

Continuing Professional Development Seminars

Magistrates Court Practice

Presenter: Peter Pickering

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CONTINUING PROFESSIONAL DEVELOPMENT SEMINARS

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About the Presenter

The presenter at this seminar will be Peter Pickering. Peter is a barrister of 17 years experience. He was initially trained as a solicitor in civil practice, then went to the Victorian Bar in 1993. Since then he has divided his practice between civil claims and criminal representation, the latter mostly for the Office of Public Prosecutions. Apart from having two readers, he was also a weekly volunteer at the Western Suburbs Legal Service for 14 years, there supervising and teaching numerous law students and junior lawyers.

Seminar Programme

9:15 am – 9:30 am	Registration
9:30 am – 9:40 am	Introduction
9:40 am – 11:10 am	Session One
11:10 am – 11:30 am	Morning Tea
11:30 am – 12:45 pm	Session Two
12:45 pm – 1:00 pm	Concluding comments – Questions and Review

The above programme is flexible and will be subject to change on the day depending on the requirements of the group who are in attendance. The times used are intended to be indicative only.

A. Jurisdiction of the Court

Extent of jurisdiction:

- any claim for damages, debt, liquidated demand within the “jurisdictional limit” - s.100(1)(a) MCA
jurisdictional limit : \$100,000.00 from 1 January 2005 - s.3 MCA
- any claim for equitable relief within the jurisdictional limit – s.100(1)(b)
- any cause of action for damages or debt or liquidated demand, irrespective of the amount, with the consent of the parties - s.100(1)(c)(i)
- any claim for equitable relief within the jurisdictional limit, irrespective of the value of the relief sought, with the consent of the parties - s.100(1)(c)(ii)
- any cause of action if given jurisdiction by another Act - s.100(1)(d)

Jurisdictional limit: what falls within?

- use of a valuers certificate - s100(3)
- r.6.01(3) joinder of claims
- r.4.01(2) abandonment of claims above the limit

Nb. an order on a complaint is conclusive evidence of the abandonment of the excess claim - r. 25.06

- No jurisdiction except that conferred by statute (s.100(1)(d)) or inherent as incidental to the exercise of the jurisdiction conferred by statute: R v McGowan, Ex parte Macko [1984]VR 1000

Outside the jurisdiction: what choices for the parties? s.101 MCA

- amendment;
- stay of proceedings pending case transfer;
- striking out of the complaint

nb. Transfer to a court without jurisdiction - Whiley Investments (Qld) Pty Ltd v Pets Paradise (Qld) Pty Ltd [2009] VSC 144 per Davies J

Equitable Jurisdiction:

- s.100(1)(b) “any claim for equitable relief”
- s.31 Supreme Court Act 1986 – inferior court has the same equitable powers of the Supreme Court, also any equitable or legal defence or counterclaim

Other proceedings pursuant to the SCA:

- s.35: Representative proceedings
- s.36: Declarations
- s.37: Injunctions and receivers, interlocutory or final injunctions for prevention of removal of assets in Victoria

Powers for preservation of property:

The court may make an order for inspection, detention or preservation of property including:

- entering any land “or do any other thing for the purpose of obtaining access to the property”;
 - take samples of the property;
 - make observations or photograph the property;
 - conduct any experiment on or with the property;
 - observe any process
- r.35.05(1)-(2)

Cause of Action:

- a material part must arise in Victoria, or the defendant resides in Victoria at the time of service - s.100 (4)

Other Jurisdictions:

- Residential Tenancies Act s.447-8, s.509-510
- Motor Car traders Act 1986 s.47
- Corporations Act 2001 s.58AA, s.1337E, MC Practice Note 3 of 2001

- Fences Act 1968 s.7

Arbitration - s.102 MCA

- court must refer a complaint under \$10,000 for arbitration
- exceptions: s.102(3)
- exemptions – complaint for recovery of municipal rates, Water Act rates or charges: MCA: s.102(2), MC Arbitration Regulations 2000 Schedule 2

Judicial Registrars:

- appointment of judicial registrars : s.16B MCA
- judicial registrar must not hear matters the judicial registrar for any reason thinks inappropriate s.16J MCA
- limited jurisdiction - Magistrates Court (Judicial Registrars) Rules 2005:

Power to make orders, including final orders, with the consent of the parties - r.4(1)(a);

Instruments Act 1958 s.5-7: leave to defend and related powers - r.4(1)(ac)

Complaint referred to arbitration where the amount of monetary relief sought is less than \$5000.00 - r.4(1)(c)

Rehearing applications pursuant to s.110 MCA - r.4(1)(cb) – see also r.4(1A)

Adjournments pursuant to s.128 - r.4(1)(cb)

Pre-hearing Conference - r.4(1)(d)

Exercise all of the powers of a magistrate but not:

- an interpleader under r.27.05 if the value of the property is over \$5000.00 - r.4(1)(f)(i)
- approve a compromise of a claim by a minor or person under a disability under r.32.05 - r.4(1)(f)(ii)
- grant an injunction under r.35.04 - r. 4(1)(f)(ii)
- make orders for detention or preservation of property under r.35.05, but can order inspection: r.4(1)(f)(ii)

B. Case Management

Overriding Objective:

The overriding objective of the MCR is to deal with a case justly – r.1.19

“Justly” includes, as far as practicable:

- effectively, promptly, economically;
- avoiding unnecessary expense;
- dealing with the case in ways proportionate to the amount of money involved and the complexity of the issues;
- allocating appropriate resources r.1.19(2)

Parties have a duty to help the court further the overriding objective – r.1.20

The court must further the overriding objective by actively managing cases –r .1.22(1)

The court may give any direction for the conduct of the proceeding conducive to its “effective, prompt and economical determination” – r.35.03

Compliance with the Rules:

A failure to comply with the rules is an irregularity and does not render the proceeding, step document or order a nullity – r.2.01(1)

Interpretation of the Civil Procedure Rules:

- r.1.12 MCR: Procedure wanting or in doubt
see: *Truckpower Automotive Engineering Pty Ltd v Goulopoulos Shiels and Mangopoulos* (unreported VSC per O’Byrne J 18 October 1996) whether a procedure “wanting or in doubt”

Where there has been a failure to comply, a court may:

- set aside the proceeding, either wholly or in part;
- set aside any step in the proceeding, document or order;

- exercise any powers to allow amendments and to make orders dealing with the proceeding

- r.2.01

But the court must not wholly set aside any proceeding or complaint on the ground the proceeding was commenced by the wrong process – r.2.02

Also, a court must not set aside any proceeding, step, document or order on the ground of failure to comply unless the application is made

- within a reasonable time after the applicant becomes aware of the failure;
- before the applicant has taken a fresh step after becoming aware of the failure.

- r.2.03

The court may dispense with compliance with any of the requirements of the MCR, either before or after – r.2.04

A court may extend or abridge any time fixed by the Rules, whether before or after the time expires - r.3.02

A court may set aside or vary:

- a self executing order;
- dismissal of a complaint on failure to comply with a self-executing order;
- striking out of a notice of defence on failure to comply;
- an order made on the failure of the defendant to comply with a self executing order;
- an order made on failure of the plaintiff to comply with a self-executing order

- r.25.07(3)

The court can order at any time the addition, substitution or removal of a party from the proceeding – r.6.05

The court may also order consolidation of multiple proceedings, proceedings to be heard at the same time or immediately following, or stay any of them – r.6.06

Amendment:

The court may at any stage of a proceeding order that a document be amended or give a party leave to amend for the purpose of:

- determining the real question in issue between the parties;
- correcting any defect in the proceeding;
- avoiding a multiplicity of proceedings

- r.35.02

Powers of Registrars:

- a registrar may refuse to accept a document where the “form or contents “ of the document show that it would be an abuse of process – r.3.06(1)
- a registrar may refuse to accept a document for filing if not prepared in accordance with the rules or any order of the court – r.3.06(2)
- a registrar may make any order in any proceedings, summons or application by consent without appearance – r.25.05(1.1)
- However, the registrar may refer the matter to the court for decision if not satisfied that the order should be made- r.25.05(2)
- a registrar may dispense with any of the requirements of r.22.01(PHC) – r.22.01(12)

Nb. Practice Note 4 of 2009

Upon receipt of a notice of hearing for:

- a proceeding,
- an arbitration,
- a PHC,
- a mediation,
- an interlocutory application;
- a summons

each party must as soon as practicable notify the other parties of the time, date and place of hearing.

C. Complaints

Form of the Complaint

Complaint is issued in Form 4A (see Annexure A)

Complaint it must contain a statement of claim – r.4.02.1

The statement of claim must contain

- a “summary of material facts on which the plaintiff relies but not the evidence on which those facts are to be proved”;
- “necessary particulars of every fact or matter”;
- if the claim arises by or under any Act, identify the specific provision;
- the amount or other relief sought;
- the place where and the date when the claim arose.

