



PRACTICE NOTE 1

GUIDANCE FOR PARTIES INVOLVED IN CADB DISCIPLINARY PROCEEDINGS ON CASE PREPARATION, HEARING AND DECISION PROCEDURES

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GLOSSARY

Expression	Description
<i>Defined terms appear in bold type throughout this practice note</i>	
AAT	Administrative Appeals Tribunal.
Administrative Matter	An Application to CADB with respect to an administrative complaint (see definition paragraph 4.5 hereof)
Agreed fact	Any fact that the Applicant and Respondent agree is not, for the purposes of the CADB Proceedings , to be disputed, that is stated in an agreement signed by the Parties or their legal representatives and tendered to the CADB Panel as evidence in the CADB Proceedings .
Applicant	The body (either ASIC or APRA) applying to CADB under s1292 of the Corporations Act .
Application	An Application made to the Board under s1292 of the Act.
APRA	Australian Prudential Regulation Authority.
ASIC	Australian Securities and Investments Commission.
ASIC Act	Australian Securities and Investments Commission Act (Cth) 2001 (as amended).
ASIC Regulations	Australian Securities and Investments Commission Regulations (Cth) 2001 (as amended).
CADB	Companies Auditors Disciplinary Board.
CADB Hearing	The hearing by a CADB Panel relating to an Application .
CADB Panel	A Panel convened in accordance with Section 210A ASIC Act .
CADB Proceedings	The course of an Application to CADB to its conclusion.
Case summary for Hearing	Annexure J and paragraphs 10.12-10.14 and 18.4 PN1 .
Chair	The Chairperson of CADB .
Conduct Matter	An Application regarding a conduct complaint (see paragraph 4.6 hereto).
Corporations Act	Corporations Act 2001 (Cth) 2001.as amended.
Deputy Chair	The deputy Chairperson of CADB .
Determination	A CADB Panel's written findings outlining the reasons for deciding whether the matters alleged in an Application have been established.
Draft Costs Order	A draft consent order as to costs agreed by the Parties.
Federal Court Costs Scale	<u>Federal Court Costs Scale</u> in force at the time an application is commenced.

Final Decision	The CADB Panel's decision incorporating the reasons for its findings and final orders on sanction delivered following a Determination .
Final Hearing	The reconvened CADB Hearing to hear Parties' submissions and evidence, to the extent relevant, on sanctions, costs and publicity.
GPN-Costs	Federal Court Costs Practice Note dated 25 October 2016 GPN Costs (as amended).
Issues Summary	A document to be prepared jointly by the Parties in accordance with paragraphs 8.2 and 8.3 PN1 which delineates the issues in dispute between them, to be provided to CADB at the pre-hearing conference and to be updated by the Parties as necessary and appropriate prior to the commencement of the CADB Hearing so that it continuously accurately reflects the disputed issues between the parties requiring Determination at the CADB Hearing .
Mediations	A structured process for dealing with disputes and other problems in which the Parties in dispute are assisted by a third person, the mediator, to facilitate their discussions.
Member	The Chair , the Deputy Chair , or a Member of CADB .
Notice of CADB Hearing	See paragraph 10.1 and Annexure I PN1 .
Parties	The Applicant and the Respondent in CADB Proceedings .
Preliminary Costs Determination	The CADB Panel's preliminary view as to what if any costs order is appropriate and the basis of that order, included in the provided Determination .
PN1	This Practice Note.
PN2	Mediation Practice Note.
PN3	Costs Practice Note.
Pre-hearing Conference	A conference held by the Chair under s1294A of the Corporations Act .
Proposed Consent Orders	Draft orders reflecting an outcome to the Application acceptable to each party. Proposed Consent orders must be accompanied by the Parties' Statement of Agreed Facts .
Registered Auditor	An Auditor registered by ASIC pursuant to s1280 Corporations Act .
Registrar	The Registrar of CADB .
Respondent	The Registered Auditor the subject of an Application to CADB .
Scheme	The scheme established by Part 9.2 Corporations Act for regulating Registered Auditors in Australia.
Statement of Agreed Facts	An agreement signed by the Parties or their legal representatives and tendered to the CADB Panel as evidence in the CADB Proceedings that identifies each Agreed Fact
Witness Summons	CADB has power to compel persons to appear at the CADB Hearing to give evidence and produce documents. See PN1 paragraphs 10.2-10.11 for details.

1. INTRODUCTION

- 1.1. This Practice Note is a guide for **Parties** involved in **CADB Proceedings**. It covers the essential aspects of commencing, preparing and conducting a **CADB Hearing**.
- 1.2. This Practice Note:
- (a) Takes effect from the date it is issued and to the extent practicable applies to **CADB Proceedings** whether filed before, or after that date.
 - (b) Is to be interpreted having regard to the legislative requirements governing **CADB's** operation.¹
 - (c) Aims to set out a principles-based practice guide for **Parties** involved in **CADB Proceedings** and is not intended to be inflexibly applied.
 - (d) Is to be read as subject to any overriding requirements of applicable legislation and the general law.

2. PREAMBLE - CADB's ROLE AND ITS FUNCTIONS, POWERS AND OBLIGATIONS

Corporations Act Scheme applying to Registered Auditors

- 2.1 **CADB's** role as a disciplinary decision maker arises within the **Scheme**. The effect of the **Scheme** is that:
- (a) Only those auditors who satisfy prescribed requirements, including being fit and proper to become registered as an auditor may be registered by **ASIC**²² and:
 - (b) Auditors on whom **ASIC** confers registration must continuously comply with the relevant requirements of the **Corporations Act**,³ which includes continuously maintaining proper professional standards when performing audit duties and functions, and maintaining fitness and propriety at all times, in order to retain their registered status.
- 2.2 The public may have trust and confidence in the efficacy of the **Scheme** because, to the extent a **Registered Auditor** does not adequately meet relevant professional standards, or any of the requirements prescribed by the **Scheme**, **ASIC** or **APRA** make invoke **CADB's** jurisdiction to cancel or suspend registration under the **Scheme** by **Application** to **CADB**.
- 2.3 This practice note sets out guidelines to **Parties** on the process **CADB** follows when such an **Application** is made.

¹ Pt. 9.2 Division 3 [Corporations Act](#) and Pt.11 [ASIC Act](#)

² Section 1292 [Corporations Act](#)

³ Section 1292 [Corporations Act](#)

- 2.4 The approach reflected in these guidelines must be viewed within the context of the **Scheme's** objectives and requirements. In particular, the responsibilities that attach to the **Parties'** special regulatory relationship, that comes into effect when an auditor becomes registered under the **Scheme**, is an important contextual consideration that informs **CADB's** expectations of the manner in which **Parties** are to conduct themselves during **CADB Proceedings**. For example, an adversarial approach to the defence of **CADB Proceedings** is not compatible with key aspects of the obligations assumed by a **Registered Auditor** under the **Scheme** framework to which they have subscribed in order to obtain the benefits conferred by registration. **CADB** expects **Parties** to be cognisant of this context and to approach **CADB Proceedings** cooperatively and in a manner that appropriately reflects the standards of professionalism and integrity contemplated by the requirements of the **Scheme**.

CADB's Role and Functions within the Scheme

- 2.5 **CADB's** key function is to be an administrative decision-making body with respect to auditors registered under the **Scheme**. **CADB's** primary powers arise from Part 9.2 Division 3 of the **Corporations Act** and it has ancillary powers conferred on it by the **ASIC Act**.⁴
- 2.6 **CADB's** role within the **Scheme**, when **ASIC** or **APRA** apply to it, is to perform the role of an independent, transparent, impartial fair and efficient decision maker and if necessary, to make orders under Section 1292 of the **Act** with respect to a **Registered Auditor**.
- 2.7 When matters are referred to **CADB** for hearing and decision, **CADB's** objective is to uphold public confidence in the efficacy of the **Scheme** by:
- (a) Ensuring each party has a fair opportunity to place evidence and submissions before **CADB** at a hearing before making our decision.
 - (b) Using the sanctions power⁵ conferred to protect the public from any future threat of improper conduct by a **Registered Auditor** if necessary.
 - (c) Delivering outcomes that:
 - (i) Recognise and uphold the importance of the proper discharge of audit duties and functions to maintaining the integrity and stability of Australia's financial system by the imposition of appropriate sanctions when necessary.
 - (ii) Reflect community expectations for high standards of conduct, including professionalism, competence, integrity and fitness and propriety, amongst those entrusted with the duties and responsibilities of a **Registered Auditor**.

⁴ Part 11 [ASIC Act](#).

⁵ Sub-Sections 1292(1) and 1292(9) [Corporations Act](#)

- (iii) By the publication of reasons for our decisions, ensure transparency and accountability of **CADB** as an independent and impartial decision-maker and to provide education and achieve deterrence with respect to other **Registered Auditors**.

