

# Practice Note: Building Cases List Practice A Practice Note on the Operation and Management of the Building Cases List



<b>Document Details</b>	
<b>Subject</b>	Commercial Division Practice
<b>Title</b>	Operation and Management of the Building Cases List
<b>Reference Number</b>	PNCO 2– 2019
<b>Commencement Date:</b>	16 September 2019
<b>Last Updated</b>	PNCI 7 – 2013 Operation and Management of the Building Cases Division issued on 18 December 2013
<b>Authorised By</b>	His Honour Judge Woodward, Judge in Charge of the Building Cases List
<b>Note</b>	This Practice Note should be read in conjunction with PNCO 1-2019 Operation and Management of the Commercial Division

**Table of Contents**

INTRODUCTION.....	3
1. The Building Cases List.....	3
EXTRACT FROM PNCO 1 – 2019 CLAUSES 48 TO 50.....	3
INTERLOCUTORY STEPS .....	6
2. Entry or Removal of Proceedings.....	6
3. First Directions Hearings .....	7
4. Appropriate Dispute Resolution.....	9
5. Expert Witnesses .....	11
6. Witness statements.....	12
7. Later Directions Hearings.....	12
APPLICATIONS AND SPECIAL PROCEDURES .....	12
8. Making an Application .....	12
9. Mandatory Stay Applications .....	13
10. Applications pursuant to the SOP Act.....	13
User’s Group .....	14
Schedule A: Standard Timetabling Orders.....	15
Schedule B: Mediation, Early Neutral Evaluation and JRC .....	19
Mediation .....	19
Early Neutral Evaluation.....	22
Judicial Resolution Conference .....	25
Schedule C: Standard Reference to Special Referee.....	27
Schedule D: Appointment of Single Joint Expert .....	30
Schedule E: Expert Conference, Joint Report and Concurrent Evidence .....	32
Schedule F: Witness Statements and Outlines .....	35
Witness Statements .....	35
Witness Outlines .....	36
Schedule G: Users’ Group .....	37

## INTRODUCTION

### 1. The Building Cases List

- 1.1 A proceeding is suitable to be managed pursuant to this Practice Note if it primarily relates to the:
- the design or carrying out of building works;
  - supervision or inspection of building works;
  - performance by an architect, designer, engineer, quantity surveyor or other building professional of any services in relation to the design of construction or the supervision or inspection of building works;
  - manufacture or provision of any materials for inclusion in building works,
- and has been entered in the Building Cases List (“**BCL**”) in accordance with the Practice Note. For the purposes of this clause “building works” includes (without limitation) the construction, demolition or removal of a building or other structure and *building work* within the meaning of the *Building Act 1993* (Vic).
- 1.2 The Judge in Charge (“**JIC**”) of the BCL is His Honour Judge Woodward. All enquiries as to the operation of this Practice Note and cases in the BCL (and otherwise as provided in the Practice Note) should be directed in the first instance to the Associates to the JIC at [bcl@countycourt.vic.gov.au](mailto:bcl@countycourt.vic.gov.au) or on 8636 6749 or 8636 6497.
- 1.3 The JIC will generally conduct Directions Hearings and other short hearings in the BCL every Friday, commencing at 9.30am (“**DH Day**”)
- 1.4 As a list in the Commercial Division, orders made and procedures adopted in the BCL will follow closely those contained in the Practice Note *Operation and Management of the Commercial Division* (“**PNCO 1 – 2019**”).
- 1.5 Except as provided in this Practice Note, proceedings in the BCL will continue to be governed by PNCO 1 – 2019 including the section “Building Cases List – Special Procedures” which, for convenience, are repeated in this Practice Note below.
- 1.6 Unless otherwise defined, terms used in this Practice Note have the meanings given in PNCO 1 – 2019.

## EXTRACT FROM PNCO 1 – 2019 CLAUSES 48 TO 50

### BUILDING CASES LIST – SPECIAL PROCEDURES

#### 48 Overview

- 48.1 The Building Cases List aims to resolve disputes in a speedy, efficient, just and cost-effective manner through procedures which are intended to meet the aim of determining proceedings by settlement, mediation or judgment within 12 months of initiation.

- 48.2 Building cases are inherently complex, often involving:
- a) significant technical issues that require expert evidence from more than one discipline,
  - b) numerous parties and multiple claims,
  - c) cross claims and notices of contribution and indemnity,
  - d) apportionment between concurrent wrongdoers pursuant to the *Wrongs Act 1958 (Vic)*.
- 48.3 The resolution of these disputes generally involves more substantial interlocutory processes and longer trial durations than most other Commercial Division disputes. Therefore, these cases may be subject to intensive case management by the Judicial Registrars of the Commercial Division leading up to the trial.<sup>1</sup>
- 48.4 Building Cases are managed tightly. The list offers “up front” trials within 6 months of initiation. This has an immediate effect of focusing all parties to the task at hand, and at the same time, reduces the time available for interlocutory disputes. The Building List strives to ensure that disputes are resolved justly, speedily and as cost efficiently as possible.
- 48.5 This is achieved by:
- a) Listing trial dates early – 6 months from initiation for under 10 day trials, 9 months for longer trials;
  - b) Ensuring trial certainty – in 2017-2018 no building case trials were “not reached”;
  - c) Managing expert witnesses – standard orders provide that experts meet before trial and prepare a joint report for the Court, setting out common ground and providing reasons for any areas of dispute. At trial, experts give evidence concurrently.
  - d) Making use of directions hearings – the Judicial Registrars hear the Building Cases List.<sup>2</sup> Where possible, interlocutory steps are conducted “on the papers” and by consent. Practitioners are required to file a running sheet prior to trial with each Counsel’s best estimate of duration.
- 48.6 All proceedings must be mediated.<sup>3</sup> Practitioners should consider the appropriateness of the appointment of a special referee to determine technical issues and judicial resolution conferences. Where there are two or more defendants to a claim or counterclaim, within three days prior to the date fixed for the mediation, practitioners for those defendants shall attend a conference (“the pre-mediation conference”) for the purpose of addressing the issue of the contribution of their respective clients towards resolution of the plaintiff’s claim. There is no requirement for the pre-mediation conference to be conducted by a mediator or facilitator. An insurer for any of the defendants shall be present at the pre-mediation conference or available to confer by telephone. The purpose of the pre-mediation conference is to ensure time is not wasted at the mediation while the defendants confer as to contribution.

