the date fixed and that a trial which is not finished within the estimated duration may be adjourned part-heard to the next date convenient to the List Judge. It is common practice for Commercial Court judges to require consecutive openings by counsel for all parties before any evidence is adduced at trial.
- 14.8 To achieve the Overarching Purpose the List Judge may limit the number of witnesses (including expert witnesses) that each party may call and the time to be taken at trial to examine and cross-examine witnesses, and for opening and closing addresses.
- 14.9 After the preparation of the Court Book, if the pleadings or particulars have been amended or additional Evidentiary Documents tendered at trial, the legal practitioner for the Plaintiff must, at the conclusion of the trial, ensure that the Court Book includes the new or additional documents, inserted in accordance with paragraph 15.4 below.
- 14.10 Where a Court Book is not ordered, a party must provide working copies for the List Judge of the current pleadings and any exhibit tendered at trial, together with electronic copies of those exhibits. All hardcopy working documents must be hole-punched, and not stapled.
- 14.11 During the opening of their case, counsel are expected to identify the critical documents in the proceeding by reference to the Court Book.

¹⁴ See r 20.03(3)(b) of the Rules and also *Investec Bank (Australia) Ltd v Mann [2012] VSC 81* which notes at [8] the potentially adverse impact of a late ceasing to act on the Court and other parties.

Use of authorities at trial

- 14.12 The attention of practitioners is drawn to Practice Note SC Gen 3, dealing with the production and the citation of judgments.
- 14.13 Parties must consult to eliminate duplication of authorities provided to the List Judge. If hard copies are produced, costs for excessive photocopying will not be allowed.
- 14.14 Parties should, where possible, restrict copying to the part or parts of each case report relevant to the issues in the proceeding.

15 EVIDENCE AT TRIAL

Court Books

- 15.1 The parties may, at the discretion of the List Judge, prepare a Court Book for use at the trial.
- 15.2 The purpose of a Court Book is to provide to the Court, the parties and witnesses an accessible bundle of the documents for use at trial. Documents contained in the Court Book will not stand as evidence in a proceeding unless the List Judge so orders.
- 15.3 As a general principle, a Court Book will consist of the Court Documents, and then a legible copy of all the Evidentiary Documents that satisfy the Relevant Document Test, **strictly in date order**. Parties must ensure that, as far as possible, all such documents are included in the Court Book and that unnecessary documents are not included. Practitioners responsible for the conduct of the trial must ensure compliance with the Relevant Document Test.

Court Book requirements

- 15.4 The Court Book **must** be prepared as follows:
- 15.4.1 the Court Book must contain an index of the contents of the whole Court Book and the index shall appear in each volume of the Court Book where it is in hardcopy format;
- 15.4.2 unless the List Judge otherwise directs, the index must list the Court Documents, with the current pleadings first, and the other Court Documents to immediately follow in a rational order, and then the Evidentiary Documents **in strict date order**;
- 15.4.3 the index must include at least the following descriptive identifying fields:
- Court Book document number;

- document date and description; and additionally for the Evidentiary Documents the source or provenance (as set out in the list of discoverable documents, if the document has been discovered);
- Court Book page number at which each document commences and ends;

15.4.4 each page of a Court Book must be numbered sequentially;

15.4.5 where exhibits to an affidavit are included in a Court Book, the exhibits must be included in the Evidentiary Documents section and not as if they came into existence only at the time the affidavit was sworn, with the description including a reference to the deponent, the date of the affidavit and the exhibit number; and

15.4.6 unless the trial is exclusively conducted electronically¹⁵, documents in a hardcopy Court Book should be single-sided (**double-sided copies must not be used**), in good quality lever arch folders, not bound, and must not be separated by dividers or tabs.

