

The Supreme Court (General Civil Procedure) Rules 2015 (Vic)

- This discussion:
- Order 4 (Process in the Court)
- Order 9 (Joinder of claims and parties)
- Order 10 (Counterclaim)
- Order 11 (Third Party Procedure)
- Order 13 (Pleadings)

Order 4 – Process in the Court

- R 4.01: Proceedings commenced by writ or originating motion
- R 4.02: Interlocutory and other applications commenced by summons
- R 4.03: a person who commences proceeding called plf, a person against whom proceeding is commenced is called def
- R 4.04: proceedings commenced by writ except an order to review, proceedings commenced by originating motion (next slide)

Originating motion

- R 4.05: When originating motion required
 - (1) A proceeding shall be commenced by originating motion—
 - (a) where there is no defendant to the proceeding;
 - (b) where by or under any Act an application is authorised to be made to the Court; or
 - (c) where required by these Rules.
- R 4.06: Optional commencement by originating motion
 - A proceeding may be commenced by originating motion where—
 - (a) it is unlikely that there will be any substantial dispute of fact; and
 - (b) for that reason it is appropriate that there be no pleadings or discovery.
- R 4.07: if proceeding is commenced by originating motion, but should have been commenced by writ, court may order proceedings continue by writ

Overarching obligations certificates

- (Cross-ref Part 4.1 of the CPA)
- R 4.09: For the purposes of section 41(2) of the Civil Procedure Act 2010 , the overarching obligations certification shall be in Form 4A.
- R 4.09.1(1): For the purposes of section 41(5)(a)(i) of the Civil Procedure Act 2010 [re a party involved in more than one civil proceeding], the specified period is the period of two years prior to the date of the certification under section 41(5)(b) of that Act.
- R 4.09.1(2): For the purposes of section 41(5)(b) of the Civil Procedure Act 2010 , the certification by a legal practitioner as to prior overarching obligations certification in relation to a party referred to in section 41(5)(a) of that Act shall be in Form 4AB.

Proper basis certification

- R 4.10(2): For the purposes of section 42(2) of the Civil Procedure Act 2010 , the proper basis certification shall be in Form 4B.

O5: Content, filing and duration of originating process (not in reading guide, for context)

- R5.02: Form of originating process
 - (1) A writ shall be in Form 5A.
 - (2) An originating motion shall be in Form 5B, 5C, 5D, 5E or 5G, whichever is appropriate.
- R5.03: Appearance
 - (1) A writ and, unless there is no defendant, an originating motion shall be indorsed with a statement to the effect that, if the defendant does not file an appearance within the time stated in the originating process, the plaintiff may obtain judgment against the defendant without further notice.
 - (2) Except as provided in paragraph (3), the time for appearance to be stated in the originating process shall be as provided by Rule 8.04.
 - (3) An originating motion under Order 53 or Order 56 which names a defendant shall state that the defendant may file an appearance on or before the day specified in the originating motion for application to the Associate Judge.

Order 9: Joinder of claims and parties

- R9.01: Joinder of claims
- A plaintiff may join any number of claims against a defendant—
 - (a) whether the plaintiff makes the claims in the same or in different capacities; and
 - (b) whether the claims are made against the defendant in the same or in different capacities.
- (Ie same P and D, more than one claim)
- Cross-rer overarching purpose of CPA

R9.02: Permissive joinder [of parties]

- Two or more persons may be joined as plaintiffs or defendants in any proceeding—
 - (a) where—
 - (i) if separate proceedings were brought by or against each of them, some common question of law or fact would arise in all the proceedings; and
 - (ii) all rights to relief claimed in the proceeding (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions; or
 - (b) where the Court, before or after the joinder, gives leave to do so.
- Cross-ref overarching purpose of CPA

Requirement of joinder [of parties]

- R 9.03: Joinder of necessary parties
- (1) Except by order of the Court or as provided by or under any Act, where the plaintiff claims any relief to which any other person is entitled jointly with the plaintiff—
 - (a) all persons so entitled shall be parties to the proceeding; and
 - (b) any person who does not consent to being joined as a plaintiff shall be made a defendant.
- (2) Where the plaintiff claims relief against a defendant who is liable jointly with some other person and also liable severally, that other person need not be made a defendant to the proceeding.
- (3) Where persons are liable jointly, but not severally, under a contract, and the plaintiff in respect of that contract claims against some but not all of those persons, the Court may stay the proceeding until the other persons so liable are added as defendants.
- (4) The Court may make an order under paragraph (1) before or after the non-joinder.