The complaint must be divided into paragraphs consecutively numbered, with each fact or matter divided into a separate paragraph – r.4.02.1 (4)

A complaint may contain inconsistent allegations in the alternative - r.4.02.2(3)

Or it may join a number of claims against the one defendant - r.6.01(1)

Content and form of documents - r.3.05

Nb. r.21.02 – content of complaints in arbitrations: “the date, place, circumstances and cause of action upon which the claim is based together with the amount or other relief or remedy sought”

Special Complaints:

Motor Vehicle Claims:

- if the claim includes the cost of repairs/total loss then an itemised quotation/assessment must be attached to the complaint – r.4.02.2

- see also r.21.06 – service of assessors’ reports 14 days prior to pre-hearing conferences or arbitrations

Complaints to be served out of Australia in form 5A.02(1) – r.4.02.3

Instruments Act 1958:

- a complaint in a bill of exchange is filed in form 24A (see Annexure B)
- a copy of the bill is attached to the complaint

Corporations Act 2001:

- originating process is complaint and supported by affidavit at the time of filing
- the affidavit must comply with the Supreme Court (Corporations Act) Rules 2.4(2)
- Plaintiff must also file a notice to defendants as per the Practice Note
- Proceeding is listed for mention.

MC Practice Note 3 of 2001 (see Annexure C)

Fences Act 1968:

- see Fencing Dispute Information Sheet (see Annexure D).

Issue of complaint - r.4.04:

Filing of Form 4A at the court registry – civil registry courts Annexure B of MCR

Complaint is valid if it bears the allocated court number and date of filing – r.4.04(3)

Filing by electronic message: see EDI (see Annexure E)

Duration of Complaint and Amendment

- the complaint is valid for service for one year from the date of filing – r.4.05(1)
- the validity can be extended for up to one further year - r.4.05(2)
- the registrar may amend a complaint at any time before service – r.35.02.1

NB. Urgent cases

- in urgent cases, eg injunctions, the court may make an order in the absence of a complaint where the plaintiff undertakes to commence the proceeding – r.4.08
- see also r.35.04 – granting of injunctions before the commencement of proceedings

Parties to a Complaint:

- a party may be a corporation but it must not “take any step in a proceeding” except by a solicitor” (r.1.14) but this does not apply to filing a complaint
- a party must give details of address for service in Victoria, whether it sues it in a representative capacity, and of any solicitor – r.4.02
- a plaintiff may sue in a representative capacity – r.6.03
- a defendant may be sued or be sued in its business name – r.6.04

Amendment of a Complaint:

A registrar may amend a complaint before service – r.35.02.1

D. Service of the Complaint

Any document may be served personally, but need not be unless required by the MCR – r.5.01

However, a complaint must be served personally – r.5.02

What is personal service?

- leaving a copy with the person to be served
- delivering it to the place of residence to a person over 16y.o.
- delivering it to a person's place of business to a person over 16y.o in charge or employed at the business

– r.5.03

What is ordinary service? r.5.07(1)

- leaving the document at the address of the person to be served
- posting to that person's address
- document exchange
- facsimile to a solicitor

Date of Service: r.5.07(2)

- service by post deemed to be the day "it would be delivered in the normal course of post"
- service by document exchange – next working day

Service on particular defendants eg. corporations, minors, the Crown – r.5.04

Service on the TAC – r.5.06

Also, see s.109X(1) of the Corporations Act- service on a company by leaving it at or posting it to the registered office, or delivering a copy personally to a director.

Service on solicitor to endorse a copy of the document served – r.5.08

Proof of service – affidavit of service is proof of service “unless the contrary is proved” – r.5.11

Nb. Time for service any document (not including a complaint) which is served after 4pm or on any day the court is closed is taken to be served on the next day the after – r.3.04(2)

See also r.3.01 : calculating time; and r.3.04.1: process in the vacation

Service Out Of Victoria:

Service and Execution of Process Act 1992 (Cth.)

- service is only effective if accompanied by the prescribed notice s.16
- prescribed notice for service : Form 1, Service and Execution of Process Regulations 1993, Schedule 1 (see Annexure F)

Service Out Of Australia – Order.5A

- only applies to certain claims - r.5A.01
- must be issued in Form 5B and contain an endorsement as to the connection with r.5A.01 – r.5A.02

Service on Partners

- when persons are sued in the name of their firm, it is sufficient service if one of those partners is served – r.5.05

Service of Blank Notice of Defence

- two blank notices of defence must be served on the defendant with the complaint - r.5.02

E. Defences

Form of Notice of Defence: Form 9A (see Annexure G)

Notice of Defence is “given” by serving the Plaintiff and by filing a copy at the registry
r.9.01(2)

Nb. A corporation may give a Notice of Defence – r.1.14(2)

Content of the Notice of Defence

- it must state which facts are admitted, denied or not admitted in the statement of claim – r.9.02(1)
- if the defendant does not, then the fact is taken to be admitted – r.9.02(2)
- if the defendant denies a fact, it must give the reasons for denying the fact and state particulars of any different fact it intends to prove – r.9.02 (3)

nb. see *Hercules v Magistrates Court of Victoria* [2008] VSCA 1 per Redlich JA

- if a fact is not admitted, a defendant must not adduce any evidence about that fact except in cross examination – r.9.02(4)
- the defendant must state any facts or matters which make the claim not maintainable, might take the plaintiff by surprise, raises questions of fact not arising from the statement of claim – r.9.02 (5)
- identify any defence under any Act relied upon – r.9.02 (6)
- be divided into consecutively numbered paragraphs, and each fact or matter contained in separate paragraphs – r.9.02 (7)
- may contain alternative allegations - r.9.02.2

nb. r.21.03: content of defence in arbitrations: the Notice of Defence must state the “date, place, circumstances, facts or matters relied on in defence of the claim”

Special Defences

- tender: cannot be relied upon unless the amount alleged to have been tendered is paid to the registrar within 7 days – r.9.02(8)

- illegality, fraud, minority, limitation of actions (see former rule 9.01)

Particulars

- the plaintiff or the defendant may request particulars of the other party by notice in writing – r.9.03, 9.04
- the notice must be within 14 days of the date of the defence – r.9.05
- the particulars must be filed and served within 14 days of the date of the notice - r.9.06
- the court may make an order that the party provide the particulars in the event of failure to comply with a notice - r.9.08

nb. Parties in arbitrations may not serve a request for further and better particulars of the claim, counterclaim or defence – r.21.04

F. Counterclaims & Third Parties

The rules apply to a counterclaim as if it were a complaint, although filed in form 7A – r.7.01(2), 7.02(1)

If a complaint is to be served outside Australia, it must be served in accordance with order 5A using Form 7AB – r.5A.06, 7.02(2)

Service of Counterclaim:

- two notices of defence in form 9A (with any necessary modifications) to be served with the counterclaim – r.7.02(3)
- counterclaim to be filed and served within 21 days of the date of the defence – r.7.01(3)

Third Parties:

Third party proceedings can be brought against any non-party for:

- contribution or indemnity
- any relief or remedy relating to the original subject matter of the proceeding
- any question relating to or connected with the subject matter which should be determined as between the parties and the third party - r.8.01, r.8.09

Third party proceedings are commenced by filing a third party notice in form 8A, served in the same manner as a complaint, the third party notice to be filed within 42 days of the notice of defence – r.8.01, 8.02(1)-(2), (4)

The third party must be served with a copy of the complaint as well as the form 8A, and the third party notice must be served on the plaintiff and any other party – r.8.02(2)-(3).

A third party who has a claim against another party (whether plaintiff or defendant) in the proceeding can file a counterclaim as if the third party is a defendant – r.8.02(3.1)

Subsequent parties may be joined by the third party by notice in writing – r.8.07

Once a third party is joined to the proceeding, a plaintiff may join the third party as a defendant by notice in writing. – r.8.03

Alternatively, a plaintiff may join a third party when the plaintiff is the subject of a counterclaim – r.8.08

G. Procedures Prior To Hearing

Discovery:

Notice for Discovery in Form 11A may be served by any party to the proceeding on any other party requiring discovery of “all documents which are or have been in the party’s possession relating to the proceeding” - r.11.02

Possession means “possession custody or power”

Cf. Arbitrations:

- no party may serve a notice for discovery - r.21.04
- in claims of \$5000.00 or more, each party must serve a “list of documents” 14 days before a pre-hearing conference or before the date fixed for arbitration - r.21.05 (1)
- the list of documents must identify each document “in the possession of the party” which supports or is injurious to the claim or counterclaim – r.21.05 (2)

The Notice for Discovery must be served within 28 days of the service of the Notice of Defence – r.11.03

The Affidavit of Documents must be in form 11B and served within 28 days of the service of the Notice- r.11.04, 11.05

Nb. there is a continuing obligation to make discovery after the affidavit is made 11.05.1

Inspection of the discovered documents is by Notice to Produce in Form 11C, and the party served with the notice must serve a notice within 7 days stating a place and time for inspection. – r.11.06

If a party fails to make to make discovery, the court may order discovery within a time limit – r.11.07(1).

A court can also order inspection of the documents – r.35.05(1)

Nb. No equivalent power in the MCR to SCR 29.05 limiting discovery

Interrogatories

Any party may serve interrogatories on another party “relating to any question in between them in the proceeding” within 28 days of the Notice of Defence – r.12.01,12.02.