## **49 Mandatory Stay Applications**

- 49.1 The question for determination on an application by a party made under section 57(4) of the *Domestic Building Contracts Act 1995 (Vic)* is whether the dispute currently before the Court is a “domestic building dispute” within the meaning of section 54 of the *Domestic Building*

<sup>1</sup> Under this Practice Note, this role passes to the JIC – see clause 1.2

<sup>2</sup> Under this Practice Note, this role passes to the JIC – see clause 3

<sup>3</sup> Under this Practice Note, parties are encouraged to consider the full range of ADR options referred to in the CPA – see clause 4.2

*Contracts Act*.<sup>4</sup> If the dispute is a “*domestic building dispute*”, then by section 57(2) of the Act if the action could be heard by the Victorian Civil and Administrative Tribunal (**VCAT**), and the Court has not heard any oral evidence concerning the dispute itself, the proceeding must be stayed and the dispute can only be litigated in VCAT.

49.2 An example of the standard Court orders for a disputed stay application is set out below:

- a) The proceeding be stayed pursuant to section 57(2) of the *Domestic Building Contracts Act 1995* (Vic).
- b) The Plaintiff pay the Defendant’s costs of and incidental to the application for stay of the proceedings under section 57(2) of the *Domestic Building Contracts Act 1995* (Vic) on a standard basis, to be taxed in default of agreement.
- c) Costs of the proceeding be reserved for determination by the Victorian Civil and Administrative Tribunal (**VCAT**) upon hearing of any proceeding issued by the Plaintiff, further or alternatively by the Defendant, in relation to the dispute in this proceeding, or, if no such proceeding is issued within a reasonable period, upon application to the County Court.
- d) In the event that VCAT is unable to, or refuses to, determine the costs of the proceeding in the County Court, the County Court will determine those costs on application.

49.3 Standard orders where the stay is made by consent are as follows:

- a) The proceeding be stayed pursuant to section 57(2) of the *Domestic Building Contracts Act 1995* (Vic).
- b) Costs of the proceeding be reserved for determination by the Victorian Civil and Administrative Tribunal (**VCAT**) upon hearing of any proceeding issued by the Plaintiff, further or alternatively by the Defendant, in relation to the dispute in this proceeding, or, if no such proceeding is issued within a reasonable period, upon application to the County Court.
- c) In the event that VCAT is unable to, or refuses to, determine the costs of the proceeding in the County Court, the County Court will determine those costs on application.

## **50 Applications pursuant to the *Building and Construction (Security of Payment) Act***

### **Summary judgment applications**

50.1 The *Building and Construction Industry (Security of Payment) Act 2002* (Vic) (**SOP Act**) is designed to reduce payment delays for subcontractors by providing a procedure for the speedy recovery of progress payments.<sup>5</sup> The benefits of falling within the scope of the legislation are significant, and disputes concerning its appropriate interpretation and application frequently arise.

50.2 The optimal method for bringing applications under the SOP Act is by summons on originating motion and supported by affidavit, and not by application for summary judgment (*3D Flow Solutions Pty Ltd v Armstrong Creek Pty Ltd* [2018] VCC 674 at [41]-[46]).

<sup>4</sup> This is an application for summary determination that is subject to the procedures provided for in this Practice Note – see clause 9

<sup>5</sup> This is an application for summary determination that is subject to the procedures provided for in this Practice Note – see clause 10

50.3 Applications made under the SOP Act for judgment are made returnable to the Commercial Division Duty Judge in the first instance.<sup>6</sup> Depending on the work load of the Court, such applications may be referred to a Judicial Registrar or a Judge of the Division.

50.4 Most of the applications are disposed of within weeks of their initiation. With disputed application for judgment, written reasons are usually provided.

### **Section 28R Judgment on Adjudication Certificates**

50.5 Application for judgment pursuant to section 28R is by Originating Motion ex parte – Form 5D – supported by affidavit/s as required by section 29R(2) exhibiting the original adjudication certificate, specifying the amount, date and method of any payment/s made, or, if no payments have been made, stating that fact and stating that no review application has been made or any review application has been completed (as applicable).<sup>7</sup>

50.6 Section 28R judgments are ordinarily made by the Judicial Registrars of the Commercial Division of the County Court on the papers.<sup>8</sup> In special circumstances, an appearance may be required.

50.7 The standard orders for the entry of judgment are as follows:

- a) Judgment for the Plaintiff against the Defendant that the Defendant must pay the Plaintiff the following amounts:
  - i. Adjudicated amount: \$
  - ii. Fees: \$
  - iii. Interest from [date] to [date]: \$
  - iv. Further interest from [date] to [date of judgment]: \$
  - v. TOTAL: \$
- b) The Defendant must pay the Plaintiff's costs of the proceeding fixed in the amount of \$2,000.00.

## **INTERLOCUTORY STEPS**

### **2. Entry or Removal of Proceedings**

2.1 Proceedings are entered in the BCL of the Commercial Division at the time the proceeding is issued. The plaintiff's practitioner can nominate to enter the BCL at the time the writ or originating motion is filed through the Court's CITEC system. A proceeding so entered after the commencement of this Practice Note, will then proceed as provided for in this Practice Note.

2.2 Clause 2.3 applies to a proceeding which has been issued:

- a) in the BCL before this Practice Note commences; or

<sup>6</sup> Under this Practice Note, this role passes to the JIC – see clause 10

<sup>7</sup> This is an application for summary determination that is subject to the procedures provided for in this Practice Note – see clause 10

<sup>8</sup> Under this Practice Note, this role passes to the JIC – see clause 10

- b) not in the BCL (whether before or after this Practice Note commences), where any party to the proceeding considers that the proceeding is suitable to be managed in the BCL in accordance with this Practice Note.

2.3 A party wishing to have a proceeding managed in the BCL in accordance with the Practice Note in either of the circumstances referred to in clause 2.2 may make application for an order to that effect (and any consequential orders concerning the future management of the proceeding) by a letter to the JIC and copied to all other parties, which letter must:

- a) state that the party seeks to have the proceeding managed in the BCL in accordance with County Court Practice Note PNCO 2 – 2019, and that any party opposing the making of an order to that effect must give notice of that opposition within 7 days as provided for in clause 2.4 of the Practice Note;
- b) in the case of a proceeding issued in the BCL before this Practice Note commences, giving brief reasons why the party considers that the proceeding will benefit from being managed in accordance with this Practice Note, notwithstanding that the proceeding has been underway for a period;
- c) in any other case, setting out the basis upon which party contends the proceeding is suitable to be managed pursuant to this Practice Note (see clause 1.1 above) and giving brief reasons why the party considers that the proceeding will benefit from being so managed; and
- d) set out any consequential orders sought by the party for the future management of the proceeding as contemplated under this Practice Note.

2.4 Any party that opposes the making of an order sought pursuant to clause 2.3 must within 7 days of receiving a letter sent in accordance with clause 2.3, send a letter in reply to the JIC and all other parties, giving brief reasons for that party's opposition.