CADB's obligations

- 2.8 **CADB's** obligations under the **Scheme** are to conduct hearings with as little formality and technicality and as much expedition as a proper consideration of the matters presented and the legislative requirements permit⁶.
- 2.9 We are not bound by the rules of evidence when conducting **CADB Hearings**.⁷
- 2.10 When exercising our discretionary power to make orders with regard to a **Registered Auditor**, an important consideration is protecting the public, but the educative and awareness-raising utility of our decisions and the broader general deterrence a sanction in a specific matter may achieve, may also be important considerations.
- 2.11 We must give **Parties** reasons in writing for our decisions.⁸
- 2.12 We must provide a **Respondent** with a proper opportunity to prepare his case and appear at a hearing before **CADB**. This practice note sets out the framework by which the **Parties** may achieve this.

3. CADB'S EXPECTATIONS OF PARTIES AND LEGAL REPRESENTATIVES INVOLVED IN CADB PROCEEDINGS.

- 3.1 In order to enable **CADB** to meet its obligation to be as expeditious as it can be, and to ensure a **Respondent** is fairly informed of the complaint, **CADB** expects an **Applicant** to be succinct and specific about the basis for its **Application** and to be responsive to any communication from a **Respondent** during preparation for a **CADB Hearing** to ensure as far as possible there is clarity about the issues in dispute about which a **CADB Panel** will be asked to make a **Determination**.
- 3.2 The **Response** to an **Application** should be aimed at promptly identifying the real issues in dispute regarding the allegations made and **Parties** are expected to pay particular attention to those issues during preparation for a **CADB Hearing**, including how those issues might be most efficiently dealt with at a **CADB Hearing**.
- 3.3 **CADB** expects both **Parties** to approach preparation for a **CADB Hearing** cooperatively flexibly, efficiently and cost effectively. Undue focus by a **Respondent** on technicalities and/or the use in **CADB Proceedings** of tactics designed to delay a **CADB Hearing** are further examples of matters that **CADB**

⁶ See s218 (1)(a) and s218 (2) [ASIC Act](#) and s1294 [Corporations Act](#) for CADB's obligations with regard to conducting hearings of Applications. Also see: *ML v ASIC & Anor* (2013) 300 ALR 764; [2013] NSWCA 109 at [18]; *Fiorentino v Companies Auditors and Liquidators Disciplinary Board* [2014] FCA 641 at [79]-[82].

⁷ Sub-section 218(1)(b) [ASIC Act](#)

⁸ Section 1296 (1)(a) [Corporations Act](#)

regards as inconsistent with the rights and responsibilities attaching to the **Parties'** regulatory relationship under the **Scheme**.

- 3.4 This practice note places significant emphasis on the **Parties'** responsibility to undertake preparation for the **CADB Hearing** with due regard for their existing regulatory relationship, and to best enable **CADB** to deliver a prompt and efficient outcome.
- 3.5 **CADB** expects a **Respondent** to appropriately utilise the timeframes allowed for in this practice note to prepare for a **CADB Hearing** should he/she wish to avail himself/herself of the opportunity to appear at the **CADB Hearing**. **CADB's** policy to proceed with a **CADB Hearing**, once the date has been fixed will be adhered to in order to meet its statutory obligations, unless there are exceptional circumstances.

4. APPLICATION TYPE - CONDUCT OR ADMINISTRATIVE

- 4.1 **CADB** categorises disciplinary matters within its jurisdiction as either **Conduct Matters** or **Administrative Matters**.
- 4.2 Certain sub-sections of section 1292 of the **Corporations Act** do not involve the exercise of **CADB's** discretion and/or will usually only require documentary evidence to prove that the relevant conduct occurred. Such matters are usually more straightforward and therefore less time consuming in terms of case preparation, hearing and decision. **CADB** categorises these as **Administrative Matters** (see paragraph 4.5).
- 4.3 On the other hand, matters which involve those sub-sections of section 1292 that require a subjective evaluation by a **CADB Panel** of the **Registered Auditor's** conduct and/or in which witness evidence will usually be required tend to involve more case preparation and a longer hearing time. The decision making/writing process therefore generally also involves more time, depending particularly on the number of allegations made. **CADB** categorises these matters as **Conduct Matters** (see definition paragraph 4.6).
- 4.4 Whether a matter is an **Administrative Matter** or a **Conduct Matter** is to be identified in the **Application**.

Administrative Matters under Section 1292 - definition

- 4.5 **CADB** deals with **Applications** as an **Administrative Matter** when the allegations made relate to a **Registered Auditor** who:
- (a) Has failed to lodge an annual statement required by s1287A of the **Corporations Act**⁹ or;
 - (b) Has ceased to be resident in Australia¹⁰ or;

⁹ Ss1292 (1)(a)(i)

¹⁰ Ss1292 (1)(a)(ii)

- (c) Is disqualified from managing corporations under Part 2D.6 of the **Corporations Act**¹¹ or;
- (d) Is incapable, because of mental infirmity, of managing his/her own affairs.¹²

Conduct Matters under Section 1292 – definition

4.6 **CADB** deals with **Applications** as a **Conduct Matter** when the allegations made relate to any of the following conduct of a **Registered Auditor**:

- (a) Has contravened the individual rotation requirements and performed a significant role in an audit without being eligible to do so;¹³
- (b) Failed to comply with a condition of registration as an auditor;¹⁴
- (c) Did not perform any (or any significant) audit work for five years and as a result has ceased to have the necessary practical experience;¹⁵
- (d) Either:
 - (i) Failed to carry out or perform adequately and properly the duties of an auditor; or
 - (ii) Failed to carry out or perform adequately and properly any duties or functions required by an Australian law to be carried out or performed by a registered company auditor; or
 - (iii) Is otherwise not a fit and proper person to remain registered.¹⁶

4.7 The statutory framework for dealing with an **Application** made to **CADB**, whether with respect to an **Administrative Matter** or a **Conduct Matter** is the same, and the overarching framework for the preparation and hearing of both types of **Applications** is the same. However, the reasonable time needed to prepare and hear an **Administrative Matter** will be less and is taken into account in the timeframes and guidelines outlined in this practice note.

5. SUMMARY OVERVIEW FOR PARTIES OF USUAL STEPS INVOLVED IN PREPARATION FOR CADB HEARINGS

5.1 Detailed steps for conducting **CADB Proceedings** when an **Application** is filed are set out from paragraph 6 of this practice note. An overview of the usual steps involved in **CADB Proceedings** is as follows:

¹¹ Ss1292 (7)(a)

¹² Ss1292 (7)(b)

¹³ Ss1292 (1)(a)(ia) (*first*)

¹⁴ Ss1292 (1)(a)(ia) (*second*)

¹⁵ Ss 1292(1)(b)

¹⁶ Ss 1292(1)(d)

- (a) A **pre-hearing conference** between **CADB** and the **Parties** will usually be fixed, in the case of an **Administrative Matter**, within 4 weeks of service of the **Application** on the Respondent, and in the case of a **Conduct Matter**, within 6-10 weeks of the **Application** being served (depending on whether parties opt to participate in a CADB convened Mediation, which would usually take place after a Respondent has filed a **Concise Response** and before a **pre-hearing conference** takes place to ensure the parties are in the best position to anticipate what case preparation steps are necessary before the matter is fixed for a **CADB Hearing**).
- (b) **CADB's** usual practice is to fix a date for the **CADB Hearing** at the **pre-hearing Conference**.
- (c) Before a **CADB Hearing** takes place, **the Respondent** will be given time to respond to allegations made and each **party** will be allowed time to prepare evidence and submissions for consideration by the **CADB Panel**.
- (d) The **CADB Hearing** of an **Administrative Matter** usually takes less than one day and occurs within 8-10 weeks of the **Application** being filed and the hearing of a **Conduct Matter** usually occurs within 12-16 weeks of the **Application** being filed. The length of a **CADB Hearing** is significantly influenced by the number of allegations made by an **Applicant**, the evidence to be adduced at the **CADB Hearing** and the extent to which **Parties** have undertaken pre-hearing preparation that minimises the time necessary to properly present the issues to a **CADB Panel** for its **Determination** such as scoping issues/issues in dispute, agreeing facts not in dispute, **Mediation** and the like.
- (e) After hearing the **Parties'** evidence and submissions at a **CADB Hearing**, the **CADB Panel** will:
 - (i) In an **Administrative Matter**, usually deliver an oral decision when the **CADB Hearing** concludes and provide a written decision with brief reasons shortly thereafter.

