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Reference No.	PNCO 4 - 2015
Subject/List	Building Cases List of the Commercial Division
Title	Operation and Management of the Building Cases List
Authorised By	His Honour Judge Anderson
Date	2015
Supersedes Reference No.	PNCI 7-2013

Introduction

1. In 2015-2016 the Judge in charge of the Building Cases List of the Commercial Division will be His Honour Judge Anderson. His Honour's Associates can be contacted by telephone on (03) 8636 6610 or (03) 8636 6486. The Building Cases List has, as its aim, the establishment of a speedy, efficient, just and cost-effective means for resolving disputes. The following procedures are intended to meet the aim of, wherever possible, determining cases by settlement, mediation or judgment within twelve months of commencement at the least cost to the parties, consistent with a just determination of the case.
2. Where possible, interlocutory steps are conducted on the papers and by consent. Parties are expected to cooperate in completing interlocutory processes so that the proceeding is brought to trial as quickly, fairly and efficiently as possible. Trial dates are usually available within 6 months of Administrative Mention for cases with an estimate of less than 10 sitting days.
3. As a list of the Commercial Division, orders made and procedures adopted in this list will mirror closely those contained in the current Practice Note *Operation and Management of the General List of the Commercial Division* (PNCO 1 – 2015). This Practice Note is to be read in conjunction with the provisions of the *Civil Procedure Act 2010* and Order 34A – Case Management, *County Court Civil Procedure Rules 2008*.

4. All *enquiries* as to the operation of this Practice Note should be directed to the Directions Group or to the Associates to Judge Anderson. The Directions Group can be contacted by emailing directions.group@countycourt.vic.gov.au or telephoning (03) 8636 6690. The Commercial Division Co-ordinator can be contacted on (03) 8636 6516.
5. All correspondence received by the Court is logged on the Court's Case List Management System (CLMS) and a record of receipt can be viewed on CourtConnect on the County Court website at <http://www.countycourt.vic.gov.au>.

Administrative Mentions

6. The filing of an appearance will trigger the administrative mention process. A notice will be sent by the Court to the parties requiring the parties to submit proposed consent orders to the Court by a nominated date. No appearance in Court is required on this date. The consent orders must be signed by all parties on the record, must outline the interlocutory steps required and indicate the mode of trial. It is anticipated that, in most proceedings, the parties will themselves resolve issues arising during the interlocutory stages to ensure that the action progresses to a hearing date at the earliest opportunity.
7. Parties submitting orders 'on the papers' should also submit proposed dates for interlocutory steps. If no dates are provided, dates will be given by the Court. The submission of inappropriate dates may result in changes without further recourse to practitioners.
8. If the parties are not ready to proceed by the administrative mention date, they should write to the Directions Group indicating why the matter is not ready and requesting that the case be listed for further administrative mention.
9. Failure to respond to an administrative mention notice may result in a proceeding being struck out by the Court.
10. Parties are requested to submit orders in the form of the standard orders available on the Civil Directions Group page of the County Court website. A standard set of directions orders can be found at Annexure 'A'. The parties are expected to cooperate and reach agreement on the detailed steps required, for example, in

organising mediation or preparing a court book. The orders are deliberately brief. For example, an order that mediation of the dispute be completed by a particular date assumes that the mediation will be conducted in accordance with a set of procedures which have been established over many years. These procedures are published on the County Court website. The Court will enforce the reasonable and usual understanding of these procedures if a dispute arises between parties.

11. Draft 'orders on the papers' should be submitted to the Directions Group by email attaching a 'Word document' of the orders sought, together with a copy of the proposed orders signed by all parties to the proceeding.
12. If the parties do not agree upon appropriate interlocutory directions, they should write to the Directions Group as soon as practicable requesting a directions hearing.
13. If the parties later agree on appropriate interlocutory directions prior to the listed directions hearing, they must forward proposed consent orders to the Directions Group **by 12 noon on the day before** the directions hearing is scheduled to take place.