2.5 The JIC will generally determine a request for an order pursuant to clause 2.3 and (if applicable) make any necessary consequential order, on the papers, without providing reasons. In doing so, the JIC will assume that any party that does not send a letter in opposition in accordance with clause 2.4, does not oppose the making of an order.

2.6 If the JIC considers that determining any aspect of an application in accordance with clause 2.3 will be assisted by further submission, the JIC will notify the parties accordingly, setting a timetable for further submissions or fixing the proceeding for hearing on a DH Day (or both).

### **3. First Directions Hearings**

3.1 The filing of an appearance will trigger the allocation by the JIC of a time and date for the First Directions Hearing (“**FDH**”). The JIC will endeavour to list the FDH on a DH Day date falling within

two to three weeks of the date of the appearance. However, parties should continue with the interlocutory steps in a proceeding as required by the *County Court Civil Procedure Rules 2018* (“**Rules**”) or any order of the Court, pending the FDH.

- 3.2 The parties will be notified of the time and date for the FDH by email from the Associates to the JIC.
- 3.3 The FDH should whenever practicable be attended by the legal practitioners with the principle carriage of the proceeding for each party. This will generally include the legal practitioner who had, or will have, the primary responsibility for drawing the pleadings in the proceeding.
- 3.4 Parties and practitioners attending the FDH should be sufficiently instructed, knowledgeable and prepared (including, where practicable, by the provision in advance of a written outline of submissions and draft orders – see clause 3.7) to engage with the JIC on each of the following matters (regardless of what stage the pleadings have reached):
  - a) the adequacy of the pleadings and particulars filed as at the date of the FDH, including whether the pleadings sufficiently disclose a cause of action, define the issues and otherwise comply with O13 of the Rules;
  - b) in the case of any party that has not filed a pleading as at the date of the FDH, the matters that are likely to be put in issue in the proceeding and the grounds for that dispute that will be relied on in the forthcoming pleading;
  - c) the identification of the real issues in the proceeding, including whether (and, if so, when) the parties should commence preparation of a joint Statement of Issues of Fact and Law;
  - d) whether there is a real possibility of a joinder of other parties to the proceeding, including the date by which a decision on such joinder will be made and the likely basis for such joinder;
  - e) whether there is a real possibility of any applications to strike out or otherwise summarily determine all or part of the proceeding;
  - f) the nature and extent of the discovery in the proceeding, how long completion of discovery is likely to take and what steps might be taken to reduce the cost and burden of discovery (such as, for example, limiting the discovery of uncontroversial source documents where higher level summaries are available or can be provided);
  - g) each of the options for appropriate dispute resolution (“**ADR**”), as outlined under clause 4;
  - h) each of the options for the evidence of expert witnesses, as outlined under clause 5;
  - i) the number and, where possible, names of lay and expert witnesses likely to be called at the trial and the manner of the giving of evidence-in-chief, as outlined under clause 6; and

j) the earliest date on which the trial could reasonably be heard and the likely duration of the trial.

- 3.5 To the extent that any party is unable to engage with the JIC on any of the matters listed above, those matters will be noted and held over for consideration at a later Directions Hearing.
- 3.6 Subject to issues raised in the course of the consideration of the matters listed in clause 3.4, the JIC will generally make timetable to trial orders at the FDH in the form of those at Schedule A.
- 3.7 Parties are encouraged to file and serve before the FDH or any later Directions Hearing where those matters are to be considered (and ideally by 4.00pm the previous day), an outline of submissions on the matters listed under clause 3.4, together with a draft of the orders likely to be sought including, where applicable, a draft of the timetable to trial orders.

#### **4. Appropriate Dispute Resolution**

- 4.1 Most (if not all) building disputes involve busy building practitioners and other professionals for whom time spent attending to legal proceedings is unproductive and costly, even before any allowance is made for legal costs. For building owners or developers, legal proceedings will usually give rise to significant and costly delays in the completion of projects that are the subject of the dispute. Further, if resolved early and before relationships irretrievably breakdown, there is a real prospect that parties involved in building disputes can continue to engage profitably with each other into the future. For these reasons, the JIC is concerned to identify every reasonable opportunity for an early resolution of all proceedings in the BCL.
- 4.2 To this end, the JIC will seek to explore with parties at the FDH and at every later Directions Hearing, the full range of ADR listed in s 3 of the *Civil Procedure Act 2010* (Vic) (“CPA”),<sup>9</sup> namely:
- a) mediation, whether or not referred to mediator in accordance with the Rules;
  - b) early neutral evaluation (“ENE”);
  - c) judicial resolution conference (“JRC”);
  - d) settlement conference;
  - e) reference of a question or a proceeding or part of a proceeding to a special referee;
  - f) expert determination;
  - g) conciliation; and
  - h) arbitration.

---

<sup>9</sup> See also CPA Chapter 5

- 4.3 Of those listed, parties and their legal practitioners should particularly familiarise themselves with each of the ADR options referred to in clause 4.2 a), b) and c). Further information on ENE is provided in clause 4.4 and suggested orders for each of these three options are at Schedule B. Parties and practitioners should consider and be ready to engage with the JIC on which (if any) of the orders is either not necessary or not desirable in the circumstances of their proceeding.
- 4.4 ENE is unfamiliar to many practitioners, who may therefore be less inclined to recommend to a party it as an ADR option. However, practitioners should consider that:
- a) the fact that building disputes are often technical and involve the construction of standard contractual provisions, makes them particularly suitable for ENE;
  - b) ENE has been used successfully for many years in overseas jurisdictions (particularly in the US);
  - c) ENE has also been successfully adopted in the Magistrates' Court since the ENE pilot program in 2010;
  - d) Queensland has adopted a comprehensive set of rules and procedures for ENE (but using the description "case appraisal" – see *Civil Procedure Act 2011 (Qld) s45* and *Uniform Civil Procedure Rules 1999 (Qld) Chapter 9, Division 4 [r334-345]*);
  - e) although the ENE will generally be conducted by the JIC or another Judge of the Court or Judicial Registrar, the orders can provide for the ENE to be conducted by an experienced legal or building practitioner (or both);
  - f) the ENE process will be confidential (unless the Court otherwise orders – see CPA s67) and non-binding;
  - g) ENE can be ordered for part of a proceeding;
  - h) orders would not ordinarily be made that the outcome of an ENE will be taken into account on the question of costs if the ENE is unsuccessful and a party fails to improve on the ENE at trial;
  - i) however, such orders could be made in appropriate cases and, in any event, parties can use the outcome of the ENE to frame an offer of compromise or *Calderbank* offer.
- 4.5 In relation to the ADR options listed in clause 4.2:
- a) the JIC will be concerned to identify the earliest feasible date for one or more of the ADR options;
  - b) because of the limited availability of judicial resources, a JRC will generally only be ordered where a private mediation is likely to cause financial hardship for a party or where there is a

sound basis for concluding that a JRC has a significantly better prospect than a private mediation of resulting in an early resolution of the proceeding;

- c) the JIC would not routinely make orders for more than one ADR option or for more than one attempt at an ADR option, but is open to doing so;
- d) if any of the ADR options is conducted by the JIC and the proceeding does not resolve, the JIC will make orders for the future management of the proceeding, but would not thereafter hear any contested Directions Hearings or applications in the proceeding or the trial of the proceeding, but may be able to conduct other ADR options (for example, if the JIC undertook an ENE, the JIC could—with the consent of the parties—later conduct a JRC); and
- e) suggested orders for a standard reference to a special referee are at Schedule C.