- 15.5 Parties have an entitlement to add documents into the Court Book against the wish of the opposing party, provided that each document satisfies the Relevant Document Test, but not to insist that another party exclude documents from the Court Book.
- 15.6 Where any dispute as to the contents of a Court Book arises between the parties, the matter should be raised with the List Judge's associate, preferably by email, without delay.
- 15.7 Regardless of whether a trial is conducted electronically, the Court Book, together with an index to the Court Book, must be produced in portable document format (PDF), and be fully text searchable.
- 15.8 A document in a Court Book may be tendered as authentic without formal proof, unless a party objects. If objection is taken, then any tender will be subject to the direction of the List Judge.
- 15.9 A Court Book should contain no unnecessary duplication of documents.
- 15.10 Where emails are included in the Court Book, email chains should be avoided. Each email should be included once as a single document, unless the associated chain has evidentiary significance.
- 15.11 Parties should expect that, where the Relevant Document Test has not been satisfied and unnecessary or irrelevant documents are included in a Court Book, or the Evidentiary Documents are not arranged in strict date order, an order may be made that the costs associated with the inclusion of such documents not be recoverable by the party that included those documents or that the costs be paid by that party.

¹⁵ See the Technology in Civil Litigation Practice Note SC Gen 5.

Witness Statements and Witness Outlines

- 15.12 Evidence in chief at trial may be led orally or in writing, at the direction of the List Judge (and subject to any further order at trial).
- 15.13 A party seeking to utilise a Witness Statement for the purpose of leading evidence in chief will be required to satisfy the List Judge that this course will better achieve the Overarching Purpose than if evidence were to be given orally in the usual way. Generally, the use of a Witness Statement will not be appropriate where contentious evidence is to be given of facts dependent on the recollection of the witness or where the credit of the witness is likely to be challenged on the topic. The List Judge may order that Witness Statements be provided by only some witnesses, or that only part of the evidence in chief of a witness be provided by way of Witness Statement.
- 15.14 A Witness Statement is, in written form, the evidence that a witness would otherwise give orally and, subject to any contrary order, will, when adopted, stand as the evidence in chief of the witness.
- 15.15 The evidence contained in a Witness Statement must:
- be directed only to matters in issue;
 - be in admissible form, in accordance with the rules of evidence, including the rules with respect to hearsay evidence, in accordance with the *Evidence Act 2008* (Vic);
 - include at the end of the statement the following verification:

“I verify that I have read the contents of this my witness statement and the documents referred to in it and that I am satisfied that this is the evidence in chief which I wish to give at the trial of the proceeding.”
- 15.16 Where a party has not been permitted to provide evidence in chief by Witness Statement, in whole or in part, the List Judge may order the provision of a Witness Outline.
- 15.17 A Witness Outline must be directed **only to matters in issue**.
- 15.18 A Witness Outline must clearly identify the topics in respect of which evidence will be given and **the substance of that evidence**, including the substance of each important conversation.
- 15.19 Where a Witness Outline is ordered, the List Judge may also order that no party may use any part of the contents of that document for the purpose of cross-examining the witness without leave of the List Judge.
- 15.20 Each Witness Statement and Witness Outline must be provided to all parties and to the List Judge in electronic format.

- 15.21 Practitioners who draft a Witness Statement or a Witness Outline should bear in mind that, unless it is written in the witness's own words, such a document is unlikely to assist either the Court or the witness.
- 15.22 A party will be taken to have waived, for the purpose of the proceeding, client legal privilege to the content of a Witness Statement or Witness Outline which has been served in that proceeding. Client legal privilege attaching to the content of an unserved draft Witness Statement, including an expert's Witness Statement, or Witness Outline is not taken to be waived merely by the filing or service of the final form of such Witness Statement or Witness Outline.
- 15.23 Subject to paragraph 15.19 above, a party may refer to or use the contents of a Witness Statement or Witness Outline served by another party before it is adopted by the intended witness, but only for the purposes of the proceeding.
- 15.24 A party receiving a Witness Statement or Witness Outline is taken to have done so subject to an implied undertaking to the Court that the Witness Statement or Witness Outline, and its contents, will not be used for any purpose other than for the legitimate purposes of the proceeding.
- 15.25 Where a witness will prove or refer to a document in a Witness Statement or a Witness Outline it must identify each such document by description and either by page number in the Court Book or, in the absence of a Court Book, by document discovery number.
- 15.26 Where an order for Witness Statements or Witness Outlines is made, a party may not, without leave, adduce from the witness evidence in chief other than evidence included in the Witness Statement or referred to in a Witness Outline of the witness.

