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COMMENCING PROCEEDINGS, SERVICE AND APPEARANCE

1. Ethical and Professional Obligations re Commencement

Step 1: Cost Disclosures

s 174(1): Main Disclosure Requirement

- **a)** A law practice must provide a written cost estimate and the basis for calculations as soon as practicable after receiving instructions; **AND**
- **b)** update the client on any significant changes.

s 174(2): Mandatory Information for Clients

- a) Information provided under (1)(a) **must** inform clients of their rights
  - **i)** to negotiate costs/billing, request itemised bills, and seek regulatory help for disputes. Updates must provide enough info for the client to make informed decisions.
  - **ii)** Negotiate the billing method (e.g., billed by time vs. billed by task).
  - **iii)** Receive a bill and demand an itemised bill if the original is not itemised.
  - **iv)** Seek help from the local regulator for any cost disputes.

- **b)** When updating about changes under (1)(b), the firm must give enough detail about the financial impact so the client can make an informed decision about how to proceed.

s 174(3): Client Understanding and Consent

- The law practice must take "all reasonable steps" to ensure the client understands and consents to the proposed course of action and the costs.

s 174(4) & (5): Cost Threshold Exceptions

- No disclosure is required if costs are below the "lower threshold." If costs are between the lower and "higher threshold," a simplified standard disclosure form can be used instead of the full section (1) requirements.
  - If the case is very cheap (under the lower limit), you don't have to give a formal disclosure. If it's slightly more expensive but still under the higher limit, you can use a basic, one-page standard form instead of a full legal contract.

s 174(6): Requirement for Writing

- All disclosures **must be in writing**.

s 174(7) & (8): Threshold "Jump" Obligations

- If costs were expected to be low but now look likely to exceed a threshold, the practice must inform the client in writing and provide the higher level of disclosure **immediately**.

**** Lower Threshold: $750 (excluding GST and disbursements).**
Higher Threshold: $3,000 (excluding GST and disbursements).

Non-Compliance

s 178(1) The Penalties for Non-Disclosure

(1) If a law practice fails to provide the required costs disclosure to a client, four things happen:

a) **The contract is void**: The costs agreement is legally cancelled and unenforceable.
b) **Payment is paused**: The client does not have to pay the legal bill until the costs are officially assessed by an independent body or a regulator resolves the dispute.
c) **No lawsuits for recovery**: The law firm is banned from suing the client to recover the unpaid fees until that official assessment or dispute resolution is finished.
d) **Disciplinary action**: The failure can be treated as a formal disciplinary offence (unsatisfactory professional conduct or professional misconduct) against the firm's principals or the specific lawyers who handled the matter.

s 178(2) The "Third-Party Payer" Rule

(2) Sometimes a client has an "associated third party" paying their legal bill (e.g., a parent paying for a child, or a company paying for an employee). If the firm gave proper disclosure to one person but forgot to give it to the other:

a) The person who **DID** receive the proper disclosure is still legally obligated to pay the bill.
b) The firm can still take legal action against the person who did receive the disclosure to recover the money.

Step 2: ASCR

3 Paramount duty to the court

3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty

4 Other fundamental ethical duties

4.1 A solicitor must also:

- **4.1.1** Act in the client's best interests.
- **4.1.2** Be honest and polite in all legal work.
- **4.1.3** Provide competent, diligent, and prompt service.
- **4.1.4** Maintain integrity and professional independence.
- **4.1.5** Follow the law and these Rules.

5 Dishonest and disreputable conduct

5.1 A solicitor must not act (professionally or personally) in a way that shows they are unfit to practice law, or that significantly:

- **5.1.1** damages public trust in the justice system; or
- **5.1.2** harms the legal profession's reputation.

6 Undertakings

6.1 If a solicitor makes a formal professional promise (an undertaking), they must fulfill it on time. They are strictly bound by it unless the person who received the promise, or a court, officially releases them.
6.2 A solicitor must not ask another solicitor to give an undertaking if fulfilling that promise relies on the cooperation of a third party who is not involved in the agreement.

7 Communication of advice

7.1 A solicitor must give clear, prompt advice so the client understands their legal issues and can make informed decisions about their case.

7.2 A solicitor must explain available alternatives to going to court (like mediation or settlement), unless it is clear the client already understands these options well enough to make their own decision.