## **5. Expert Witnesses**

- 5.1 The engagement of a single joint expert pursuant to CPA s65L, if properly managed, can result in significant cost savings to both parties and promote an early resolution of a dispute. However, it will generally require a reasonably high level of cooperation between the parties and their legal practitioners and more intense management by the JIC to facilitate the engagement. This may include the JIC selecting an expert from a list of candidates proposed by the parties and settling the questions for the selected expert. Thus parties should expect to incur greater expense in the process of engaging and instructing the single joint expert, but significant savings in having to contribute only a proportion of the costs of a single expert.
- 5.2 Subject to these matters, the JIC will generally make orders for the appointment of a single joint expert on any issue requiring expert evidence, unless persuaded by one or more of the parties to the contrary. Suggested orders for such appointment are at Schedule D.
- 5.3 In cases where more than one expert gives evidence on a particular issue or set of issues in a proceeding, the JIC will routinely make orders pursuant to CPA ss65I, 65J and 65K:
- a) for those experts to participate in an expert witness conference in respect of common issues, including for the appointment of an independent person to facilitate that conclave in appropriate cases;
  - b) for the preparation of a joint experts report by those experts (including, where appropriate, a Scott Schedule), setting out the results of the expert witness conference; and
  - c) for the experts to give all or part of their oral evidence concurrently.
- 5.4 Suggested orders dealing with these matters are at Schedule E.

## **6. Witness statements**

- 6.1 The JIC will invite submissions from the parties on whether evidence-in-chief of lay witnesses should be given in whole or in part by witness statement.
- 6.2 Evidence-in-chief by witness statement will generally be preferred except where the determination of factual matters in dispute will depend on an assessment of the credibility of a witness or where the extra expense usually involved in the preparation of witness statement is out of proportion to the sum in dispute in the proceeding.
- 6.3 In cases where all or part of the evidence-in-chief of a lay witness is to be given orally, parties will be ordered to file and serve an outline of that evidence.
- 6.4 Suggested orders for witness statements and outlines of evidence are at Schedule F.

## **7. Later Directions Hearings**

- 7.1 The listing of frequent Directions Hearings can add significantly to the cost of a proceeding. The JIC will be seeking to strike a balance between active management of cases in the BCL and continuing to ensure that proceedings in the Court are resolved in a speedy, efficient, just and cost-effective manner.
- 7.2 Except for the FDH, parties are encouraged to seek orders by consent or to submit materials sufficiently in advance of a Directions Hearing (ordinarily not less than 48 hours) so that the JIC can propose orders on the papers in respect of any matters that the parties are unable to resolve.
- 7.3 Parties in the BCL have general liberty to apply and are encouraged to do so if difficulties arise, upon application to the to the JIC by email. In an appropriate case, an application may be brought before the JIC on short notice.

## **APPLICATIONS AND SPECIAL PROCEDURES**

### **8. Making an Application**

- 8.1 The provisions of PNCO 1 – 2019 concerning consent orders (clause 21), ex parte applications (clause 22) applications (clause 23) and interlocutory disputes (clauses 24 to 31) apply to proceedings in the BCL except as follows:
  - a) a party wishing to have an issue determined on the papers in accordance with PNCO 1 – 2019 clause 23.2 should email the Associates to the JIC in lieu of the Commercial Registry;
  - b) the JIC may of the JIC's own motion determine that an application can be determined on the papers and, having done so, will follow the procedure in PNCO 1 – 2019 clause 23.3;

- c) a party making application by email pursuant to PNCO 1 – 2019 clause 25 should email the Associates to the JIC in lieu of the Commercial Registry and should include in the email an estimate of the likely duration of the application;
- d) for applications by summons under PNCO 1 – 2019 clause 26, parties are required to telephone the Associates to the JIC in lieu of the Commercial Registry to obtain a return date and time for insertion in the summons;
- e) applications whether by email or by summons will generally be listed for hearing at the next available DH Day;
- f) in relation to affidavits (PNCO 1 – 2019 clauses 25.4 and 26.5), where the documents sought to be exhibited exceed 10 pages in total, they must be exhibited in the affidavit as a single paginated exhibit (for example: “Now produced and shown to me marked “AB-1” is a paginated bundle of the documents I seek to rely on in my affidavit”), with the deponent thereafter referring to page numbers of the exhibit (for example: “the letter dated ## is at pages ## to ## of Exhibit AB-1”);
- g) outlines of submissions (PNCO 1 – 2019 clause 26.6) should be emailed to the Associates to the JIC

## **9. Mandatory Stay Applications**

- 9.1 The provisions of PNCO 1 – 2019 clause 49 (extracted above) apply to applications by a party made under s57(4) of the *Domestic Building Contracts Act 1995* (Vic).
- 9.2 These applications should be made by summons supported by an affidavit or affidavits in accordance with PNCO 1 – 2019 clause 26 and may be subject to determination on the papers in accordance with PNCO 1 – 2019 clause 23, both as varied by clause 8 of this Practice Note.
- 9.3 Depending on the likely length and complexity of these applications, they may in the first instance be the subject of directions by the JIC in relation to further affidavits and written submissions, but referred for final hearing to the Duty Judge or another Judge of the Court.

## **10. Applications pursuant to the SOP Act**

- 10.1 The provisions of PNCO 1 – 2019 clause 50 (extracted above) apply to applications by a party made under the *Building and Construction (Security of Payment) Act 2002* (Vic) (“**SOP Act**”).
- 10.2 These applications should be made by Originating Motion supported by an affidavit or affidavits in accordance with PNCO 1 – 2019 clause 26 and may be subject to determination on the papers in accordance with PNCO 1 – 2019 clause 23, both as varied by clause 8 of this Practice Note.

- 10.3 Depending on the likely length and complexity of these applications, they may in the first instance by the subject of directions by the JIC in relation to further affidavits and written submissions, but referred for final hearing to the Duty Judge or another Judge of the Court.
- 10.4 In any case, applications will generally be made returnable on a DH Day. To obtain a first return date, contact the associates to the JIC.