Directions Hearings and Applications

14. Directions hearings before Judge Anderson will generally be held every Friday at 10am except for some Fridays in the months of May, August and December (see Annexure 'B').
15. Applications may be made by the filing and service of a draft form of proposed order together with an affidavit(s) in support, unless the County Court Rules specifically require the issue of a summons, in which case a chamber summons should be issued. If the matter is likely to take in excess of one hour, please advise his Honour's Associates. Affidavits which merely exhibit correspondence between solicitors are discouraged. At the hearing, a bundle of the relevant correspondence can simply be handed up. It is expected that any original exhibits to filed affidavits will be handed up in Court on the day of the hearing.
16. Directions hearings and Applications listed in the Building Cases List will be advertised on the County Court website and in the Daily Law List the day before a scheduled hearing.

Pleadings

17. The Rules require the parties to deliver properly particularised pleadings which are designed to elucidate the issues in dispute. Where the pleadings are confusing or otherwise unhelpful, or particulars are simply requested in order to delay the proceeding, the Court intervenes where it is apparent that the conduct of one party is not assisting the speedy resolution of the case.
18. In some cases, a plaintiff may issue proceedings where there is little merit in the claim or, alternatively, an appearance is filed where a defendant has no real defence. In these cases, the Court will, so far as it can, assist the parties with procedures designed to resolve the dispute as soon as possible. The Court may, for example, order that a party swear an affidavit setting out the basis of its claim or defence.

Discovery and Interrogatories

19. Interrogatories will only be permitted in an exceptional case where the time taken to administer interrogatories and have them answered is justified by the criteria that it is likely to bring the proceeding to resolution at an earlier time.
20. The process of discovery of documents seeks to allow each party access to documents in circumstances where the absence of discovery would not permit justice to be done between the parties. On the other hand, it is recognised that discovery can be a lengthy and costly process in building litigation and the level of discovery appropriate in a case must be measured against the issues in dispute.
21. Generally, the Court will require discovery of certain minimum documents reflected in the standard directions orders. A 'catch-all' category comprises those documents it is 'reasonable in the circumstances' to discover. Initially, it is for the parties to determine the question of reasonableness. If the parties are unable to do so, they can obtain the assistance of the Court.
22. Generally, the Court will not participate in the process of approving lists of discoverable documents. To do so in advance takes a lot of time and removes from the parties the responsibility of sorting these issues out between themselves. On the other hand, the preparation of discovery lists is a useful process with which most practitioners are now familiar and the parties may continue to find it a useful way of

describing the degree of discovery which, in a particular case, is to be regarded as 'reasonable'.

Mediation

23. Parties to proceedings in the Building Cases List should anticipate that orders for mediation will be made by Judge Anderson. When a mediator is appointed by the parties, it shall be the responsibility of the parties to ensure that the mediator is supplied with copies of the necessary documents. Usually, and subject to any other order, this will be the responsibility of the plaintiff's solicitors.

24. It is to be expected that all proceedings will be mediated. The timing of the mediation will depend on the parties' assessment. Generally, the nature of the dispute should have been articulated before mediation, but otherwise the mediation should be held before substantial costs have been incurred by the parties.

Special Referee, Judicial Resolution Conference and Other Procedures

25. Practitioners should consider the appropriateness of the appointment of a special referee pursuant to Rules 34A.22 and 50.01 to 50.06, to determine technical issues for which the Court processes are not always appropriate.

26. In certain circumstances, the Court may order a judicial resolution conference. The parties themselves, or a representative of a corporate party with authority to settle the proceeding, must attend. The parties may be ordered, in advance of the conference, to file and serve a position paper of 2 or 3 pages discussing the issues of fact and law raised in the case, or to detail in an affidavit the circumstances relevant to a disputed transaction, or a party may be required to produce copies of relevant documents relating to issues of liability and/or quantum.

27. A judicial resolution conference may be conducted by a Judicial Registrar, and in special circumstances by a Judge, in open Court or in private session. The objective of a judicial resolution conference is to settle the action, or if this is not possible, to refine the issues and to determine the most appropriate interlocutory steps to bring the matter quickly to trial. Further information is available at paragraphs 41 – 46 of PNCI-1-2015.

28. Practitioners are invited to suggest any other procedures, albeit novel, which may assist in the expeditious resolution of the proceeding.