If that decision is adverse to the **Respondent**, the **CADB Panel** will also announce what, if any, orders it considers would be appropriate (such as suspension or cancellation of registration) and reconvene after a short period to hear submissions from each party on sanction and costs and publicity.
 - (ii) In a **Conduct Matter**, usually adjourn and prepare a **Determination**. A **CADB Panel** endeavours to finalise its **Determination** as promptly as possible having regard to the number of issues, and the extent of the evidence. The **Parties** may facilitate a more expeditious outcome to the extent they refine the issues in contest between them as encouraged by the case preparation guidelines in this practice note and the preparation of the **Issues Summary**.
 - (iii) Depending on the view formed by the **CADB Panel** after the initial hearing in a **Conduct Matter**, the following will occur:
 - I. If **CADB** is satisfied that some or all grounds of the **Application** have been established, the **Determination** (which includes the

CADB Panel's preliminary view on an appropriate costs order) will be provided to the **Parties** and a date fixed to reconvene the **CADB Hearing** to provide the **Parties** with an opportunity to make further submissions and/or adduce evidence relevant to the questions of sanction, costs and publicity before final orders are made. That hearing is usually fixed for a date within one month of the **CADB Panel** delivering its **Determination** to the parties, and usually takes no more than five hours. The **CADB Panel** will then formulate its **Final Decision** and deliver it to the **Parties**. Details of the **Final Decision** will be published in the Government Gazette within 14 days and on **CADB's** website.¹⁷ At the same time the **CADB Panel** will deliver a separate written decision to the **Parties** on costs and publicity. **CADB** does not publish its decisions on costs and publicity.

- II. If a **CADB Panel** is not satisfied there are grounds established by the **Application** for the exercise of its powers, a **Final Decision** setting out reasons, will be provided to the **Parties**. The **CADB Panel** will indicate to the **Parties** its preliminary view on an appropriate costs order and if requested the **CADB Hearing** may be reconvened within 1-2 weeks to provide the **Parties** with an opportunity to address the **CADB Panel** with respect to appropriate costs order/s if either party so requests. Otherwise, this may be done by written submissions from each party being filed via the **Registrar** within a period directed, usually seven days.

6. COMMENCING CADB PROCEEDINGS - INITIAL STEPS

Preamble - Outline of Concise Outline/Concise Response process to be used in CADB proceedings

- 6.1 **CADB** requires any **Application** filed with **CADB** to be accompanied by a **Concise Outline**.¹⁸ The **Respondent** has an opportunity to respond to the **Concise Outline** with a **Concise Response**.¹⁹
- 6.2 The **Concise Outline/Concise Response** process for the commencement of **CADB Proceedings** is:
 - (a) Intended to ensure that a **Respondent** has sufficient information to understand the basis of the allegations made as well the orders sought, putting him/her in a position at the outset of **CADB Proceedings** to identify any key areas of disagreement
 - (b) Designed to inform each party at the commencement of **CADB Proceedings** of the detail of the other's position without imposing prescriptive requirements to prepare legal pleadings, or provide all of the

¹⁷ Ss1296 (1)(c) [Corporations Act](#)

¹⁸ See Annexure A for guidance

¹⁹ See Annexure F for guidance

evidentiary material that may ultimately be necessary to prove the **Applicant's** allegations, recognising the context of the pre-existing regulatory relationship between the **Parties** and **CADB's** role in the **Scheme** as an independent administrative decision maker.

- (c) Facilitates the identification and delineation of the issues in dispute between the **Parties** before the first **pre-hearing conference** in order to:
 - (i) Provide a framework for **Parties'** hearing preparation by reference to those issues identified as in dispute - particularly in **Conduct Matters**, which usually involve more complexity, and:
 - (ii) Put **Parties** in a sufficiently informed position to formulate and seek appropriate case preparation directions (including document requests of the other party if necessary), at the **pre-hearing conference**, and:
 - (iii) Utilise **CADB's** time efficiently and cost-effectively.

Application and Concise Outline to be filed to commence proceedings

6.3 **ASIC** or **APRA** may commence a Proceeding by filing with the **Registrar** (by email registrar@cadb.gov.au):

- (a) An **Application** in the form of **Annexure B (Application)** that specifies whether a matter is a **Conduct Matter** or an **Administrative Matter** and specifies the orders sought and:
- (b) A **Concise Outline**.

6.4 A **Concise Outline** is a document that succinctly and concisely:

- (a) Outlines the conduct alleged to have occurred.
- (b) Describes the evidence proposed to be relied upon to prove the allegations at a **CADB Hearing**, and/or annexes key documentation:
- (c) Identifies the grounds in Section 1292 enlivening **CADB's** jurisdiction.

6.5 A **Concise Outline** must be specific and include sufficient detail to enable a **Respondent** to understand the matters being alleged. See **Guidance on Preparing Concise Outline in Annexure A** hereto.

6.6 **CADB Proceedings** will be commenced on the day **CADB** receives an **Application** and a **Concise Outline**. **Annexure B** is pro-Forma template for an **Application**.

6.7 The form of the **Concise Outline is a matter for the Applicant** depending on the nature and scope of the relevant allegations. As well as a scanned copy signed by the **Applicant**, **CADB** requests a Word version of each document for working purposes. As a matter of form, both the **Application** and **Concise Response** should include page numbering for ease of reference.

Service of proceedings on Respondent by the Applicant

- 6.8 When an **Application** and **Concise Outline** are filed, **CADB** will allocate a matter number to be used on all subsequent documents to be filed in the **CADB Proceedings**. The **Application** and **Concise Outline** will be annotated by **CADB** with the date received and a proceedings number for verification purposes and a PDF copy will be returned to the Applicant.
- 6.9 The **Applicant** must seek forthwith to arrange service of the stamped **Application** and **Concise Outline** on the **Respondent** in accordance with paragraph 6.10. The **Application** and **Concise Outline** are to be accompanied by a covering letter in the form of **Annexure C**.
- 6.10 Service of the **Application** and **Concise Outline**, and accompanying documents may be effected on the individual registered auditor named in the Application by either sending the document set out in paragraph 6.9 by tracked post, or personal delivery to the registered auditor's principal place of practice address as last recorded in the database of Registered Auditors maintained by ASIC pursuant to s1285 of the Act. If there is an email address recorded in the latest Annual Statement filed by the Registered Auditor with ASIC under s1287A of the Corporations Act, the Application and Concise Outline and accompanying documents must also be transmitted to that email address in order to effect service on the Applicant under these guidelines^{19a}.
- 6.11 Once the **Respondent** has been served in accordance with paragraph 6.9, the **Applicant** must notify the **CADB Registrar** by email. The email confirming must also provide details of the service effected including:
- a. The address to which the proceedings were served;
 - b. Address and email details (if any) recorded in ASIC register and latest annual statement of registered auditor.
 - c. The manner of service, including either the date of personal delivery and/or service, by whom on behalf of the Applicant (may include a process server engaged by the Applicant) and with whom the documents were left.
 - d. Postal details including, date posted, addressee and tracking details, including confirmation of delivery if available.

^{19a} As it is a legislative requirement for all registered auditors to keep ASIC informed of contact details under the regulatory scheme (see Section 1287 of the Act), service of CADB proceedings in accordance with those recorded details is reasonably assumed to be sufficient to bring the Application to the relevant registered auditors attention. See contextual comments in 2.4 herein.

CADB notifies Parties of initial directions and time for Response

- 6.12 Once **CADB** is notified that a **Respondent** has been served with the **Application** in accordance with paragraph 6.10, the **Registrar** will, after 5 working days, send a **Notice to Respondent to file Concise Response and Notice to Parties of Pre-hearing Conference (Annexure D hereto) (Notice to file Concise Response)**. The **Notice to file Concise Response** specifies:
- (a) The date by which the **Respondent** may file a **Concise Response** to the **Concise Outline**. In an **Administrative Matter** this date will be 10 business days from the date of the **Notice**. In a **Conduct Matter**, (subject to paragraph 7.7 below), this will be 15 business days from the date of the **Notice**.
 - (b) The date and time fixed for a **pre-hearing conference**, which will be a minimum of 10 business days following the due date for filing the **Concise Response** to allow the parties time to confer once a **Response** is filed.
- 6.13 **CADB** intentionally waits 5 business days before serving the **Notice to file Concise Response** in order to allow a **Respondent** just served with **CADB Proceedings** the opportunity to:
- (a) Review the **Application** and **Concise Outline**.
 - (b) Review the procedures that will apply to the conduct of **CADB Proceedings** as set out in this practice note.
 - (c) Decide on how to conduct his/her response to the **Application**. For example, whether he/she wishes to appear in person at a **CADB Hearing** or make written submissions to the **CADB Panel** before it conducts a hearing.
 - (d) Make arrangements to prepare for and attend a **CADB Hearing** within the timeframes outlined herein. Depending on the type of **Application**, this may include arranging legal representation if desired or putting in place business arrangements in order to undertake hearing preparation on his/her own account. Should a **Respondent** decide to retain a lawyer, this should be done promptly given the timeframe within which **CADB Hearings** occur. The **Respondent** is responsible for ensuring that any legal representative they may retain is aware of and will commit to observing the timeframes referred to in this practice note punctually, can start promptly on preparing a **Concise Response** and is available for a **CADB Hearing** within the timeframes stipulated.

