

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

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# Order 42 (Subpoenas)

- R 42.02: Issuing of subpoena
- (1) The Court may, in any proceeding, by subpoena order the addressee—
  - (a) to attend to give evidence as directed by the subpoena;
  - (b) to produce the subpoena or a copy of it and any document or thing as directed by the subpoena;or
- (c) to do both of those things.
- (2) The Prothonotary shall not issue a subpoena—
  - (a) if the Court has made an order, or there is a Rule of the Court, having the effect of requiring that the proposed subpoena—
    - (i) not be issued; or
    - (ii) not be issued without the leave of the Court and that leave has not been given; or
  - (b) requiring the production of a document or thing in the custody of the Court or another court.
- (3) The Prothonotary shall seal with the seal of the Court, or otherwise authenticate, a sufficient number of copies of the subpoena for service and proof of service.
- (4) A subpoena is taken to have been issued on its being sealed or otherwise authenticated in accordance with paragraph (3).
- (5) In any proceeding to which Order 28A applies, the Prothonotary may issue in RedCrest a subpoena which has been submitted by a party.

# R 42.03: Form of subpoena

- (1) A subpoena shall be in accordance with—
  - (a) Form 42A, for a subpoena to attend to give evidence;
  - (b) Form 42B, for a subpoena to produce; or
  - (c) Form 42C, for a subpoena both to attend to give evidence and to produce.
- (2) A subpoena shall not be addressed to more than one person.
- (3) Unless the Court otherwise orders, a subpoena shall identify the addressee by name or by description of office or position.
- (4) A subpoena to produce shall—
  - (a) identify the document or thing to be produced; and
  - (b) specify the date, time and place for production.
- (5) A subpoena to attend to give evidence shall specify the date, time and place for attendance.
- (6) The date specified in a subpoena shall be the date of trial or any other date as ordered by the Court.
- (7) The place specified for production may be the Court or the address of any person authorised to take evidence in the proceeding as ordered by the Court.
- (8) The last date for service of a subpoena—
  - (a) is the date falling 5 days before the earliest date on which an addressee is required to comply with the subpoena or an earlier or later date fixed by the Court; and
  - (b) shall be specified in the subpoena.
- (9) If the addressee is a corporation, the corporation shall comply with the subpoena by its appropriate or proper officer.

- **R 42.03.1: Alteration of date for attendance or production**

- (1) The issuing party may give notice to the addressee of a date or time later than the date or time that is specified in a subpoena as the date or time for attendance or for production or for both.
- (2) If notice is given under paragraph (1), the subpoena has effect as if the date or time notified appears in the subpoena instead of the date or time that is specified in the subpoena.

- **R 42.04: Setting aside or other relief**

- (1) The Court may, of its own motion or on the application of a party or of any person having a sufficient interest, set aside a subpoena in whole or in part, or grant other relief in respect of it.
- (2) An application under paragraph (1) shall be made on notice to the issuing party.
- (3) The Court may order that the applicant give notice of the application to any other party or to any other person having a sufficient interest.

## R 42.05: Service

- (1) A subpoena shall be served personally on the addressee.
- (2) The issuing party shall serve a copy of a subpoena to produce on each other party as soon as practicable after the subpoena has been served on the addressee, but it shall not be necessary that the copy served be sealed or be served personally.

# R 42.06: Compliance with subpoena

- (1) An addressee need not comply with the requirements of a subpoena to attend to give evidence (a subpoena in Form 42A) or a subpoena both to attend to give evidence and to produce (a subpoena in Form 42C) unless conduct money has been provided or tendered to the addressee a reasonable time before the day on which attendance is required [ie a sum of money or its equivalent, such as pre-paid travel, sufficient to meet the reasonable expenses of the addressee of attending court as required by the subpoena and returning after so attending;: r 42.01].
- (2) An addressee need not comply with the requirements of a subpoena unless it is served on or before the day specified in the subpoena as the last day for service of the subpoena.
- (3) Despite Rule 42.05(1), an addressee shall comply with the requirements of a subpoena even if it has not been served personally on that addressee if the addressee has, by the last day for service of the subpoena, actual knowledge of the subpoena and of its requirements.
- (4) The addressee shall comply with a subpoena to produce—
  - (a) by attending at the date, time and place specified for production or, if the addressee has received notice of a later date or time from the issuing party, at that later date or time, and producing the subpoena or a copy of it and the document or thing to the Court or to the person authorised to take evidence in the proceeding as permitted by the Court; or
  - (b) by delivering or sending the subpoena or a copy of it and the document or thing to the Prothonotary at the address specified for the purpose in the subpoena, so that they are received not less than two clear business days before the day specified in the subpoena for attendance and production or, if the addressee has received notice of a later day from the issuing party, before that later day.