### **User's Group**

- 11.1 The JIC will meet every six months with a Users' Group representing legal and other practitioners with experience in building disputes. Practitioners wishing to offer suggestions for the more efficient conduct of the BCL are encouraged to do so. These can be discussed with a member of the Users' Group or sent by email to the Associates to the JIC. The names of the current Users' Group members are listed in Schedule G.

**Schedule A: Standard Timetabling Orders**

1. The proceeding is set down for trial on [DATE] as a Cause before the Judge in Charge of the Building Case List (“JIC”) sitting alone (estimate [DAYS] sitting days).

**OR**

2. The trial listed for [DATE] is vacated and the proceeding is refixed for trial on [DATE] as a Cause before the JIC sitting alone (estimate [DAYS] sitting days).
3. The plaintiff is to pay the setting down for trial fee on or before [DATE]. In default, any party may pay the fee within a further 21 days. If the fee is not paid the trial date will be vacated.

**OR**

4. The setting down for trial fee has been paid in this proceeding.
5. The plaintiff is to pay the first day hearing fee on or before [DATE].

**OR**

6. The first day hearing fee has been paid in this proceeding.
7. **[Only if trials are 10 days or longer]** The proceeding is listed for a pre-trial directions hearing on [1 WEEK BEFORE TRIAL] at 9:30am before the JIC.
8. Any application to vacate the trial date or revise the estimation of trial duration must be made at least 30 days before the trial date.
9. The parties shall cooperate in completing the interlocutory processes so that the action is brought to trial as quickly as is reasonably practicable.
10. By 4:00pm on [DATE], the defendant is to file and serve a defence and any counterclaim.
11. By 4:00pm on [DATE], the plaintiff is to file and serve any reply and defence to counterclaim.

12. By 4:00pm on [DATE], the parties must deliver any request for further and better particulars of a pleading. Any request must be answered within 30 days.
13. By 4:00pm on [DATE], each party must make discovery (including full inspection) of the following documents:
  - a. each document referred to in the party's pleadings or the particulars of the pleadings;
  - b. any document which may be produced by the party at the trial during examination-in-chief, cross-examination or re-examination;
  - c. any document which may harm the party's case;
  - d. any document or class of documents which any other party reasonably requests the party to discover.
14. [ADR – see Schedule C].
15. [Expert evidence – see Schedules D and E].
16. By [DATE], each party must have issued any subpoenas under Order 42A.
17. By 4:00pm on [4 WEEKS BEFORE TRIAL], the plaintiff must serve a proposed Court Book Index on the Defendant.
18. By 4:00pm on [3 WEEKS BEFORE TRIAL], the Defendant must respond with any requested additions to the Court Book.
19. The Court Book must comply with the Commercial Division Guidelines which are available on the court website (<https://www.countycourt.vic.gov.au/files/documents/2019-02/commercial-division-court-book-guidelines.pdf>).
20. The plaintiff must, by 4:00pm on [2 WEEKS BEFORE TRIAL], file by email to the Associates to the Judge in Charge of the Building Case List and serve an electronic pdf

copy of the Court Book and a separate electronic pdf copy of the Court Book Index be filed through CITEC. The plaintiff is required to one hard copy of the Court Book and Court Book Index available for use by any witness.

21. [Witness Statements or Witness Outlines [1 WEEK BEFORE TRIAL] - see Schedule F]
22. The parties must cooperate to prepare the following documents, in consultation with trial counsel (if any), and file them by email with the Associates to the Judge in Charge of the Building Case List by 4:00pm two business days before trial:
  - a. a chronology identifying agreed and disputed facts and documents, with Court Book references;
  - b. a summary of the key issues of fact and law in the case; and
  - c. a trial running sheet setting out:
    - i. time in opening submissions of each party;
    - ii. the name of each witness in the order in which they will likely be called, with an estimate for examination-in-chief, cross-examination and re-examination for each witness;
    - iii. the expertise of any expert witness;
    - iv. time in closing submissions of each party;
    - v. the impact of any special requests (for example, interpreters, videolinks, applications for evidence to be heard concurrently).
23. All other interlocutory processes will be conducted in accordance with the Rules of Court.
24. Reserve liberty to the parties to apply by email to the Associates to the Judge in Charge of the Building Cases List ([bcl@countycourt.vic.gov.au](mailto:bcl@countycourt.vic.gov.au)) for further directions upon giving reasonable notice to all other parties.

25. Costs reserved.

**Schedule B: Mediation, Early Neutral Evaluation and JRC**

**Mediation**

1. By 4:00pm on [DATE] the parties must have participated in a mediation of the proceeding.
2. Unless otherwise ordered, the costs of the mediator and of the mediation venue will in the first instance be shared equally between the parties.
3. The mediator must be a legal practitioner with experience in building disputes appointed by agreement between the parties, or failing agreement, appointed by the Judge in Charge of the Building Cases List (“JIC”). If co-mediators are appointed, at least one of the mediators must be such a legal practitioner.
4. The plaintiff must provide to the mediator or mediators as soon as practicable after appointment, a copy of this order and the current pleadings and particulars in the proceeding.
5. By 4.00pm on [NO LESS THAN 2 WEEKS BEFORE THE MEDIATION] the parties must have participated in a pre-mediation conference with the mediator for the purposes of (to the extent these matters have not already been agreed):
  - a. discussing and (if possible) agreeing a summary of the issues to be resolved at mediation;
  - b. identifying if there are any potential impediments to a resolution of the proceeding at mediation (for example, incomplete discovery, the need for valuations or other expert reports, the need for up-to-date financial information, the potential unavailability of a decision maker, the possible need for approval for settlement over a particular sum from a board of directors, re-insurer or other body or third party who will not be present at the mediation);
  - c. agreeing what additional documents should be provided to the mediator to assist the mediator in facilitating a resolution of the proceeding (for example, affidavits filed in the proceeding, key contractual documents and expert reports);

- d. identifying the names and positions of each person who will be present at the mediation;
  - e. agreeing on the form of the mediation agreement to be executed by the parties in advance of the mediation;
  - f. confirming the venue and time for the mediation; and
  - g. confirming that the parties will participate in the mediation in good faith and will engage in genuine negotiations aimed at settling the proceeding, including by making reasonable offers or proposals for settlement and giving due consideration to any such offers or proposals made by another party or by the mediator.
6. The pre-mediation conference must be attended by the legal practitioners for the parties with primary responsibility for the conduct of the proceeding (including trial counsel, if retained) and may be attended by other representatives of the parties as agreed in advance of the pre-mediation conference.
7. While it is desirable that the pre-mediation conference be held in person, the mediator and the parties may agree to hold the pre-mediation conference by telephone.
8. By 4.00pm on [NO LESS THAN 1 WEEK BEFORE THE MEDIATION], the plaintiff must provide to the mediator:
- a. the settled summary of issues to be resolved at mediation; and
  - b. any other documents which will assist the mediator in facilitating a resolution of the proceeding as agreed by the parties at the pre-mediation conference.
9. By 4.00pm on [NO LESS THAN 2 BUSINESS DAYS BEFORE THE MEDIATION], the parties will exchange Position Papers headed, "Confidential and Without Prejudice – For the Purposes of Mediation Only", setting out their respective positions on the settled summary of issues and any other matters that may assist the discussion at the mediation, including their arguments on the legal principles relevant to the dispute.