7. THE CONCISE RESPONSE PROCESS

Respondent to prepare Concise Response

- 7.1 The next phase of hearing preparation is time provided to a **Respondent** to set forth an outline of their position if they wish to. This may be done by means of a **Concise Response**. The primary purpose of a **Concise Response** is to provide

the **Respondent** with an opportunity to identify which matters alleged in the **Concise Outline** are disputed, to identify why they are disputed and to advance any other matters potentially relevant to **CADB's** decision on the **Application**, having regard to its jurisdiction.

7.2 A **Concise Response** must:

- (a) Be directed to responding to the matters alleged in the **Concise Outline**.
- (b) Include sufficient detail to enable the **Applicant** to understand which matters alleged in the **Concise Outline** the **Respondent** disputes and why they are disputed, including an outline of the evidence to be adduced in support of their position.
- (c) Be succinct and specific.

7.3 See *Guidance on Preparing Concise Response* in **Annexure F** hereto and template for Concise Response at **Annexure E** hereto.

Filing and Serving Concise Response

7.4 The **Concise Response** must be signed and dated by a **Respondent** or his legal representative and may be filed with **CADB** by emailing a signed and dated PDF copy to registrar@cadb.gov.au.

7.5 **CADB** will stamp the **Concise Response** for verification and serve it on the **Applicant** by email to the email address specified in the **Application**.

7.6 In an **Administrative Matter**, the **Notice (Annexure E)** will provide a **Respondent** with 10 business days to file a **Concise Response**.

7.7 In a **Conduct Matter** the **Notice (Annexure E)** will provide a **Respondent** with 15 business days to file a **Concise Response**. One automatic extension of 5 business days for filing a Concise Response is available in **Conduct Matters** by invoking the process set out in **Annexure G**. The automatic extension will only be granted if the **Respondent** communicates the information set out in **Annexure G** to the **CADB Registrar** by email registrar@cadb.gov.au in the timeframe outlined. If **CADB** provides the automatic extension the **Registrar** will notify the **Parties** and provide a revised timetable for filing the **Concise Response** and a revised date for the **pre-hearing conference**.

7.8 The time provided to prepare the Response in a **Conduct Matter** (which may be up to 25 business days following service of the **Application** if an automatic extension is provided) takes into account the importance to the efficient conduct of the Proceedings of time for a **Respondent** to properly formulate the **Concise Response**, which assists in ensuring that the timetable when set at the **pre-hearing conference** will accommodate all necessary pre-hearing steps and that the **Parties** hearing preparation will be appropriately directed to the issues in dispute.

7.9 Should the parties opt for a CADB facilitated **Mediation**, as set out in paragraphs **8.6-8.12**, further time may be made available after the **Concise Response** is filed

and **before** a **pre-hearing conference** is convened to allow the **Mediation** to take place in accordance with the procedures set out in those paragraphs and in [PN2](#).

- 7.10 Other than the procedures for extending time to file a **Concise Response** as set out in paragraph 7.7, **CADB** will not otherwise entertain extensions of time for filing a **Concise Response**, in either **Conduct** or **Administrative** matters, unless there are extenuating circumstances. In that case those circumstances must promptly be notified by email to the **CADB Registrar** (and copied to the **Applicant**) at least 5 working days before the **Response** is due to be filed. Appropriate third-party verification of the relevant matters relied on must be provided, for consideration by the **Chair**. Extensions of more than 5 further working days should not be expected.

No response or appearance by Respondent to CADB proceedings.

- 7.11 A **Respondent** may choose not to attend a **CADB Hearing** or the **Pre-hearing conference**. An available alternative is to instead make written submissions to the **CADB Panel**²⁰ before the **CADB Hearing** attaching any documents or other material that the **Respondent** wishes the **CADB Panel** to consider. If a **Respondent** adopts this approach any documents and material the **CADB Panel** will be asked to consider must be provided to the **Registrar** before the date fixed for the hearing.
- 7.12 As a general matter, if either party needs or wishes to communicate with **CADB** once proceedings commence, this may be done by email to the **Registrar** registrar@cadb.gov.au and any such communications must be copied to the other party.

8. FURTHER STEPS EXPECTED OF PARTIES PRIOR TO PRE-HEARING CONFERENCE

Guidance on Matters for discussion by Parties regarding hearing preparation

- 8.1 **CADB** expects **Parties** to communicate cooperatively, from the outset, to facilitate completion of the pre-hearing steps outlined in this practice note within the timeframes contemplated.
- 8.2 Subject to opting for a **Mediation** conference as described in paragraphs 8.6-8.12 below, in which case the timeframes set out in those paragraphs will apply, the **Parties** must, within 5 business days of the **Concise Response** being filed, confer for the purpose of:
- (a) Identifying and delineating the issues in dispute and finalising an **Issues Summary** and:
 - (b) Exploring and formulating case preparation steps that are aimed at facilitating an efficient **CADB Hearing**, in order to prepare a

²⁰ Ss 216 (9) [ASIC Act](#)

draft timetable based on the matters identified, for discussion with the **Chair** at the **pre-hearing conference**.

- 8.3 An **Issues Summary** and a draft timetable for case preparation must be provided to the **CADB Registrar** 24 hours prior to the scheduled **pre-hearing conference**.
- 8.4 Guidance on the range of matters that it may be necessary for the **Parties** to discuss in order to properly formulate a draft timetable for case preparation, depending on the type of matter and its complexity and size, are set out in **Annexure H**.
- 8.5 Before the **pre-hearing conference**, the **Parties** must:
- (a) Read and consider the guidance set out in **Annexure H**; and
 - (b) ensure that all hearing preparation matters are identified and incorporated into a draft timetable that meets the timeframes set out in this practice note.
 - (c) Finalise an **Issues Summary**, noting that this document may be updated prior to the **CADB Hearing** to the extent the status of disputed issues between the parties changes as hearing preparation progresses.
 - (d) Form a view on the length of time necessary for the **CADB Hearing**, bearing in mind the need to ensure the most efficient and effective use of the **CADB Panel's** time.
- 8.6 This section applies both to **Conduct** and **Administrative** matters although we recognise that in the case of **Administrative** matters in which the questions of fact are relatively clear cut, the processes described above may be satisfied with commensurately brief documentation, and the potential for the **Parties** agreeing on **Proposed Orders** achieved via direct discussions rather than the more structured approach offered by a **CADB** facilitated **Mediation**.

CADB facilitated Mediation available in Conduct Matters as a tool for efficient hearing preparation

- 8.7 **CADB** encourages **Parties** to a **Conduct Matter** to consider the benefits of the more structured environment that a **Mediation** conference presided over by a **CADB** member may provide as the forum for exploring both those matters relevant to hearing preparation identified above and the possibility of reaching consensus on **Agreed Facts and Proposed Orders** for submitting to a **CADB Panel**.
- 8.8 **Parties** are referred to **CADB Practice Note 2 – Guidelines for Mediation [PN2](#)** for further guidance on **CADB** conducted **Mediations** available to be utilised by **Parties** to **CADB Proceedings** on the terms outlined.
- 8.9 The range of potential benefits of **Mediation** to the efficient and timely conduct of **CADB Proceedings** may include:
- (a) Isolating and/or refining those facts and/or allegations identified by the **Concise Outline/Concise Response** process that either party disputes.

- (b) Isolating and/or refining those facts and/or allegations identified by the **Concise Outline/Concise Response** process about which there is consensus.
 - (c) Developing a **Statement of Agreed Facts**.
 - (d) Reaching agreement on ways to resolve outstanding factual differences that may reduce hearing time.
 - (e) Formulating a list of agreed matters.
 - (f) Formulating the **Issues Summary** and/or of disputed issues requiring **Determination** at the **CADB Hearing**.
 - (g) Reaching agreement on all matters, in which case the **Parties** may submit **Agreed Facts** and **Proposed Orders** for consideration by a **CADB Panel** (see also paragraph 12). **Proposed Orders** must be accompanied by **Agreed Facts**.
- 8.10 **Mediation**, if the **Parties** agree to participate, must occur as soon as practicable after the **Concise Response** is served and in **CADB's** view should usually occur prior to a **pre-hearing conference**. To facilitate this, **CADB** will extend the date fixed for the **pre-hearing conference** by up to **15** business days to allow **Mediation** to occur on **Application** by the **Parties** to the **Registrar**.
- 8.11 Should **Parties** opt to participate in **Mediation**, they should promptly notify the **Registrar**, no later than **7** business days after the Response is filed, in writing of at least 3 dates on which both **Parties** may be available to attend a **Mediation** within the following 15 business days. If **Parties** have opted for **Mediation** within the **CADB** framework as provided for in [PN2](#) the **Chair** will make arrangements to appoint a **CADB Member** to act as Mediator and fix a date and a venue for **Mediation**; usually this will be in the capital city of the State in which the **Respondent** resides. The **pre-hearing conference** will be adjourned accordingly.
- 8.12 To the extent **Mediation** between the **Parties** may lead to any of the outcomes referred to in paragraph 8.8, the **CADB Hearing** will be streamlined, with attendant cost and efficiency benefits for all involved. **Parties** are also referred to paragraph **12** below, which provides information on the role of the **CADB Panel** with respect to **Agreed Facts** or **Proposed Orders** and **Agreed Facts** submitted by the **Parties**.
- 8.13 To ensure that case preparation remains on track to achieve the steps outlined in this practice note, and to avoid the need for convening a further meeting in the event **Mediation** does not result in a consensus position between the **Parties**, the **Parties** should allow additional time after the **Mediation** concludes to consult (between themselves) on formulating the **Issues Summary** and a draft timetable for the **CADB Hearing** to be submitted at the **pre-hearing conference** in accordance with paragraph 8.3, having regard to the scope of the outstanding matters for **Determination** following **Mediation** and relevant guidance in **Annexure H**.

