

# Commercial Division referral to arbitration information sheet



## 1. Introduction

1.1. This information sheet applies where:

- (a) a County Court proceeding involves an arbitration agreement<sup>1</sup> (see section 3); or
- (b) the parties agree for the matter to be referred to arbitration (see section 4).

## 2. What is arbitration?

- 2.1 Arbitration is a private dispute resolution process where parties agree to resolve their dispute by referring it to an arbitrator, who makes a binding decision on the dispute (called an award) which can be enforced in a court.
- 2.2 Most civil and commercial matters are arbitrable.<sup>2</sup> For many legal practitioners – both domestically and internationally – arbitration is their dispute resolution method of choice, particularly because party autonomy is paramount.
- 2.3 Arbitration can be a cost-effective, speedy, confidential, and practical process. The process allows parties to choose an arbitrator with preferred skills and experience – including arbitrators with subject matter expertise.
- 2.4 Parties can choose an arbitration procedure that is most cost effective for their dispute, having regard to the nature of the evidence required to be considered by the arbitrator. The flexible nature of arbitration allows parties to choose whether their arbitration will be conducted by ‘documents only’ or by oral hearing with a capped duration and the area or building where their hearings take place (for example, whether it be in their town, suburb or by video conference platform).
- 2.5 An arbitral award may be enforced in accordance with s 35 of the *Commercial Arbitration Act* 2011 (CAA) by application to the County Court Arbitration List.<sup>3</sup>

## 3. Where there is an arbitration agreement

- 3.1 Where there is an arbitration agreement, and a party ‘requests’ the County Court to refer the matter to arbitration, subject to s 8 of the CAA, the County Court **must** refer the matter to arbitration.
- 3.2 Section 8 of the CAA provides for the circumstances where there is an arbitration agreement and a substantive claim before the County Court:

*(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting*

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<sup>1</sup> An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. See s 7(1) CAA.

<sup>2</sup> However, see paragraph 4.4 of this information sheet for some important exceptions.

<sup>3</sup> Where the parties have agreed that the County Court is to have jurisdiction under the CAA (s 6).

*the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

*(2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*

- 3.3 On the time limit referred to in s 8(1) of the CAA, see [CPB Contractors Pty Limited v Celsus Pty Limited \(formerly known as SA Health Partnership Nominees Pty Ltd\) \[2017\] FCA 1620](#); (2017) 353 ALR 84 [91]–[94].
- 3.4 The elements that must be satisfied to obtain a stay of the County Court proceeding are:
- (a) an action brought before the court;
  - (b) the action is in a 'matter' which is the subject of an arbitration agreement;
  - (c) no later than when submitting its first statement on the substance of a dispute, a party to the action requests that the parties be referred to arbitration; and
  - (d) the arbitration agreement is not null and void, inoperative, or incapable of being performed.
- 3.5 Standard orders to obtain a stay are set out in Schedules 1 and 2.

## 4. Request for referral to arbitration by agreement

- 4.1 If a proceeding does not involve an arbitration agreement, it is open to the parties to enter into an agreement to resolve their dispute by arbitration instead of in the County Court.<sup>4</sup>
- 4.2 There are some cases that the County Court identifies as being suitable for arbitration. This may be because:
- (a) **the dispute needs to be resolved quickly.** Arbitration may be quicker than litigation, particularly if the chosen arbitration scheme can deliver an award for a fixed fee in a fixed time from the commencement of the arbitration process;
  - (b) **confidentiality may be a concern.** If the parties choose to arbitrate, the proceedings will not be open to the public to watch – and any documents not yet filed with the Court will not be accessible to the public. The final decision will not be published online for others to see;
  - (c) **flexibility would assist.** If the parties are located in regional or remote areas, or they have other commitments or demands and would prefer to choose their own hearing schedule, the flexible nature of arbitration may be appropriate; and/or
  - (d) **the amount claimed is small.** It may make commercial sense to do everything possible to resolve the dispute more cost effectively, so that legal costs do not exceed the claim amount.
- 4.3 If your case exhibits one (or more) of the above features, the County Court encourages the parties to consider arbitration. Where parties agree to refer an existing proceeding to arbitration, the County Court may transfer the matter to the Arbitration List and make an order under s 66(1) of the *Civil Procedure Act* 2010 referring the proceeding to arbitration.