Expert evidence

- 15.27 The List Judge may give directions to the effect that:
- 15.27.1 expert evidence at trial will follow factual evidence upon which the expert evidence is predicated;
 - 15.27.2 two or more experts engaged by the respective parties be sworn and present their evidence concurrently, and may, if permitted by the List Judge, question each other in relation to their evidence; and
 - 15.27.3 the parties consult and propose matters upon which the experts are to confer.
- 15.28 Where contentious expert evidence is to be adduced, the Commercial Court will almost invariably direct that experts confer before trial pursuant to r 44.06 of the Rules. Typical directions appear in **Schedule 9**.
- 15.29 Where a conference of experts is directed, legal practitioners and the experts must ensure the expert code of conduct is strictly adhered to. In particular, legal practitioners are not to participate in the conference. In appropriate cases, the List

Judge may order that the conference of experts be facilitated by an Associate Judge, Judicial Registrar or other suitably qualified person.

- 15.30 Following any conference, the experts must prepare a joint report for the Court stating:
- 15.30.1 the matters upon which they were directed to confer;
 - 15.30.2 that they have met and discussed each matter upon which they have been directed to confer;
 - 15.30.3 the matters on which they agree;
 - 15.30.4 the matters on which they disagree; and
 - 15.30.5 a brief summary of the reasons for any disagreement.

16 ORDERS AND JUDGMENTS

- 16.1 Practitioners should prepare and submit draft orders for all hearings where orders are sought.
- 16.2 Liberty to apply is implied in all orders and need not be expressly ordered.
- 16.3 As a general rule, orders will be authenticated by the List Judge pursuant to r 60.02 of the Rules. After a hearing, the Plaintiff will usually be required to prepare a draft order and email it to the Associate.
- 16.4 Where a party is experiencing difficulties in meeting a timetable, the problem should be immediately notified to the List Judge's Associate so that the difficulties can be properly managed and consequential delays avoided or minimised.
- 16.5 Judgment may not be entered administratively in a proceeding within a Commercial List unless the List Judge gives leave to do so.

17 FEES

- 17.1 Part 1A of the Schedule to the *Supreme Court (Fees) Regulations 2012* (Vic) prescribes the fees payable in the Commercial Court.
- 17.2 A fee for entering a proceeding into a List may be payable pursuant to item 1A.8 of Part 1A of the Schedule. Practitioners should read the Regulations in conjunction with Practice Note SC CC 7 - Imposition of Fees in Commercial Court Judge-Managed Lists and any other Practice Notes the Court issues from time to time.

AMENDMENT HISTORY

21 December 2017: This Practice Note was reissued on 21 December 2017 and replaced the earlier version of this Practice Note which was issued on 30 January 2017.

Vivienne Macgillivray
Executive Associate to the Chief Justice
21 December 2017

SCHEDULE 1¹⁶

HEADING TO PROCEEDINGS IN THE COMMERCIAL COURT

[Non-Corporations Proceeding]

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST - [JUDGE NAME]
[RELEVANT SPECIALIST] LIST

S ECI 20XX

BETWEEN:

#

Plaintiff

- and -

#

Defendant

[Corporations Proceeding]

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

S ECI 20XX

IN THE MATTER OF XY Pty Ltd (ACN 111 111 111)

BETWEEN:

#

Plaintiff

- and -

#

Defendant

¹⁶ See par 5.4 above.