9. PRE-HEARING CONFERENCE

Procedural information

- 9.1 The **pre-hearing conference** will usually be fixed at 10.30 am and **CADB** expects that **Parties** and any counsel and/or legal advisers to be involved in the **CADB Hearing** are present and have their diaries available so that a date may be fixed.
- 9.2 Usually, the **pre-hearing conference** is conducted by teleconference but may be convened in person if there is good reason. **Parties** should allow 30 minutes for attendance at the time specified
- 9.3 The attendees at a **pre-hearing conference** are such persons as the **Chair** allows.²¹ Usually this is a representative of the **Parties** and/or their lawyers.
- 9.4 As a **pre-hearing conference** usually deals with procedural issues a transcript is not prepared.

Purpose and Objectives of the Pre-Hearing Conference

- 9.5 The primary purposes of the **pre-hearing conference** are, by reference to the matters that are in dispute (that **Parties** are expected to have identified and summarised in the **Issues Summary**), to:
- (a) Discuss the steps for hearing preparation in the draft timetable, identified by the **Parties**, including if necessary, their utility/objective.
 - (b) Finalise case preparation directions based on the parties' draft timetable.
 - (c) Discuss the likely time necessary for the **CADB Hearing** and fix a date/s for that hearing having regard to the **Issues Summary**.
- 9.6 **CADB** expects any participant representing a party to be fully prepared to discuss the above matters and to have considered how much time is reasonably required for the hearing, based on the number of witnesses to be called by each party, the matters in dispute, the time that may be required for cross-examination and the submissions to be made, and to have their diaries (and if relevant, those of counsel) available so that the **Chair** may fix the date/s for hearing.
- 9.7 **CADB's** usual practice is to convene the hearing in the capital city of the **Respondent's** home State. Should either party wish to propose that the hearing occur elsewhere they may raise it for discussion at the **pre-hearing conference**.
- 9.8 Generally, **Parties** may expect that a **CADB Hearing** will be fixed as soon as the earliest date by which the **Parties**, acting expeditiously and in accordance with the timetable set, can reasonably be ready to proceed. As a guide, the **CADB Hearing** of an **Administrative Matter** usually occurs within 4-6 weeks of the **pre-hearing conference**, and the **CADB Hearing** of a **Conduct Matter** usually occurs within 4-10 weeks of the **pre-hearing conference**.

²¹ Ss 1294A(2) [Corporations Act](#)

- 9.9 The **CADB Registrar** will confirm the timetable set (and any other directions made) at the **pre-hearing conference** by subsequent email to the **Parties**.
- 9.10 **Parties** are expected to comply punctually with the timetable set.

Changes to timetable set or directions made

- 9.11 Amendments to the timetable set by the **Chair** at the **pre-hearing conference** may be varied by agreement between the **Parties only** if the proposed amendment/s do not impact either **Parties'** readiness to proceed on the date/s fixed for hearing. In such circumstances details of the **agreed** changes may be emailed to the **Registrar** for the record.
- 9.12 Any other changes to the timetable must be approved by the **Chair** and a request should be made via the **Registrar** for consideration and include details of why the variation has become necessary.
- 9.13 Requests for extensions of time to the timetable fixed or for further directions should not be necessary and are not generally given.
- 9.14 Any non-compliance with a timetable that is shown to prejudice the other party at the **CADB Hearing** will be a matter that the **CADB Panel** may take into account in considering what evidence to admit at the hearing, and may also be a matter relevant to the **CADB Panel's** consideration as to sanction, if relevant and/or in relation to an order as to costs.

One Pre-hearing Conference usually sufficient

- 9.15 One **pre-hearing conference** is usually sufficient before a **CADB Hearing** takes place however, if in **CADB's** view a subsequent **pre-hearing conference/s** is/are necessary to facilitate a timely hearing, the **Parties** will be notified of arrangements by the **Registrar** and informed about the matters to be addressed.²²
- 9.16 The **Chair** may also adjourn any **pre-hearing conference** held and reconvene on 24 hours' notice if he/she forms the view that to do so would facilitate the **Parties'** case preparation in accordance with the timetable set.

10. STEPS FOLLOWING PRE-HEARING CONFERENCE

CADB gives Notice of hearing

- 10.1 Following the **pre-hearing conference**, the **Chair** will convene a **CADB Panel** to hear and determine the **Application** and will send to the **Parties** a **Notice of CADB Hearing** to the effect set out in **Annexure I** hereto. This **Notice** will specify a timeframe for the filing of copies of each party's documents for the hearing, to be provided to **the CADB Panel Members**.

²² Under section 1294A of the [Corporations Act](#), the Chairperson of the Board must give written notice of a conference to the Applicant at least 14 days before the proposed date of the conference. ASIC or APRA may waive this requirement and may be asked to do so in order to progress proceedings expeditiously.

CADB's power to summons persons to give evidence at the Hearing

- 10.2 The Chair of the **CADB Panel** or a **Member** of the **CADB Panel** has the power to compel a person to appear at the **CADB Hearing** to give evidence and produce documents (**Witness Summons**).²³ This power may be invoked either by **CADB** on its own motion or upon the **Application** of either party to the proceedings in accordance with paragraph 10.6.
- 10.3 A person served with a Summons must not, without reasonable excuse, fail to attend a **CADB Hearing** or fail to produce documents or fail to answer questions.²⁴

Process for a party to request CADB to issue a witness summons

- 10.4 Either party may request **CADB** to issue a **Witness Summons** if that party intends to call the person summonsed to give evidence at the **CADB Hearing**. **Applications** requesting **CADB** to issue a **Witness Summons** are to be made within the guidelines set out in paragraphs 10.5-10.11 below and, to the extent documents are sought by the **Witness Summons**, those documents must be adequately identified in the **Application** for **Witness Summons**.
- 10.5 **Parties** are expected to have considered whether any **Witness Summons** will be required before the **pre-hearing conference** in accordance with **Annexure H paragraph (f)** and to have sought appropriate directions having regard to the process for issuing a **Witness Summons** set out herein, if so.
- 10.6 If there are no directions in place in proceedings with respect to the issue of a **Witness Summons**, because for example, other potential witness evidence emerges following the **pre-hearing conference** and a party considers that a **Witness Summons** will be required, that party may apply to **CADB** (copied to the other party) to issue a **Witness Summons** to the third party to give evidence at the hearing fixed by **CADB** by providing to the **Registrar** in writing, not less than 21 days prior to the date fixed for hearing (copied to the other party), the following information:
- (a) Details of the person/s to be summonsed and their contact details together with an outline of the nature of the evidence it is expected they can provide, including details of appropriately identified documents or categories of documents being sought for production at the **CADB Hearing**, bearing in mind that such requests must be reasonable; and
 - (b) A draft **Witness Summons** electronically, in "Word" format, in the form specified in the **ASIC Regulations**.²⁵
- 10.7 **CADB** endeavours to deal with an **Application** for a **Witness Summons** promptly and will not expressly invite objections from the other party, however if the other party does object, the **Registrar** should be notified promptly in writing of the basis of the objection.

²³ S217 [ASIC Act](#)

²⁴ Ss219 [ASIC Act](#)

²⁵ ASIC regulations 2001: reg 11 Sch One Form 3

- 10.8 When deciding whether it is appropriate to exercise **CADB's** power to issue a **Witness Summons**, the **Chair** (or **Member** of the **CADB Panel**) needs to be satisfied, at a minimum, that it is likely that the person can give relevant evidence and, if documents are also sought, that the nominated documents are likely to be relevant. Details of the likely evidence should be provided at the **pre-hearing conference** or when an **Application** for the issue of a **Witness Summons** is otherwise made. The **Chair** or **Member** of the **CADB Panel** will take into account the relevance of the evidence sought and whether the **Witness Summons** could involve oppression to the recipient by, for example providing short notice or involving the production of numerous documents, or documents that are insufficiently identified.
- 10.9 The party requesting the issue of a **Witness Summons** must pay the fees and allowances for the witness's expenses.²⁶
- 10.10 **CADB's** view is that it does not have power to issue a **Witness Summons** for the production of documents only.²⁷
- 10.11 The other party will have a right to cross-examine any witness summonsed by the other party, should they give evidence at the **CADB Hearing**, in the usual course.