# R 42.06 (cont)

- (5) In the case of a subpoena that is both a subpoena to attend to give evidence and a subpoena to produce, production of the subpoena or a copy of it and of the document or thing in any of the ways permitted by paragraph (4) does not discharge the addressee from the obligation to attend to give evidence.
- (6) Unless a subpoena specifically requires the production of the original, the addressee may produce a copy of any document required to be produced by the subpoena.
- (7) The copy of a document may be—
  - (a) a photocopy; or
  - (b) in an electronic form in any of the following electronic formats—
    - (i) .doc and .docx—Microsoft Word documents;
    - (ii) .pdf—Adobe Acrobat documents;
    - (iii) .xls and .xlsx—Microsoft Excel spreadsheets;
    - (iv) .jpg—image files;
    - (v) .rtf—rich text format;
    - (vi) .gif—graphics interchange format;
    - (vii) .tif—tagged image format; or
    - (viii) any other format agreed with the issuing party.

# R 42.07: Production otherwise than upon attendance

- (1) This Rule applies if an addressee produces a document or thing in accordance with Rule 42.06(4)(b).
  - (2) The Prothonotary shall, if requested by the addressee, give a receipt for the document or thing to the addressee.
  - (3) If the addressee produces more than one document or thing, the addressee shall, if requested by the Prothonotary, provide a list of the documents or things produced.
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- **R 42.08: Removal, return, inspection, copying and disposal of documents and things**
  - The Court may give directions in relation to the removal from and return to the Court, and the inspection, copying and disposal, of any document or thing that has been produced to the Court in response to a subpoena.

# R 42.09: Inspection of, and dealing with, documents and things produced otherwise than on attendance

- (1) This Rule applies if an addressee produces a document or thing in accordance with Rule 42.06(4)(b).
- (2) On the request in writing of a party, the Prothonotary shall inform the party whether production in response to a subpoena has occurred, and, if so, include a description, in general terms, of the document and thing produced.
- (3) Subject to this Rule, no person may inspect a document or thing produced unless the Court has granted leave and the inspection is in accordance with that leave.
- (4) Unless the Court otherwise orders, the Prothonotary may permit the parties to inspect at the office of the Prothonotary any document or thing produced unless the addressee, a party or any person having sufficient interest objects to the inspection under this Rule.
- (5) If the addressee objects to a document or thing being inspected by any party to the proceeding, the addressee shall, at the time of production, notify the Prothonotary in writing of the objection and of the grounds of the objection.
- (6) If a party or person having a sufficient interest objects to a document or thing being inspected by a party to the proceeding, the objector may notify the Prothonotary in writing of the objection and of the grounds of the objection.
- (7) On receiving a notice of an objection under this Rule, the Prothonotary—
  - (a) shall not permit any, or any further, inspection of the document or thing the subject of the objection; and
  - (b) shall refer the objection to the Court for hearing and determination.
- (8) The Prothonotary shall notify the issuing party of the objection and of the date, time and place at which the objection will be heard, and the issuing party shall notify the addressee, the objector and each other party accordingly.
- (9) The Prothonotary shall not permit any document or thing produced to be removed from the office of the Prothonotary except on application in writing signed by the solicitor for a party.
- (10) A solicitor who signs an application under paragraph (9) and removes a document or thing from the office of the Prothonotary, undertakes to the Court by force of this Rule that—
  - (a) the document or thing will be kept in the personal custody of the solicitor or a barrister briefed by the solicitor in the proceeding; and
  - (b) the document or thing will be returned to the office of the Prothonotary in the same condition, order and packaging in which it was removed, as and when directed by the Prothonotary.
- (11) The Prothonotary may, in the Prothonotary's discretion, grant an application under paragraph (9) subject to conditions or refuse to grant the application.

# R 42.10: Disposal of documents and things produced

- (1) Unless the Court otherwise orders, the Prothonotary may, in the Prothonotary's discretion, return to the addressee any document or thing produced to him in response to the subpoena.
- (2) Unless the Court otherwise orders, the Prothonotary shall not return any document or thing under paragraph (1) unless the Prothonotary has given to the issuing party at least 14 days' notice of the intention to do so and that period has expired.
- (3) The addressee of a subpoena which is in accordance with Form 42B or Form 42C must complete the declaration by the addressee provided for in the subpoena.
- (4) The completed declaration must be included in the subpoena or copy of the subpoena which accompanies the documents produced under the subpoena.
- (5) Subject to paragraph (6), the Prothonotary may, upon the expiry of four months from the conclusion of the proceeding, cause to be destroyed all the documents produced in the proceeding in compliance with a subpoena which were declared by the addressee to be copies.
- (6) The Prothonotary may cause to be destroyed those documents declared by the addressee to be copies which have become exhibits in the proceeding when they are no longer required in connection with the proceeding, including on any appeal.