Liberty to Apply

29. Parties in the Building Cases List are granted general liberty to apply and are encouraged to do so if difficulties arise, upon application to the Directions Group or to his Honour's Associates by email. In an appropriate case, an application may be brought before his Honour on short notice.

30. Where it is appropriate to do so, his Honour will also hear and determine other urgent applications arising out of building projects, notwithstanding that the proceeding has not been entered in the Building Cases Division at the time of the application. Such matters include applications for interlocutory injunctions, applications under the *Commercial Arbitration Act 2011* and applications under the *Building and Construction Industry Security of Payment Act 2002*.

Applications Pursuant to the *Building and Construction Industry Security of Payment Act 2002*

31. In line with the procedure adopted in the Supreme Court, for construction contracts entered into after 30 March 2007, application for judgment pursuant to section 28R is to be by Originating Motion *ex parte* – Form 5D – supported by affidavit(s) as required by section 28R(2), and the original adjudication certificate.

32. Application for a debt certificate pursuant to section 33 is to be by way of an Originating Motion on notice to respondent – Form 5C – with Form 45A summons supported by affidavit(s).

33. With respect to applications pursuant to the *Building and Construction Industry Security of Payment Act 2002*, see generally *Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd* [2009] VSC 425.

Court Books

34. Practitioners are urged to use great care and selectivity in determining what documents are to be included in court books.

Vacation of Trial Dates

35. On occasions, trial dates will need to be vacated. Applications to vacate trial dates should be made at the earliest opportunity and only in exceptional cases should this be within 30 days of the trial. The application should be made in writing to the Commercial Division Duty Judge or to the Associates to Judge Anderson.
36. The application must set out the reasons for the need to vacate the trial date and attach signed minutes of consent executed by all parties to the proceeding. Upon receipt of the application, Judge Anderson will determine whether affidavits in support are required and whether the application is to be listed for a directions hearing or orders will be made 'on the papers'.
37. If a case is set down for trial and a practitioner is seeking leave to file a Notice of Ceasing to Act, that application must be made at the earliest opportunity, as otherwise practitioners may not be released from their obligations. Practitioners are referred to Order 20.03 of the County Court Civil Procedure Rules 2008 and the relevant guideline annexed to PNCO 1 – 2015.
38. Callovers of cases fixed for trial are not conducted.

Settlements

39. If an action resolves, the Court should be informed at the earliest opportunity to enable hearing dates to be backfilled in order to maximise the use of judicial resources.
40. Orders can be made 'on the papers' striking out or dismissing cases by consent and for other orders sought (for example, for costs) provided the consent of all parties is provided. If it is intended to file a Notice of Discontinuance, parties are reminded that the consent of all parties or the leave of the Court is required if this is done after pleadings have closed. A Notice of Discontinuance must be filed with the Registry. It is not sufficient for an unfiled Notice of Discontinuance to be faxed to the Directions Group.
41. Practitioners should ensure that applications for orders 'on the papers' disposing of a proceeding clearly set out what is proposed, including the orders proposed in any counterclaim or third party proceedings and are consented to by all parties to the proceeding.

Circuit Courts

42. Interlocutory applications in building cases in circuit courts may be listed for hearing before Judge Anderson. Such cases may be transferred to Melbourne for hearing or the trial given a special fixture at a circuit court. Practitioners are referred to PNCO 3 – 2015, *Commercial Division Cases in Circuit Courts*.

Orders

43. All orders 'on the papers' are made by the Directions Group and uploaded directly onto CLMS. Orders can be accessed by practitioners through Court Connect.

44. There may be a time delay between the submission of the orders and their finalisation. Practitioners should be aware that the ordinary rules of the Court will apply in the meantime. In particular, practitioners are reminded that a defence is to be filed within 30 days from the filing of an appearance unless an order varying this time frame has been made and finalised.

45. The practice of Judge Anderson with regards to orders made in Court is that the order will be given to the parties directly after the conclusion of the hearing. It is appreciated if parties wait in the body of the Court for the orders to be given to them. Should this process not be possible, the orders will be sent to the parties by email shortly after they are made.

Setting Down for Trial

46. It is intended that the procedure adopted in recent years of normally fixing a trial date on the occasion of the administrative mention be continued. Therefore, it will be necessary for the parties to consider and inform the Court of the following matters:

- a. availability of witnesses;
- b. realistic outside estimate of duration of trial; and
- c. any unavailable hearing dates.