SCHEDULE 2¹⁷
STANDARD VALUATION ORDER

[PROCEEDING HEADING]

ORDER

JUDGE:	The Honourable Justice/ Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

THE COURT ORDERS THAT:

1. An independent person (“the Valuer”) be appointed to express an opinion as to the value of the shares of # (“the Company”).
2. The Valuer be a person agreed upon by the parties by 4.00 pm on # .
3. Pursuant to s 247A of the *Corporations Act 2001* (Cth), the plaintiff and one representative of each of his or her legal and accounting advisers is authorised to inspect the books (as the term “books” is defined in s 9 of the *Corporations Act 2001* (Cth)) of the Company.
4. The defendant by its officers and employees, including #, must make the books of the Company available for inspection and copying in accordance with paragraph 3 of these orders between the hours of 9.00 am and 5.00 pm commencing on # and ending on #.
5. The plaintiff provide to the Valuer a copy of each document which the parties or either of them wish the Valuer to see for the purposes of the valuation by 4.00 pm on #.

¹⁷ See par 10.7 above.

6. Any submission which either party wishes to make to the Valuer be in writing and provided to the Valuer and to the other party by 4.00 pm on #.
7. The Valuer may inspect all or any of the books of the Company for the purposes of the valuation.
8. Each party must comply with the reasonable requests of the Valuer, including for the provision of any information or documents including copy documents, as soon as reasonably practicable after the making of such a request.
9. The Valuer must complete the valuation and provide a copy to the parties and the Court by 4.00 pm on #.
10. The parties pay the costs of the Valuer in equal shares in the first instance.
11. The further hearing of the summons for directions is adjourned to #.
12. Liberty to apply is reserved to the parties and the Valuer on reasonable notice.
13. Costs are reserved.

SCHEDULE 3¹⁸

MATTERS FOR CONSIDERATION AT A FINAL DIRECTIONS HEARING

1. Confirmation that the parties will be ready for trial on the appointed trial date and that the estimated trial duration remains accurate.
2. The order of opening submissions by all parties prior to evidence from witnesses.
3. The length of opening oral submissions.
4. The exchange of written outlines of opening submissions.
5. The filing of agreed statements of facts.
6. The filing of a chronology.
7. The filing of an agreed statement on any expert evidence, identifying the issues which remain in dispute between the parties' experts.
8. The timing of the giving of expert evidence, and whether it should be given concurrently.
9. Where witness statements have been ordered or affidavits are to be relied upon, the procedure for and time for notices of objection to evidence and responses, and consultation to resolve the objections.
10. The exchange of written outlines of closing submissions.
11. The proposed order of closing oral submissions.
12. Time limits to be imposed on parties for:
 - (a) opening addresses;
 - (b) presentation of a party's case, including cross-examination; and
 - (c) closing addresses.
13. The mode of proof of any particular facts in dispute.
14. Whether any questions should be referred to a special referee or a Court appointed expert.
15. The appointment of any specially qualified assessor to assist the Court.

¹⁸ See par 10.10 above.

16. Whether a further mediation or other form of Appropriate Dispute Resolution is required.
17. Whether the quantum of damages should be assessed after all other questions in the proceeding have been determined¹⁹.
18. Whether the trial should be conducted electronically, and if so, what further directions and protocols may be necessary.²⁰

¹⁹ Where quantum is to be assessed separately, parties must, however, ensure that full particulars of loss and damage are given and may be required to file evidence concerning quantum of loss before mediation or trial.

²⁰ Practitioners are directed to the Technology in Civil Litigation Practice Note SC Gen 5.