10. Subject to the next order, the mediation must be attended in person by the people who have the ultimate responsibility and authority for deciding whether to settle the dispute and relevant legal practitioners, being (where applicable):
  - a. the parties themselves, or a representative of a corporate party with full authority to make all decisions relating to the conduct of the proceeding, including to settle the proceeding;
  - b. the legal practitioners for the parties with primary responsibility for the conduct of the proceeding and advising the parties in relation to the proceeding and its settlement (including trial counsel, if retained); and
  - c. any other person who is likely to be required to approve the settlement (such as insurers or litigation funders).
11. If attendance in person by any person referred to in the previous order is impracticable, the parties and mediator may agree that the person may attend or be available by telephone, audio-visual link or otherwise as may be agreed or, failing agreement, as the JIC directs. Otherwise, failure to comply with the above order may lead to adverse costs orders being made against the defaulting party.
12. At the commencement of the mediation, the mediator must ask those present in person or by telephone or audio-visual link, to indicate their agreement to participate in the mediation in good faith and engage in genuine negotiations aimed at settling the proceeding, including by making reasonable offers or proposals for settlement and giving due consideration to any such offers or proposals made by another party or by the mediator.
13. The Position Papers and anything said or done by any person in the course of the mediation are confidential and without prejudice and no evidence shall be admitted at the hearing of any proceeding concerning these matters, unless the Court otherwise orders having regard to the interests of justice and fairness.
14. Within 7 days from the date of mediation, the mediator is to complete the "[Mediation Decision Sheet](#)", which is available on the County Court website, and email it to the

Associates to the Judge in Charge of the Building Cases List at ([bcl@countycourt.vic.gov.au](mailto:bcl@countycourt.vic.gov.au)).

### **Early Neutral Evaluation**

1. The proceeding is fixed for an early neutral evaluation (“ENE”) hearing by [the Judge in Charge of the Building Cases List (“JIC”)] at [TIME] on [DATE] on and estimate of ## hours.
2. All documents required to be provided to the Court under this order must be sent by email to the Associates to the JIC at [bcl@countycourt.vic.gov.au](mailto:bcl@countycourt.vic.gov.au).
3. The parties in consultation with trial counsel (if any), must cooperate to prepare and send to the JIC by 4:00pm on [7 BUSINESS DAYS BEFORE THE ENE], the ENE Book of Documents comprising a single paginated pdf file containing (in the order indicated):
  - a. a statement of the factual and legal issues in dispute in the proceeding;
  - b. a chronology identifying agreed and disputed facts and documents, with page references if possible;
  - c. the statement of the factual and legal issues in dispute in the proceeding; and
  - d. in chronological order, the key documents (including any expert reports) that the parties expect to rely on for the purposes of the ENE.
4. By 4.00pm on [5 BUSINESS DAYS BEFORE THE ENE] the plaintiff must provide to the JIC and serve, a written outline of evidence and argument on facts and law, prepared by reference to the statement of factual and legal issues, with page references to the ENE Book of Documents, together with a pdf copy of each authority referred to in the outline or which the party otherwise expects to refer to in the course of the ENE hearing.
5. By 4.00pm on [3 BUSINESS DAYS BEFORE THE ENE] the defendant must provide to the JIC and serve, a written outline of evidence and argument on facts and law in reply, prepared by reference to the statement of factual and legal issues, with page references to the ENE Book of Documents, together with a pdf copy of each authority referred to in

the outline or which the party otherwise expects to refer to in the course of the ENE hearing, that has not been provided already by the plaintiff.

6. The written outlines of evidence and argument on facts and law referred to above must be limited to 15 A4 pages, including footnotes, endnotes, annexures or schedules, with 1.5 spacing and no less than 11pt font for the body of the document and 8pt font for footnotes.
7. The pdf copies of each authority referred to above should have as its file name, the full medium neutral or other citation (omitting any characters that are invalid for file names).
8. The ENE hearing should be attended by:
  - a. the parties themselves, or a representative of a corporate party with full authority to make all decisions relating to the conduct of the proceeding, including to settle the proceeding; and
  - b. the legal practitioners for the parties with primary responsibility for the conduct of the proceeding and advising the parties in relation to the proceeding and its settlement.
9. At the ENE hearing:
  - a. the parties should assume (unless informed otherwise) that the JIC has read the statement of the factual and legal issues in dispute in the proceeding, the chronology identifying agreed and disputed facts and documents, the current pleadings and particulars and the outlines of evidence and argument on facts and law and is generally familiar with the key documents in the ENE Book of Documents;
  - b. proceedings will be more informal than a trial, and may involve the JIC asking questions and testing submissions of the legal practitioners involved, inviting parties or others present on behalf of a party to answer questions or contribute directly to the discussion of issues and encouraging those present to speak more frankly than might be appropriate for a trial;

- c. subject to b. above, the ENE hearing will commence with submissions on behalf of the plaintiff, followed by submissions on behalf of the defendant and conclude with brief reply submissions on behalf of the plaintiff, with times allowed for such submissions allocated at the commencement of the ENE;
    - d. the JIC is not bound by the rules of evidence; and
    - e. proceedings will not be recorded or transcribed.
  10. The JIC will provide the JIC's decision at the conclusion of, or as soon as practicable after, the ENE hearing. The JIC's decision will be in writing and may (in the JIC's discretion) include brief reasons.
  11. [Subject to the orders below] The written outlines of evidence and argument on facts and law, the JIC's decision and anything said or done by any person in the course of the ENE hearing are confidential and without prejudice and no evidence shall be admitted at the hearing of any proceeding concerning these matters, unless the Court otherwise orders having regard to the interests of justice and fairness.
  12. The parties must notify the JIC within 14 days of the JIC's decision whether the proceeding has been resolved and (in any case) what orders are sought for the disposal or continuation of the proceeding (as the case may be).
- [ALTERNATIVE APPROACH - noting that the same outcome as contemplated by the orders below may be achieved by a party serving and offer of compromise or *Calderbank* offer in the terms of the JIC's decision]
13. [A party who is dissatisfied with the JIC's decision may elect to have the proceeding go to trial by serving and providing to the JIC within 14 days of the date of delivery of the JIC's decision a notice in writing rejecting the JIC's decision ("Rejection Notice").]
  14. [If no Rejection Notice is given in accordance with these orders, the JIC's decision will bind the parties and will thereafter operate as a judgment and order of this Court.]
  15. [If a Rejection Notice is given in accordance with these orders, that decision has no effect other than as provided by these orders and the proceeding must be decided by the Court as if it had never been referred for ENE.]

