



Magistrates' Court
Of Victoria

PRACTICE DIRECTION

No. 5 of 2010

CIVIL PROCEDURE ACT 2010

1. The Civil Procedure Act 2010 will come into operation on 1 January 2011

Background

2. The purpose of this Practice Direction is to outline the practices and procedures of the Court in relation to:
 - a. the certification requirements of the Act;
 - b. the applications foreshadowed by sections in the Act.

Directions:-

Types of certification

3. The Act requires certification in three circumstances:
 - a. Overarching obligations certification – personal certification by parties at or following the commencement of a proceeding that they have “*read and understood the overarching obligation and the paramount duty*” set out in the Act (s.41);
 - b. Proper basis certification – certification by a party’s legal practitioner, or, or by an unrepresented party, that in relation to “*the first substantive document*” in a proceeding and “*any document that contains significant amendments*”, each allegation of fact, denial or non-admission “*has a proper basis*” (s.42);
 - c. Pre-Litigation requirements compliance certification – certification by a party or the party’s legal representative that the “*pre-litigation requirements*” of the Act have been complied with, or alternatively stating “*the reasons why those requirements have not been undertaken*”: (s.43).

Commencement of provisions

4. The provisions of the Act relating to overarching obligations certification and proper basis certifications will come into operation on 1 January 2011. Pre-litigation requirements compliance certification will operate from 1 July 2011, six months after the commencement of Part 3.1 of the Act. (s.33(2)).

Form of certification

5. The certification in each case will be by written document filed with the court in accordance with a form prescribed by the Rules of Court. The necessary amending rules will come into operation on 1 January 2011 and will contain the prescribed forms of certification.

Urgent cases

6. A proceeding may be issued in urgent cases without the necessary certifications. In those circumstances, the appropriate certificate must be filed "*as soon as practicable*" thereafter (s.44).

Consequences of failure to certify

7. Ordinarily, a failure to comply with the certification requirements will not prevent a proceeding being commenced (s.45). However, a failure to comply with the certification requirements may be taken into account by the court in making orders as to costs or otherwise (s.46).

Overarching obligations certification

8. The paramount duty to the court of each party involved in civil litigation is "*to further the administration of justice*" (s.16). The overarching obligations of a party are set out in ss.17 to 26 of the Act.
9. The Act states that the purpose of the overarching obligations is "*to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute*" (s.7(1)).
10. Each party to litigation must personally provide the overarching obligations certification. It must be filed "*with the first substantive document in the civil proceeding filed by the party*" (s.41(2)(a)). "*Substantive document*" is defined in section 3 of the Act.
11. To comply with the statutory obligations, parties would ordinarily file an overarching obligation certificate with the following documents:
 - a. In a proceeding commenced by complaint-
 - (i) by a plaintiff, when the complaint is issued;
 - (ii) by a defendant, when the notice of defence is filed.
 - b. In a proceeding commence by counter claim-
 - (i) by a plaintiff to counter claim, who has not previously filed a certificate in the actions, when the counter claim is filed;
 - (ii) by a defendant to counter claim, who has not previously filed a certificate in the action, when the notice of defence to counter claim is filed.
 - c. In a third (or subsequent party) proceeding-

- (i) by an initiating party, who has not previously filed a certificate in the action, when the third party (or similar) proceeding is filed;
- (ii) by a responding party, when the notice of defence to the third party (or similar) proceeding is filed.

Processes upon failure to file the overarching obligations certification

12. If a party fails to file the prescribed overarching obligation certification, the court will adopt the following processes:

- a. The court will not prevent the proceeding from being commenced;
- b. Following the issue of the proceeding, if the court ascertains that there has been a failure by a party to file an overarching obligations certification in accordance with the Rules of Court, a notice may be sent to the party's address for service;
- c. The notice will draw the party's attention to the failure to appropriately certify and will seek compliance with the Act and will advise that the party's continued failure to appropriately certify may result in the court:
 - (i) referring any application for a default judgment to a magistrate for consideration in open court;
 - (ii) requiring the parties to the proceeding to attend court for a directions hearing before a magistrate.
- d. At any such hearing, a magistrate may:
 - (i) order the defaulting party to pay the cost of all other parties;
 - (ii) if the defaulting party is a plaintiff or in the position of a plaintiff, and the default continues, stay the proceeding until the default is remedied, or order that the proceeding be struck out if the default is not remedied by a time to be stated in the order;
 - (iii) if the defaulting party is a defendant or in the position of a defendant, order that the notice of defence be struck out if the default is not remedied by a time stated in the order;
 - (iv) make any other order of the kind anticipated by s.46 of the Act.