SCHEDULE 4²¹
STANDARD MEDIATION ORDER

[PROCEEDING HEADING]

ORDER

JUDGE:	The Honourable Justice/ Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

THE COURT ORDERS THAT:

1. The proceeding be referred to a mediator to be agreed between the parties, or in default of agreement to be appointed by the Court, such mediation to take place by/ not to take place before #.
2. [Not required where matter referred to judicial mediation before an Associate Judge or a Judicial Registrar]. Subject to the terms of this order, the solicitor for the plaintiff must, after consultation with all parties, deliver to the mediator a copy of this order, all pleadings (including requests for and further particulars) and a copy of any other necessary information, and take all steps necessary to ensure that the mediation commences as soon as practicable.
3. The mediation must be attended by those persons who have the ultimate responsibility for deciding whether to settle the dispute and the terms of any settlement and the lawyers who have ultimate responsibility to advise the parties in relation to the dispute and its settlement.

²¹ See par 13.4 above.

4. The mediator not later than # report back to the court whether the mediation is finished.
5. Subject to any further order, the costs of the mediation be paid in the first instance by the parties in equal shares.

SCHEDULE 5²²

STANDARD REFERENCE TO SPECIAL REFEREE

[PROCEEDING HEADING]

ORDER

JUDGE:	The Honourable Justice/ Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

1. Pursuant to r 50.01(1)(b) of the Rules it is ordered that the questions set out in Annexure 1 [or as the case may be] be referred to a special referee.
2. # is nominated as the special referee.
3. The special referee may indicate the acceptance of the nomination by filing with the Commercial Court Registry, within 7 days of the date of this order, a written consent to act. The special referee must thereupon deliver to each of the parties a copy of the consent to act and a statement of proposed remuneration for so acting.
4. Subject to the filing by the nominee of a written consent to act as special referee under this order, and provided no party objects to the proposed remuneration within 7 days after the date of the filing of the consent to act, the nominee is appointed as the special referee under this order such appointment to be effective on the date of the filing of the consent to act.

²² See par 13.6 above.

5. The special referee must make a report in writing to the Court on each of the questions. The report must state the opinion of the special referee upon each of the questions giving reasons for this opinion. The report together with a copy for each of the parties must be delivered to the Commercial Court Registry not later than # or by such later date as the Court may direct.
6. Within 14 days after the date of the filing of the consent to act the parties must provide security for the payment of the remuneration of the special referee by the payment into Court or if all parties agree in writing by payment into an interest bearing account in the names of the solicitors for the parties. The amount of security will be the amount proposed by the special referee or such other sum as the Court may from time to time direct. In the event that this direction be not complied with the reference will be stayed pending further order.
7. Security for the payment of the remuneration of the special referee be provided in the first instance in equal shares by the parties. All other questions as to the remuneration of the special referee, including its final determination and which party or parties should ultimately bear it, are reserved.
8. The sum provided by way of security for the remuneration of the special referee, including interest, shall not be disbursed otherwise than pursuant to an order of the Court.
9. Unless the Court otherwise orders, the reference shall be conducted by the special referee in accordance with the procedures set out in Annexure 2.
10. At the time of giving the report pursuant to this order the special referee must deliver to each of the parties a signed memorandum setting out the remuneration claimed including any disbursements and file a copy with the Court.

11. Each of the parties and the special referee have liberty to apply.
12. Costs of this application are reserved.

ANNEXURE 1 - QUESTIONS REFERRED

INSERT QUESTION(S)#

ANNEXURE 2 - CONDUCT OF THE REFERENCE

The following directions are given pursuant to r 50.02 of the Rules:

1. Subject to the requirements of the rules of natural justice and the following directions and any further directions which may be given by the Court, the special referee may conduct the reference in such manner as is appropriate for the efficient and economical implementation of this order.
2. Within 21 days after the date of appointment the special referee must conduct a preliminary conference with the parties or their legal representatives to determine the manner of conducting the reference.
3. The special referee is authorised for the purposes of the reference to have and use the following material in addition to any material which may be tendered and received as evidence in the reference:
 - (1) a copy of this order;
 - (2) a copy of the pleadings including any particulars;
 - (3) the following documents:
 - (a) [list documents or put in Schedule]

A copy of each of the above must be delivered to the special referee by the plaintiff within 14 days after the date of appointment.

