

# SAMPLE OF JOINDERS:

## Joinder of parties

---

### Joinder by the plaintiff:

#### Joinder of parties before commencing proceedings: (r 9.02, 9.03 SCR)

##### 1. Permissive joinder:

- What is it?
  - o Can pick and choose parties
- How can plaintiffs join? Two or more persons may be joined as plaintiffs in two scenarios:
  - o 1. Where; (r 9.02(a) SCR)
    - if separate proceedings were brought by them, there is some **common question of law or fact** which would arise in both proceedings; **and** (r 9.02(a)(i) SCR)
      - **Example** of common question of law:
        - o *Britles v Commonwealth*: Facts: P injured in industrial action. Solicitor starts action out of time. **Common question of law?**
          - Narrowly viewed:
            - One question of law: was SEC negligent for workplace accident?
            - Different question of law: was the solicitor negligent in filing it?
            - Different questions of law
          - Broad construction:
            - **Who is liable for the P's loss? Common question of law.**
            - This part is not decided.
      - o *Payne v Young*, was the fee charged an excise fee?
      - o Was a duty of care owed?
    - **Example** of common question of fact:
      - o Did the oysters cause hepatitis?
    - What if not all the questions of fact/law are the same?
      - o That's ok. Does not require all questions to be in common. "for the most part" questions of law raised common questions of evidence – *Aston P/L v CSR* [2012] VSC
      - o Eg pre-existing conditions
  - All rights to relief claimed in the proceedings are in respect of or **arise out of the same transaction or series of transaction;** (r 9.02(a)(ii) SCR)
    - Will be the same transaction were the next step is a natural sequence of the injury *Britles v Commonwealth*

- *Britles v Commonwealth*: Facts: P injured in industrial action. Solicitor starts action out of time. **Same transaction or series of transactions?**
  - First transaction – touching the wire at work
  - Next transaction – seeing a solicitor who filed out of time
  - Are they the same transaction or series?
    - **Held:** Series, yes – court
    - Going to the lawyer was a natural sequence of the injury for the P
- May not be a series of transactions, but ‘claims aris[ing] out of **similar** transactions’ **X** *Payne v Young*
  - In *Payne v Young* 7 P’s were each charged a fee which they argued was void.
  - In *Bishop v Bridgelands*, each letter to investors was different, each investment was different
  - May require **participation** by the P’s *Payne v Young*; *Bishop v Bridgelands*
    - (Example in the inspection services. *Payne v Young*)
    - ‘Each series of transactions was peculiar to each individual plaintiff’. *Payne v Young*
  - **Example:** if they ate oysters at the restaurant the next week. Does not satisfy (a)(ii)
- Will need to ask more questions to see if same transactions
  - Eg what time at the restaurant
  - Eg Did they order the same food
  - Eg Did they place one order and share = one transaction
- 2. Court gives leave to do so (r 9.02(b) SCR)
  - Courts generally do so when you can prove (a)(i) OR (a)(ii) (*A & J Partitions*)
  - **Primary factors to take into account per *Lee v Korean Society of Victoria***
    - Overarching purpose of the act (s 8(1) CPA)
      - Which is the **just, efficient, timely and cost effective resolution** of the real issues in dispute (s 7 CPA), same factor as *Wilcox J* in *Bishop v Bridgelands*
        - **Example** in *Bishop v Bridgelands*: Smaller parties might not have the funds to achieve justice independently (disadvantage to Ps)
    - Having regard to the efficient conduct of the business of the court (s 9(1)(c) CPA),
    - the efficient use of judicial and administrative resources (s9(1)(d) CPA) same factor as *Wilcox J* in *Bishop v Bridgelands*
    - and any prejudice that may be suffered by a party as a consequence of any order proposed to be made or direction

proposed to be given by the court (s9(2)(f) CPA) same factor as Wilcox J in *Bishop v Bridgelands*

- Example in *Bishop*: Would it be cheaper and faster to have one court case rather than 114 plaintiffs and 1 D, rather than 114 court cases? **Disadvantage to D.** However, note: not all 114 may have continued to litigate.