# R 42.11: Costs and expenses of compliance

- (1) The Court may order the issuing party to pay the amount of any reasonable loss or expense incurred in complying with the subpoena.
- (2) If an order is made under paragraph (1), the Court shall fix the amount or direct that it be fixed in accordance with the Court's usual procedure in relation to costs.
- (3) An amount fixed under this Rule is separate from and in addition to—
  - (a) any conduct money paid to the addressee;
  - (b) any witness expenses payable to the addressee.

# R 42.12: Failure to comply with subpoena – contempt of court

- (1) Failure to comply with a subpoena without lawful excuse is a contempt of court and the addressee may be dealt with accordingly.
- (2) Despite Rule 42.05(1), if a subpoena has not been served personally on the addressee, the addressee may be dealt with for contempt of court as if the addressee had been so served if it is proved that the addressee had, by the last day for service of the subpoena, actual knowledge of the subpoena and of its requirements.
- (3) Paragraphs (1) and (2) are without prejudice to any power of the Court under any Rules of the Court (including any Rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

# Order 42A – Subpoena for production to Prothonotary

- What is the difference between this Order and Order 42? See <https://www.supremecourt.vic.gov.au/forms-fees-and-services/registry-services/inspecting-and-issuing-subpoenas>
- **R 42A.02: Issuing subpoena**
- A subpoena issued under this Order shall require the addressee to produce to the Prothonotary on or before a day specified by the Prothonotary in the subpoena the document identified in the subpoena.
- **R 42A.03: Form of subpoena**
- A subpoena under this Order shall be in Form 42AA.

## R 42A.04: Affidavit of service

- (1) A subpoena under this Order shall be served personally on the addressee.
- (2) The issuing party shall serve a copy of a subpoena to produce under this Order on each other party as soon as practicable after the subpoena has been served on the addressee, but it shall not be necessary that the copy served be sealed or be served personally.
- (3) A party who serves a copy of a subpoena under this Order shall forthwith file an affidavit of service.

# R 42A.05: Compliance with subpoena

- (1) The addressee shall comply with the subpoena under this Order by producing the document to the Prothonotary by delivering or sending it and, if sent, the document shall be sent so that the Prothonotary receives it on or before the day specified in the subpoena.
- (2) Unless a subpoena specifically requires the production of the original, the addressee may produce a copy of any document required to be produced by the subpoena.
- (3) The copy of a document may be—
  - (a) a photocopy;
  - (b) in an electronic form in any of the following electronic formats—
    - (i) .doc and .docx—Microsoft Word documents;
    - (ii) .pdf—Adobe Acrobat documents;
    - (iii) .xls and .xlsx—Microsoft Excel spreadsheets;
    - (iv) .jpg—image files;
    - (v) .rtf—rich text format;
    - (vi) .gif—graphics interchange format;
    - (vii) .tif—tagged image format;
    - (viii) any other format agreed with the issuing party; or
  - (c) in any other appropriate form.
- (4) Even where a subpoena specifically requires the production of the original, the addressee may, with the consent of the issuing party, produce a copy, instead of the original, of the document required to be produced.

- **R 42A.06: Receipt for document**

- Where a document is produced in compliance with a subpoena under this Order the Prothonotary shall, if requested to do so, give a receipt to the person producing the document.

- **R 42A.07: Objection by addressee or other person**

- If—
  - (a) the addressee has any objection to producing a document identified in the subpoena or to its being inspected by any one or more of the parties to the proceeding; or
  - (b) a person having a sufficient interest, other than a party, has any objection to the production of a document identified in the subpoena or to its being inspected by any one or more of the parties to the proceeding—
- that person shall notify the Prothonotary in writing of that objection and state the grounds of that objection before the day specified in the subpoena.

- **R 42A.08: Objection by party to inspection by other party**

- (1) Subject to paragraph (2), if a party has any objection to the inspection by another party of a document identified in the subpoena, the party having the objection shall notify the Prothonotary in writing of that objection and state the grounds of that objection before the day specified in the subpoena.
- (2) If a party other than the plaintiff seeks by subpoena the production of any hospital or medical file or record concerning the plaintiff or the plaintiff's condition, the plaintiff may, before taking objection under paragraph (1), inspect the file or record produced to the Prothonotary and notify the Prothonotary thereafter of any objection the plaintiff has to inspection by any other party, provided that the plaintiff makes that inspection and notifies that objection and the grounds of that objection in writing within seven days after the day specified in the subpoena for production of the file or record to the Prothonotary.

- **R 42A.09: Procedure after objection**

- (1) Upon receiving notice under Rule 42A.07 or 42A.08, the Prothonotary shall refer the subpoena to a Judge of the Court or an Associate Judge for the hearing and determination of the objection.
- (2) The Prothonotary shall notify the issuing party in writing of the objection and the grounds of that objection and the time and place at which the objection will be heard and that party shall notify the addressee and all other parties accordingly.