47. The parties should seek the earliest possible hearing date from the Court consistent with the determination of the most efficient timetable for the completion of the interlocutory steps. Where the trial estimate exceeds 10 days, the trial date is confirmed after consultation with Her Honour Judge Kennedy, the judge-in-charge of

the Commercial Division, to ensure that the other demands on judicial resources in the Commercial Division are not compromised.

48. The Court attempts to list lengthy building cases both with a fixed hearing date (ordinarily within 12 months) and as a “reserve” on an earlier date. Where a case is fixed as a “reserve”, the primary case fixed will be identified so that parties in the “reserve” case can ascertain the likelihood of the earlier date becoming available. Parties will not be required to start their case on the “reserve” date if the primary case does not adjourn or resolve at least 30 days prior to the hearing date.

49. A special order (paragraph 3) is included in the standard directions orders to ensure that lengthy trials are not vacated in circumstances where other cases cannot be fixed. If a lengthy trial is refixed, it is likely that there will be a substantial delay before the refixed hearing date.

Setting Down For Trial Fee

50. All orders that a proceeding be set down for trial will be accompanied by a requirement to pay the setting down for trial fee. A setting down for trial fee will be payable, generally 4-6 weeks after a trial date is set. Practitioners are reminded that non-payment of the fee will result in the trial date being automatically vacated. It is possible to apply for reinstatement of the trial date and an extension of the time to pay the fee, without waiting to see if the defendant will pay the fee. However unless application is made promptly (and certainly within 21 days), it will not be possible to refix the trial for the same date.

51. A separate trial fee may be payable each time a proceeding is allocated a trial date. Multiple adjournments of trial dates might therefore attract multiple trial fees.

The Trial

52. To facilitate the efficient running of the trial and to ensure time estimates are adhered to, counsel must submit to the Court a running sheet agreed by all parties at least one week before the trial date. The running sheet must include:

- a. the time estimate for each opening submission;
- b. the names of all witnesses (including expert witnesses) to be called and on what days;

- c. the time estimate for examination in chief and cross-examination of each witness;
- d. the time estimate for each closing submission.

53. In some cases, a tentative running sheet may be ordered to be provided at an earlier date if, for example, it is necessary to determine whether a trial may be likely to require a special listing in excess of 10 sitting days.

54. It is anticipated that the running sheet will be used throughout the trial and should be constructed accordingly. Subject to the direction of the trial judge, the running sheet should be sent to the Associates to Judge Anderson via email.

55. Witness statements are not encouraged although they may be ordered if it is considered that some useful purpose will be served. However, other processes, including statements of issues, agreed facts, agreed documents or a chronology should be used if appropriate.

Building Case Users' Group

56. Judge Anderson proposes to meet every 12 months with a 'User's Group' representing legal and other practitioners concerned with building disputes. Practitioners wishing to offer suggestions for the more efficient conduct of the Building Cases List are encouraged to do so. These can be emailed to the Associates to Judge Anderson at any time. The details of current Users' Group members can be found in Annexure "C".

Annexure 'A'

BUILDING CASES LIST OF THE COMMERCIAL DIVISION STANDARD TIMETABLING ORDERS

NOTE: The orders contained below do not affect the operation of the *County Court Civil Procedure Rules 2008* until the consent of all parties to the proceeding is obtained and/or an order is made by the Court.

1. The proceeding is set down for trial on _____ as a Cause before a judge sitting alone, (estimate _____ sitting days).

AND / OR

The proceeding is listed as a reserve trial on _____ behind case no. CI _____, ("the primary case") and will be heard on that date if the primary case adjourns or resolves at least 30 days prior to the hearing date.

OR

The trial listed for _____ is vacated and the proceeding is refixed for trial on _____ as a Cause (estimate _____ days).