8 Client instructions

8.1A solicitor must follow a clients lawful, proper and competent instructions

19 Frankness in court

19. 1 A solicitor must not deceive or knowingly or recklessly mislead the court

19.2 A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading

21 Responsible use of court process and privilege

21.1 When using the court's power to force someone to do something (like issuing subpoenas), a solicitor must ensure the action:

- **21.1.1** Is justified by the available evidence;
- **21.1.2** Actually helps advance the client's case;
- **21.1.3** Is not done primarily to harass or embarrass someone; and
- **21.1.4** Is not done primarily to gain an unfair advantage outside of the court proceedings.

22 Communication with opponents

22.1 A solicitor must not knowingly lie to an opponent about the case, including during settlement negotiations.

22.2 If a solicitor realises they have made a false statement to an opponent, they must correct it immediately.

22.3 A solicitor is not considered to have lied simply by staying silent when an opponent makes a factual or legal mistake.

22.5 A solicitor must not communicate privately with the court about a current case without the opponent present (except in formal *ex parte* hearings), unless:

- **22.5.1** The court contacted the solicitor first and requires a response; or
- **22.5.2** The opponent gave prior consent to the specific communication.

22.6 If a solicitor communicates with the court under the exceptions in Rule 22.5, they must promptly tell the opponent exactly what was discussed.

22.7 When communicating with the court using the opponent's consent (under Rule 22.5.2), the solicitor must strictly limit the conversation to the specific topics the opponent agreed to.

22.8 If a solicitor intends to ask the court for a delay (an adjournment), they must notify the opponent of the plan and the reasons as soon as possible. They must also try to inform the court promptly, with the opponent's cooperation.

2. Pre-Litigation Steps and Disclosure

Step 1: Letter of Demand

STATE: While not a requirement, it is common practice prior to the issue of proceedings to issues a LOD to alert the OP that an issue has arisen and they need to take steps to resolve it or compensate P, otherwise P will commence litigation.

RELATIONSHIP WITH CPA

- Where a LOD is issued pre-commencement, the Overarching obligations (OO's) cannot apply as there is no proceeding on foot at the time of issue (**Giles v Jeffrey**; **s 3 CPA**)
- However, the issue of an LOD pre-commencement can be relied on after the commencement of proceeding (at which point the OO's enliven) (**Giles v Jeffrey**)

Step 2: Pre-action Protocols

**** REMEMBER THAT CPA CERTIFICATION IS ON FIRST SUBSTANTIVE DOCUMENT WHICH DOESN'T NECESSARILY MEAN SOC – CAN BE URGENT APPLICATION**

STATE: The plaintiff's obligations under the CPA include the necessity of issuing an overarching obligations certification with the writ stating that they have read and understood their OO's and the paramount duty of the court (**s 41(1) CPA**)

- Overarching obligations are included in **ss 16-26 CPA**, and the relevant ones for issuing proceedings:
  - are the obligation to act honestly – **s 17 CPA**
  - to only make claims with a proper basis – **s 18 CPA**
  - not to mislead and deceive **– s 21 CPA**
  - to reasonably endeavour to resolve the dispute – **s 22 CPA**

Certification Requirements

Each party must personally certify that they have read and understood their OO's and the paramount duty of the court (**s 41(1) CPA**)

Lawyer - Proper basis certification (PBC)

- In addition, the lawyers must certify there is a proper basis to the claim **s 42(1) CPA**
  - A lawyer must file a proper basis certification in the following circumstances:
  - **(a)** When filing a party's first substantive document.
  - **(b)** When filing any subsequent document that:
    - **(i)** Adds or substitutes a party.
    - **(ii)** Adds or substitutes a claim or cause of action.
    - **(iii)** Adds or substitutes a defence or reply.
    - **(iv)** Adds or substitutes a material denial or non-admission.
    - **(v)** Makes a significant amendment to an earlier document.

- The lawyer must certify that, based on available factual and legal material: - **s 42(1A) CPA**
  - **(a)** Each allegation of fact has a proper basis.
  - **(b)** Each denial has a proper basis.
  - **(c)** Each non-admission has a proper basis.