The Interrogatories must be answered by affidavit within 28 days after service of the interrogatories – r.12.04

Nb. SCR and CCR r.30.04 require the interrogatories and answers to be “filed and served”, MCR only require “served”

Cf. Arbitrations: - no party may serve interrogatories - r.21.04

All interrogatories must be answered “without evasion” unless it is objectionable as:

- not relating to question between the parties;
 - unclear, vague or too wide;
 - oppressive;
 - requires expression of an opinion a party is not qualified to give
 - privileged
- r.12.05

nb. R.12.05 is similar to SCR 30.07 (1), but there is no equivalent to SCR 30.07 (2) or 30.05

The answers may be tendered as evidence on an application or at hearing - r.12.08

If a party fails to answer interrogatories, the court may make an order requiring the answers within a specified time – r.12.07

Applications

Applications must be on notice to the other party in Form 20A and must be accompanied by an affidavit filed before hearing – r.20.02, 20.03, 16.01(b)

The affidavit used in an application may contain a statement of fact based on information and belief if the grounds of the belief are set out – r.18.03(2)

Nb. An application must be filed and heard in the court in which the proceeding is filed – Practice Note 2 of 2002

The application and affidavit must be served “within a reasonable time before hearing” or no later than 2pm on the day before hearing r.20.04

A court may:

- Adjourn the hearing on such terms as it thinks fit - r.20.05
- Hear the matter in the absence of the other party - r.20.06 (1)-(2)
- Strike out a defence or dismiss a claim eg. r. 11.07(1)(b)-(d)

H. Procedures Instead Of Hearing

Default Judgment

If a defendant does not “give” Notice of Defence within 21 days after service of the complaint, the Plaintiff may apply for an order in Form 10A - r.10.01

- it may be filed in electronic form - r.10.1(2(a), 10.02.1

The Form 10A must be accompanied by an affidavit of service of the complaint- r.10.02(a)

In cases other than debt, liquidated demand or claim for damage to a motor vehicle, it must be accompanied by a further affidavit verifying the complaint and the nature and extent of the loss – r.10.02 (b)

- nb see SCR r.21.03, 21.04 re. interlocutory and final judgments

“If satisfied an order should be made” the registrar must make the order or refer the matter to court if not satisfied or at the plaintiff’s request – r.10.03

The court may then:

- make the orders sought
- direct further affidavits be filed
- give directions
- refuse to make the orders
- make any other orders it considers appropriate

The registrar can make orders after the filing of any further affidavits – r.10.03(5)

Orders In Default Of Compliance

The court may order a complaint to be dismissed for non-compliance with the MCR and the defendant may apply for costs:

- failure to give particulars – r.9.08(1)(b)(i), 9.08(1)(c),
- failure to make discovery – r.11.07(1)(b)(i), 11.07(1)(c)

- failure to answer interrogatories – r.12.07(1)(b)(i), 12.07.(1)(c)
- failure to attend a pre-hearing conference – r.22.01(6)(a)
- failure to attend a mediation – r.22A.04(1)(a)

The application must be accompanied by an affidavit if it is made pursuant to orders 9,11 and 12. The registrar may make the order or may refer to the court for decision – r.10.06

A defendant whose notice of defence is struck out shall be taken to be a defendant who does not give a notice of defence – eg. r.11.07(2), 12.07(2), 22.01(9), 22A.04(4)

- see also r.25.07(2)

Summary Judgment for the Plaintiff

This only applies to a claim or counterclaim for a debt or liquidated demand – r.10.07, 10.15

It is not available to a plaintiff in an arbitration – r.21.04

An application may be made at any time (but only once) on the ground that the defendant has no defence to “the whole or part of the claim, or no defence except as to the amount of the claim” – r.10.08(1), r.10.08(5)

- cf. SCR 22.02

The application must be in from 10C and the affidavits in support must be filed before hearing – r.10.08(2),(4)

However, the application and affidavits must be filed and served not less than 14 days before the hearing date – r.10.10

The defendant may show cause against the orders, and must serve a copy of any affidavit in opposition not less than three days before the hearing – r.10.11(1),(3)

Nb. If a defendant serves an affidavit, the court may “by order” allow the plaintiff to rely on an affidavit in reply – r.10.12. There is no provision for supplementary affidavits.

The court may orders as follows:

- dismiss the application r.10.13

- order any party or the maker of any affidavit to attend for cross examination - r.10.14(1)
- order any party or the maker of any affidavit to produce any books or papers – r.10.14(2)
- give directions – r.10.17
- the plaintiff may continue with any remainder of the claim or other claim – r.10.18
- make an order on the claim or part of the claim – r.10.13(b)
- give the defendant leave to defend the claim or part of the claim, unconditionally or on terms – r.10.13 (1)(c)
- make a declaration of liability until the amount of the claim is ascertained - r.10.16
- stay execution of the order against the defendant pending the hearing of any counterclaim – r.10.13(2)

I. Evidence

All evidence must be oral, on oath or affirmation - r.16.01

Affidavits must be used whenever practicable, and must be used in applications – r.16.03, 16.01(b)

Nb. Affidavits, exhibits or annexures are not to be filed unless required by the rules or by order, but may be tendered at hearing – see Practice Note 4 of 2009 and r.18.06, 18.09

Affidavits may be used if notice is given at least 21 days before hearing and at least 10 days before hearing the other party does not give notice of objection – r.16.02

Evidence in Motor vehicle claims:

The itemised quotation or assessment attached to the claim, counterclaim or third party notice is evidence of the cost of repairs unless notice is given within 42 days after service that the maker of the quotation or assessment attend for cross-examination – r.16.01.1

Expert witnesses:

Statement of an expert witness is to be served not later than 10 days before hearing – r.19(1)

The parties must not adduce expert evidence except by cross examination unless the party has served an expert witness statement – r.19.02(3). However, this does not apply to motor vehicle claims or where there has been an affidavit under r.16.02 – r.19.01

The statement of the expert witness must contain:

- name and address of the witness
- qualifications
- “the substance of the evidence it is proposed to adduce”
 - r.19.02 (2)
 - cf. r. 19.02(3) service of the “report” of the expert witness and SCR 44.03, 44.05

Nb. A party to an arbitration cannot serve an expert witness statement - r.21.04(f) however, a copy of any assessor's report "or documents relating to an assessment in the possession of the party" must be served not less than 14 days before a pre-hearing conference or the arbitration hearing

Admissions

- a party may serve a notice requiring the other party to admit facts or the authenticity of documents (Form 14A) within 14 days – r.14.03(1),14.04(1)
- if a party served with the notice does not dispute the facts or the authenticity of the document in the notice, the party will be taken to have admitted the fact or the authenticity of the documents – r.14.03(2), r.14.04(2)
- A party may dispute the facts of documents by notice in Form 14B – r.14.03(4), r.14.04(4)
- If a party disputes a fact or the admission of a document and it is later proved, the disputing party pays the costs of proof – r.14.05

Witness Summons

The order for the witness summons is taken to be made when the summons (Forms 17A-D) is signed by the registrar – r. 17.02(1)

The summons may be addressed to a number of persons and must be served personally – r.17.02(2)-(3)

Service is in accordance with Order 5 – r.17.03

The summons must be accompanied by conduct money "sufficient to meet the person's reasonable expenses of complying" – r.17.04

The person may be paid the fees, expenses and income lost – r.17.05

Nb. A person producing documents only may produce the documents to the registrar 2 days before hearing – r.17.08

J. Alternative Dispute Procedures

Pre-Hearing Conferences

A magistrate or registrar may refer a proceeding, or part of a proceeding, to a PHC – MCA s.107, r.22.00

The magistrate or registrar must conduct the PHC and may-

- Refer it back to court if not settled - s.107(2)(a)
- Refer to arbitration – s.107(2)(b)
- If it is settled, refer to a court for the making of an order - s.107(2)(c)
- Dismiss a complaint for failure of the plaintiff to appear – r.22.01(6)(a)
- Strike out a defence for failure of the defendant to appear – r.22.01(6)(b)
- Make an order for the defendant’s costs if the complaint is dismissed – r.22.07(a)
- Make an order on the claim for debt, liquidated demand or for motor vehicle damage or loss, when the defence is struck out – r.22.01(7)(b)
- Adjourn the PHC and make an order for costs – r.22.01(8)
- Make a consent order – r.22.01(10)
- Extend or abridge time under rule 3.02 – r.22.01(11)
- Consolidate proceedings under rule 6.06 – r.22.01(11)(b)
- Give leave to join subsequent parties under r.8.07 - r.22.01(11)(c)
- Make orders re. failure to give particulars under 9.08(1) - r.22.01(11)(d)
- Make orders re. failure to give discovery under 11.07(1) - r.22.01(11)(e)
- Make orders re. failure to answer interrogatories under 12.07(1) - r.22.01(11)(f)
- Transfer the venue of the proceedings of its own motion under rule 29.01(6) - r.22.01(11)(g)
- Order any document be amended, but not as to costs, under rule 35.02 - r.22.01(11)(h)

- Make directions under rule 35.03 - r.22.01(11)(i)
- Order inspection, but not detention or preservation, of property under rule 35.05(1) - r.22.01(11)(j)
- Order a complaint be heard by a court and not referred to arbitration - r.22.01(11)(k)