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<sup>4</sup> The CAA applies to "domestic commercial arbitrations". See s 1 of the CAA.

- 4.4 Despite most civil and commercial matters being arbitrable, the following types of cases cannot be referred to arbitration:
- (a) **Domestic Building Disputes which have not been initiated.** Under the *Domestic Building Contracts Act* 1995, VCAT has jurisdiction to hear and determine domestic building disputes; and
  - (b) **Retail tenancy disputes.** Retail tenancy disputes must be determined by VCAT only, regardless of any agreement of the parties before or after the dispute arises (see ss 89 and 94 of the *Retail Leases Act* 2003).
- 4.5 Matters which are generally arbitrable are disputes with respect to: commercial contracts, building and construction contracts, partnerships, supply agreements, commercial leases, franchises, mortgages and securities, farm debts, trusts, corporations matters, renovation works, media, sports, entertainment, and travel.
- 4.6 Matters likely to not be suitable for arbitration are disputes involving citizenship, marriage, competition, taxation, workplace disputes, bankruptcy and corporate insolvency, illegality and fraud.<sup>5</sup>
- 4.7 Standard orders for the referral of a proceeding to arbitration are set out in Schedule 3.

## 5. Arbitration schemes

- 5.1 The parties are free to agree on the arbitrator and the procedure to be followed.
- 5.2 There are a number of arbitration bodies or schemes that parties may consider could assist them. For example:
- (a) **Arbitration Victoria (AV).** AV advertises capped and scale fee arrangements for small value claims.<sup>6</sup> The AV Rules state that its arbitrators publish their award within 90 days of the arbitration's commencement for 'documents only' arbitrations, and 120 days for arbitrations with a substantive hearing.<sup>7</sup> Parties are able to select their own arbitrator from a panel of arbitrators shown on the AV website: [www.arbitrationvictoria.com](http://www.arbitrationvictoria.com). For more information, see the AV Flyer, the AV User Manual and the AV Rules, each of which is available for download from the AV website.
  - (b) **Resolution Institute (RI).** The RI has published on its website an arbitration agreement. Annexure 1 to the agreement sets out RI arbitrators' commitment to capped and scale fees, as well as agreed time periods for the duration of the arbitration, which are proportionate to the sum in dispute.<sup>8</sup> For more information, and to view the RI's panel of arbitrators, visit: <https://www.resolution.institute/resolving-disputes/county-court-of-victoria-arbitration-scheme>.
  - (c) **Victorian Commercial Arbitration Scheme (VCAS).** VCAS is an appointment scheme operated by the Victorian Bar. The VCAS Rules and User Guide provide that VCAS

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<sup>5</sup> See paragraphs 1.5 and 1.11 of the Victorian Commercial Arbitration Scheme ('VCAS') User Guide for a list of examples of types of matters that are, and are not, likely to be arbitrable.

<sup>6</sup> The AV User Manual sets out its capped fees on page 6. The size of the cap depends on the amount in dispute (claim or claim and counterclaim, if applicable). If the amount in dispute is not quantified, the arbitrator's fees shall be fixed by agreement between the arbitrator and the parties, or, if no agreement can be reached, by the Secretariat of AV, taking into account the circumstances of the case. Fees may be altered if the arbitrator and the parties agree there are exceptional circumstances (see paragraph 18 of the AV User Manual).

<sup>7</sup> See rules 58 and 59 of the AV Rules which state that these fixed times apply as far as is practicable.

<sup>8</sup> The RI arbitration agreement provides any agreed arbitration period may be altered by agreement of the parties. Annexure 1 provides that fees may be altered by agreement of the parties.

arbitrators agree to specific capped and scale fee arrangements<sup>9</sup> for small claims the subject of the Court's referral and to publish their award within 90 days of the arbitration's commencement for 'documents only' arbitrations and 120 days for arbitrations with a substantive hearing (as far as practicable).<sup>10</sup> VCAS allows the parties to select their arbitrator from the VCAS panel, but if they cannot agree, an arbitrator can be appointed by the President of the Victorian Bar. See the VCAS Information Sheet, the VCAS User Guide and the VCAS Rules (available for download in the 'Resources' tab on the VCAS website: <https://vcas.net.au/>) for more information.<sup>11</sup>

- 5.3 Parties should carefully consider any rules, agreements and other governing documents proposed by a scheme or body to be incorporated into the arbitration agreement, to ensure they are best suited to them. Please note that any specific provisions or rules referred to in this information sheet are subject to change at the discretion of each of the bodies and schemes.
- 5.4 By listing the examples in paragraph 5.2(a)-(c) for the assistance of parties, the Court is not endorsing or favouring one arbitration body or scheme over another.