- It must be based on the lawyer's belief in truth: **s 42(3) CPA**
- Self-represented litigants must complete this personally – s **42(4)**

CONSEQUENCES

- If the parties fail to meet certification requirements, unless otherwise ordered by the court, **it will not prevent the commencement of litigation** - **s 45 CPA**
  - HOWEVER, the failure to provide certification can be considered re costs, compliance wth procedural obligations and n the making of orders – **s 46 CPA**

Sanctions for Contravention

- Any contravention of the OO's in relation to a civil proceeding can be considered by the court (**s 28 CPA);**

- If there is a contravention on balance, the court can make orders in the interests of justice (incl. costs, orders to remedy the contravention, and order preventing a person from taking certain steps in proceeding) (**s 29 CPA**)

Step 3: Pre-Litigation Offer

X may make an offer of compromise in writing re a claim prior to commencing proceedings (**r 26.08.01(1)).** If this was not accepted, the court will consider this in any costs order (SEE COSTS)

3. Limitation of Actions

The LAA legislation represents the legislatures judgment that the welfare of society is best served by constraining the limitation period to bring cause of action (**Brisbane South Regional Health Authority**). This is because:

- Evidence can be lost when matters are delayed = inaccurate outcomes increase
- Oppressive to D's to allow old claims to be lodged
- Sense of security for People/ organisations (e.g. insurance companies) → they cannot be sued after a certain point (can be oppressive)
- Public interest to settle disputes asap

Step 1: Introduction

ASK: Has the time for bringing the claim expired?

- IF NO, can commence proceeding
- IF YES – D has a defence to argue the action is **time barred**

STRUCTURE TO ANSWER QUESTION

1. Identify all the P's relevant causes of action (different LAA periods apply to different claims)
2. Assess when the cause of action accrued (started)
3. Assess which LAA provision applies
4. Are there any arguments for suspension of time?
5. Assess when time will run out or expire to file the claim
6. If time has expired – are there arguments for an extension
7. Have the parties violated CPA OO's in the process? (e.g minimise delay – **s 24**)
   a. Consider lawyers – failure to file in time may = professional negligence claim

Step 2: Identify all the P's claims

State/identify all the P's relevant causes of action (as different LAA periods apply to different claims)

Step 3: When did the cause of action accrue (start)

A cause of action accrues when all the necessary facts have occurred and there is an OP capable of being sued

TYPES

Breach of contract

- See the relevant statute

Contract

- When breach occurs

Negligence

- When damage is suffered b/c damage is the last element of negligence

Personal Injury (two types)

- **DEFINITION:** include any disease and impairment of a person's physical or mental condition – **s 3(1) LAA**

1. Dust/Tobacco
    - Where Personal Injury is caused by dust/tobacco exposure, time begins when P **first knows** that P has suffered Personal Injury and that Personal Injury was caused by the act/omission of another person – **s 5(1A) LAA**

2. Non-dust Tobacco (any personal injury or death)
    - When the injury was **discoverable** – **s 27D LAA**
        - A cause of action is "discoverable" on the **first date** the plaintiff knows or ought to know **ALL THREE** of the following facts:– **s 27F**
            a) The fact that the Personal Injury concerned has occurred; **AND**
            b) The fact that the Personal Injury was cause by D's fault; **AND**
            c) Personal injury was sufficiently serious to justify bringing an action
        - A person "ought to know" a fact if they would have discovered it by taking **all reasonable steps** prior to that date – **s 27F(2)**
            - Court will take into consideration conduct and statement to determine if person ought to have known – **s 27F(3)**

3. P injured by a parent/guardian when a minor
    - Action is deemed discoverable (starts accruing) at 25 or when the cause of action is actually discoverable by P, whichever is **later** – **s 27I(1)(a) LAA**
        - **Example**
            a) **Scenario A (Clock starts at 25):** You are injured by a parent at age 10. By age 20, you fully understand the injury, that your parent caused it, and that it is serious enough to sue (the s 27F test is met).
                - *Result:* The law pauses the clock. Your 3-year limitation period does not start ticking until your 25th birthday.
            b) **Scenario B (Clock starts later than 25):** You are injured by a parent at age 10. You turn 25, but you do not connect your severe psychological trauma to your parent's actions until a psychiatrist diagnoses you at age 30 (the s 27F test is met at 30).
                - *Result:* Your 3-year limitation period starts ticking on your 30th birthday.