All parties must attend the hearing in person and with a legal practitioner “or other person empowered by law “ – r.22.01

However, if the attendance of a person at a PHC is unreasonable given their location, if requested in writing a PHC may be conducted by telephone – see Practice Note 2 of 2005

If the party is a corporation, a legal practitioner and a person “in the exclusive employ of the corporation” and authorised in writing must appear – r.22.01(3)

Also, the party must have a person present who can settle the proceedings – r.22.01(4)

All proceedings of a PHC are confidential – r.22.02

Mediation

A magistrate or a registrar may refer a matter to mediation, either in whole or part – r.22A.01, MCA s.108(1)

All parties must attend the hearing in person and with a legal practitioner “or other person empowered by law “ – r.22A.03(1)

If the party is a corporation, a legal practitioner and a person “in the exclusive employ of the corporation” and authorised in writing must appear – r.22.03 (2)

Also, the party must have a person present who can settle the proceedings – r.22.03(3)

A magistrate or registrar may make orders dismissing a proceeding or striking out a defence for failure of a party to attend the mediation – r.22A.04(1)

A registrar may make consent orders agreed at a mediation, including orders for the final disposition of the proceedings – r.22A.05

A mediator:

- may adjourn a proceeding with the consent of the parties – r.22A.06

- must file a mediation report in Form 22AA within 7 days

All proceedings of a mediation are confidential, and no evidence is admitted at hearing unless the parties agree in writing– r.22A.08, MCA s.108(1)

Nb. All time limits for taking a step in a proceeding are calculated from the date of the filing of a mediation report, not from the date of the filing of a defence – r.22A.09

See also Practice Direction 13 of 2004 and 6 of 2007 – Mediation Programme

A mediator has the same immunity and protection as a Supreme Court Judge – s.108A MCA

K. Special Procedures Prior To Hearing

Applications

An application must be made on notice and be supported by affidavit – r.20.01

The application must in Form 20A and the affidavit must be filed before hearing – r.20.03(1)(3)

The applicant must serve the application and a copy of the affidavit on “every person to whom notice is to be given” a reasonable time before hearing and no later than 2pm on the previous day – r.20.04

Instruments Act 1958

Application for leave to defend is given by the court pursuant to s.5 of the I.O.

Application for leave to defend is made without notice in Form 24B and must be accompanied by an affidavit sworn by the applicant “or by another person” who can depose to facts from his or her own knowledge – r.24.04

Nb. Instruments Act s.5: the defendant to show a defence, such facts as would make it incumbent on the holder to prove consideration or such other facts deemed sufficient by the court.

The court does not make the decision in open court – r.1.11(d)

Once a court makes a decision, the registrar must notify the parties in Form 24D

If leave is not granted, a plaintiff may apply for an order in Form 24C and the registrar must make the order if satisfied that

- the complaint has been served
- the defendant has not given leave to defend

- r.24.05

However, a defendant may be given leave to defend after an order has been made in favour of the plaintiff is “special circumstances” and it appears reasonable to do so and on such terms as the court thinks fit – s.6 Instruments Act

An application under s. 6 is made in Form 24E and not less than 5 days before the day of hearing serve a copy on the complaint personally. The application must state the special circumstances. – r.24.07(1)-(3)

If such an application is made, no enforcement for 14 days from the date of filing or until after hearing – r.24.07(4)

Failure to appear at the hearing means an applicant may not make a further application without leave – r.24.07(5)

Preliminary Discovery and Discovery From A Non-Party

Application to Ascertain a Defendant:

Application may be made to “ascertain a description of a person sufficient for the commencing of a proceeding” after the applicant has made reasonable enquiries and it appears that “some person”:

- has or is likely to have “knowledge of facts”; or
- has had or is likely to have had “any document or thing”

“tending to assist in such ascertainment”

the court may make an order:

- the person (or appropriate officer of a corporation) attend before the court to be orally examined “in relation to the description of the person concerned; or
- make discovery to the applicant of all documents relevant to the description of the person.
- produce any document relating to the description of the person concerned.

- r.13.03

nb. This applies between a party in a proceeding and a non-party – r.13.04

Application from a Prospective Defendant:

A court may make an order for discovery from a prospective defendant where:

- there is reasonable cause to believe that the applicant has a right to obtain relief from an ascertained person; and
- after “all reasonable enquiries”, the applicant does not have sufficient information to decide whether to commence proceedings; and
- there is reasonable cause to believe that the person is likely to have or have had any document relating to the question “whether the applicant has the right to obtain the relief” and the inspection “would assist the applicant to make the decision

- r.13.05

nb. This applies between a party and a non-party– r.13.06

A party may apply for non-party discovery where it relates to any question in the proceeding – r.13.07

Procedure – applications under Order 13

- to be served on every party to the proceeding
- to be personally served
- supported by an affidavit stating the facts on which it is based and specifying the documents or class of documents – r.13.08(1)(2)

Inspection of any documents as per r.11.06

Nb. Costs: orders can be made for the costs and expenses of the applicant, the person against whom the order is sought and of any party in the proceeding, including security for costs – r.13.10

L. Hearings

No opening or closing addresses are made at the hearing of a complaint without court orders – r.23.02

A court may adjourn a hearing at any time on such terms as it thinks fit – r.23.04

If a party does not attend, a court may

- proceed with a hearing;
- strike out or dismiss the complaint;
- adjourn the hearing;
- make any other order the court considers appropriate

- r.23.03

Arbitrations

- the court is not bound by the rules of evidence “but may inform itself on any matter in such manner as it thinks fit”
- the court is bound by the rules of natural justice
- the court is not required to conduct any proceedings in a formal manner;
- the court may exercise any powers a court may exercise on a hearing
- evidence may be orally or in writing and must be given on oath or by affidavit.

- MCA s.103

- an award of the court in an arbitration has the effect as if it were an order in a proceeding – r.104(3)

Nb. Some proceedings do not have to be conducted in open court – r.1.11

Orders of the Court

A court may make any order as the case requires:

- on the application of a party; and

- whether or not it was sought in the complaint;
- at any stage of the proceeding

- r.25.01

The order takes effect from the date it is made, unless the court otherwise orders –r.25.02

An order must be complied within 14 days of service of the order:

- unless the court otherwise orders
- the order concerns the payment of money other than into court;
- the order is for delivery of goods

- r.25.03

An award in an arbitration must be in writing, but if the court includes in the award a statement of reasons, it does not have to be in writing – s.104(1)-(2).

However, a statement of reasons may be requested within 28 days of the making of the award and it is to be furnished within a “reasonable time” – r.104(4)

Discontinuance or Withdrawal

A complaint, counterclaim or third party notice may be discontinued or a defence withdrawn at any time without leave by notice in writing filed and served– r.4.09 (1)-(2)

If a proceeding is withdrawn, a court may order a subsequent proceeding stayed until costs are paid – r.4.11

M. Costs

Unless “it is impracticable to do so”, costs are to be fixed on the day of hearing of the complaint or application - r.26.01 (2)

Otherwise, costs are to be assessed pursuant to Order 26A – r.26.01(2)

Nb. No costs are awarded in an arbitration where the ward is less than \$500.00 “unless satisfied special circumstances make it appropriate to do so” – s.105 MCA. Costs in arbitrations are awarded pursuant to the Magistrates Court Arbitration (Professional Costs) Regulations – “the Costs Cap”

Unless otherwise ordered, costs are to be fixed in accordance with the scales in appendix A and shall be:

- party – party
- the amount recovered determines the scale of the Plaintiff’s costs
- the amount sought to be recovered determines the Defendant’s costs

- r.26.03

Costs when there is a counterclaim:

- if Plaintiff succeeds on claim and counterclaim, costs fixed on the amount recovered on the claim, BUT
- if the counterclaim is larger than the claim, costs incurred after service of the counterclaim determined on the amount of the counterclaim.
- If the defendant succeeds on claim and counterclaim, costs are fixed on the amount of the counterclaim or the claim, whichever is larger.
- If both parties are successful, by the amounts they recover on their claims.
- If both parties fail, on the amounts claimed by the opposite party

- r.26.04

nb. If the scale of costs does not provide for any case, the court may allow reasonable costs, and may allow a greater or lesser sum if the scale is inadequate or excessive – r.26.02(2), (3)

Assessment under Order 26A

- costs which are to be assessed may be on party-party- basis (r.26A.04), solicitor client (r.26A.05), indemnity (r.26A.06) or “such other basis as the court may direct” – r.26A.03
- However, unless otherwise ordered, the costs must be party-party – r.26.07

Costs are assessed by a registrar, following an application per Order 20 – no affidavit required together with bill in accordance with 26A.14 – r.26A.10

The application must be served 21 days before the hearing of the application, but the registrar must not assess the bill unless a copy is served on the other party “before or at the time of service of the application”- r.26A.10(2), r.26A.12

Objections to the bill by notice served not less than 7 days before hearing – r.26A.19

The registrar may:

- allow or disallow costs where there is no objection - r.26A.21;
- make a interim, separate or final orders re. costs – r.26A.29(2)-(3)
- increase the amount of any allowance or expense in Appendix A – r.26A.33
- give directions re. parties to whom the application should be addressed or should attend - r.26A.22(1)
- disallow costs of attendance of any party “whose attendance is unnecessary”- r.26A.22(2)
- make orders for reserved costs – r.26A.24
- order a party liable to be paid costs to serve an application – r.26A.26
- order a solicitor who has caused a party to fail to have costs assessed to pay costs of the application before the registrar – r.26A.27

However, any party “interested” may attend the assessment- r.26A.22

Any party objecting to the registrar allowing or disallowing any item in a bill may apply to the court on notice for a review by a magistrate, such application to be within 14 days – r.26A.30(1)-(3)

Nb. The application for review does not operate as a stay of the registrar's order except as the registrar or magistrate otherwise orders – r.26A.30(8)

Security for Costs

Security for costs may be ordered against “any person who makes a claim in the proceeding”- r.31.01

The application may be made by a defendant, a defendant to a counterclaim or a defendant to a third party claim – r.31.01

Cf. SCR 62.01

Security for costs may be ordered where-

- the Plaintiff is ordinarily resident out of Victoria;
 - the Plaintiff is a corporation and there is reason to believe that there the Plaintiff has insufficient assets in Victoria to pay the costs of the defendant;
 - a proceeding in another court for the same claim against the same defendant is pending
 - the plaintiff has changed address after the commencement of the proceeding to avoid the consequences of the proceeding
 - under any Act or Companies code the court may require security for costs
- r.31.02

The Court may:

- order that security be given “in the manner and at the time the court directs” – r.31.03
- if the plaintiff fails to give security as required by the order, the court may dismiss the claim – r.31.04
- set aside or vary any order for security for costs – r.31.05;
- order that the proceeding be stayed until the giving of the security – r.31.02

Offers of Compromise

Both Plaintiff and defendant may serve an offer of compromise in writing, which must say that it is served in accordance with Order 15 – r.15.02(1)-(3)

The offer must be open for at least 7 days and a written acknowledgment of service must be served by the receiving party within 3 days – r.15.03(3)-(5)

The offer is to be paid within 30 days of acceptance (r.15.04), is without prejudice (r.15.05) and the defendant must pay the costs of the claim up to the day of acceptance (r.15.03(8)).

Consequences of failure to accept:

- if the offer is made by the Plaintiff, costs on the next higher scale from the date the offer was served, unless Scale F applies – r.15.08(2)(c)
- if the offer is served by the defendant, the plaintiff is entitled to costs to the date of the offer and the defendant from that date – r.15.08(3)
- the court must disregard interest after the date of the offer if an order is assessed as being more or less favourable – r.15.08(5)

N. After the Hearing

Appeals

A party to civil proceeding may appeal against a “final order” on a “question of law”- s.109(1) MCA

The appeal must be instituted no later than 30 days from the date the order was made – s.109(2)(a)

An appeal after 30 days is an application for leave to appeal and the Supreme Court may grant leave if satisfied:

- the failure to appeal was due to exceptional circumstances;
- the other party would not be materially prejudiced by the delay
- s.109(4)-(5)

Powers on Appeal: the Supreme Court may make any order it thinks appropriate, including:

- remitting the case for rehearing
- giving directions

Nb. The rehearing may be a complete rehearing, not just a reconsideration of the original evidence – see *Ericsson Pty Ltd v Potosi* (2000) 1 VR 260 per Brooking JA

Nb. Appeals are conducted in accordance with the SCR – s.109(3) MCA

“INTERNAL APPEALS”:

Appeals from Judicial Registrars:

Review of decisions of judicial registrar by a magistrate - s.16K MCA

Magistrate may direct hearing and determination by judicial registrar may be reviewed by the Court

Nb. a review is a hearing de novo

Procedure for review: Magistrates Court (Judicial Registrars) Rules 2005 r.5

- Request must be in Form 1 – Request for Direction;
- Request must be accompanied by an affidavit stating the reasons for the request and filed within 14 days of the order, but time can be extended by the Court.
- The request is determined by the court without notice to any party, unless the court directs

Nb. The filing of the request does not operate as a stay, but a party may request a stay (r.6) and the direction that the decision be reviewed operates as a stay (r.7)

Appeals from Orders of Registrars:

“Any person affected” by an order made by a registrar may appeal to a magistrate r.33.01(1)

- The appeal must be commenced by application under Order 20 within 14 days after the order is made – r.33.02(1.1)-(2)

Nb. The application does not operate as a stay of the order unless ordered by the magistrate, and this rule does not apply to orders in default of defence – r.33.02(4)-(5)

Setting Aside Orders

If a final order is made against a person who did not attend the proceeding, the court may set aside the order and rehear the matter – MCA s.110

However, the application operates as stay on an order for payment of money, but not otherwise unless the court orders – s.110(3),(4)

The application for re-hearing of a summary judgment under r.10.08 or 10.15 is by Form 10D and must be served not less than 3 days before the day of hearing. – r.10.19(1)-(3).

The court may give direction as to the future conduct of the matter, including adjourning the application on such terms as it thinks fit – r.10.19(1)(5).

However, if an applicant fails to appear at the rehearing application and the application is struck out, the applicant can reapply only if the applicant first obtains leave of the court – MCA s.110(5)

O. Enforcement

An order of the court may be enforced by:

- warrant to seize property;
- attachment of earnings order;
- attachment of debts order.
- s.111(1)(a)-(c) MCA

Oral Examination

The court can require a debtor to appear for examination as to:

- the amount and source of income of the debtor,
- property and assets of the debtor,
- cash “readily available” or “can be made so available” by the debtor,
- debts liabilities and other financial obligations of the debtor
- “any other matter relating to the financial circumstances of the debtor”
- r.27.12.1(1)

The summons is in Form 27CA and must be served not less than 7 days before the hearing, accompanied by a Form 27CC (Form 27CD for a corporation) – r.27.12.1(2)-(2A).

The debtor is examined under oath by the registrar or counsel, with no other person’s present except with the consent of both parties – r.27.12.1(3),(6)

Nb. The debtor is required to bring “all books of account, papers, documents, passbooks and current statements for all bank/building society/credit union accounts, and all relevant files dealing with your income, purchases and expenditure – Form 27CA

A registrar may adjourn an examination as he or she sees fit – r.27.12.1(9)

Warrants

A warrant to seize property may be issued in Form 27B to seize and sell any personal property of the debtor – r.27.09(3)

- the personal property includes seizure of money and bank notes which need not be sold – r.27.09(4)
- cheques, bills of exchange, promissory notes, bonds specialties or securities may be seized, held as security and proceedings issued in the name of the judgment debtor for the recovery of money secured or made payable – r.27.09(5)

A warrant of delivery may enforce an order for:

- delivery of goods;
- delivery of goods or payment of their assessed value
- s.111(8)(a)-(b)

A warrant of delivery may be issued in Form 27C – r.27.12

If the order of the court is for assessed value only, the order may be enforced as for any order for the payment of money – r.27.11(2)

A warrant:

- is valid for one year, but may be extended for up to one year – r.27.03(1)-(2)
- may include a claim for costs including of unsuccessful execution – r.27.04
- may be used against an single defendant when the debt is owed jointly – r.27.07(1)
- may be used against any members of firm or in the name or style of a person – r.27.08(2)

Nb. s.40 of the Bankruptcy Act 1966 – the return of execution process unsatisfied is an act of bankruptcy(1)(d)(ii)

Also, where a warrant to seize property is returned unsatisfied in whole or part, the creditor may apply to the registrar for a certificate for filing in the Supreme Court – s.112 (1) MCA.

No further enforcement proceedings may be taken in the Magistrates court but the entry of the certificate allows the judgment to be enforced by the same means as a Supreme Court judgement – s.112(3) MCA.

Attachment of Earnings

The court must be satisfied that the debtor has earnings payable or likely to be payable, and has failed to comply with an order – r.27.13

Nb. “Earnings” includes wages, salary, fees, bonus commission, overtime pay or other emoluments in addition to wages or salary, but does not include pension under the Social Security or Veterans’ Entitlement Acts – r.27.01

The application is by summons in Form 27D, supported by affidavit in Form 27E – r.27.15(2)-(3)

The summons, affidavit and Form 27F notice to be served personally or by registered post not less than 14 days before the day of hearing – r.27.15(4), r.27.26

A court may make an order in the absence of the debtor if:

- the debtor has been served with the application;
- the debtor had a reasonable opportunity to attend the hearing;
- the debtor is employed by a known employer
- the court is satisfied as to the earnings of the debtor

- r.27.17(1)

The Court may act on:

- evidence from the defendant’s employer
- evidence from the debtor’s spouse;
- a statement or information from an oral examination of the debtor

- r.27.17(2), 27.16(3)

In the absence of the debtor or spouse, the court must specify a protected earnings rate and a normal deduction rate or, if the court does not have sufficient evidence, make an order that

the employer pay such an amount as the court thinks reasonable having regard to the circumstances of the debtor “as far as they are known to the court.” – r.27.17(3)

Oral Examination:

The court may direct the judgment debtor attend for an oral examination as to

- the amount and source of income of the debtor,
- property and assets of the debtor,
- cash “readily available” or “can be made so available” by the debtor,
- debts liabilities and other financial obligations of the debtor
- “any other matter relating to the financial circumstances of the debtor”