16. [Unless having regard to the interests of justice and fairness the Court order otherwise, if the Court's decision in the proceeding is not more favourable overall to the party that gave the Rejection Notice than the JIC's decision, the costs of the proceeding and the ENE must be awarded against that party.]

### **Judicial Resolution Conference**

1. The proceeding is listed for a Judicial Resolution Conference ("JRC") before a Commercial Judicial Registrar [Judge in Charge of the Building Cases List/other Judge] at 10:30am on [DATE].
2. The parties must cooperate to prepare and send to by email to the [JUDICIAL OFFICER CONDUCTING THE JRC] at [##]@countycourt.vic.gov.au by 4.00pm on [NO LESS THAN 4 BUSINESS DAYS BEFORE THE JRC]:
  - a. a summary of issues to be resolved at the JRC; and
  - b. any other documents (not being the pleadings) which will assist the judicial officer conducting the JRC in facilitating a resolution of the proceeding.
3. By 4.00pm on [NO LESS THAN 2 BUSINESS DAYS BEFORE THE JRC], the parties will exchange and send by email to the [JUDICIAL OFFICER CONDUCTING THE JRC] at [##]@countycourt.vic.gov.au, Position Papers headed, "Confidential and Without Prejudice - For the Purposes of Mediation Only", setting out their respective positions on the issues in the proceeding any other matters that may assist the discussion at the mediation, including their arguments on the legal principles relevant to the dispute.
4. Subject to the next order, the JRC must be attended in person by the people who have the ultimate responsibility and authority for deciding whether to settle the dispute and relevant legal practitioners, being (where applicable):
  - a. the parties themselves, or a representative of a corporate party with full authority to make all decisions relating to the conduct of the proceeding, including to settle the proceeding;

- b. the legal practitioners for the parties with primary responsibility for the conduct of the proceeding and advising the parties in relation to the proceeding and its settlement (including trial counsel, if retained); and
  - c. any other person or third party who is likely to be required to approve the settlement (such as insurers or litigation funders).
5. If attendance in person by any person referred to in the previous order is impracticable, the parties may agree that the person may attend or be available by telephone, audio-visual link or otherwise as may be agreed or, failing agreement, as the [JUDICIAL OFFICER CONDUCTING THE JRC] directs. Otherwise, failure to comply with the above order may lead to adverse costs orders being made against the defaulting party.
6. The Position Papers and anything said or done by any person in the course of the JRC are confidential and without prejudice and no evidence shall be admitted at the hearing of any proceeding concerning these matters, unless the Court otherwise orders having regard to the interests of justice and fairness.
7. The parties [are to be provided with and] read the JRC Information Sheet, attached to this order, before the JRC.

**Schedule C: Standard Reference to Special Referee**

1. Pursuant to r50.01(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. All documents required to be provided to the Court under this order must be sent by email to the Associates to the Judge in Charge of the Building Cases List ("JIC") at [bcl@countycourt.vic.gov.au](mailto:bcl@countycourt.vic.gov.au).
3. # is nominated as the special referee.
4. The special referee may indicate the acceptance of the nomination by emailing the JIC 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.
5. 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.
6. The special referee must make a report in writing to the JIC 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 emailed to the JIC not later than # or by such later date as the JIC may direct.
7. 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 JIC may from time to time direct. In the event that this direction is not complied with, the reference will be stayed pending further order.

8. Security for the payment of the remuneration of the special referee must 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.
9. 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.
10. Unless the JIC otherwise orders, the reference shall be conducted by the special referee in accordance with the procedures set out in Annexure 2.
11. 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 email a copy to the JIC.
12. Each of the parties and the special referee have liberty to apply.
13. 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 r50.02 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 JIC, 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:
  - a. a copy of this order;
  - b. a copy of the pleadings including any particulars;
  - c. the following documents:

[list documents or put in Schedule]
4. 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.
5. 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.
6. The special referee is not bound by the rules of evidence.
7. The attendance of witnesses and the production of documents may be compelled by the issue of subpoena in accordance with O42 of the Rules.
8. Each of the parties must comply with any lawful direction that the special referee considers necessary for the reference.
9. 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.
10. The parties may be represented on the reference by legal practitioners.
11. The special referee may administer an oath or take an affirmation for the purpose of the reference.

**Schedule D: Appointment of Single Joint Expert**

1. Expert evidence in relation to [INSERT general description of the subject matter of the expert evidence] is to be adduced by way of a report by a single joint expert engaged and instructed jointly by the plaintiff and defendant pursuant to s65L of the *Civil Procedure Act 2010 (Vic)*.
2. The following directions are made in relation to the joint expert report:
  - (a) by 4:00pm on [DATE], the plaintiff serve on the defendant a document setting out a list of proposed questions for consideration by an expert, each of the assumptions that the expert should make in considering the questions and a list of the documents to be provided to the joint expert (“Joint Expert Instructions”);
  - (b) by 4:00pm on [DATE], the defendant serve on the plaintiff a document setting out their comments on the Joint Expert Instructions;
  - (c) by 4:00pm on [DATE], the legal advisers (including counsel) for the parties confer with a view to reaching agreement on a suitable joint expert and the final form of the Joint Expert Instructions;
  - (d) if the parties are able to reach agreement on both the joint expert and the Joint Expert Instructions, by 4:00pm on [DATE] (and after first obtaining the consent in writing of the proposed joint expert to his or her engagement) the plaintiff on behalf of itself and the defendant instruct the joint expert accordingly, and file and serve a copy of the Joint Expert Instructions in the form sent to the joint expert (but not including the documents provided to the expert);
  - (e) the Joint Expert Instructions include an instruction to comply with the Expert Witness Code of Conduct (“Code”) contained in r44.01 of the *County Court Civil Procedure Rules 2018 (Vic)* and be accompanied by a copy of the Code and a copy of these orders and request that the expert provide his or her report to both parties by 4:00pm on [DATE];
  - (f) the joint expert may request further information or direction from the solicitors for both parties and may receive such further information;

- (g) if the parties are unable to reach agreement as provided for in sub-paragraph (d) above, by 4:00pm on [DATE] the plaintiff must make an application to have the proceeding listed for directions at the next available date to determine the identity of the joint expert and/or the form of the Joint Expert Instructions;
- (h) by 4pm on the day before the date for such directions, each party file and serve an outline of submissions, incorporating (if applicable) the name, curriculum vitae and written consent of the expert witness or witnesses they consider suitable for appointment as a joint expert;
- (i) the plaintiff file a copy of the report of the joint expert as soon as practicable after it is received by the plaintiff;
- (j) if a party is dissatisfied with the evidence of the joint expert, that party may seek leave of the Court to adduce other or additional expert evidence; and
- (k) pending any further order in relation to the costs of the proceeding generally, the costs of the joint expert, including any administrative expenses incurred, will be borne equally by the parties.