4. The special referee may make such enquiry and inspection of any document or thing and apply such personal knowledge and expertise as is reasonably necessary for the purpose of the reference.
5. The special referee is not bound by the rules of evidence.
6. The attendance of witnesses and the production of documents may be compelled by the issue of subpoena in accordance with order 42 of the Rules.
7. Each of the parties must comply with any lawful direction that the special referee considers necessary for the reference.

8. Where a party wishes to rely upon the opinion of an expert the special referee may direct that a copy of the expert's opinion and the reasons in support be provided to the other parties. The special referee may direct that the experts meet in the absence of the special referee and the parties with a view to settling any points of difference between them and to presenting a joint report for use in the reference. Except as all the parties whose experts have participated in such a meeting in writing agree, no evidence may be admitted in the reference or otherwise in this proceeding of anything said or done at the meeting.
9. The parties may be represented on the reference by legal practitioners.
10. The special referee may administer an oath or take an affirmation for the purpose of the reference.

SCHEDULE 6²³

STANDARD ORDER FOR APPOINTMENT OF AN EXPERT TO ASSIST THE COURT

[PROCEEDING HEADING]

ORDER

JUDGE:	The Honourable Justice/ Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	<ol style="list-style-type: none">1. The parties have agreed [alternatively: Upon the application of (insert relevant parties); alternatively: Upon the Court's own motion] that [insert name of expert] be appointed as Expert pursuant to section 65M of the <i>Civil Procedure Act 2010</i> (Vic).2. [Insert name of Expert] has signed a consent to act.

THE COURT ORDERS THAT:

1. [Insert name of expert] ("the Expert") be and is hereby appointed by the Court pursuant to section 65M of the *Civil Procedure Act 2010* (Vic) as an independent [insert field of expertise] expert for the purpose of assisting the Court and inquiring into and reporting to the Court on the following questions:

#INSERT QUESTIONS#

2. During business hours on the giving of reasonable notice by the Expert:
 - (a) [Insert parties or relevant parties] respectively, must:

²³ See par 13.7 above.

- (1) permit the Expert to have full access to inspect all books and documents of [insert relevant parties]; and
 - (2) permit copies to be taken by the Expert and provided to the Expert of such books and documents as are in its respective possession, custody or control and are requested by the Expert; and
- (b) [Insert relevant parties] must:
 - (1) provide written answers to questions posed by the Expert; and
 - (2) (if applicable) make available its accountants, [insert name] to provide written answers to questions posed by the Expert.
3. The costs of the Expert are costs in the proceeding, and in the first instance be paid in advance within 7 days after receipt of each invoice issued by the Expert, as to 50% by the plaintiffs, and as to 50% by the defendants [or such other apportionment as is appropriate].
4. Each of the parties and the Expert have liberty to apply.

SCHEDULE 7²⁴

TYPICAL FORM OF TRIAL ORDER - WITNESS OUTLINES ORDERED

[PROCEEDING HEADING]

ORDER

JUDGE:	The Honourable Justice/ Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

THE COURT ORDERS THAT:

Trial date

1. The proceeding is set down for trial and fixed for hearing on # on an estimated duration of # days.

Mediation

2. See **Schedule 4** – standard mediation order.

Court Book [only if Court Book ordered]

3. The plaintiff prepare a Court Book containing the following documents:
 - (a) the current pleadings including requests for and particulars;
 - (b) all documents, in date order, which any party expects to tender in evidence in chief or refer to in cross-examination.
4. The plaintiff by # serve on each other party a draft index for the proposed Court Book. Each of those other parties must send a list of documents to be included or documents to be excluded from the proposed Court Book and all parties must consult as to and agree upon the contents of the Court Book by #.

²⁴ See par 14.1 above.

5. The plaintiff by # serve on each other party and file for the use of the judge a copy of the Court Book²⁵. The plaintiff must also provide the judge with the index to the Court Book in electronic form, together with an electronic copy of the Court Book in fully searchable portable document format (PDF).