- r.27.16(2), Form 27J

Nb. The court can also direct any person who “appears” to owe money to the debtor or be an employer of the debtor to give the court a statement of monies owed – r.27.16(1)(b), Form 27K

These orders are without prejudice to other modes of enforcing attendance of the debtor before the court –r.27.16(4)

The order (Form 27L):

- must specify the normal deduction rate per payday
- must not exceed a rate reasonably securing payment under the order – r.27.18(1)
- must specify a protected earnings rate not less than 80% of the net earnings of the debtor unless the court has received a Form 27F or examined the debtor - r.27.18(3), (5)
- must specify an additional administrative cost to be deducted by the employer – r.27.18(4)
- is served on the debtor and anyone to who it is directed – r.27.19(1)
- comes into force 7 days after service – r.27.19(2)

If the employer fails to make payments, the creditor may apply to have it enforced, even if the debtor is no longer employed – r.27.20

The order can also be varied, suspended or discharged on application by a party – r.27.21

Nb. No warrant or other enforcement of the debt while the attachment is in force unless the court orders – r.27.13(2)

The order is made a by a registrar, who may refer the matter to the Court if not satisfied that it should be made – r.27.13(1.1)

Attachment of Debts:

A debt may be attached if it is due or accruing to the debtor – r.27.27

The application:

- is by affidavit accompanied by a draft order (Form 27P or 27Q)
- may be made with or without notice to any person
- may be made before or after oral examination

But must not be made unless shown by affidavit that:

- the debt is unsatisfied in whole or part;
 - the debt is due or accruing from the garnishee;
 - the garnishee is within Victoria
- r.27.30(1)-(3)

A registrar may refuse to make an order if of the opinion that the remedy is “worthless or vexatious” on account of the amount to be recovered, the debt sought or otherwise, but the creditor may appeal against a refusal to make the order – r.27.30

A garnishee may dispute the order within 14 days of service and the court may determine

Appendix

COMPLAINT

IN THE MAGISTRATES' COURT
OF VICTORIA
AT

Court Number:

BETWEEN

Plaintiff

OF

And

Defendant

OF

Date of Document
Filed on behalf of:
Solicitors name:
Address:

Solicitors Code:
Telephone:
Reference

Nature of Complaint – *(e.g. Monies Owings, Work and Labour done)*

Amount of Claim - \$

1. The address for service of the plaintiff is:
(address must be within Victoria if the plaintiff sues in person)
2. Name and address of the solicitor for the plaintiff –
3. The Plaintiff sues (or the defendant is sued) in the following representative capacity *(eg. As administrator of the estate of)* :

STATEMENT OF CLAIM

(Here set out in numbered consecutive paragraphs all the material facts relied on for the claim against the defendant including particulars of every fact or matter.

If the claim arises by or under any act, identify the specific provisions relied on. State specifically the amount or other relief or remedy sought. State the place where and the date when the claim arose.

If the claim arises out of a motor vehicle collision and the claim includes a claim for the costs of repairs to the vehicle or total loss of the vehicle, an itemised quotation of the costs of the repairs or an assessment of the loss (whichever is relevant) must be attached to this complaint.

- 1.

TO THE DEFENDANT

TAKE NOTICE that this complaint has been brought against you by the plaintiff as set out in the statement of claim.

IF YOU INTEND TO DEFEND this complaint, YOU MUST GIVE NOTICE OF DEFENCE, **within 21 days of service upon you of this complaint, to –**

- (a) the plaintiff; and
- (b) the registrar of the Magistrates' Court of Victoria at
- (c)

(insert proper venue)

IF YOU GIVE NOTICE OF DEFENCE, the Court will write to you and tell you of the hearing date.

IF YOU DO NOT GIVE NOTICE OF DEFENCE WITHIN 21 DAYS OF SERVICE, the plaintiff may OBTAIN AN ORDER AGAINST YOU for the amount of claim and costs without further notice.

IF YOU PAY the amount of \$ and costs of \$ to the plaintiff or the plaintiff's solicitor without giving notice of defence you may avoid further costs.

DATE OF FILING:

THIS COMPLAINT IS VALID IF IT BEARS THE ALLOCATED COURT
NUMBER AND THE DATE OF FILING

Dated:

*(To be signed by the Plaintiff
or the Plaintiff's Solicitor)*

COMPLAINT**(Instruments Act 1958)***[heading as in Form 4A]***Form 24A**

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this complaint.

IF YOU INTEND TO DEFEND the proceeding YOU MUST GIVE NOTICE of your intention by first obtaining the leave of the Court to defend the claim and then giving notice of defence.

IF YOU DO NOT OBTAIN THE LEAVE OF THE COURT TO DEFEND, the plaintiff may OBTAIN AN ORDER AGAINST YOU on the claim without further notice.

THE PROPER TIME FOR OBTAINING LEAVE TO DEFEND is as follows—

- (a) where you reside within 80 kilometres of the post office at the corner of Bourke and Elizabeth Streets, Melbourne, within 16 days of service;
- (b) where you reside beyond that distance, within 21 days after service.

IF YOU PAY the amount of the claim, namely \$ and \$ for legal costs to the plaintiff or to the plaintiff's solicitor within the proper time stated above, this proceeding will come to an end. Notwithstanding the payment you may have the costs fixed by the Court.

APPLICATION FOR LEAVE TO DEFEND must be made within the proper time stated above to the Court at the venue of the Court at which this complaint was filed.

THE COURT MAY GIVE LEAVE TO DEFEND if you—

- (a) pay into Court the amount claimed, namely, \$; or
- (b) file affidavits satisfactory to the Court which disclose—
 - (i) a defence; or
 - (ii) such facts as would make it incumbent on the holder to prove consideration; or
 - (iii) such other facts as the Court considers sufficient to support the application.

DATE OF FILING:

THIS COMPLAINT IS VALID IF IT BEARS THE ALLOCATED COURT NUMBER AND THE DATE OF FILING

Particulars of Claim

The Plaintiff claims \$ principal and interest [*or* \$ balance of principal and interest] due to the payee [*indorsee or bearer*] of a bill of exchange [*promissory note or order for the payment of money*] of which the following is a copy.

[Here copy bill and all indorsements on it]

1. This Complaint was filed by—

- * the plaintiff in person;
- * for the plaintiff by [*name of firm of solicitor*], solicitor(s), of [*business address of solicitor*].

Form 24A

2. The address of the plaintiff is—
 3. The address for service of the plaintiff is—[*If the plaintiff sues by a solicitor, the business address of the solicitor. If the plaintiff sues in person, the address in 2.*]
 4. The address of the defendant is—
- * Delete if inapplicable.
-



Magistrates' Court
Victoria

PRACTICE NOTE

No: 3 of 2001

**PROCEEDINGS COMMENCED IN THE MAGISTRATES' COURT UNDER THE
CORPORATIONS LAW OF VICTORIA**

1. This Practice Note applies to all proceedings commenced in the Magistrates' Court under the Corporations Law of Victoria ("the Corporations Law") on or after 1 November 2001 .
2. Practitioners are reminded that, by section 51(1A) of the **Corporations (Victoria) Act** 1990, the Rules of the Supreme Court of Victoria, made under section 51(1) of that Act, apply to all proceedings commenced in the Magistrates' Court under the Corporations Law, with such alterations as are necessary. Therefore by virtue of Rule 2.2. of the Supreme Court (Corporations Law) Rules 1999, all applications for relief required or permitted by the Corporations Law in the Magistrates' Court, must be made by originating process.
3. An originating process in the Magistrates' Court must be commenced by a complaint in accordance with Rule 4.04 of the Magistrates' Court Civil Procedure Rules 1999.
4. **Unless the Court otherwise orders**, a complaint must not be filed or allocated a court number by a registrar unless accompanied by a supporting affidavit as required by Rule 2.4 of the Corporations Law Rules. Such affidavit must comply with the requirements of Rule 2.4(2) of the Corporations Law Rules but otherwise comply with the Magistrates' Court Rules.
5. **Unless the Court otherwise orders**, a complaint, which was filed prior to this Practice Note, must not proceed to final determination in any proceeding in which the plaintiff's claim includes an application, required or permitted to be made to the Magistrates' Court by the Corporations Law unless there has been filed and served an affidavit in support as required by Rule 2.4 of the Corporations Law Rules.

6. The plaintiff is to prepare a notice to defendant(s) in the form of the notice set out hereunder:
7. Upon accepting the complaint, notices of defence, affidavit and the notice to defendant(s) the registrar must:
 - (a) endorse sufficient copies for service and proof of service;
 - (b) if the proceeding is filed at Broadmeadows, Dandenong, Frankston, Heidelberg, Melbourne, Ringwood or Sunshine list the proceeding for mention, not less than 28 days after filing, before the Applications Court at Melbourne and endorse the mention date on the notice to defendant(s);
 - (c) if the proceeding is filed at any other venue list the proceeding for mention, not less than 28 days after filing, before the Court and endorse the mention date on the notice to defendant(s).
8. Service of the complaint, notices of defence, affidavit and the notice to the defendant must be effected upon the defendant no less than 7 days prior to the mention date.
9. On the mention date the Court may:
 - (a) make a final order;
 - (b) give directions for the future conduct of the proceeding; or
 - (c) hear any application.
10. No application for an order in default of defence may be made prior to the mention day.