- **R 42A.10: Inspection of document produced**
- If no objection is notified under Rule 42A.07 or 42A.08 or to the extent that any such objection is disallowed, each party, unless a Judge of the Court or an Associate Judge otherwise orders, may, by appointment with the Prothonotary, inspect and take copies of a document produced in compliance with a subpoena under this Order.
  
- **R 42A.11: Removal of document**
- (1) The Prothonotary shall not permit any document produced in compliance with a subpoena under this Order to be removed from the office of the Prothonotary except upon application in writing signed by the solicitor for a party.
- (2) A solicitor who signs an application under paragraph (1) and removes a document from the office of the Prothonotary, undertakes to the Court by force of this Rule that—
  - (a) the document will be kept in the personal custody of the solicitor or a barrister briefed by the solicitor in the proceeding; and
  - (b) the document will be returned to the office of the Prothonotary in the same condition, order and packaging in which it was removed, as and when directed by the Prothonotary.
- (3) The Prothonotary may, in the Prothonotary's discretion, decline to accede to any application under paragraph (1).

# R 42A.12: Return or disposal of document

- (1) Subject to any order of the Court, the Prothonotary—
  - (a) may in the Prothonotary's discretion return to the addressee any document produced to the Prothonotary in compliance with the subpoena;
  - (b) shall, upon returning the document, inform the addressee that the subpoena to produce remains in force until the trial or other determination of the proceeding; and
  - (c) may specify a date by which the document is to be produced again to the Prothonotary in compliance with the subpoena.
- (2) Subject to paragraph (3), the Prothonotary shall not return any document under paragraph (1) until after the Prothonotary has given to the issuing party 14 days' notice in writing of the Prothonotary's intention to do so.
- (3) In an urgent case and at the request of—
  - (a) the addressee; or
  - (b) in the case of any hospital or medical file or record concerning the plaintiff or the plaintiff's condition, the plaintiff—
- the Prothonotary may return a document under paragraph (1) without first giving notice under paragraph (2), but in such a case, after returning the document, the Prothonotary shall give notice to the issuing party that the document has been returned.
- (4) The addressee of a subpoena must complete the declaration by the addressee provided for in the subpoena.
- (5) The completed declaration must be included in the subpoena or copy of the subpoena which accompanies the documents produced under the subpoena.
- (6) Subject to paragraph (7), the Prothonotary may, upon the expiry of four months from the conclusion of the proceeding, cause to be destroyed all the documents produced in the proceeding in compliance with a subpoena which were declared by the addressee to be copies.
- (7) The Prothonotary may cause to be destroyed those documents declared by the addressee to be copies which have become exhibits in the proceeding when they are no longer required in connection with the proceeding, including on any appeal.

- **R 42A.13: Production of document at trial**
- Subject to Rule 42A.12, the Prothonotary shall, unless otherwise ordered, produce or hand to the Associate of the trial Judge for production at the trial of the proceeding each document produced to the Prothonotary in compliance with a subpoena under this Order.
  
- **R 42A.14: Subpoena for trial not affected**
- The issuing of a subpoena under this Order shall not preclude the issuing of a subpoena otherwise than under this Order.

# Order 42: Affidavits

- **R 42.01: Form of affidavit**
- (1) An affidavit shall be made in the first person.
- (2) Unless the Court otherwise orders, an affidavit shall state—
  - (a) the place of residence of the deponent and the deponent's occupation or, if the deponent has none, the deponent's description; and
  - (b) that the deponent is a party to the proceeding or employed by a party, if such be the case.
- (3) Notwithstanding paragraph (2), where a deponent makes an affidavit in a professional or other occupational capacity, the affidavit may, instead of stating the deponent's place of residence, state—
  - (a) the address of the deponent's place of business;
  - (b) the position the deponent holds; and
  - (c) the name of the deponent's firm or employer, if any.
- (4) An affidavit shall be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject.
- (5) Every affidavit shall be signed by the deponent, except as provided by Rule 43.02(1), and the jurat shall be completed and signed by the person before whom it is sworn.
- (6) Each page of an affidavit shall be signed by the person before whom it is sworn.
- (7) The person before whom an affidavit is sworn shall legibly write, type or stamp below the person's signature in the jurat—
  - (a) the person's name and address; and
  - (b) a statement of the capacity in which the person has authority to take the affidavit.

- See r 43.02 for circumstances of affidavit by illiterate or blind person
- See r 43.02.1 for circumstances of affidavit where interpreter required
- **R 43.03: Content of affidavit**
- (1) Except where otherwise provided by or under these Rules, an affidavit shall be confined to facts which the deponent is able to state of the deponent's own knowledge.
- (2) On an interlocutory application an affidavit may contain a statement of fact based on information and belief if the grounds are set out.