Parties to file Case Summary before CADB Hearing.

- 10.12 The **Notice of CADB Hearing** specifies that each party submit a **Case Summary for Hearing** in the form of **Annexure J** hereto no later than 14 days before the date fixed for commencement of the **CADB Hearing**.
- 10.13 The purpose of the **Case Summary for Hearing** is to provide the **Parties** with a tool to outline and draw together all of the material they wish to rely on at the **CADB Hearing**, including commencing documents (e.g. the **Application** and **Concise Outline** in the case of the **Applicant** and the **Concise Response** in the case of a **Respondent**), the outlines of evidence or statements filed, any **Statement of Agreed facts** or chronology and/or reference to any indexed bundles of documents filed and an updated **Issues Summary** and to confirm that all such documents have been provided to the **CADB Registrar** and the other party.
- 10.14 If either party fails to utilise this step, it will not prevent the **CADB Hearing** proceeding, but may be matter relevant to a consideration of any costs order to be made.

Submissions

- 10.15 The pre-hearing process set out in this practice note is aimed at identifying early the key issues in dispute between the **Parties** and directing case preparation,

²⁶ ASIC regulations 2001: reg 11 Schedule 2

²⁷ [Deveson and Ors v Australian Broadcasting Tribunal \(1991\)](#) 32 FCR 124; *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd & Ors* (2004) 59 IPR 361, and compare the power of the Takeovers CADB Panel in s192(1)(a) of the [ASIC Act](#).

particularly as to the organisation of relevant evidence and how it may be most effectively presented at the **CADB Hearing**. While the circumstances of each case will differ, the **Parties** are asked to consider whether, prior to commencement of the **CADB Hearing**, there would be merit in filing written submissions to the **CADB Panel** on any of the issues identified in case preparation, that may assist in further contributing to an efficient hearing.

11. INFORMATION FOR PARTIES ON CONDUCT OF CADB HEARINGS

Representation at hearing and who may attend

- 11.1 Representation at a **CADB Hearing** is regulated by s218(3) of the **ASIC Act** and **Parties** are asked to refer to that section. In outline, it provides that a **Respondent** may attend in person and/or may be represented by a lawyer and **ASIC** (or **APRA**) may be represented by a staff member, a member or acting member of **ASIC** (or **APRA**), a person authorised by **ASIC** (or **APRA**) or by a lawyer.
- 11.2 A **CADB Panel** may give directions as to other persons who may be present at a **CADB Hearing** to take place in private.²⁸ **Parties** are asked to notify the **Registrar** in writing of any such request as soon as possible after the **Notice of Hearing** has been issued. The request should include the names of those persons whose attendance at the **CADB Hearing** is requested by a party, the relationship of those persons to that party and why that person's attendance is necessary.

CADB Hearings generally in private

- 11.3 Subject to paragraph 11.4, all **CADB Hearings** must take place in private.²⁹
- 11.4 If a **Respondent** requests a public **CADB Hearing**, then, subject to any directions of the **CADB Panel**, that must occur. The **CADB Panel** may, if it is satisfied that it is desirable to do so, by reason of the confidential nature of any evidence or matter, or in order to protect the interests of any other person, direct that part of the **CADB Hearing** take place in private and give directions as to who may be present, or give directions preventing or restricting the publication of evidence given before the **CADB Panel** or matters contained in documents lodged with, or produced to the **CADB Panel**.³⁰
- 11.5 The **Applicant** cannot request a public **CADB Hearing**.³¹

Witnesses

- 11.6 Any witness called by either party to give oral evidence will be allowed to be present at the **CADB Hearing** while they give that evidence, but not otherwise

²⁸ Ss216 (4) [ASIC Act](#)

²⁹ Ss216 (2) [ASIC Act](#)

³⁰ Ss216 (3) [ASIC Act](#)

³¹ Ibid footnote 31

except with the leave of the **CADB Panel**. The **CADB Panel** will usually give leave for an expert (if retained) to remain in the hearing room to the extent other relevant evidence is being given.

- 11.7 If a party calls a witness, the other party will generally be entitled to cross-examine that witness. Therefore, in matters where a party files a witness statement/s in advance of the **CADB Hearing**, that party must arrange for the witness to be available at the **CADB Hearing** for cross-examination, if required by the other party.
- 11.8 Before providing oral evidence at a **CADB Hearing**, a witness must take an oath or an affirmation³².
- 11.9 With respect to any witnesses summonsed to attend the **CADB Hearing**, **Parties** are expected to be in a position to inform the **CADB Panel** at commencement of the **CADB Hearing** of the likely time that any such witness will be required so that the **Registrar** may contact them to coordinate appropriate arrangements.

Usual Format for hearings

- 11.10 It is open to the **Parties** to propose a format for a **CADB Hearing** based on their specific circumstances. This matter may be addressed with the **CADB Panel** at the commencement of the **CADB Hearing**. Otherwise, a **CADB Hearing** is usually conducted as set out in Annexure K, which the **Parties** are expected to read and consider.

12. PROPOSED CONSENT ORDERS AND AGREED FACTS – ROLE OF CADB PANEL

- 12.1 As already outlined herein, **Parties** are actively encouraged (either by **Mediation** or otherwise) to explore prior to the **CADB Hearing** the possibility of, reaching agreement on orders to be proposed based on a **Statement of Agreed Facts (Proposed Consent Orders)**, and or settling **Agreed facts (Agreed Facts)** for tender at the **CADB Hearing** or utilising any other case management tools that may assist a **CADB Panel** to conduct an expeditious **CADB Hearing**.

Process if Parties reach agreement on Proposed Consent Orders

- 12.2 If, before a **CADB Hearing** commences **Parties** reach agreement on **Proposed Consent Orders** that each is prepared to propose to a **CADB Panel** for its consideration at the **CADB Hearing**, the **Parties** should jointly notify the **Registrar** and provide details of the **Proposed Consent Orders** to the **Registrar**. **Proposed Consent Orders** must be accompanied by a **Statement of Agreed Facts**.
- 12.3 Although the resolution of matters is desirable and **CADB** actively encourages a pro-active and cooperative approach by the **Parties**, **CADB's** jurisdiction to make orders nevertheless depends upon it being "*satisfied*" of the relevant matters referred to in Section 1292 of the **Corporations Act** and there are established

³² Ss217 (2) [ASIC Act](#)

principles that govern **CADB's** power to make **Proposed Consent Orders** on the basis of a **Statement of Agreed Facts**.

- 12.4 Specifically, the **CADB Panel** must be satisfied that the **Proposed Consent Orders** are appropriate in the circumstances. If the facts involved are complex, the **CADB Panel** may, in order to be satisfied, need to evaluate aspects of the evidence supporting the **Statement of Agreed Facts**, for example and if so, will notify **Parties** and allocate hearing time accordingly.
- 12.5 If the **Parties** submit **Proposed Consent Orders** on the basis of a **Statement of Agreed Facts**, the **Chair** will notify the **Parties** as to how the **CADB Panel** will proceed. Usually, a brief **CADB Hearing** will be convened in order for the **CADB Panel** to hear submissions in support of the **Proposed Consent Orders** and to the extent there are matters not covered by the **Proposed Consent Orders**, to deal with those issues. The **CADB Panel** will then prepare a **Final Decision** and publish it in the normal course in accordance with paragraph 16.³³
- 12.6 **CADB** recognises that if the **Parties** join in proposing a discretionary order by consent that fact is a matter weighing significantly in favour of the **CADB Panel** being satisfied that the **Proposed Consent Orders** reflect an appropriate sanction, particularly given the **Applicant's** role as guardian of the public interest.
- 12.7 **Proposed Consent Orders** may include a proposed order as to costs. If so, a **CADB Panel** will deal with the issue of costs based on the **Parties'** submissions in accordance with the principles outlined in [PN3](#).