13. The purpose of these procedures are:

- a. to draw the attention of a party to a default in making appropriate certification;
- b. generally, to require compliance with the provisions of the Act before a party is permitted to proceed with the litigation.

Proper basis certification

14. The certification that each allegation of fact, each denial and each non-admission in a document has “*on the factual and legal material available...a proper basis*” must be made by a legal practitioner acting for or on behalf of a party to the proceeding. If a party is not represented by a legal practitioner, the proper basis certification must be completed by that party (s.42(4)). The certification must be filed with “*a party’s first substantive document in a civil proceeding and any document that contains significant amendments*” thereto (s.41(1)). “*Substantive document*” is defined in s.3 of the Act.
15. To comply with the statutory obligations, a legal practitioner (or a self-represented litigant) would ordinarily file a proper basis certificate with the following documents:
 - a. In a proceeding commence by complaint:
 - (i) by a plaintiff, with the statement of claim or particulars of claim filed with complaint;
 - (ii) by a defendant, with the notice of defence;
 - (iii) by either party, with an amended statement of claim, notice of defence or reply that contains “*significant amendments*”.
 - b. In a proceeding commenced by counter claim-
 - (i) by a plaintiff to counter claim, when the counter claim is filed;
 - (ii) by a defendant to counter claim, when the notice of defence to counter claim is filed;
 - (iii) either party, with an amended statement of claim, defence or reply that contains “*significant amendments*”.
 - c. In a third (or subsequent party) proceeding-
 - (i) by an initiating party, when the third party (or similar proceeding) is filed;
 - (ii) by a responding party, when the notice of defence to the third party (or similar proceeding) is filed;
 - (iii) by either party, with an amended statement of claim, defence or reply that contains “*significant amendments*”.
16. The phrase “*significant amendments*” is not defined in the Act. To provide general guidance, it is suggested that all amending documents which add, delete or substitute a party, a cause of action, a substantive defence, a substantive matter by way of reply or a material allegation of fact should be accompanied by proper basis certification. If a pleading, or other document, is amended by leave of the court, it is to be expected that as part of the order granting leave to amend, the court will indicate whether the amended document requires proper basis certification. The absence of such an

indication in a court order will not relieve a party from complying with the certification requirements of the Act.

17. If a party fails to file the prescribed proper basis certification, any failure to comply with the Act in this regard will be dealt with by the court in accordance with the processes set out in paragraph 12.

Pre-litigation requirements compliance certification

18. The provisions of the Act relating to pre-litigation requirements compliance certification will operate from 1 July 2011. The pre-litigation requirements are set out in Part 3.1 of chapter 3 of the Act.
19. No pre-litigation requirements compliance certification is required-
 - a. for claims made under the *Accident Compensation Act 1985* where the pre-litigation processes of that Act has been followed (s.32(1)(d)).
20. Certification of compliance with the pre-litigation requirements must be made by each party to a relevant civil proceeding or that party's legal practitioner. The certification must be in writing and "*filed with the first substantive document filed by the party*" (s.43(3)(b)). "*Substantive document*" is defined in section 3 of the Act.
21. To comply with the statutory obligations, parties would ordinarily file a pre-litigation requirements compliance certificate with the following documents:
 - a. In a proceeding commenced by complaint-
 - (i) by a plaintiff, when the complaint is issued;
 - (ii) by a defendant, when the notice of defence is filed.
 - b. In a proceeding commenced by counter claim-
 - (i) by a plaintiff to counter claim, when the counter claim is filed;
 - (ii) by a defendant to counter claim, when the defence to counter claim is filed.
 - c. In a third (or subsequent party) proceeding-
 - (i) by an initiating party, when the third party (or similar) proceeding is filed;
 - (ii) by a responding party, when the defence to the third party (or similar) proceeding is filed.
22. Once the relevant provisions of the Act in relation to pre-litigation requirements compliance certification come into force, a failure to comply with the Act in this regard will be dealt with by the court in accordance with the processes set out in paragraph 12.