Witness Outlines

6. Subject to any order of the judge, evidence in the trial be given orally with the parties providing a witness outline for each witness they intend to call.
7. The plaintiff file and serve its witness outlines by 4:00 pm on #.
8. The defendant file and serve its witness outlines by 4:00 pm on #.
9. Each party have available for use by the judge a copy of all its witness outlines in hardcopy and electronic form.
10. Each witness outline must satisfy the following requirements:
 - (a) it should be set out in numbered paragraphs;
 - (b) it should be a brief outline of the evidence the witness will give;
 - (c) it must clearly identify the topics in respect of which evidence will be given and the substance of that evidence, including the substance of each important conversation.
11. The content of a witness outline served pursuant to an order of the Court is subject to the same implied undertaking as to confidentiality as applies to a document produced upon discovery.
12. No person may use any part of the contents of a witness outline for the purposes of cross-examination of the person providing the witness outline or any other person without leave of the judge.
13. The plaintiff have available at the hearing a further copy of documents tendered in evidence **[or the Court Book if ordered]** for the exclusive use of witnesses during their examination.

²⁵ See par 15.7 above

14. The plaintiff file and serve a chronology of the relevant facts and events by 4:00 pm on #.
15. The parties file and exchange written outlines of opening submissions, limited to # A4 pages, 1.5 spaced text in a common font style, size 12, by 4:00 pm on #.
16. Costs are reserved.

SCHEDULE 8²⁶

TYPICAL FORM OF TRIAL ORDER - WITNESS STATEMENTS ORDERED

[PROCEEDING HEADING]

ORDER

JUDGE:	The Honourable Justice/ Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

THE COURT ORDERS THAT:

Trial date

1. The proceeding is set down for trial and fixed for hearing on # on an estimated duration of # days.

Mediation

2. See **Schedule 4** – standard mediation order.

Court Book [only if Court Book ordered]

3. The plaintiff prepare a Court Book containing the following documents:
 - (c) the current pleadings including requests for particulars and particulars;
 - (d) all documents, in date order, which any party expects to tender in evidence in chief or to be referred to in cross-examination.
4. The plaintiff by # serve on each other party a draft index for the proposed Court Book. Each of those other parties must send a list of documents to be included or documents to be excluded from the proposed Court Book and all

²⁶ See par 14.1 above.

parties must consult as to and agree upon the contents of the Court Book by #.

5. The plaintiff by # serve on each other party and file for the use of the judge a copy of the Court Book²⁷. The plaintiff must also provide the judge with the index to the Court Book in electronic form, together with an electronic copy of the Court Book in fully searchable portable document format (PDF).

Witness statements

6. Subject to any order of the judge, evidence in the trial be by witness statement.
7. The plaintiff file and serve its witness statements by 4:00 pm on #.
8. The defendant file and serve its witness statements by 4:00 pm on #.
9. Each party have available for use by the judge a copy of all its witness statements in paper form and in electronic form.
10. Each witness statement satisfy the following formal requirements:
 - (a) it should be set out in numbered paragraphs;
 - (b) as far as possible, it should be expressed in the witness's own words;
 - (c) it should contain evidence only in admissible form. For example, hearsay should be avoided;
 - (d) where the witness statement contains conversations these should, if the witness's recollection permits, be expressed in direct speech. If this is not possible, this fact should be stated and the witness's best recollection or the substance of the conversation may be set out;
 - (e) it should contain at the end of the statement the following verification:

“I verify that I have read the contents of this my witness statement and the documents referred to in it

²⁷ See par 15.7 above.

and that I am satisfied that this is the evidence in chief which I wish to give at the trial of the proceeding.”