**Schedule E: Expert Conference, Joint Report and Concurrent Evidence**

1. By 4:00pm on [DATE], the plaintiff file and serve any expert report in relation to [INSERT general description of the subject matter of the expert evidence, e.g. its loss and damage].
2. By 4:00pm on [DATE], the defendant file and serve any expert report in reply.
3. By 4:00pm on [DATE], the experts shall meet for the purposes of conducting an expert conference (“Conference”) and producing a joint report (“Joint Report”).
4. The following directions are made in relation to the Conference:
  - (a) the purpose of the Conference is to enable the experts to prepare the Joint Report;
  - (b) the Conference is to take place in Melbourne at an appropriate venue to be agreed by the parties;
  - (c) [INSERT AS APPROPRIATE: the Conference shall take place with the assistance of [NAME OF FACILITATOR], who shall act as Facilitator];
  - (d) each party must ensure that before the Conference their respective experts have been instructed to comply with the Expert Witness Code of Conduct (“Code”) contained in r44.01 of the *County Court Civil Procedure Rules 2018 (Vic)*, and [that they and the Facilitator] have been provided with a copy of the Code and of these orders as well as all expert reports which have been filed and served by the other experts attending the Conference;
  - (e) subject to sub-paragraph (f) below, the Conference and the preparation of the Joint Report is to occur without any communication to or from the parties, their employees or agents, or any legal representative for or associated with any party, from the time of commencement of the Conference until after the filing and service of the Joint Report;
  - (f) the experts may jointly request [OR the Facilitator may request] further information or direction by letter signed by them directed to the solicitor for each of the parties and may receive such further information;
  - (g) all matters that are discussed at the Conference will be confidential and without prejudice, except to the extent that those matters are included in the Joint Report; and

- (h) none of the parties, their employees or agents, or any legal representative for or associated with any party are to attend the Conference.
5. [The following directions are made in relation to the Facilitator:
- a. the Facilitator is directed to chair the Conference and to act as an impartial facilitator to assist the nominated experts to produce the joint expert report no later than 4 days after the Conference; and
  - b. the Facilitator will be responsible for the manner by which the Conference is to be conducted.]
6. The following directions are made in relation to the Joint Report:
- (a) [subject to paragraph (b) below] the precise form of the Joint Report is a matter for the experts [and the Facilitator] to determine, bearing in mind the Code and their overarching obligations under the *Civil Procedure Act 2010* (Vic) CPA;
  - (b) [INSERT AS APPROPRIATE: the questions to be addressed by the experts as part of their Joint Report are at Annexure 1 of this Order (“Questions”)];
  - (c) as far as possible, the Joint Report should identify matters on which the experts are agreed and matters on which they disagree and include an explanation of why agreement has not been reached [ALTERNATIVE: the Joint Report should address the Questions and set out the experts’ answers to the Questions with their paths of reasoning, stating whether or not they agree upon the answers to the Questions and, where they do not agree, stating the reasons why];
  - (d) the Joint Report must be signed by each of the experts [and certified by the Facilitator as the Joint Report of the experts]; and
  - (e) by 4:00pm on the date that is [INSERT NUMBER OF DAYS] after the conclave, the plaintiff [OR the Facilitator] shall file and serve the Joint Report.
7. Pending any further order in relation to the costs of the proceeding generally, the costs of the Conference[, the Facilitator] and the Joint Report, including any administrative expenses incurred, will be borne equally by the parties.

8. The experts shall give evidence at the trial concurrently and, except as contained in the Joint Report or as the parties otherwise agree in writing, no evidence may be admitted of anything said or done at the expert Conference.

## **Schedule F: Witness Statements and Outlines**

### **Witness Statements**

1. Subject to any order of the trial judge, evidence-in-chief at trial will be given by witness statement being, in written form, the evidence that a witness would otherwise give orally and will, when adopted, stand as the evidence-in-chief of the witness.
2. By 4.00pm on [DATE], the plaintiff must file and serve its witness statements.
3. By 4.00pm on [DATE], the defendant file and serve its witness statements.
4. At the time of filing, each party also send a copy of its witness statements to the Associates to the Judge in Charge of the Building Cases List at [bcl@countycourt.vic.gov.au](mailto:bcl@countycourt.vic.gov.au), in both pdf and MS Word form.
5. 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 and that I am satisfied that this is the evidence in chief which I wish to give at the trial of the proceeding.”
6. Where the statement of the witness, if admitted in evidence, proves a document, the document should be identified by reference to its page range within the Court Book.

7. The content of a witness statement served pursuant these orders is subject to the same implied undertaking as to confidentiality as applies to a document produced upon discovery.
8. 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.

### **Witness Outlines**

1. Subject to any order of the trial judge, evidence in the trial be given orally with the parties providing a witness outline for each witness they intend to call.
2. By 4.00pm on [DATE], the plaintiff must file and serve its witness outlines.
3. By 4.00pm on [DATE], the defendant file and serve its witness outlines.
4. At the time of filing, each party also send a copy of its witness outlines to the Associates to the Judge in Charge of the Building Cases List at [bcl@countycourt.vic.gov.au](mailto:bcl@countycourt.vic.gov.au), in both pdf and MS Word form.
5. Each witness outline must satisfy the following requirements:
  - a. it should be set out in numbered paragraphs;
  - b. it should be a brief outline in summary form 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.
6. The content of a witness outline served pursuant to these orders is subject to the same implied undertaking as to confidentiality as applies to a document produced upon discovery.
7. 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.

### **Schedule G: Users' Group**

The members of the BCL Users' Group as at the commencement of this Practice Note are:

- Romauld Andrew, Victorian Bar
- Victoria Blidman, Victorian Bar
- Adam Rollnik, Victorian Bar
- Kylie Weston-Scheuber, Victorian Bar
- David McKenzie, LMG Lawyers
- Jos Mulcahy, Russell Kennedy
- James Turnbull, Rigby Cooke
- Nathan Abbott, Collins Biggers & Paisley
- Daniel Oldham, Oldham Construction Lawyers
- John Coghlan, Building Consultant, principal, Buildspect Consulting