Date: 17th September, 2001.

IAN L. GRAY
Chief Magistrate

Court No:

NOTICE TO DEFENDANT(S)

TO: *[name and address of each defendant (if any)]*:

This complaint will be mentioned at *[address of Court]* at **am/*pm*
on .

If you intend to defend the complaint you must attend:

- (a) in person or instruct a legal practitioner to attend on your behalf on the
mention date; and
- (b) give a notice of defence in accordance with Order 9.

If you or your legal practitioner do not attend on the mention date the Court may :

- (a) make a final order ;
- (b) give directions as to the future conduct of the proceeding; or
- (c) hear any application.



Magistrates' Court
Victoria

Phone: (03) 96287777
Facsimile: (03) 96287728

Melbourne Magistrates' Court
Civil Registry
233 William St
Melbourne 3000

Current @ May 2008

INFORMATION SHEET

Procedure relating to 'fencing' disputes and issuing a Complaint (form 4a)

The following is a **general** guide for the completion of the complaint initiating civil proceedings in the Magistrates' Court where the dispute is covered by either *Part I* or *Part II* of the *Fences Act 1968* -

- *Part I* deals with the construction of dividing fences;
- *Part II* deals with the repair of dividing fences.

For information concerning situations involving:-

- *agricultural or pastoral land;*
- *where a watercourse or road is the boundary;*
- *disputes between landlord and tenants;*
- *unalienated Crown land*

advice should be sought from a solicitor.

Before taking any Court action, it is strongly recommended that parties seek mediation which is available through the

*Dispute Settlement Centre of Victoria,
Level 4, 456 Lonsdale St, Melbourne, 3000
Ph: 96038370 Toll free: 1800 658 558
Email: dscv@justice.vic.gov.au.*

This option does **not** involve legal cost and if a resolution is **not** reached, the matter can still be taken to Court.

Further information on the Dispute Settlement Centre with regard to fencing and other disputes is available from the Department of Justice Website at www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Disputes/Types+of+Disputes/JUSTICE++Fence+Disputes.

The Victorian Law Reform Committee has available a "Quickguide" on the Fences Act at www.parliament.vic.gov.au/lawreform/fences/quickguide/default.htm

PART I OR PART II OF THE FENCES ACT?

Part I: Construction of a dividing fence

Prior to the filing of proceedings, the owner of the adjoining property **must** be served with a **Notice to Fence** (section 6). This **Notice** shall:-

- a) be in writing/print;
- b) specify the boundary to be fenced (*eg: b/n 14 Wood St and 16 Wood St, Ringwood, 3134*)
- c) contain a proposal for fencing the boundary (*eg: 50% to be paid by each party*)
- d) specify the kind of fence proposed to be constructed (*eg: 1.5m high paling fence*)

If 1 month (from the date the adjoining property owner is served with a **Notice to Fence**) goes by and there is **no** agreement as to either **b)**, **c)** or **d)** above, a complaint can be made to the Magistrates' Court nearest the property.

Part II: Repair of a dividing fence

Prior to the filing of proceedings under this *Part*, the owner of the adjoining property **must** be served with a **Notice to Repair** (section 15). This **Notice** shall request the adjoining owner to:-

- a) repair the fence, if the fence has been destroyed or damaged through the neglect of the adjoining owner

or

- b) join in or contribute to the repair of the fence in proportions to be agreed.

If there is **no** agreement as to either **a)** or **b)** above after 7 days from service of the **Notice**, the fence may be repaired and the cost, or proportion of the cost, may be recovered by the filing of a complaint at the Magistrates Court nearest the property.

Under either *Part I* or *Part II*, the complaint should be a **Form 4A Complaint**.

Court forms (*eg: Form 4A, Form 5A, etc*), are prescribed forms and may be drafted on a computer in accordance with the *Magistrates' Civil Procedure Rules 1999* or, if available, obtained from a Court Registry or from the Magistrates' Court website www.magistratescourt.vic.gov.au.

PREPARING THE COMPLAINT (FORM 4A)

General Heading

The Court where the Complaint is filed should be nominated (ie: the Court nearest the property where the fence is proposed or nearest the defendant's address);

The full names of both the plaintiff(s) and the defendant(s) and their addresses should be stated where provided for.

- The defendant(s) is/are the owner(s) of the adjoining land and against whom the complaint is made. The defendant may be a corporation.
- The plaintiff(s) is/are the person(s) filing the complaint and who owns the property.

The “**address for service of the plaintiff**” is usually the plaintiff's address but may be another address at which correspondence may be sent to, and served upon, the plaintiff. This address may include a postal box number.

The “**name and address of solicitor**” is only required if the plaintiff is legally represented and then usually the solicitor will have drafted the complaint anyway.

If the plaintiff sues in a “**representative capacity**”, the that capacity should be stated

Statement of Claim

The correct address of the properties which are divided by the proposed fence in question should be cited.

State when a **Notice to Fence/Notice to Repair** was served upon the defendant(s).

Usually the dispute is over-

- (a) whether the construction of a new fence is necessary; and/or
- (b) the kind of fence to be built; and/or
- (c) the cost to be borne by each party

Only the issues in dispute need be addressed in the claim and where the dispute includes a monetary amount the amount sought, **not** including the costs of the issue of legal process, should be stated;

State that there has been **no** agreement between the plaintiff and the defendant on the issues relating to the construction/repair of the dividing fence.

Attach a copy of the **Notice to Fence/Notice to Repair** to the Complaint

Attach to the Complaint a copy of a quote from a fencing contractor or the account from the fencing contractor if the fence has been repaired under *Part II*.

If a non-monetary claim, specify what is sought;

If the claim is under *Part I* of the **Fences Act**, state what other remedy is also sought (ie: height of fence, type of fence, boundary, etc).

REGISTRAR OF THE MAGISTRATES' COURT

The Registrar of the Court where the Complaint is being filed needs to be specified. The complaint should be filed at the Court nearest the address where the fence is to be built or nearest the defendant's address (*ie*: proper venue)

THE AMOUNT OF CLAIM AND COSTS (the paragraph commencing "IF YOU PAY")

This is completed **only** if a monetary amount is in dispute and the boundary and the type of fence have been resolved and agreed upon. If all matters are in dispute or if the claim is a **non-monetary** one, **DO NOT COMPLETE**.

If applicable, the amount of the claim (if a monetary figure is claimed) should be stated (*ie*: the proportion of the cost of the fence sought) and the costs of filing the complaint should be specified;

The costs include the Court fee for filing and may include the anticipated costs of a process server to serve the completed Complaint document after it has been filed with the Magistrates' Court..

If the defendant is a **corporation**, the costs of a company search may be claimed. A separate figure for this claim may be added and the form amended.

For example:-

"IF YOU PAY the amount of \$ and \$ costs and \$
search fee to the plaintiff....."

ISSUING/DATE OF FILING/COURT NUMBER

The "**Date of Filing**" is the date that the Registrar will endorse as the date of filing with the Court;

On the date that the Complaint is filed and subsequently is processed, it will be allotted a **Court number**. A Complaint is only valid for service if it bears the date of filing and the Court number;

After filing, a cover sheet generated by the Court computer will be returned to the plaintiff. **The responsibility for endorsing the Court number on any copy Complaint for service and any other Court form lies with the plaintiff.**

Only the original Complaint is lodged at the Registry for filing therefore photocopies of the Complaint will need to be made for service before it is sent to the Registry and retained.

If the costs claimed on the Complaint are incorrect (*ie*: by over claiming), the Complaint will be returned for correction.

The signature of the Registrar or a Court seal is **no longer required** on a Complaint form.

SIGNATURE OF PLAINTIFF & DATE OF FILING

Claim to be signed and dated. If the plaintiff is a **company or a firm**, it is suggested that the position of person (authority) also be stated and the name printed.

AFTER ISSUE, WHAT TO DO NEXT?

After receiving the cover sheet from the Registry, **one copy of the Complaint together with two (2) copies of the defence notice (Form 9A)** must be served on **each defendant** against whom the money/remedy is sought;

Remember that the Court number and date of issue are found on the coversheet and must be endorsed on the copy Complaint(s) for service.

Service on **individuals** must be by what is specified as **personal service**. This can be achieved in either of 3 ways, that is, by handing the documents to the defendant(s), by leaving the documents for the defendant(s) at their residence with some person apparently over 16yrs, or by leaving them at the place of business (where the defendant(s) conduct a business) with someone apparently over 16yrs apparently in charge or employed in the office;

The plaintiff may employ a process server or otherwise arrange for service.

If service is required to be effected on a **corporation**, the Complaint and defence notices may be served by post to the **registered office** of the company (the registered office may be obtained by doing a relevant company search);

AFTER SERVICE, WHAT HAPPENS NEXT?

IF A DEFENCE IS FILED

If a defence (**Form 9A**) is filed, it must be served by the defendant on the plaintiff and filed with the issuing Court **within 21 days of service** of the complaint but at **any time before** an order is obtained by the plaintiff.

