



Practice Note No. 5 of 2014

The Chief Justice has authorised the issue of the following Practice Note

Applications under s 233 *Corporations Act 2001* (Cth) – oppressive conduct of the affairs of a company

1. Many applications each month are issued in the Court seeking relief under s 233 of the *Corporations Act 2001* (Cth) where it is alleged that the affairs of a company have been conducted in an oppressive manner. Under the *Supreme Court (Corporations) Rules 2013*, such applications must be commenced by originating process.¹ Unless the Court otherwise directs, the originating process must be supported by an affidavit stating the facts in support of the process² and must annexe an ASIC³ search of the company.⁴
2. Almost all of the claims seeking relief under s 233 of the *Corporations Act* relate to small businesses, most commonly family businesses. Frequently, the value of the business is not substantial. Nevertheless, applications are often supported by affidavits which run to many pages and considerable detail. At the first return of the originating process, it is common for orders to be made for inspection and copying of the books of the company, for valuation of the shares in the company and for mediation.⁵
3. The Court intends to operate a 6 month pilot programme in respect of oppression applications. The Court is embarking on this course with a view to facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute in applications under s 233 of the *Corporations Act*. In particular, the pilot will trial

¹ *Supreme Court (Corporations) Rules 2013* ('Corporations Rules'), r 2.2(1)(a).

² Corporations Rules r 2.4(1).

³ Australian Securities and Investments Commission.

⁴ Corporations Rules r 2.4(2).

⁵ See schedules 4 and 6 to Practice Note No. 10 of 2011 for the form of standard valuation and mediation orders.

initiatives aimed at exploring resolution of the dispute at a very early stage of the proceeding before significant costs have been incurred.

4. From 1 October 2014 and subject to any contrary order of the Court, the following procedure will apply in respect of applications under s 233 of the *Corporations Act* (whether or not other relief is also sought):
 - (a) Applications for relief are to be made by originating process supported by an affidavit which:
 - (i) is no more than three pages in length;
 - (ii) sets out a clear and succinct summary of the facts alleged to constitute the acts of oppression;
 - (iii) exhibits a current ASIC search of the company; and
 - (iv) has no other exhibits.

In preparing the affidavit, practitioners should have regard to the relevant authorities which provide examples of the type of conduct that may ground a claim under s 233.
 - (b) The application will be made returnable for an initial conference before an Associate Judge. The parties (as well as their practitioners) will be expected to attend that conference. The Associate Judge will explore with the parties whether the application can be resolved before any other interlocutory steps are taken or whether, for example, the Defendant(s) should first be afforded an opportunity to file a responding affidavit of no more than 3 pages before continuing with the initial conference.
 - (c) If urgent orders are sought that are beyond the jurisdiction of Associate Judges, or for some other reason the Associate Judge forms the view that the application should be referred to a Judge immediately, then that referral will be made, possibly before the conduct of the initial conference. For example, it is unlikely that the pilot procedure will be appropriate if the application concerns a publicly listed company. In a case such as that, the matter is likely to be referred to a Judge for management outside the pilot programme.

- (d) For cases remaining in the pilot programme, if the matter does not resolve at the initial conference, an Associate Judge will make directions for the future conduct of the matter. Those orders will likely include an order for access and inspection of the books of the company, valuation (where appropriate) and mediation with a further directions hearing to be scheduled before an Associate Judge after the mediation has finished. Orders for points of claim, points of defence and more detailed affidavits are unlikely to be made until after the mediation.
 - (e) Once these steps have been completed, and if the dispute has not resolved, the application will be managed by an Associate Judge or referred to a Judge for further directions and/or hearing.
5. This process will be reviewed by the Court after an initial trial period of 6 months.

8 September 2014

Vivienne Macgillivray

Executive Associate to the Chief Justice