## 6. Further information

- 6.1 Her Honour Judge Brimer has been appointed to manage the Commercial Division's Arbitration List. All arbitration proceedings, any applications in arbitration proceedings, and any urgent applications with respect to arbitration matters, should be directed at first instance to Her Honour's associates (telephone 03 8636 6841 or email [arbitration.list@countycourt.vic.gov.au](mailto:arbitration.list@countycourt.vic.gov.au)).
- 6.2 Parties should otherwise refer to the Commercial Division Omnibus Practice Note (PNCO-2 of 2022).

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<sup>9</sup> See the VCAS Rules and the User Guide, and in particular Annexure B of the VCAS User Guide.

<sup>10</sup> See rules 63 and 64 of the VCAS Rules which state that these timeframes apply as far as is practicable. See also paragraph 7.2 of the VCAS User Guide which allows the arbitrator to modify procedures to suit the circumstances, bearing in mind fairness, speed and cost-effectiveness.

<sup>11</sup> See paragraph 8.8 of the VCAS User Guide which provides fees may be altered if the arbitrator and the parties agree there are exceptional circumstances.

**Schedule 1 – Standard orders for a contested referral to arbitration under s 8(1) of the Commercial Arbitration Act 2011**

THE COURT ORDERS THAT:

1. Pursuant to s 8(1) of the *Commercial Arbitration Act 2011*, the parties [*and the dispute sought to be referred – briefly describe dispute, including by reference to pleadings or affidavit*] are referred to arbitration and the proceeding in this Court (“County Court proceeding”) is stayed on the basis that the matter is the subject of a valid and binding arbitration agreement.
2. The respondent is to pay the applicant’s costs of and incidental to the application under s 8(1) of the *Commercial Arbitration Act 2011* on the standard basis, to be taxed in default of agreement.
3. The costs of the County Court proceeding are reserved for determination by the arbitrator or, if no such arbitration is commenced within a reasonable period, upon application to the County Court.
4. If the arbitrator is unable to, or refuses to, determine the costs of the County Court proceeding, the County Court will determine those costs on application.

**Schedule 2 – Standard orders for an uncontested referral to arbitration under s 8(1) of the Commercial Arbitration Act 2011**

THE COURT ORDERS THAT:

1. Pursuant to s 8(1) of the *Commercial Arbitration Act 2011* the parties [*and the dispute sought to be referred – briefly describe dispute, including by reference to pleadings or affidavit*] are referred to arbitration and the proceeding in this Court (“County Court proceeding”) is stayed on the basis that the matter is the subject of a valid and binding arbitration agreement.
2. The costs of the County Court proceeding are reserved for determination by the arbitrator or, if no such arbitration is commenced within a reasonable period, upon application to the County Court.
3. If the arbitrator is unable to, or refuses to, determine the costs of the County Court proceeding, the County Court will determine those costs on application.

**Schedule 3 – Referral to Arbitration by agreement under s 66(1) of the Civil Procedure Act 2010**

OTHER MATTERS:

- A. The parties have agreed in writing to refer their civil proceeding to arbitration.
- B. The parties have signed an arbitration agreement, annexed to these consent orders.
- C. [*The arbitration agreement provides OR the parties have agreed in writing*] that the County Court is to have jurisdiction under the *Commercial Arbitration Act 2011*.

THE COURT ORDERS THAT:

1. This proceeding (“County Court proceeding”) is referred to arbitration pursuant to s 66(1) of the *Civil Procedure Act 2010*.
2. The County Court proceeding is stayed.
3. The costs of the County Court proceeding are reserved for determination by the arbitrator or, if no such arbitration is commenced within a reasonable period, upon application to the County Court.

4. If the arbitrator is unable to, or refuses to, determine the costs of the County Court proceeding, the County Court will determine those costs on application.