- R 43.04: Where an affidavit is made by two or more deponents, the names of the persons making the affidavit shall be inserted in the jurat, except that, if the affidavit is sworn by both or all the deponents at one time before the same person, it shall be sufficient to state that it was sworn by "each of the abovenamed" deponents.
- **R 43.05: Alterations**
  - (1) Notwithstanding any interlineation, erasure or other alteration in the jurat or body, an affidavit may be filed, unless the Court otherwise orders, but may not be used without the leave of the Court unless the person before whom it is sworn has initialled the alteration.
  - (2) Paragraph (1) shall apply to an account verified by affidavit as if the account were part of the affidavit.

# R 43.06: Annexures and exhibits

- (1) A document referred to in an affidavit shall not be annexed to the affidavit but may be referred to as an exhibit.
- (2) An exhibit to an affidavit shall be identified by a separate certificate annexed to it—
  - (a) bearing the same heading as the affidavit; and
  - (b) signed by the person before whom the affidavit is sworn.
- (3) The certificate shall—
  - (a) be in Form 43A; and
  - (b) contain in the bottom right hand corner of the page in bold type and in a font size not less than 20 points the distinguishing mark of the exhibit and a brief and specific description of the exhibit.

- R 43.07: Unless the Court otherwise orders, an affidavit may be used in a proceeding notwithstanding that it was sworn before the commencement of the proceeding.
- R 43.08: Notwithstanding any irregularity of form an affidavit may, with the leave of the Court, be used in evidence.
- R 43.09: Filing
  - (1) Unless the Court otherwise orders, an affidavit—
    - (a) which has not been filed; or
    - (b) which has not been served or filed in compliance with an order in respect of its service or filing—
  - shall not be used by the party by or on whose behalf it was made.
  - (2) An affidavit may be filed with the Prothonotary or with the proper officer in court.

# Order 44 – Expert evidence

- Cross reference evidence
- Also cross reference Part 4.6 of the Civil Procedure Act
  
- R 44.02: Application of Order
- (1) This Order applies to a proceeding however commenced.
- (2) This Order does not apply to the evidence of a party who would, if called as a witness at the trial, be qualified to give evidence as an expert in respect of any question in the proceeding.
- (3) With respect to the opinion of a medical practitioner, in a proceeding for medical negligence in which the plaintiff claims damages for or in respect of bodily injury, this Order applies to an opinion on the liability of the defendant but does not otherwise apply to a medical report to which Order 33 applies.

# R 42.13: Documents and things in the custody of a court

- (1) A party who seeks production of a document or thing in the custody of the Court or of another court may inform the Prothonotary in writing accordingly, identifying the document or thing.
- (2) If the document or thing is in the custody of the Court, the Prothonotary shall produce the document or thing—
  - (a) in Court or to any person authorised to take evidence in the proceeding, as required by the party; or
  - (b) as the Court directs.
- (3) If the document or thing is in the custody of another court, the Prothonotary shall, unless the Court has otherwise ordered—
  - (a) request the other court to send the document or thing to the Prothonotary; and
  - (b) after receiving it, produce the document or thing—
    - (i) in Court or to any person authorised to take evidence in the proceeding as required by the party; or
    - (ii) as the Court directs.

# R 44.03: Report of expert

- (1) Unless otherwise ordered, a party who intends at trial to adduce the evidence of a person as an expert shall—
  - (a) as soon as practicable after the engagement of the expert and before the expert makes a report under this Rule, provide the expert with a copy of the code; and
  - Rule 44.03(1)(b) amended by S.R. No. 52/2016 rule 5(1).
  - (b) not later than 30 days before the day fixed for trial, serve on each other party, a report by the expert in accordance with clause 3 of the code and deliver a copy for the use of the Court.
- \* \* \* \* \* (2) revoked
- (3) If the expert provides to a party a supplementary report, including a report indicating that the expert has changed the expert's opinion on a material matter expressed in an earlier report—
  - (a) that party shall forthwith serve the supplementary report on all other parties; and
  - (b) in default of such service, the party and any other party having a like interest shall not use the earlier report or the supplementary report at trial without the leave of the Court.
- (4) Any report provided by the expert pursuant to this Rule—
  - (a) shall be signed by the expert; and
  - (b) shall be accompanied by clear copies of any photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter to which the report refers.

- R 44.04: Unless otherwise ordered, a party may put in evidence a report served on that party by another party under this Order.
- R 44.05: Except with the leave of the Court or by consent of the parties affected, a party shall not, except in cross-examination, adduce any evidence from a person as an expert at the trial of a proceeding unless the substance of the evidence is contained within a report or reports which the party has served under this Order.