11. Where the statement of the witness, if admitted in evidence, proves a document, a copy of the document may be annexed to the witness statement or the document may be identified and tendered separately whether in the Court Book **[if a Court Book has been ordered]** or otherwise.
12. The content of a witness statement served pursuant to an order of the Court is subject to the same implied undertaking as to confidentiality as applies to a document produced upon discovery.
13. Where any witness is not willing to provide a witness statement, the party calling the witness must, by the date fixed for the delivery of the witness statement of that witness, file and serve a statement of the substance of the evidence which the party expects that witness to give and will be entitled to lead oral evidence in chief from that witness.
14. The plaintiff have available at the hearing a further copy of the documents tendered in evidence **[or the Court Book if ordered]** for the exclusive use of witnesses during their examination.
15. The plaintiff file and serve a chronology of the relevant facts and events by 4:00 pm on #.
16. The parties file and exchange written outlines of opening submissions, limited to # A4 pages, 1.5 spaced text in font size 12, by 4:00 pm on #.
17. Any party receiving a witness statement may, not less than # working days before the witness is due to give evidence, give notice to the party proposing to call the witness stating:
 - (a) that a specified part of the witness statement is objected to as being inadmissible;
 - (b) that the witness is required to give oral evidence as to any part of the contents of the witness statement.

If no such notice is given the party calling the witness may take it that no part of the witness statement is objected to and that it will stand as the witness' evidence in chief if adopted by the witness.

18. If the party calling the witness accepts the requirement referred to in the preceding sub-paragraph, evidence of that part of the content of the witness statement must be given orally.
19. The judge will, before the witness is sworn, determine any unresolved issues arising out of any such notice.
20. The judge may require the witness to give oral evidence as to any part of the content of the witness statement, notwithstanding that no party has required this.
21. A copy of the witness statement, after deletion of any inadmissible passages and passages as to which oral evidence is to be given, must be available at trial for use by the witness and for tender in evidence.
22. A witness when sworn, and having given evidence of formal matters, must be asked whether the content of the witness statement is true and correct. If an affirmative answer is given, the witness will be taken to have adopted the witness statement and the witness statement may be admitted into evidence.
23. The witness statement when adopted will stand as the evidence in chief of the witness subject to these orders. The party calling a witness may not, without leave, adduce further evidence in chief from that witness.
24. Costs are reserved.
25. There is liberty to apply.

SCHEDULE 9²⁸
STANDARD JOINT EXPERTS ORDER

[PROCEEDING HEADING]

ORDER

JUDGE: The Honourable Justice/ Associate Justice #

DATE MADE:

ORIGINATING PROCESS:

HOW OBTAINED:

ATTENDANCE:

OTHER MATTERS:

THE COURT ORDERS THAT:

1. On or before #, each of the plaintiff and the defendants must nominate an expert (“the Experts”) and provide that expert with a copy of the Expert Witness Code of Conduct.
2. The parties each provide the Experts with copies of or access to all documents, and any other information, requested by the Experts to complete their joint report referred to below.
3. By #, the Experts confer and provide to the court and to the parties a joint report (“the Joint Report”) containing their joint opinion as to each of the following questions:

#INSERT QUESTIONS#

²⁸ See par 15.28 above.

4. If the Experts are unable to express a joint opinion on any question, the Joint Report must describe the difference(s) between the opinions and set out their respective reasons for disagreeing.
5. The Experts' conference is intended to be a consultation of Experts without any influence from a party to the proceeding. To that end, subject to paragraph 6:
 - (a) The conference of experts and all further communications between them in relation to the preparation of the Joint Report must be conducted in the absence of the parties, their employees or agents, or any practitioner for or associated with any party;

[*optional*: The conference of experts shall be facilitated by as associate judge, judicial registrar or other suitably qualified person.]
 - (b) None of the Experts may in the preparation of the Joint Report consult with any party, their employees or agents, or any practitioner for or associated with any party; and
 - (c) Notwithstanding (a) and (b), the Experts may jointly request further information or direction by letter signed by them directed to the practitioner for each of the parties and may receive such further information.
6. Save as contained in the Joint Report, unless the parties agree in writing no evidence may be admitted of anything said or done by any person at the conference between the Experts.