The antidote to joinder of claims and/or parties

- R 9.04: Joinder inconvenient
- Notwithstanding Rules 9.01 and 9.02, where any joinder of claims or of parties may embarrass or delay the trial of the proceeding or cause prejudice to any party or is otherwise inconvenient, the Court may order that—
 - (a) there be separate trials;
 - (b) any claim be excluded;
 - (c) any party be compensated by an award of costs or otherwise for being required to attend, or be relieved from attending, any part of a trial in which that party has no interest;
 - (d) any person made a party cease to be a party on condition that that party be bound by the determination of the questions in the proceeding or without any such condition.
- R 9.05: Effect of misjoinder or non-joinder of party
- A proceeding shall not be defeated by reason of the misjoinder or non-joinder of any party or person, and the Court may determine all questions in the proceeding so far as they affect the rights and interests of the parties.

R 9.06: Addition, removal, substitution of party

- At any stage of a proceeding the Court may order that—
 - (a) any person who is not a proper or necessary party, whether or not that person was one originally, cease to be a party;
 - (b) any of the following persons be added as a party—
 - (i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon; or
 - (ii) a person between whom and any party to the proceeding there may exist a question arising out of, or relating to, or connected with, any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding;
 - (c) a person to whom paragraph (b) applies be substituted for one to whom paragraph (a) applies.
- And see r 9.07 for procedure
- Ie, doesn't use terminology of joinder which relates to stage of initiation
- Cross-ref r 9.11 – slide after next, for amendment of proceedings after change

Special situations

- R 9.08: D dead at commencement of proceeding
 - Cross-ref r 9.11 – next slide, for amendment of proceedings after change
- R 9.09: Change of party on death or bankruptcy
- R 9.10: Failure to proceed after death of party if r 9.09 is not invoked

R 9.11: Amendment of proceedings after change of party

- (1) Where an order is made under Rule 9.06 or 9.08—
 - (a) the writ or other originating process filed in the Court shall, subject to Rule 27.02(5) and (6), be amended accordingly within the time specified in the order, and otherwise within 10 days after the making of the order; and
 - (b) a reference to the order, the date of the order and the date on which the amendment is made shall be indorsed upon such originating process.
- (2) The filing of a copy of the originating process amended and indorsed as required by paragraph (1) shall be a sufficient compliance with that paragraph.
- (3) Where an order is made under Rule 9.06 or 9.08 adding or substituting a person as defendant—
 - (a) the proceeding against the new defendant commences upon the amendment of the filed originating process in accordance with paragraph (1) or (2);
 - (b) the plaintiff shall serve the amended originating process on that defendant within such time as the Court directs, and, unless the Court otherwise orders, it shall be served personally;
 - (c) unless otherwise ordered, where the new defendant is an added defendant, the proceeding shall be continued as if the new defendant were an original defendant, and where the new defendant is a substituted defendant, all things done in the course of the proceeding before it was commenced against the new defendant shall have effect in relation to the new defendant as they had in relation to the old defendant, except that the filing of appearance by the old defendant shall not dispense with the filing of appearance by the new.

R 9.12 Consolidation or trial together

- (1) Where two or more proceedings are pending in the Court, and—
 - (a) some common question of law or fact arises in both or all of them;
 - (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
 - (c) for any other reason it is desirable to make an order under this Rule—
- the Court may order the proceedings to be consolidated, or to be tried at the same time or one immediately after the other, or may order any of them to be stayed until after the determination of any other of them.
- (2) Any order for the trial together of two or more proceedings or for the trial of one immediately after the other, shall be subject to the discretion of the trial Judge.

Order 10: Counterclaim

- R 10.01: applies relevantly to proceedings commenced by writ
- R 10.02:
 - (1) A defendant who has a claim against the plaintiff may counterclaim in the proceeding.
 - (2) Rule 9.01 applies to a counterclaim as if the plaintiff were the defendant and the defendant were the plaintiff.
 - (3) A defendant who counterclaims shall plead the defendant's defence and the counterclaim in one document called a defence and counterclaim.
- R 10.03: Counterclaim against plaintiff and another person
- A defendant may join with the plaintiff as defendant to the counterclaim any other person, whether a party to the proceeding or not, who, if the defendant were to bring a separate proceeding, could be properly joined with the plaintiff as a party in accordance with Rule 9.02.