# R 44.06: Conference between experts

- (1) The Court may direct expert witnesses—
  - (a) to confer; and
  - (b) to provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for their not agreeing.
- (2) The Court may specify the matters on which the experts are to confer.
- (3) An expert witness may apply to the Court for further directions.
- (4) The Court may direct the legal representatives of a party—
  - (a) to attend the conference;
  - (b) not to attend the conference;
  - (c) to attend or not to attend at the option of the party whom they represent.
- (5) Subject to paragraph (1)(b), except as the parties affected agree in writing, no evidence shall be admitted of anything said or done by any person at the conference.
- (6) An agreement reached during the conference shall not bind a party except in so far as the party agrees in writing.

# Order 45: Originating motion

- R 45.02: Evidence by affidavit
  - (1) Except where otherwise provided by any Act or these Rules, and subject to paragraph (2), evidence at the trial of a proceeding[by originating motion] shall be given by affidavit.
  - (2) By agreement of the parties, evidence at the trial of the proceeding may be given orally, unless the Court otherwise orders.
- R 45.06: Judgment where no appearance
  - (1) Where a defendant fails to file an appearance within the time limited, the Court may—
    - (a) on application made by the plaintiff without notice to the defendant; and
    - (b) on proof of service of the originating motion and of the failure—
  - give judgment against that defendant for the relief or remedy sought in the originating motion.
  - (2) For the purpose of these Rules, the hearing of the application is the trial of the proceeding.
  - (3) Except for the purpose of proof of service of the originating motion and of the failure of the defendant to appear, the plaintiff shall not, unless the Court otherwise orders, use in evidence on the application any affidavit made by the plaintiff or on the plaintiff's behalf and not served on the defendant with the originating motion.

# R 45.04: Proceedings after appearance

- (1) Where a defendant has filed an appearance, no judgment shall be given for the relief or remedy sought except on application by the plaintiff in accordance with this Rule.
- (2) Except as provided in paragraph (3), application shall be made to an Associate Judge by summons in Form 45A served on the defendant.
- (3) In a proceeding commenced by originating motion under Order 53, the plaintiff may apply for judgment on the day specified in the originating motion for application to the Associate Judge.
- (4) On an application under paragraph (2) or (3), the Associate Judge may, as appropriate—
  - (a) where the Associate Judge has authority to give the judgment sought by the plaintiff, hear and determine the application or refer it to another Associate Judge for hearing and determination;
  - (b) by consent of the defendant, give the judgment;
  - (c) refer the application to a Judge of the Court for hearing and determination;
  - (d) place the proceeding in the list of cases for trial and give directions for the filing and service of affidavits or otherwise.

# R 45.05: Special procedure

- (1) In this Rule "plaintiff" includes a person who proposes to commence a proceeding by originating motion.
- (2) The Court may by order—
  - (a) dispense with the requirements of Rules 5.03(1) and 8.02; and
  - (b) authorise the plaintiff to commence a proceeding by originating motion in Form 5C.
- (3) Without limiting paragraph (2), an order may be made—
  - (a) in an urgent case;
  - (b) to save time and expense for the parties; or
  - (c) where the defendant consents.
- (4) An order may be made on application by the plaintiff before or after the proceeding is commenced and, except where the originating motion has been served on the defendant, application may be made without notice to the defendant.
- (5) An application made before the proceeding is commenced shall not constitute a proceeding for the purpose of any requirement of these Rules with respect to originating process.
- (6) Judgment shall not be given for the plaintiff, or an order made, for the relief or remedy sought in the originating motion or otherwise except on application made to an Associate Judge or, if the Associate Judge does not have authority to give the judgment or make the order sought by the plaintiff, to a Judge of the Court, on notice to the defendant in Form 45B.
- (7) Where an application is made to an Associate Judge under paragraph (6), the Associate Judge may, as appropriate—
  - (a) hear and determine the application or refer it to another Associate Judge or a Judge of the Court for hearing and determination;
  - (b) by consent of the defendant, give judgment;

# Order 46: Applications

- R 46.01: This Order applies to an interlocutory or other application in a proceeding.
- R 46.02: Application by summons
  - (1) An application made on notice to any person shall be by summons, unless the Court otherwise orders.
  - (2) An application by summons is made when the summons is filed in accordance with Rule 46.04.
  - (3) An application not by summons is made when it comes on for hearing.
- R 46.03: Notice of application
- On the hearing of an application the Court may order that the person making the application give notice of it to any person having a sufficient interest.

# R 46.04: Form and filing of summons

- (1) A summons shall be in Form 46A.
- (2) A summons shall be filed—
  - (a) where application is made to a Judge of the Court, or the Costs Court, with the Prothonotary;
  - (b) where application is made to an Associate Judge, other than an Associate Judge who is a Costs Judge, with the appropriate Associate Judge's Associate or the Prothonotary;
  - (c) where application is made to a judicial registrar, other than a judicial registrar in the Costs Court, with the appropriate judicial registrar's Associate or the Prothonotary.