If a defence is received by the Registry, the matter will be usually be listed for a Pre-hearing Conference before a Registrar

IF NO DEFENCE IS FILED

If **no defence** is received within the 21 day period then, it is recommended that the following procedure be adopted-

- As soon as the 21 day period for filing a defence has expired and **no** defence has been received, an **Application (Form 20A)** should be prepared and filed with the Court at which the Complaint has been filed seeking an order against the defendant(s) in the terms of the claim. This **Application** is to be accompanied by an affidavit in support of the application which outlines the circumstances of the dispute and repeats the terms of the claim sought.
- The **Application** will be issued by the Registry and listed at the *Magistrates' Court [which issued the complaint]*. A copy of the **Application** need **not** be served on the defendant(s) as **no** defence has been filed but the **applicant will need to attend** the Court in support of the application on the nominated hearing date.
- Before (or at the same time) as a **Form 20A Application** is filed, an **affidavit of service (Form 5A)** of the complaint upon the defendant(s) be filed with the Registry. This affidavit of service needs to state the name of the person who was served, the address, time of day and date when service was effected.

If service has been effected by **post to a corporation** then **two (2) working days extra** should be allowed from the date of posting when calculating the 21 day period.

FEES

There are Court fees for the filing of the Complaint depending on the **amount** or the **nature of the claim**. Traditionally, the fee for fencing disputes is the figure which relates to claims other than for monetary amounts. This figure can be found from the “Costs and Fees Ready Reckoner” from the “Related Pages” panel to the right of the Fencing Disputes website page.

If the claim is solely for a monetary amount, the scale of fees applied is also as set out in the Costs and Fees Ready Reckoner

If a process server is employed to serve a document, he/she may charge a fee.

There is also a fee on any **Form 20A Application**.

PLEASE NOTE:

It is again stressed that this resume is a **guide only** and does **not** cover all situations. It is generally a guide for disputes in residential areas between owners of adjoining properties.

It is no substitute for legal advice which may be obtained from a solicitor (who may charge a fee). Court staff may only advise on what **can** be done **not** what **should** be done.

Electronic Data Interchange (EDI) Program

The Magistrates' Court of Victoria's Civil Electronic Data Interchange (EDI) Program was introduced in late 1993. The facility enables authorised solicitors to electronically lodge civil complaints, enter judgment in default of a defence and issue Warrants to Seize Property and Summonses for Oral Examination.

The advantages of utilising the EDI system for both the Court and stakeholders are summarised below:

- Increase in available court resources as attendance at the Registry is not required;
- Elimination of a requirement for postage or a document exchange facility has resulted in a significant decrease in the risk of documents being delayed or misdirected;
- Decrease delay in the issue of Complaints, Orders, Warrants to Seize Property and Summonses for Oral Examination;
- Elimination of the need for payment by cheque or stamp duty;
- Decrease in paper-based transaction thereby facilitating less data entry and the reducing the risk of data entry errors; and,
- Increased efficiency for solicitors as complaints can be issued for any civil issuing Magistrates' Court across Victoria.

How EDI works

A solicitor enters the required details for a document into their office computer which is then transmitted electronically to the Court's 'Courtlink' system overnight. The following morning the solicitor will receive a message which contains confirmation of the data exchange. In the case of a Complaint, this will include a court case number and a date of filing. In the event that the exchange was unsuccessful for any reason, an error message will explain what was wrong with the data sent, or what other factor prevented the request from being processed. For example, a request for judgment in default of a defence may result in a message that the transaction could not be processed because a Notice of Defence has been filed. Similarly, an error message will also provide feedback to the solicitor if the information sent electronically did not include some required information.

Certain requests cannot be processed by EDI. If any order has been made by a Magistrate, an application for default judgment cannot be obtained electronically. This is to protect the integrity of the process and was a key consideration in the development of the system.

Once the solicitor receives confirmation of a successful transaction, the electronically held information is transferred by the solicitor's computer onto properly formatted documents, e.g. a Complaint or a Notice of Order Made. The printed complaint contains all the data entry information provided by the solicitor set out in accordance with the requirements of the

Rules, including the allocated case number and date of filing, and it is valid for service. This process saves time and resources for the entering of data by court staff.

Court fees and transaction costs are electronically withdrawn from an account nominated by the solicitor using the service.

For further information on the EDI Program please contact the Court's EDI Service Team on (03) 9603 9380.

Information on the three service providers for the EDI service is available from their websites through the links on the right.

Form 1

(section 16)

Forms

(regulation 4)

Service and Execution of Process Act 1992

Notice to defendant¹

Please read this notice and the attached document very carefully

If you have any trouble understanding them you should get legal advice as soon as possible

Attached to this notice is a [*name of process*] (“the attached process”) issued out of the [*issuing court*]

Service of the attached process outside [*State or Territory of issue*] is authorised by the *Service and Execution of Process Act 1992*.

Your rights

If a court of a State or Territory other than [*State or Territory of issue*] is the appropriate court to determine the claim against you set out in the attached process, you may be able to:

²have the proceeding stayed by applying to the [*issuing court*].

³apply to the Supreme Court in [*State or Territory of issue*] to have the proceeding transferred to another Supreme Court, or another superior court.

If you think the proceeding should be stayed or transferred you should get legal advice as soon as possible.

Service and Execution of Process Regulations 1993

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Rectified 21/04/2006 Federal Register of Legislative Instruments F2004C00245

Forms

Schedule 1 Form 1 Schedule 1 Forms Form 1

Contesting this claim

If you want to contest this claim, you must take any action set out in the attached process as being necessary to contest the claim.

⁴If you want to contest this claim, you must also file an appearance in the [*issuing court*]. You have only 21⁶ days after receiving the attached process to do so.

The appearance⁵ must contain

⁷an address in Australia where documents can be left for you or sent to you.

⁸your address.

¹If the person to be served is not described in the process as a “defendant” substitute the correct description.

²Omit if the court of issue is a Supreme Court. ³Omit if court of issue is not a Supreme Court.

⁴If the defendant need not enter an appearance (as defined in section 14 of the Act) in order to contest the claim, omit this paragraph and the remainder of the form.

⁵If the document that must be filed is not called an appearance, substitute the correct name.

⁶If the issuing court has allowed a shorter period than 21 days for filing an appearance, substitute that shorter period and disregard the next paragraph.

If the law of the State or Territory of issue would allow a longer period than 21 days for filing an appearance in the case of service within the State or Territory, substitute that

longer period. If that law would allow different periods for service within the State or Territory, depending on the place of service, and at least one of those periods would be longer than 21 days, substitute the longest of those periods.

NB: This note is a summary, for guidance only, of subsections 17 (1) and (1A) of the Act. The applicable period under those provisions must be stated.

7Omit if appearance is not required to set out an address for service. 8Omit if appearance is required to set out an address for service.

Rule 9.01(2)

Form 9A

NOTICE OF DEFENCE

IN THE MAGISTRATES' COURT
OF VICTORIA
AT

Court Number:

BETWEEN

Plaintiff

OF

And

Defendant

OF

Date of Document
Filed on behalf of:
Solicitors name:
Address:

Solicitors Code:
Telephone:
Reference

TO THE PLAINTIFF

AND TO THE REGISTRAR OF THE MAGISTRATES' COURT AT

TAKE NOTICE that the defendant intends to defend this Complaint

AND TAKE NOTICE that the defendant's defence is as follows

*(Set out the defence of the defendant in paragraphs numbered consecutively with each fact
or matter stated so far as practicable in a separate paragraph)*

Notes

1. A defence must state which of the facts in the statement of claim are admitted, denied or not admitted – see Rule 9.02(1).
2. A defendant who in the defence does not state whether a fact stated in the statement of claim is admitted, denied or not admitted, will be taken to admit the fact – see Rule 9.02(2)
3. A defendant who states that a fact stated in the statement of claim is denied must –
 - a) Give reason for denying the fact; and
 - b) If the defendant intends to prove a fact different from that stated in the statement of claim, state with necessary particulars the fact that the defendant intends to prove – see Rule 9.02(3)
4. Save with the leave of the Court, a defendant who states that a fact stated in the statement of claim is not admitted must not except in cross-examination adduce any evidence with respect to that fact at the hearing of the proceeding – see Rule 9.02(4)
5. The defendant must state specifically with particulars any fact or matter which -
 - a) makes the claim of the plaintiff not maintainable; or
 - b) if not stated specifically, might take the plaintiff by surprise; or
 - c) raise questions of fact not arising out of the statement of claim – see Rule 9.02(5)
6. If the defence arises by or under any Act, the defence must identify the specific provision relied on – see Rule 9.02(6)

FILED:

(Date of filing)

*(To be signed by the Defendant or the
Defendant's Solicitor)*

1. This notice was signed -

- * by the defendant in person;
- * for the defendant corporation by
(name of person)
of
(address)
who holds the position of
(director, secretary or other person authorised in writing by the defendant corporation)
- * for the defendant by
of
(business address of solicitor)

2. The address of the defendant is –

3. The address for service of the defendant is –

(If the defendant defends by a solicitor, the business address of the solicitor. If the defendant defends in person, the address in 2).

* Delete if not applicable