Step 4: After cause of action has accrued, which LAA provision applies

Contract

6 years from the accrual (i.e from the breach) – **s 5(1)(a) LAA**

- Unless remedy sought is equitable (then no limit) – **s 31**

Tort

6 years from accrual – **s 5(1)(a)**

Defamation

1 year from publication – **s 5(1AAA)**

Personal Injury

STATE: Here, [X] has a personal injury as they are suffering from [...] which is a disease or impairment to their physical or mental condition (**s 3(1) LAA**)

Non-dust/tobacco Personal Injury

STATE: **Part IIA** applies to causes of action for damages that relate to death or PI, regardless of whether the action is found under contract, statute or otherwise

- Does **NOT** apply to (**sub-s(2)):**
  - Actions for damages where a statutory compensation scheme applies (eg Accident Compensation Act; Workplace Injury Rehab Act) (**s 27B(2)(a)**);
  - Workers compensation (**s 27B(2)(b)**)
  - Transport accidents (**s 27B(2)(c)**)
  - Dust-related injury (**s 27B(2)(d))**
  - Injury resulting from smoking or use of tobacco products / exposure (**s 27B(2)(e)**)

RELEVANT LAA PERIOD

Per s 27D, the LAA **expires** after whichever **elapses first**:

1. 3 years from the date the cause of action is **discoverable** – **s 27D(1)(a)**
   - **EXCPETION:**
     - A P under a disability has 6 years – **s 27E**

OR

2. Long stop limitation – 12 years from the date of the act/omission alleged to have resulted in death/personal injury – **s 27D(1)(b)**

Personal Injury – Dust/Tobacco

1. General Rule: s 5(1AA)

- **Application**: General personal injury claims (e.g., car accidents, slip and falls).
- **Deadline**: 3 years from the date the cause of action accrued.
- **Accrual Trigger**: Usually the date of the incident (when the injury occurs).

- **Hierarchy**: This rule is "Subject to subsection (1A)"—meaning if (1A) applies, (1A) overrides it.

2. Disease & Disorder Exception: s 5(1A)

- **Application**: Personal injuries consisting of a disease or disorder (e.g., asbestos-related illness, silicosis, tobacco-related cancer).
- **Deadline**: 3 years from the date of knowledge.
- **Accrual Trigger**: The 3-year clock starts only when the plaintiff first knows:
  - (a) Injury: That they have suffered the disease/disorder; AND
  - (b) Causation: That the injury was caused by the act or omission of someone else.
- **Legal Standard**: Uses actual knowledge (subjective) rather than "discoverability" (objective).

Step 5: Suspension of time?

Fraud/Mistake – s 27

RED FLAG: Where D actively conceals the wrong, they committed so P does not notice.

- Normally, the clock starts ticking the moment a legal wrong occurs. This section delays that clock if **fraud** or **mistake** prevented you from knowing you had a right to sue.

Per s 27, the LAA will **not begin to run until** the P has discovered the fraud where:

(a) The action was based on the fraud of **D/their agent**
  - **Example:** A person sells you a "diamond" ring for $10,000, knowing it is actually glass. You only find out it is glass eight years later when getting it appraised. Under this section, your time to sue starts the day of the appraisal, not the day of the sale.

(b) The right to an action was **concealed** by fraud
- Applies when the original wrong was **not** fraud (e.g., negligence or breach of contract), but the defendant **hid the evidence** of that wrong.
  - **EXAMPLE**: A builder uses sub-standard foundations that breach building regulations. To prevent you from noticing, they quickly cover the faulty work with concrete and landscaping. Because they intentionally hid the breach, the limitation period is "paused" until the defect becomes visible or is discovered.

(c) The action for relief is the consequence of a mistake
- This applies when a transaction occurred because of a **genuine error**, and you are suing to undo that error
- The clock should not run while both parties are unaware that a mistake even happened.

Acknowledgement/Part Payment – s 24 - s 26

Section 24: The "Reset" Triggers

- This section defines what actions cause the limitation period to start fresh (accrue again).

S 24– Land and Mortgages

1) If a person is "squatting" on land or a borrower is in possession of mortgaged property, the 15-year clock restarts if they
   (a) Acknowledge the true owner's title; **or**
   (b) Make a payment (principal or interest) toward the mortgage debt.

S 24 - Mortgagee in Possession

2) If the lender is holding the land, the borrower has 15 years to "redeem" (get it back) from the date the lender last acknowledged their title or accepted a payment.