R 10.04: Procedure

- (1) Where a defendant joins a person as defendant to the counterclaim under Rule 10.03, the defence and counterclaim shall contain a second title of the proceeding showing—
 - (a) who is plaintiff to the counterclaim; and
 - (b) who are defendants to the counterclaim.
- (2) The defendant shall serve on the person joined as defendant to the counterclaim a copy of the defence and counterclaim as follows—
 - (a) where the person so joined is already a party to the proceeding, the copy shall be served within the time fixed by Rule 14.04 for serving a defence;
 - (b) where the person joined is not already a party, the copy shall be served personally and, unless the Court otherwise orders, shall be served within 30 days after the expiration of the time fixed by Rule 14.04 for serving a defence.
- (3) The person joined as a defendant to the counterclaim shall, upon service of a copy of the defence and counterclaim, if not already a party, become a party and be in the same position as if that person had been sued as defendant in the ordinary way by the defendant making the counterclaim.
- (4) Without limiting paragraph (3), where the person joined as defendant to the counterclaim is not already a party to the proceeding, Orders 8, 11, 14 and 21 shall apply as if—
 - (a) the counterclaim were a writ the indorsement of claim on which constituted a statement of claim in accordance with Rule 5.04;
 - (b) the defendant making the counterclaim were a plaintiff in the party; and
 - (c) the person joined were a defendant in the proceeding.
- (5) A counterclaim served on a defendant to the counterclaim who is not already a party shall commence with a notice in Form 10A.
- (6) A notice of appearance by a defendant to a counterclaim who is not already a party shall be in Form 10B.

Conduct of trial

- R 10.05 Trial of counterclaim
- A counterclaim shall be tried at the trial of the claim of the plaintiff unless the Court otherwise orders.
- R 10.06: Counterclaim inconvenient
- Notwithstanding Rules 10.02 and 10.03, where a counterclaim may embarrass or delay the trial of the claim of the plaintiff or cause prejudice to any party or otherwise cannot conveniently be tried with that claim, the Court may—
 - (a) order separate trials of the counterclaim and the claim of the plaintiff;
 - (b) order that any claim included in the counterclaim be excluded;
 - (c) strike out the counterclaim without prejudice to the right of the defendant to assert the claim in a separate proceeding;
 - (d) order that any person joined as defendant to the counterclaim cease to be a party to the counterclaim.

Stay, consequences of stay

- R 10.07: Stay of claim
- Where the defendant by the defendant's defence admits the claim of the plaintiff and counterclaims, the Court may stay the original proceeding until the counterclaim is disposed of.
- R 10.08: Counterclaim on stay etc., of original proceeding
- A counterclaim may be prosecuted notwithstanding—
 - (a) that judgment is given for the plaintiff in the original proceeding; or
 - (b) that the original proceeding is stayed, discontinued or dismissed.

Lastly, judgment offset

- R 10.09: Judgment for balance
- Where the plaintiff succeeds on the claim and the defendant succeeds on the counterclaim and a balance in favour of one of them results, the Court may give judgment for the balance.

Order 11 – Third Party Procedure

- R 11.01: Claim by third party notice
- Where a defendant claims as against a person not already a party to the proceeding (in this Order called the third party)—
 - (a) any contribution or indemnity;
 - (b) any relief or remedy relating to or connected with the original subject matter of the proceeding and substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question relating to or connected with the original subject matter of the proceeding should be determined not only as between the plaintiff and the defendant but also as between either or both of them and the third party—
- the defendant may join the third party as a party to the proceeding and make the claim against that third party by filing and serving a third party notice.
- 11.02: Statement of claim on third party notice
- A third party notice shall be—
 - (a) in Form 11A; and
 - (b) indorsed with a statement of claim.

- R 11.03: see time for filing appearance
- R 11.04: Filing and service of third party notice
 - (1) A claim by third party notice shall be commenced by filing a third party notice in the Court whereupon the third party shall become a party to the proceeding.
 - (2) A third party notice shall be filed and served on the third party in the same manner as originating process is filed and served on a defendant.
- R 11.05: Time for third party notice
 - (1) In a proceeding commenced by writ or a proceeding in respect of which an order has been made under Rule 4.07(1), a defendant may not file a third party notice until the defendant has first served a defence.
 - (2) A defendant may file a third party notice—
 - (a) within 30 days after the time limited for the service of a defence; or
 - (b) at any time with the leave of the Court or the consent in writing of the plaintiff and any other party who has appeared.