- **Regard of practical matters (*Bishop*)**

- Applicants should be represented by **the same solicitor**
- There should be a **substantial overlap in the evidence**
  - Example: *Bishop*: content of the letters were similar

## 2. **Necessary joinder** 9.03 SCR

- What is it?
  - The parties MUST sue and join with the person jointly entitled
    - E.g. two people TOGETHER lend me money, I don't pay them back, both people need to sue me
  - What happens?
    - They are co-plaintiffs
  - Why?
    - It's the same action.
- What's the law?
  - Where a P claims relief to which **another person is jointly entitled** with the plaintiff, all persons jointly entitled must be joined (r 9.03(1) SCR)
- What if one party does not want to join? (r 9.03(1)(b) SCR)
  - Court makes jointly entitled unwilling participant a second **defendant** (r 9.03(1)(b) SCR)
  - There's no cause of action against it, court is just insisting them to be a party
    - A mechanism for them to be notified so they will not come back in the future

## 3. **What if there is a misjoinder or non-joinder?** (r 9.05 SCR)

- Will a proceeding be defeated?
  - Proceeding will **not be defeated** because of a misjoinder or non-joinder of any party or person
- What will the court do?
  - the Court may determine all questions in the proceeding so far as they affect the rights and interests of the parties.
  - See below 'addition of parties after commencement of proceedings' r 9.06 SCR
- Does it require remedying?
  - Yes.
  - Court will ask you to amend to redraft the writ.
- If D spent money based on the misjoinder or non-joinder, you will likely have to pay those costs wasted.

# SAMPLE OF ORIGINATING MOTION

## Originating process → IF YOU ARE THE PLAINTIFF

1. There are 2 options for commencing a proceeding:
  - Writ – (Form 5A; per r 5.02 SCR) (per SCR 4.01); or
    - o Usual process (r 4.04)
      - Every proceeding shall begin with a writ except: (SCR 4.04)
        - Appeal from lower jurisdictions (Order 58)
        - Order to review (SCR 1.12)
        - See below under originating motion
    - o It identifies 1 or more defendants against whom a claim is made
  - Originating motion (Form 5B, 5C, 5D or 5E per r 5.02 SCR) (per SCR 4.05-4.06)
    - o Used in limited circumstances
      - Where there is **no defendant** to the proceeding; or (SCR 4.05(1)(a))
        - Example: probate
      - No pleadings?
      - An Act or the Supreme Court rules require an originating motion; or (SCR 4.05(1)(b))
      - Where it is unlikely that there will be any substantial disputes of fact and for that reason it is appropriate that there be no pleadings or discovery (SCR 4.06)
2. Indorsement (what has to be written on your originating process.
  - For either writ or originating motion:
    - o (only if there's a defendant) indorse with a statement to the effect that if the defendant does not file an appearance within the time stated in the originating process, the P may obtain judgment against the D without further notice (r 5.03 SCR)
    - o if in representative capacity, indorse with a statement showing that capacity (r 5.06 SCR)
    - o Indorse the P's and D's details: (r 5.07(1) SCR)
      - (a) Address of the P, (b) address of D, (c) if suing by solicitor, the P's solicitor's name or firm and business address.
  - **For a writ:** must contain an indorsement, either:
    - o **1. General** (r 5.04(2)(b) SCR); or
      - statement that puts defendant on notice of the claim and foreshadows statement of claim (**within 30 days**) – must specify
        - nature of claim,
        - cause of action relied upon
        - relief/remedy sought (r 5.04)
      - (This is what you do when you don't have time, you then have **30 days** to produce your statement of claim)
    - o **2. Special** (r 5.04(2)(a))