2. The setting down for trial fee must be paid by the plaintiff by _____. In default, the defendant may pay the fee within 21 days. Otherwise the hearing date will be vacated.
3. **[Only if trials are 10 days or longer]** By _____ (**about 60 days prior to the trial date**) the parties must discuss with each other the current state of preparedness for the trial and whether a directions hearing would be appropriate. The result of the discussion must be communicated in writing to the Associate to His Honour Judge Anderson (or if he is unavailable, to the Associate to the Commercial Division Duty Judge) by the plaintiff's solicitors and copied to each other party. The Judge will determine whether a directions hearing should be held and will be fixed by the Judge's Associate in consultation with the parties.

4. Any application to vacate the trial date must be made to the Judge in Charge of the Building Cases List, or if the Judge in charge is not available, to the Commercial Division Duty Judge at least 30 days before the trial date.
5. The parties shall cooperate in completing the interlocutory processes so that the action is brought to trial as soon as is reasonably practicable.
6. By 4pm on _____, the defendant is to file and serve a defence.
7. By 4pm on _____, the parties must deliver any request for further and better particulars of a pleading. Any request must be answered within 30 days.
8. By 4pm on _____, 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.
9. All other interlocutory processes will be conducted in accordance with the Rules of Court.
10. By _____, all parties are to serve all expert reports as to damages and liability upon which the parties intend to rely together with all supporting documentation. Reports not served by that date shall not be lead in evidence or relied upon in cross examination or in any other way at trial by any party except by leave of a judge or by consent of the parties. **[Note: The parties may seek orders for the exchange of preliminary expert reports prior to mediation with final reports to be filed at a later date if the matter does not resolve at mediation.]**
11. By _____, the parties must exchange a list of witnesses the party intends to call at the trial with a summary of between six to ten lines, setting out the substance of the evidence the witness will give.

12. By _____, the parties must have completed the mediation of the dispute.
13. By _____, each party must have issued any subpoenas under Order 42A.
14. By 4pm on _____ (*one week before the trial date*), trial counsel must submit in writing to the Associates to His Honour Judge Anderson a running sheet agreed by all parties. The running sheet must include:
 - a. the time estimate for each opening submission;
 - b. the names of all witnesses (including expert witnesses) to be called and on what days;
 - c. the time estimate for examination in chief and cross-examination of each witness;
 - d. the time estimate for each closing submission
15. Court Books must be prepared by the Parties, (either jointly or separately) and filed with the Court at the commencement of the hearing.
16. The parties must notify the Court if the action settles.
17. Reserve liberty to the parties to apply to the Judge in Charge of the Building Cases Division for further directions upon giving reasonable notice to all other parties.
18. Costs reserved.

Annexure 'B'

BUILDING CASES LIST OF THE COMMERCIAL DIVISION

**before the Judge in charge
His Honour Judge Anderson**

DIRECTIONS HEARING DATES

(unless otherwise specified matters will be listed at 10am)

2015

3 JULY
10 JULY
17 JULY
24 JULY
31 JULY

14 AUGUST
28 AUGUST

11 SEPTEMBER
18 SEPTEMBER
25 SEPTEMBER

2 OCTOBER
9 OCTOBER
16 OCTOBER
23 OCTOBER
30 OCTOBER

6 NOVEMBER
13 NOVEMBER
20 NOVEMBER
27 NOVEMBER

4 DECEMBER
11 DECEMBER

2016

22 JANUARY
29 JANUARY

5 FEBRUARY
12 FEBRUARY
19 FEBRUARY
26 FEBRUARY

4 MARCH
11 MARCH
18 MARCH

8 APRIL
15 APRIL
22 APRIL
29 APRIL

6 MAY
13 MAY
20 MAY
27 MAY

3 JUNE
10 JUNE
17 JUNE
24 JUNE

Annexure 'C'

BUILDING CASES LIST OF THE COMMERCIAL DIVISION

**before the Judge in charge
His Honour Judge Anderson**

Building Cases List Users' Group Members

Ms Geraldine Gray (Victorian Bar)

Mr Andrew Laird (Victorian Bar)

Mr Nathan Abbott (Law Institute of Victoria)

Mr Alex McKellar (Law Institute of Victoria)

Ms Nicole Feeney (Law Institute of Victoria)

Mr John Permewan (Building Dispute Practitioners' Society)

Mr Toby Shnookal QC (Institute of Arbitrators and Mediators Australia)

Mr Bernard Carr (Institute of Arbitrators and Mediators Australia)