## R 46.05: service

- (1) The applicant shall serve a sealed copy of a summons and, except where these Rules otherwise provide, a copy of any affidavit in support on every person to whom notice of the application is to be given.
- (2) Service under paragraph (1) shall be made within a reasonable time before the day for hearing named in the summons, and in no case later than 2.00 p.m. on the previous day or, where the Prothonotary's office was closed on the day before the day for hearing, not later than 2.00 p.m. on the day the office was last open.
- (3) A plaintiff may serve any summons on a defendant personally before appearance.

# R 46.05.1: Day for hearing

- (1) A summons which has not been served may, at the request of the party who filed it, be amended on or before the day for hearing named in the summons to name another day.
- (2) The summons may be amended—
  - (a) if the summons is to be heard by the Court constituted by a Judge of the Court, by the Prothonotary or a Judge's Associate;
  - (b) if the summons is to be heard by the Court constituted by an Associate Judge, by an Associate Judge's Associate or the Prothonotary;
  - (c) if the summons is to be heard by the Court constituted by a judicial registrar, by a judicial registrar's Associate or the Prothonotary.
- (3) A summons shall not be amended under this Rule more than once.
- (4) This Rule does not limit the power of the Court under Rule 36.01.

# R 46.06: Adjournment

- (1) The Court may adjourn the hearing of an application on such terms as it thinks fit.
- (2) The Associate of the Judge of the Court, Associate Judge or judicial registrar (as the case requires) who is to hear the application or, where an application is to be heard within a specialist list, an Associate responsible for the specialist list—
  - (a) may by consent adjourn the hearing of an application to a particular date or for a particular time or generally, and reserve the costs of the adjournment; and
  - (b) shall record the adjournment and any reservation of the costs by indorsement on the court file.
- (3) If the hearing of an application is adjourned under paragraph (2), the Court may thereafter, whether the costs of the adjournment were reserved or not, make an order in relation to the costs of or occasioned by the adjournment as it thinks fit.
- (4) Rule 63.22 shall apply to costs reserved under paragraph (2) as if the costs were reserved by order of the Court.

- R 46.07: Absence of party to summons
- (1) Where any person to whom a summons is addressed fails to attend, the Court may hear the application if satisfied that the summons was duly served.
- (2) Where on an application by summons the applicant fails to attend, the Court may dismiss the application or make such other order as it thinks fit.
- R 46.08: Setting aside
- The Court may set aside or vary an order which affects a person where the application for the order—
  - (a) was made on notice to that person, but the person did not attend the hearing of the application; or
  - (b) was not made on notice to that person.

# Order 47: Place and mode of trial

- R 47.01: Place of trial
- Unless the Court otherwise orders, the place of trial of a proceeding shall be determined in accordance with Rule 5.08.
  - le: 5.08 (1) A writ shall be indorsed with a statement of the place and mode of trial desired.
  - (2) If the writ is not indorsed with a statement as to the place of trial, the plaintiff shall be taken to desire trial in Melbourne, and, if the writ is not indorsed with a statement as to the mode of trial, the plaintiff shall be taken to desire trial without a jury.
  - (3) The plaintiff may indorse an originating motion with a statement of the place of trial desired, and, if the originating motion is not so indorsed, the plaintiff shall be taken to desire trial in Melbourne.

# R 47.02: Mode of trial

- (1) A proceeding commenced by writ and founded on contract (including contract implied by law) or on tort (including a proceeding for damages for breach of statutory duty) shall be tried with a jury if—
  - (a) the plaintiff in the writ or the defendant by notice in writing to the plaintiff and to the Prothonotary within 10 days after the last appearance signifies that the plaintiff or the defendant (as the case requires) desires to have the proceeding so tried; and
  - (b) the prescribed fees for the purposes of section 24 of the Juries Act 2000 are paid.
- (2) Any other proceeding shall be tried without a jury, unless the Court otherwise orders.
- (3) Notwithstanding any signification under paragraph (1), the Court may direct trial without a jury if in its opinion the proceeding should not in all the circumstances be tried before a jury.
- (4) Trial with a jury shall be with a jury of six.