- Statement of claim attached
- (much more detailed, providing particulars about the breach, the loss, allege all the facts that establish your cause of action)
  - this is what you do if you have time
- **For an originating motion:**
  - indorsement must specify (r 5.05)
    - (a) relief/remedy;
    - (a) Act under which claim made, if any;
    - (b) question of law to be answered
  - (Pleadings not required for OM)

## SAMPLE OF APPERANCE

# If you are the defendant: APPEARANCE

### Defendant's possible responses to service:

Options include:

1. Do nothing (i.e. do not enter an appearance)
2. Enter an unconditional appearance
3. Enter a conditional appearance

### **1. Doing nothing (i.e. not entering an appearance):**

1. Consequences:
  - Will be exposed to default judgment
2. How can P enforce default judgment against D?
  - This only applies to proceedings commenced by writ (SCR 21.01)
    - P may ask Court to grant judgment/orders P has requested without any further notice to D (SCR 21.01(2))
    - P may have to pay sheriff a small fee to enforce judgment
3. How to overturn judgment in default of appearance: (r 21.07 SCR)
  - The Court may set aside or vary any judgment entered or given (r 21.07 SCR)
  - Should address three elements when attempting to set aside default judgment (see *Cook v DA Manufacturing (2004) QCA, QLD CoA*):
    - 1. A satisfactory **explanation** for the failure to appear
      - E.g. does not speak English
    - 2. Establish **no unreasonable delay** in making the application (*NAB v Singh [1995] 1 Qd R 377*)
      - E.g. As soon as I realised what it was, I sought assistance
    - 3. Demonstrate a **prima facie defence** on the merits (*Mearns v Willoughby [2003] NSWCA 382*)

### **2. Unconditional appearance – standard response**

1. Why would you do this/what happens?
  - Submits to jurisdiction
  - Informs P the action will be defended
  - Waives objection to service irregularities
2. What information should be provided?
  - File the notice of appearance **SCR 8.02** ((**Form 8A** per **SCR 8.05(1)**)
    - o (States the name, address and contact details of person entering an appearance and provides the proper address for service of (further) documents in the proceeding)
3. Then filed with the Court and served on P. (**SCR 8.05(3)**)
  - Service is just ordinary service within **Rule 6.07(1)**
4. Consequences of not serving on P:
  - Court may order D to pay any costs of the P occasioned by the failure of the D to comply (**SCR 8.05(4)**)
5. Go to Defence options

### **3. Enter a conditional appearance**

1. May file a conditional appearance (**r 8.08(1) SCR**)
2. Why would you do this/what are the consequences?:
  - Object to court's jurisdiction, but prevents default judgment
  - Entering conditional appearance as stating P can't get a default judgment due to diplomatic immunity
  - Allows the D to take issue with service irregularities
    - o although the fact that the D has filed a notice of appearance indicates that the proceedings have come to his attention, and **r 6.11 SCR** (improperly serviced but comes to their attention) will apply
3. Will **only have effect as conditional appearance if summons also made** within **14 days** after filing conditional appearance – **8.08(3) and 8.08(4)**
  - Otherwise will be same as unconditional appearance **8.08(3)**
4. What information should be provided?
  - Form depends on originating process:
    - o If writ: **Form 8B (r 8.08(2)(a) SCR)**
    - o If originating process in RedCrest under **Order 28A, Form 8AC (r 8.08(2)(b) SCR)**
  - Personal details:
    - o Name
    - o Proper address for service
    - o Solicitors details
  - If interstate:
    - o Application under the cross-vesting act to get case transferred
  - If international:
    - o *forum non conveniens* argument
5. By when does it have to be filed by?
  - If to be served in Victoria:
    - o Not less than **10 days** of being served (**SCR 8.04(a)**)
  - If to be served outside of Victoria but in Australia
    - o **21 days** after service (**SCR 8.04(b)**)

- **+ Include SEPA (s 17)**
- If to be served in New Zealand or in Papua New Guinea
  - Not less than **28 days** after service (SCR 8.04(c))
- In any other case
  - Not less than **42 days** after service (SCR 8.04(d))