Service (cont)

- R 11.07: Other requirements for service
- (1) A third party notice shall be served on the third party within 60 days after it is filed.
- (2) Notwithstanding paragraph (1), the Court may fix another period for the service of a third party notice either—
 - (a) before the notice is filed; or
 - (b) at the time it grants leave under Rule 11.05(2) to file the notice.
- (3) Where a third party notice has not been served on the third party, the Court, from time to time, by order may extend the period for service of the notice for such further period it thinks fit.
- (4) An order may be made under paragraph (3) before or after expiry of the period for service.
- (5) At the time of service of a third party notice on a third party there shall also be served a copy of—
 - (a) any order or consent under Rule 11.05(2);
 - (b) any order under paragraph (2) of this Rule made before the third party notice was filed fixing a period for service of the notice;
 - (c) any order under paragraph (3) of this Rule;
 - (d) the writ or other originating process;
 - (e) any pleadings or affidavits filed and served in the proceeding.
- (6) Within the period for service of the third party notice on the third party a copy of the notice shall be served—
 - (a) on the plaintiff; and
 - (b) on any other party who has appeared.
- (7) If a copy of the third party notice is not served in accordance with paragraph (6), the Court, on application by the plaintiff or the third party, may order that the questions between the plaintiff and the defendant be tried before and separately from the questions between the defendant and the third party.

- R 11.08 permits filing of appearance by third party
- R 11.09: Defence of third party
- (1) A third party who files an appearance shall serve a defence to the statement of claim indorsed on the third party notice within 30 days after filing the appearance.
- (2) The third party may serve a defence to the statement of claim of the plaintiff by which the third party disputes the liability to the plaintiff of the defendant by whom the third party was joined on any ground not raised by that defendant in the defendant's defence.
- (3) Rules 14.05 to 14.10 apply, with any necessary modification, as if the claim by third party notice were a proceeding commenced by writ.
- (4) Where a third party files an appearance, the defendant by whom the third party was joined shall serve on the third party a copy of any pleading that may from time to time thereafter be served between the plaintiff and that defendant.

- R 11.10: Third party may counterclaim, and r 10.02 then applies, and then the TP becomes P and D becomes D as against that claim as well
- R 11.11 governs default by third party where judgment is entered or given for P against D, where TP has not filed an appearance, or after appearance has not filed a defence
- R 11.12 extends discovery to as between D and TP, and permits the TP to attend and take part in trial and be bound by result
- R 11.13: third party directions and orders by court

- R 11.14: at or after trial, Court may give judgment for D or TP; if judgment is given for P against D, and D against TP, latter will not be enforced until former is satisfied
- R 11.15 permits other party claims
- R 11.16 permits fourth and subsequent party claims
- R 11.17 permits TP claims by P on counterclaims by D

Order 13: Pleadings

- R 13.01: Formal requirements
- (1) Every pleading shall bear on its face—
 - (a) the description of the pleading; and
 - (b) the date on which it is served.
- (2) A pleading shall be divided into paragraphs numbered consecutively, and each allegation so far as practicable shall be contained in a separate paragraph.
- (3) A pleading which is settled by counsel shall be signed by that counsel, and if it is not so settled, it shall be signed by the solicitor for the party, or if there is none, by the party.

R 13.02: Content of pleading

- (1) Every pleading shall—
 - (a) contain in a summary form a statement of all the material facts on which the party relies, but not the evidence by which those facts are to be proved;
 - (b) where any claim, defence or answer of the party arises by or under any Act, identify the specific provision relied on; and
 - (c) state specifically any relief or remedy claimed.
- (2) A party may, by that party's pleading—
 - (a) raise a point of law;
 - (b) plead a conclusion of law if the material facts supporting the conclusion are pleaded.
- R 13.03: Document or conversation
- The effect of any document or the purport of any conversation, if material, shall be pleaded as briefly as possible, and the precise words of the document or conversation shall not be pleaded unless those words are themselves material.

- R 13.04 indicates that a party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the opposite party unless the other party has specifically denied it in that party's pleading.
- R 13.05: An allegation of the performance or occurrence of any condition precedent necessary for the claim or defence of a party shall be implied in that party's pleading.
- R 13.06: Implied contract or relation
- Where it is alleged that a contract or relation between any persons is to be implied from a series of letters or conversations or other circumstances, it shall be sufficient to allege the contract or relation as a fact, and to refer generally to the letters, conversations or circumstances without setting them out in detail.

R 13.07: Matter which must be pleaded

- (1) A party shall, in any pleading subsequent to a statement of claim, plead specifically any fact or matter which—
 - (a) the party alleges makes any claim or defence of the opposite party not maintainable; or
 - (b) if not pleaded specifically, might take the opposite party by surprise; or
 - (c) raises questions of fact not arising out of the preceding pleading.
- (2) In a proceeding for the recovery of land—
 - (a) the indorsement of claim on the writ or, if that indorsement does not constitute a statement of claim, the statement of claim shall describe the land so that it is physically identifiable;
 - (b) the defendant shall plead specifically every ground of defence on which the defendant relies and a plea that the defendant or the defendant's tenant is in possession of the land is not sufficient.
- (3) A claim for exemplary damages shall be specifically pleaded together with the facts on which the party pleading relies.