S 24 - Debts and Money Claims

3) For standard debts or claims against a deceased person's estate, the limitation period (usually 6 years) restarts if the debtor:
(a) Acknowledges the debt; or
(b) Makes a partial payment.

Section 25: The Formalities (How it must be done)

S 25(1) For an acknowledgment to legally "reset the clock," it must meet strict criteria.

- **In Writing**: Oral admissions are insufficient. It must be a written document.
- **Signed**: It must be signed by the person making the acknowledgment (the debtor or person in possession).
- To/From the Right People: * It can be made by or to an agent (e.g., a lawyer or accountant).

(1) It must be made to the person claiming the right (the **creditor**/owner). Telling a random third party that you owe money does not reset the clock.

Section 26: The "Who is Bound" by acknowledgement/part payment

** Most important is (**5) and (6)**

S 26(5) and (6) – General Money Debts

Action	Who is Bound?	Layman Example
Acknowledgment (Writing)	**Only the maker** (+ their heirs).	If A and B co-signed a loan, and A writes a letter admitting the debt, the clock resets **only for A**. B's 6-year limit continues to expire.
Payment (Cash/Transfer)	**Everyone** liable.	If A makes a $5 payment on the co-signed loan, the clock resets for **both A and B**.

Legal Incapacity

Sometimes the clock pauses because the plaintiff is not legally capable of running a lawsuit (**s 27J**).

** A person unable (or substantially impeded) in managing their affairs for the specific cause of action due to disease, physical, or mental impairment. – **s 27J**

General Rule:

- The limitation period is suspended for the duration a plaintiff is under a "legal incapacity" - **s 27J(2)**

What is legal incapacity? – s 27J(1)

A plaintiff is under a legal incapacity ***only*** if they are:

(a) **A minor,** EXCEPT when in the custody of a capable parent/guardian.
(b) An incapacitated person (for **more than** 28 continuous days), EXCEPT when they have an appointed guardian legally authorised to sue on their behalf.

*(Note: Having a capable parent/guardian **removes the legal incapacity**).*

Discoverability & Imputed Knowledge – s 27J(3)

- **Applies to**: Minors/incapacitated persons who are ***NOT*** under a legal incapacity (i.e., they have a capable parent/guardian).
- **Rule**: Facts known (or reasonably discoverable) by the capable parent/guardian are legally deemed known by the minor/incapacitated person to trigger the limitation clock.

EXAMPLE:

- **Enlivened (Clock Pauses)**
    - Facts: Plaintiff injured (clock starts). Later enters coma for >28 days. No formal guardian appointed.
    - Application: Plaintiff meets the definition of an "incapacitated person" under s 27J(1)(b).
    - Result: s 27J(2) applies. The limitation clock is suspended for the duration of the coma.

- **Not Enlivened (Clock Continues)**
    - Facts: Plaintiff injured (clock starts). Later enters coma. Formal guardian appointed immediately with legal authority to sue.
    - Application: Plaintiff is excluded from "legal incapacity" under s 27J(1)(b)(i)-(ii) because an authorised guardian exists.
    - Result: s 27J(2) does not apply. The limitation clock continues running without interruption.

Minor injured by relative/close associate

s 27I(1): Application and Time Limits

- The plaintiff was a minor at the time of the injury/death **AND** the defendant was their parent, guardian, or a "close associate" of the parent/guardian.
    (a) **Discoverability**: The cause of action is deemed discoverable when the victim turns 25 years old, OR when actually discovered, **whichever is later.**
    (b) **Long-stop Period**: The absolute deadline to sue is 12 years from the date the victim turns 25 (i.e., expires on their 37th birthday).

s 27I(2): "Close Associate" Test

- A person whose relationship with the parent/guardian means:
  - **(a)** The parent/guardian might be influenced not to sue the person; **OR**
  - **(b)** The victim might be unwilling to disclose the injury or incident to the parent/guardian.

s 27I(3): Death Before Age 25

- If the victim dies before their 25th birthday, substitute "when the victim turns 25" with "the date of death" for calculating limitation periods for the deceased estate (survivor actions).

Step 5A: Suspension of time?

s 27O(1): The Qualification Checklist To pass through this gateway and use the special rules, the lawsuit must be for personal injury or death caused by:

(i) **Physical or sexual abuse** that occurred when the victim was under 18.
(ii) **Psychological abuse**, but *only* if it was a direct result of that physical or sexual abuse.