# R 47.03: Payment of jury fees

- (1) A party requiring a proceeding to be tried with a jury shall pay the prescribed fees for the purposes of section 24 of the Juries Act 2000 to the Prothonotary.
- (2) If a proceeding is to be tried with a jury because the defendant so signified by notice in writing, the prescribed fees shall be paid by the defendant to the Prothonotary within 14 days after the date is fixed for the trial of the proceeding.
- (3) In case of a default under paragraph (1) or (2), the Court may order that the proceeding be tried without a jury.
- (4) The party requiring a proceeding to be tried with a jury must produce a copy of the receipt for payment of the prescribed fees or other proof of that payment to the associate to the Judge hearing the proceeding—
  - (a) before the trial commences;
  - (b) before the trial resumes on each day in relation to which the prescribed fees are payable or, if an order is made under section 24(4) of the Juries Act 2000 , in accordance with that order.

# R 47.04: Separate trial of question

- The Court may order that—
  - (a) any question in a proceeding be tried before, at or after the trial of the proceeding, and may state the question or give directions as to the manner in which it shall be stated;
  - (b) different questions be tried at different times or places or by different modes of trial.
- R 47.05: Judgment after determination of preliminary question
- If the determination of any question in a proceeding and tried separately from the proceeding substantially disposes of the proceeding or renders the trial of the proceeding unnecessary, the Court may dismiss the proceeding or make such other order or give such judgment as it thinks fit.

# Order 49: Trial

- R 49.01: Order of evidence and addresses
- (1) The Court may give directions as to the order of evidence and addresses and generally as to the conduct of the trial.
- (2) Subject to any direction given under paragraph (1)—
  - (a) where the burden of proof on any question lies on the plaintiff, the plaintiff shall begin;
  - (b) where the burden of proof on all the questions lies on the defendant, the defendant shall begin.
- (3) Subject to any direction given under paragraph (1)—
  - (a) where the only parties are one plaintiff and one defendant, and there is no counterclaim, the order of evidence and addresses shall be as provided by the following paragraphs of this Rule; and
  - (b) in any other case, the order of evidence and addresses shall be as provided by those paragraphs with such modifications as the nature of the case requires.
- (4) The party who begins may make an address opening the party's case and may then adduce that party's evidence.

## R 49.01 (cont)

- (5) When, in the course of the case for the party who begins, no document or thing is admitted in evidence on tender by the opposite party, and at the conclusion of that case—
  - (a) the opposite party adduces evidence, the opposite party may first make an opening address and after adducing that party's evidence, the opposite party may make a closing address and thereafter the party who began may make a closing address;
  - (b) the opposite party does not adduce evidence, the party who began may make a closing address and then the opposite party may make an address.
- (6) When, in the course of the case for the party who begins, any document or thing is admitted in evidence on tender by the opposite party, and at the conclusion of that case—
  - (a) the opposite party adduces evidence, the order of proceedings shall be as provided by paragraph (5)(a);
  - (b) the opposite party does not adduce evidence, the opposite party may make an address and then the party who began may make a closing address.

# R 49.02: Absence of party

- (1) If, when the trial of a proceeding is called on, any party is absent, the Court may—
  - (a) order that the trial be not had unless the proceeding is again set down for trial, or unless such other steps are taken as the Court directs;
  - (b) proceed with the trial generally or so far as concerns any claim for relief in the proceeding; or
  - (c) adjourn the trial.
- (2) The Court may set aside or vary any judgment, order or verdict obtained where a party is absent at the trial.
- (3) An application under paragraph (2) shall be made within 14 days after the trial.

- R 49.03: The Court may adjourn a trial on such terms as it thinks fit.
- R 49.04: Death before judgment
  - (1) Where a party to a proceeding dies after the verdict or finding on the questions of fact, the Court may give judgment notwithstanding the death.
  - (2) Paragraph (1) does not affect the power of the Court under Rules 9.08 and 9.09.

# Order 62: Security for costs

- R 62.02: When security for costs may be ordered
- (1) Where—
  - (a) the plaintiff is ordinarily resident out of Victoria;
  - (b) the plaintiff is a corporation or (not being a plaintiff who sues in a representative capacity) sues, not for the plaintiff's own benefit, but for the benefit of some other person, and there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so;
  - (c) a proceeding by the plaintiff in another court for the same claim is pending;
  - (d) subject to paragraph (2), the address of the plaintiff is not stated or is not stated correctly in the plaintiff's originating process;
  - (e) the plaintiff has changed the plaintiff's address after the commencement of the proceeding in order to avoid the consequences of the proceeding;
  - (f) under any Act the Court may require security for costs—
- the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against that defendant be stayed until the security is given.
- (2) The Court shall not require a plaintiff to give security by reason only of paragraph (1)(d) if in failing to state the plaintiff's address or to state the plaintiff's correct address the plaintiff acted innocently and without intention to deceive.

- R 62.03: Where an order is made requiring the plaintiff to give security for costs, security shall be given in the manner and at the time the Court directs.
- R 62.04: Where a plaintiff fails to give the security required by an order, the Court may dismiss the plaintiff's claim.
- R 62.05: The Court may set aside or vary any order requiring a plaintiff to give security for costs.