- R 13.08 allows facts or matters to be pleaded whether they occurred before or after commencement of proceeding
- R 13.09: Inconsistent pleading
- (1) A party may, in any pleading, make inconsistent allegations of fact if the pleading makes it clear that the allegations are pleaded in the alternative.
- (2) A party shall not in any pleading make any allegation of fact, or raise any new claim, inconsistent with any allegation made or claim raised in a previous pleading by that party.
- (3) Paragraph (2) shall not affect the right of a party to amend, or apply for leave to amend, that party's previous pleading so as to plead the allegations or claims in the alternative.

R 13.10: Particulars of pleading

- (1) Every pleading shall contain the necessary particulars of any fact or matter pleaded.
- (2) Without limiting paragraph (1), particulars shall be given if they are necessary—
 - (a) to enable the opposite party to plead;
 - (b) to define the questions for trial; or
 - (c) to avoid surprise at trial.
- (3) Without limiting paragraph (1), every pleading shall contain particulars of any—
 - (a) misrepresentation, fraud, breach of trust, wilful default or undue influence which is alleged; or
 - (b) disorder or disability of the mind, malice, fraudulent intention or other condition of the mind, including knowledge or notice, which is alleged.
- (4) The pleading of a party who claims damages for bodily injury shall state—
 - (a) particulars, with dates and amounts, of all earnings lost in consequence of the injury complained of;
 - (b) particulars of any loss of earning capacity resulting from the injury;
 - (c) the date of the party's birth;
 - (d) the name and address of each of the party's employers commencing from the day being 12 months before the party sustained the injury, the time of commencement and the duration of each employment and the total net amount, after deduction of tax, that was earned in each employment.
- (5) In a proceeding for libel the indorsement of claim on the writ or, if that indorsement does not constitute a statement of claim, the statement of claim shall state sufficient particulars to identify the publication in respect of which the proceeding is commenced.
- (6) Particulars of debt, damages or expenses which exceed three folios shall be set out in a separate document referred to in the pleading and the pleading shall state whether the document—
 - (a) has already been served and, if so, when; or
 - (b) is to be served with the pleading.

R 13.11: Order for particulars

- (1) The Court may order a party to serve on any other party particulars or further and better particulars of any fact or matter stated in the party's pleading or in an affidavit filed on that party's behalf ordered to stand as a pleading.
- (2) The Court shall not make an order under paragraph (1) before service of the defence unless the order is necessary or desirable—
 - (a) to enable the defendant to plead; or
 - (b) for some other special reason.
- (3) The Court may refuse to make an order under paragraph (1) if the party applying for the order did not first apply by letter for the particulars the party requires.

R 13.12: Admission and denials

- (1) Except as provided in paragraph (3), every allegation of fact in any pleading shall be taken to be admitted unless it is denied specifically or by necessary implication or is stated to be not admitted in the pleading of the opposite party, or unless a joinder of issue under Rule 13.13 operates as a denial of it, and a general denial of the allegations, or a general statement that they are not admitted, shall not be sufficient.
- (2) Where the party pleading intends to prove facts which are different to those pleaded by the opposite party, it shall not be sufficient for the party merely to deny or not to admit the facts so pleaded, but the party shall plead the facts the party intends to prove.
- (3) Any allegation that a party has suffered damage and any allegation as to the amount of damages shall be taken to be denied unless specifically admitted.

R 13.13: Denial by joinder of issue

- (1) No reply or subsequent pleading merely joining issue shall be served.
- (2) At the close of pleadings a joinder of issue on the pleading last served shall be implied.
- (3) No joinder of issue, express or implied, shall be made on a statement of claim or counterclaim.
- (4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading upon which issue is joined unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the joinder of issue operates as a denial of every other allegation.

Set off and counterclaim

- R 13.14 allows a defendant with a claim against plf for recovery of a debt or damages to rely on that claim as a defence to a claim or part of a claim for damages and can be relied on as a set off even without a counterclaim
- R 13.15: Counterclaim
- This Order applies, with any necessary modification—
 - (a) to a counterclaim as if it were a statement of claim; and
 - (b) to a defence to counterclaim as if it were a defence.