The CAVEAT: Standalone psychological abuse (such as severe emotional neglect without a physical or sexual element) does not qualify for these special rules.

N/B**: s 27R** does preserve the inherent jurisdiction of the SCV to dismiss or stay proceedings where there is unfairness to the D

Step 6: SUB-CONCLUSION – Has time run out or expired?

- Has time run out?
- How much longer does P have to bring the claim?

Step 7: Can time be Extended?

EXTENDING SUBSTANTIVE DEADLINES – COMMENCING PROCEEDING - LAA

Where time has elapsed, P can apply to the court for an extension – **s 27K LAA (1)**

s 27K(2): Court's Power & The Test

(a) Hearing: The court may hear arguments from anyone likely to be affected (usually the defendant).
(b) **The Test:** The court may extend the limitation period if it decides it is "**just and reasonable**" to do so. The court specifies the length of the extension.
  - This is **subject to the mandatory factors** listed in **s 27L).**

s 27K(3): Legal Effect

- If the order is made, the strict limitation period is legally extended for that specific plaintiff's lawsuit in that specific court.

Factors the MUST be considered – s 27L LAA

s 27L(1) LAA	s 27L(2) LAA
(a) Length and reasons for delay (b) Extent of prejudice to OP (c) Could P ascertain relevant facts from OP? (d) Duration of disability/legal incapacity (e) Time period of discoverability (f) Promptness and reasonability of P's actions on discovering claim (g) Steps taken by P to obtain expert advice	(a) Whether time prejudiced fair trial of claim (b) Nature and extent of P's losses (c) Nature of OP's conduct

EXTENDING PROCEDURAL DEADLINES - SCR 3.02

3.02(1): Court's General Power

- The Court may extend (lengthen) or abridge (shorten) any time limit set by the Rules or by a previous court order.

3.02(2): Timing of Application

- The Court can grant an extension whether the application is made before or after the deadline has already expired.

3.02(3): Extension by Mutual Consent

- Parties can agree to extend procedural deadlines by mutual consent without requiring a formal court order (unless the Court explicitly orders otherwise).

4. Originating Process

The originating process is the formal requirement to commence litigation. It is the overarching concept.

Step 1 – Introduction

STATE: P can commence proceedings via a **writ** or **originating motion – 4.01 SCR**

Once the originating documents are completed, P must file the documents with the court and pay the filing fee

Step 2A – Writ

WHEN IS WRIT REQUIRED? – r 4.04 SCR

Every proceeding shall be commenced by writ – **r 4.04**

- EXCEPTIONS
  - Originating motion – **r 4.05; r 4.06**

FORM OF WRIT – r 5.02 SCR

- P must file a writ on Form 5A

APPEARANCE WARNING – r 5.03 SCR

- Writ must state that if D fails to file an appearance within the required timeframe, the P may obtain default judgment without further notice

CLAIM ON WRIT – r 5.04 SCR

- The writ **must** contain an indorsement, which can be either:
  - **a SOC** with information about the nature of the claim, the cause of action relied on and relief sought (**SCR r 5.04(2)(a)); OR**
  - **any statement** sufficient to give notice of the nature of the claim, cause of action and relief sought (**SCR r 5.04(2)(b), Ruzeu**).

PARTY REPRESENTATED BY ANOTHER – r 5.06 SCR

- Where a party sues or is sued in a representative capacity, the originating process shall be indorsed with a statement showing that capacity.

ADDRESS OF PARTIES – r 5.07 SCR

- Writ must include the following contact details:
  - **(a)** P's address
  - **(b)** D's address (whether person or company)
  - **(c)** Solicitors' details
    - their name, their firm, and their business address **within Victoria**
  - **(d)** Email address

PLACE AND MODE OF TRIAL – r 5.08 SCR

(a) Writ shall be indorsed with the place and mode of trial desired

(b) If absent, then default is trial in Melbourne without a jury.