Applications pursuant to the Act

23. The Act provides for the following applications:
- a. where it is alleged that a person has contravened an overarching obligation (s.29(2));
 - b. for an extension of the time to make a s.29(2) application (s.31);
 - c. for a party to pay all or part of another party's costs of compliance with the pre-litigation requirements (s.38(1), s.38(4)(b));
 - d. for a representative of a party to pay all or part of another party's costs of compliance with the pre-litigation requirements (s.38(2), s.38(4)(b));
 - e. for an order consequential upon a party's failure to comply with the pre-litigation requirements (s.39(2)(b));
 - f. for summary judgment (ss.61 & 62);
 - g. for an order to resolve transitional difficulties (s.78(2)(a)).

Application arising from a party's contravention of an overarching obligation (s.29(2)(a))

24. The application may be made by any party to a civil proceeding or any other person who, in the opinion of a the court, has a sufficient interest in the proceeding (s.29(2)(a)).
25. The application must be made "*in the court in which the civil proceeding was or is being heard*" and must be made "*in accordance with the rules of court*" (s.30). The application must be made "*prior to the finalisation of the civil proceeding to which the application relates (excluding any period for appeals)*" (s.30(2)).
26. The application must be made by summons in the proceeding supported by any affidavit material, in compliance with Order 46 of the Rules of Court, whether or not the proceeding has been finalised and whether or not the application is made by a party to the proceeding.

Application to extend for a s.29 application (s.31(1))

27. An application for extension of time for an application pursuant to s.29 may be made "*after the finalisation of the civil proceeding*", if the applicant "*was not aware of the contravention of the overarching obligations*" until after the finalisation of the civil proceeding to which the application relates (s.31).
28. The application to extend time should be made at the same time as, and as part of, the primary application pursuant to s.29 of the Act, noting as the first order sought in the summons: "*Leave to the applicant to apply for an order under s.29 of the Civil Procedure Act 2010 after the finalisation of the civil proceeding*". The application must be made by summons in compliance with the Rules of Court.

Order for a party to pay another party's costs of compliance with pre-litigation requirements (s.38(1), s.38(4)(b))

29. An application seeking an order for payment by a party of another party's costs of compliance with pre-litigation requirements must be made by written notice to the party against whom the costs order is sought.

Order for a representative of a party to pay another party's costs of compliance with pre-litigation requirements (s.38(2), s.38(4)(b))

30. An applications seeking an order for payment by a representative of a party of another party's costs of compliance with pre-litigation requirements must be made by written notice to the party against whom the costs order is sought.

Orders following a party's non-compliance with pre-litigation requirements (s.39(2)(b))

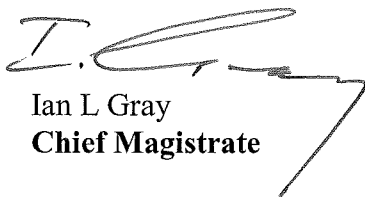
31. An application seeking orders following a party's non-compliance with pre-litigation requirements must be made by written notice to the party against whom an order is sought.

Summary judgment (ss.61 & 62)

32. Unless the proceeding is an arbitration for a small claim, an application by a plaintiff for summary judgment against a defendant, or by a defendant against a plaintiff, must be made by written notice to the party against whom judgment is sought.

Orders to resolve transitional difficulties (s.78(2)(a))

33. An application seeking orders to resolve transitional difficulties must be made by written notice to all other parties.



Ian L Gray
Chief Magistrate

21 December 2010