13. PROCESS FOR CONCLUDING AN ADMINISTRATIVE MATTER FOLLOWING CADB HEARING

- 13.1 Following presentation by each party of its case in an **Administrative Matter**, **CADB** may either deliver its findings orally at the conclusion of the **CADB Hearing**, and provide brief reasons in writing shortly thereafter or adjourn to formulate and prepare the **Determination** and provide it to the **Parties** when subsequently delivering its findings.
- 13.2 If **CADB's Determination** is adverse to the **Respondent**, the **CADB Panel** will include details of the orders it proposes to make with regard to sanction, costs and publicity and the **Parties** will be provided with a period of **5** business days to file evidence/evidence in response, including a Costs Summary and Response in the case of costs and character evidence in the case of sanction, and/or to make submissions with respect to the orders proposed, and/or to submit a **Draft Costs Order**.
- 13.3 The **CADB Panel** will consider any evidence or submissions made by either party including any **Draft Costs Order** that may be filed before finalising its view and issuing its final written decision and orders as to sanction (**Final Decision**)

³³ For examples of published decisions CADB has issued on the basis of a **Statement of Agreed Facts** and **Proposed Consent Orders** see CALDB's decisions in [-Wessels](#) in which the proposed orders were negotiated during a CADB facilitated mediation and [Traianedes](#) where the parties conducted negotiations directly.

together with a brief separate decision on costs and publicity in order to conclude the **CADB Proceedings**.

14. PROCESS FOR CONCLUDING A CONDUCT MATTER ADVERSE TO A RESPONDENT FOLLOWING CADB HEARING

- 14.1 Following presentation by each party of its case in a **Conduct Matter** at a **CADB Hearing**, that hearing will be adjourned pending the **CADB Panel** formulating its conclusion on the relevant issues and preparing a **Determination** setting out the reasons for its findings.
- 14.2 When a **CADB Panel's Determination** in a **Conduct Matter** is adverse to a Respondent, it is likely that the sanction imposed will be more serious than in an Administrative Matter. A Respondent in a Conduct Matter will therefore be given a further opportunity to appear in person before the **CADB Panel** at a **Final Hearing** to make submissions as to sanction before the **CADB Panel** makes its **Final Decision**.
- 14.3 The usual process for a **Final Hearing** is to reconvene the **CADB Hearing** on a date to be fixed in consultation with the **Parties** in order to hear the **Parties** on what orders are appropriate in relation to sanctioning the **Registered Auditor**, paying the costs of the **Applicant**, and publicising the **Final Decision**.
- 14.4 The **Final Hearing** will be convened as soon as possible after a **Determination** is provided to the **Parties** (usually within 4 weeks) and is an opportunity for the **Parties** to make oral submissions and present evidence, such as character evidence and evidence on costs incurred, as the case may be, for the **CADB Panel** to consider before making its final orders on costs publicity and sanctions.
- 14.5 The **CADB Panel** usually invites written submissions and evidence by way of written signed statements from the **Parties** on the questions of sanctions and costs and publicity in advance of the **Final Hearing**. Further guidance on each of these matters is included in Annexure L.
- 14.6 Directions for the filing of any further evidence on sanction, costs and publicity will be made when **CADB** delivers its **Determination** to the parties. Parties should work on the basis that the timetable will allow each party up to 8 business days each to file their evidence/evidence in response, (including the Costs Summary and Response and any character evidence in the case of sanction), and/or to prepare written submissions, and/or to submit a **Draft Costs Order**.
- 14.7 **Parties** are asked to provide written submissions in electronic format, in "*Word*" version and any other documentation in scanned electronic form.
- 14.8 The **Final Hearing** usually takes between 2 and 5 hours and will be fixed for a maximum of 1 day.
- 14.9 **Parties** may opt in all cases to submit a **Draft Costs Order** in which case the **CADB Panel** will make such order by consent.

15. PROCESS FOR CONCLUDING A CONDUCT MATTER IF NO GROUNDS OF THE APPLICATION ARE ESTABLISHED.

- 15.1 In cases where the **CADB Panel** has found that no grounds in the **Application** have been established, the procedure described above varies insofar as the **Determination** will be delivered to the **Parties** but not otherwise in the future be published nor the matter of sanction arise.
- 15.2 Parties are directed to the comments in Annexure L with regard to dealing with costs, although unless specifically requested, the **CADB Panel** will not usually reconvene to further hear the **Parties**, but will proceed to make its final decision on the basis of the written material filed by the parties. Directions for filing relevant evidence and submissions will be made when the **Determination** is provided to the parties.
- 15.3 As already noted, **Parties** may opt in all cases to submit a **Draft Costs Order** in which case the **CADB Panel** will make such order by consent.

16. FINAL DECISION OF CADB PANEL

- 16.1 Following the **Final Hearing**, or a consideration of the remaining issues on written material provided by the **Parties**, a **CADB Panel** will make a decision as to whether and what sanction is appropriate and will issue a **Final Decision** that will include the reasons for its findings provided to the parties in the **Determination and** any orders as to sanction.
- 16.2 **CADB** will usually deliver a separate written decision on costs and publicity at the same time. **CADB** does not publish its decisions on costs and publicity. **CADB** may issue separate decisions on publicity and costs and may defer its decision on costs orders to a date later than its decisions on sanctions and publicity depending on the circumstances of the matter.
- 16.3 Details of the **Final Decision** must be published in the Government Gazette³⁴ within 14 days and on **CADB's** website.
- 16.4 **CADB** aims to deliver its decisions within two weeks of the conclusion of the **Final Hearing**.
- 16.5 **Parties** are directed to **Annexure M** that sets out details of the documentation prescribed with respect to **CADB** decisions.

17. APPEAL/REVIEW OF CADB'S DECISION

- 17.1 Either party may apply to the **AAT** for a review of the **Final Decision**. Either party may also have a right of review before the Federal Court of Australia under the Administrative Decisions (Judicial Review) **Act**.
- 17.2 **CADB** provides a party with details of the rights available to review a **Final Decision** when providing its **Final Decision**.

³⁴ Ss1296(1)(c) [Corporations Act](#)

18. OTHER MATTERS

No response or appearance by Respondent to CADB Proceedings

- 18.1 If a **Respondent** who is served with an **Application** does not file a **Concise Response** or attend the **pre-hearing conference** in accordance with the **Notice (Annexure E) CADB** will make any necessary directions for the **Applicant's** further preparation for a **CADB Hearing** and will fix a date for that hearing to proceed and be determined as set out herein.
- 18.2 Following the **pre-hearing conference**, the **Registrar** will notify the **Respondent** of the directions made by **CADB** and the date fixed for the **CADB Hearing** by sending that information to the **Respondent** at the address recorded on the **Respondent's** most recent Annual Statement lodged with **ASIC** in accordance with Section 1287A **Corporations Act**. The **Applicant** must provide a copy of that statement to the **Chair** at the **pre-hearing conference**.
- 18.3 The **CADB Hearing** will proceed on the date fixed at the **pre-hearing conference** and a **Notice of Hearing** will be sent to both **Parties** in accordance with paragraph 10.1 hereof.
- 18.4 To the extent an **Applicant** seeks to rely on documents at a **CADB Hearing** at which a **Respondent** does not appear, it must show those documents have been provided to the **Respondent**. This may be satisfied by including in the **Case Summary for Hearing (Annexure J)**, evidence of the manner in which and the date that relevant documents were sent to the **Respondent**.
- 18.5 Evidence that such documents were provided to the **Respondent** at the address recorded on the **Respondent's** most recent Annual Statement lodged with **ASIC** in accordance with Section 1287A **Corporations Act**, will usually constitute satisfactory evidence that the **Respondent** has received the relevant documents.
- 18.6 If a **Respondent** chooses not to attend a **CADB Hearing**, they may nonetheless make written submissions to a **CADB Panel**³⁵ beforehand attaching any documents or other material they may wish a **CADB Panel** to consider (see paragraph 7.11 hereof).

MARIA MCCROSSIN

CADB CHAIRPERSON

September 2020

³⁵ Ibid footnote 21

PN1 ANNEXURE A - Guidance on Preparing Concise Outline

With respect to each allegation of relevant conduct made in a **Concise Outline**, the following information must be included:

- (a) The **key facts** and **circumstances** that, if established by the evidence support a finding that the conduct occurred.
- (b) The relevant sub-section of the **Corporations Act** grounding the allegation [e.g.: 1292(1)(d)(i)]

While the precise form of the **Concise Outline** is a matter for the **Applicant** depending on the extent of the allegations included and the supporting facts, its primary purpose is to bring to the attention of the **Respondent** (and **CADB**) succinctly and promptly the key allegations and supporting facts said to enliven **CADB's** jurisdiction is the guiding principle.

CADB intends that the **Applicant's Concise Outline**, if prepared as outlined above will comprise succinct narrative describing the relevant facts and issues, include document references and attach copies of **key** documents and describe the witness evidence proposed to be adduced sufficient to enable the **Respondent** to understand the factual basis of each allegation that the **Applicant** will be asking the **CADB Panel** to consider at the hearing and the specific basis under s1292 to which each of the allegation/s are directed.

However, a **Concise Outline** is organised, it must clearly identify in respect of each allegation/s made, the facts alleged to be relevant and describe briefly the evidence to be adduced e.g. outline/s of witness evidence; description of key documentary evidence.