FILING OF WRIT – r 5.11 SCR

- When Writ is filed, **proceeding commences** – **r 5.11(1)**
- Writ is filed when Prothonotary seals and dates writ; **OR** – **r 5.11(1.1)(a)**
- In accordance with **r 28A.03 – r 5.11(1.1)(b).**

DURATION AND RENEWAL OF ORIGINATING PROCESS – r 5.12 SCR

(1) **Initial Validity**: A writ or originating motion is valid for service for 1 year from the filing date.
(2) **Court Extension**: If unserved, the Court may extend validity for up to 1 year from the date of the extension order. This can be done multiple times.
(3) **Timing of Extension**: An extension order can be made before or after the original period expires.
(4) **Application Process**: The plaintiff can apply without notice to the defendant. If the Court determines the defendant should be heard, it will:
  (a) Adjourn the hearing; and
  (b) Direct the plaintiff to notify the defendant.
(5) **Formalities**: If extended, the Prothonotary must stamp the sealed copy with the order date and the new expiry date.

Step 2B – Originating Motion

RED FLAG: EXCEPTION TO WRIT

- An originating motion is made under **SCR r 4.05–6** and is **used only in limited circumstances** —
  - Must be used if there is **no D to the proceeding**: **SCR r 4.05(1)(a);**
  - May be used where there is **no substantial factual dispute** (and therefore it is appropriate there is no pleadings or discovery) (**SCR r 4.06**)

MUST STATE: - **r 5.05 SCR**

(a) The relief or remedy sought and the relevant Act (if applicable).
(b) The specific question the court needs to answer (if applicable).

- NO pleading is required – **r 5.05**

FILING: - **r 5.05 SCR**

- The originating motion can be filed per Form 5B, 5C, 5D, 5E or 5F (whichever is appropriate) (**SCR r 5.02(2)–(3)**)

Step 3 – CPA Certificates

TWO key certificates must be filed with the parties **first substantive documents** (SOC for P, Defence for OP)

1. Overarching obligations certification (**s 41 CPA**) – certifies that the party has read and understood their overarching obligations and paramount duties under the CPA (**ss 16-26 CPA** e.g. duty to act honestly, not to mislead/deceive, endeavour to resolve dispute)

2. Proper basis certification (**s 42 CPA**) – legal practitioner certifies that they hold a reasonable belief that each allegation has a proper basis
    - **(1)** When Required: A legal practitioner must file this certification:
        - **(a)** With the party's first substantive document.
        - **(b**) With **<u>any subsequent document that significantly alters the cas</u>**e (e.g., adds/substitutes a party, claim, defence, material allegation/denial, or makes a significant amendment).

    - **(1A)** Content (**<u>Writs</u>**): Certifies that on available material, there is a proper basis for each allegation, denial, and non-admission of fact.

    - **(1B)** Content (**<u>Originating Motions</u>**): Certifies that on available material, there is a proper basis for the claim, question posed, or response.

    - **(2)** Filing
        - Use Form 4B

    - **(3) Defining "Proper Basis":**
        - **(a)** <u>Allegations/Denials</u>: Founded on a reasonable belief they are true or untrue.
        - **(b)** <u>Non-admissions</u>: Founded on not knowing whether a fact is true or untrue.
        - **(c)** <u>Claims/Questions/Responses</u>: Founded on a reasonable belief they have a proper legal and factual basis.

    - **(4)** **<u>Unrepresented Parties</u>**: If a party does not have a lawyer, they must personally complete the certification and are held to the same standards as a legal practitioner under this section.

- The court cannot prevent commencement of proceedings merely because of a failure to file either certificate however failure will be taken into consideration when the court makes orders (**s 45 CPA**).

5. URGENT APPLICATIONS

<u> IF URGENT APPLICATION IS APPLIED FOR BEFORE PROCEEDINGS OR ANY DOCUMENT IS LODGED (SO THE URGEN APPLICATION IS THE FIRST DOCUMENT LODGED) STATE A 4B PROPER BASIS CERTIFICATE IS REQUIRED</u>**

Interlocutory Applications – Order 46

RULE: INTERLOCUTROY APPLICATION UNDER ORDER 46 ONLY APPLY <u>BEFORE OR DURING</u> PROCEEDINGS

- Interlocutory applications ensure that the process for arriving at a determination is fair and just

Step 1: Scope

R 46.01 – When this Applies

- General Scope: Applies **to any interlocutory (<u>OR ANY OTHER</u>) application made within a proceeding**.

Step 2: Procedure

- Application must be **made by summons** – r 46.02
    - Shall be in Form 46A – r 46.04

- Court may order applicant give **notice** to any person with **sufficient interest in the proceeding**

SERVICE – R 46.05

- Applicant must serve a sealed copy of the summons **<u>and any supporting affidavits</u>** on all persons requiring notice – R 46.05(1)
- Must be **served within a reasonable time**. – r 46.05(2)

Step 2A: Supporting Affidavit

FORM REQUIREMENTS

43.01

(1) Must be in the <u>first person</u>.

(2) Must state:

(a) Deponent's residence and occupation (or description).

(b) Whether the deponent is a party or employed by a party.

(3) **PROFESSIONAL EXCPETION**: If making the affidavit in an occupational capacity, may state business address, position, and employer instead of residence.

CONTENT REQUIREMENTS

43.03 Content of affidavit

(1) Confined to facts within the deponent's personal knowledge.

(2) **Interlocutory exception**: May state information/belief if grounds are provided.

(3) Bundle exhibits (Excluding Chapter III proceedings):

- (a) Pages must be sequentially numbered from the start of the affidavit to the end of the exhibit.
- (b) Affidavit body must reference documents using these sequential page numbers

SIGNATURE/WITNESS REQUIREMENTS

R 43.01

(5) **Deponent must sign**. Witness must complete and sign the jurat (subject to **43.02(1)**).

(6) Witness must sign every page.

(7) Witness must legibly write, type, or stamp below their jurat signature:

- (a) Their name and address.
- (b) Their authorized capacity to take the affidavit.

TIME FOR SWEARING

43.07

May be sworn/affirmed **BEFORE** the proceeding commences, unless the Court orders otherwise.

FILING REQUIREMENTS

43.09

(1) Affidavit **CANNOT be used** by the submitting party if:

- (a) Not filed.
- (b) Not served/filed in compliance with a Court order.

(2) File with the Prothonotary or proper court officer.

OTHERS

BLIND/ILLITERATE DEPONENT

43.02

(1) Witness must certify in/below the jurat that:

- (a) The affidavit was read to the deponent in the witness's presence.
- (b) The deponent seemed to perfectly understand it.
- (c) The deponent signed/marked in the witness's presence.

2) If not certified, the affidavit is inadmissible unless the Court is satisfied it was read and understood.

INTERPRETER REQUIRED

43.02.1

(1) Accredited interpreter must state the following in the jurat or a separate affidavit.

(2) Interpreter must verify:

- **(a)** Before translating:
  - **(i)** Read and agreed to the code of conduct (Form 44AA).
  - **(ii)** Had adequate preparation time.

- **(b)** During execution:
  - **(i)** Sight translated the entire affidavit. Deponent confirmed understanding and agreement to the witness.
  - **(ii)** Deponent swore/affirmed in interpreter's presence.

2 + DEPONENTS

43.04

- All names must be in the jurat.
- If sworn/affirmed simultaneously before the same witness, "each of the abovenamed" is sufficient.

ALTERATIONS

43.05

(1) Alterations (erasures, interlineations) <u>must be initialled by the witness</u>. Uninitialled alterations require Court leave to be used in evidence.

(2) Applies equally to verified accounts attached to the affidavit.

EXHIBITS

43.06

- Documents in the affidavit are referred to as exhibits. They cannot be annexed to the affidavit itself, but can via a separate certificate be annexed which identifies the exhibits

IRREGULARITY

43.08

Court may grant leave to use an affidavit despite irregular form.

Step 3: Consider If Party Absent

46.07 Absence of party to summons

Summons Addressee absent: Court may hear application (requires proof of due service) **– r 46.07(1)**

Applicant absent: Court may dismiss application or make other order – **r 46.07(2)** `

Step 4: Consider Ex Parte Application (BELOW)

There are limited circumstances where giving an affected party notice of the application may be undesirable, impracticable or inappropriate. In these cases, two additional conditions must be met before an ex parte application is granted:

1. **<u>Full and frank disclosure</u>** – P must honestly disclose all arguments, including those OP would put if they were there

2. **<u>Costs undertakings</u>** – P must agree to pay OP costs if application was unwarranted

RED FLAG: Relevant for urgent applications (where notice to the other side may be detrimental because their actions may defeat the application before its heard) – e.g. freezing or search orders + injunctions; may also be used where the D has not been identified proper in the litigation