CADB does not intend, nor is it necessary to achieve the purpose of the **Concise Outline**, for every relevant document to be attached to a **Concise Outline**. However, documents that the **Applicant** alleges are **key** to demonstrating the basis of each of the **Applicant's** allegations may be included if those documents are third party documents of which the **Respondent** may not be aware.

Documents that provide relevant context and explanation may be referred to in narrative form in order to provide such context, but do not need to be annexed at the outset of proceedings.

If a **CADB Panel** is to be asked to infer dishonesty or wrongdoing by the **Respondent** the facts from which such inference is to be drawn must be fully and separately set in the SOFAC, and not pleaded in the alternative to a less serious allegation such as negligence.³⁶ If an alternative non-dishonesty case is to be maintained, a SOFAC must clearly and separately articulate and particularise that alternative case.³⁷

³⁶ *ASIC v Joubert* CALDB decision 11 May 2016 at paragraphs 10-46

³⁷ *ASIC v Fiorentino* CALDB decision 24 June 2014 at [954]-[958]

PN1 ANNEXURE B - Pro-forma Application - Disciplinary Matter

Companies Auditors Disciplinary Board

APPLICATION

Applicant [Set out name of **Applicant**]

Applicant details **contact** [Include name address direct telephone number and **email address**]

Respondent [Set out name business, residential and email address and telephone contact details]

Application date: [Set out date on which **Application** is filed]

Location: [Set out State in which **Respondent** practises and details of accounting firm if any at which **Registered Auditor** is employed or otherwise practises]

Matter Type: [Insert *Conduct/Administrative** **Disciplinary Matter**]

CADB Matter # [To be inserted by **Registrar**]

- 1. The **Applicant** applies to the Board for orders under s 1292 of the **Corporations Act** 2001 with respect to [full name] [**Registered Auditor #**] who has been registered as an auditor since [insert date of first auditor registration] and who practises as [insert employment status] at [insert name and address of accountancy practice if relevant]. Include details of any current conditions on registration, if relevant.

- 2. The **Applicant** asserts that the **Respondent**...[Set out each element in s 1292 relied upon and cross-reference allegations in Concise Outline e.g.: “(a) has failed to carry out or perform adequately and properly the duties of an auditor within s 1292(1)(d)(1) [cross refer allegations in support from Concise Outline] and/or (b) has failed to carry out or perform adequately and properly duties or functions required by an Australian law to be carried out or performed by a registered company auditor within s 1292(1)(d)(ii)[cross refer allegations in support from Concise Outline] and/or (c) is otherwise not a fit and proper person to remain registered as an auditor within s 1292(1)(d)”].

- 3. The **Applicant** seeks the following order(s): [Set out orders sought e.g.: “(a) An order that **CADB** cancel the registration of the **Respondent**, or in the alternative (b) An order that the **CADB** suspend the registration of the **Respondent** for one year alternatively such period as **CADB** determines (c) Costs”.]

.....

Signature of authorised officer of **Applicant**

Date:

PN1 ANNEXURE C - Pro-Forma letter Applicant to Respondent

(To be provided to **Registered Auditor** with **Application** and Concise Outline).

Dear [*name of registered auditor*],

[Proceedings Name/Number]

We enclose by way of service **Application** and **Concise Outline** in proceedings [*insert CADB proceedings #*] commenced by **ASIC** on xx date with the Companies Auditors Disciplinary Board (**CADB**).

For your information, **CADB** is an independent statutory body with powers conferred under the **Corporations Act** to hear and determine disciplinary matters with respect to registered auditors and impose sanctions if necessary. Further information on **CADB** and its functions and powers may be found at <https://www.cadb.gov.au/>

The attached **Application** seeks orders from **CADB** that [*insert details of orders being sought*] based on the matters outlined in the **Concise Outline**, also attached.

CADB has issued guidance to **Parties** on its process for dealing with **Applications** made to it by **ASIC** or **APRA (PN1)**. A copy of **PN1** is located on **CADB's** website [manuals and-guidelines](#). We note **CADB** has a statutory obligation to deal with disciplinary matters fairly and expeditiously. **PN1** sets out **CADB's** usual process. This **Application** is with respect to (*specify an/a Administrative or Conduct Matter*) as defined in Paragraph [*insert 4.5/4.6* of PN1 as case may be*]. We draw your attention to **Part 6** of **PN1** which outlines the steps **CADB** will now take with respect to this **Application** and to the timeframes set out in **Part 7** of **PN1** for you to lodge a Response if you wish to.

Finally, we draw your attention to **Part 8** of **PN1**. To the extent there are matters you, or lawyers retained by you, may wish to discuss with regard to the **Application** or if you have any questions, please contact [*insert name/telephone/email of applicant contact*].

We hope to work constructively with you to prepare this matter for hearing in accordance with the objectives and guidelines outlined in **PN1** and will contact you as soon as we receive your Response to arrange a date to confer in relation to the matters set out in **Part 8** of **PN1**.

Yours Faithfully

PN1 ANNEXURE D - Notice to Parties of Application and Initial pre-hearing directions

Companies Auditors Disciplinary Board

NOTICE OF APPLICATION AND INITIAL PRE-HEARING DIRECTIONS

Proceedings:

Applicant:

Respondent:

1. On [*insert date*] an **Application** was lodged with the Companies Auditors Disciplinary Board (**CADB**) by [*ASIC/APRA*] (**Applicant**) concerning [*name of Respondent*] of [*address*] (**Respondent**) pursuant to s 1292 of the **Corporations Act**. That **Application** seeks [*specify orders sought against Respondent*].
2. **Section 1294** of the **Corporations Act** 2001 requires **CADB** to give the **Respondent** an opportunity to appear at a hearing, to make submissions and to adduce evidence in relation to the **Application** before making any orders. The **Parties** are asked to read carefully the relevant sections of the **Corporations Act**, 2001 (particularly Part 9.2, Div.3) and of the Australian Securities and Investments Commission Act, 2001 (particularly Part 11) which set out the rights of both **Parties** regarding the hearing and details of the sanctions **CADB** may order. **Parties** are asked to read and follow **PN1** in relation to case preparation and for information on the conduct of hearings by **CADB**. In particular **Parties** are asked to note that **CADB** must deal with matters referred to it expeditiously, and given the usual timeframes, steps for responding to the **Application**, such as obtaining legal advice, must be implemented promptly. The **Parties** should expect the hearing date to be fixed within (*insert timeframe for either Administrative or Conduct Matter*) of the date the **Application** is filed.
3. **Parties** are also referred to **CADB**'s practice notes on **Mediation** ([PN2](#)) and **Costs** ([PN3](#)).

CADB now makes the following pre-hearing directions:

1. **The Respondent is directed to file and serve either;**
 - (a) **A Concise Response and Appearance to the Concise Outline served with the Application, on or before [*insert date*].** The **Respondent** is referred to **PN1** for procedure and guidelines for preparing **Concise Response**. Or;
 - (b) If the **Respondent** does not wish to respond to the **Application**, a **Notice of Appearance** on or before [*insert date*].
2. To assist with the efficient conduct of the hearing of this matter, the **Chair** has fixed a **pre-hearing conference to be held with the Parties and/or their authorised representatives by teleconference on [*date*] at [*time*].**

Further information to Parties on Pre-hearing conference preparation and procedure

- A. The **Respondent** is referred to Part 7 **PN1** for guidelines on preparing a Concise Response.
- B. **Parties** are referred to Part 8 **PN1** for guidelines on preparing for the **pre-hearing conference**. In particular, **CADB** notes that the **Parties** are expected to consult prior to the **pre-hearing conference** and to agree on a proposed draft timetable for discussion at the **pre-hearing conference** and consider other matters relevant to the preparation of the matter may require discussion with the **Chairperson** at the **pre-hearing conference**. **Parties** are asked to follow the guidelines in Part 8 **PN1**.
- C. The **Parties** must send to the Board, no later than 48 hours before the **pre-hearing conference**;
 - (a) The proposed timetable and draft directions or, to the extent agreement has not been reached, each party's proposal.
 - (b) A List of disputed issues identified via the Concise Outline/Concise Response process. This may be an agreed list or, to the extent agreement has not been reached, each party's list.
- D. The **Parties** are asked to advise the **Registrar** no later than [date] details of the participants in the **pre-hearing conference** and the telephone number on which each participant may be contacted. The **Registrar** must be notified of changes to these details promptly by email.
- E. If the **Respondent** does not wish to appear at the hearing (or otherwise take part in) the **Application**, the **Respondent** is asked to inform the **Registrar** by email as soon as possible. **CADB** will notify the **Respondent** of the hearing date when fixed and the **Respondent** may nonetheless lodge submissions with **CADB** to be considered at the hearing, as provided for in Section 216 **ASIC Act 2001**.

PN1 ANNEXURE E - Pro forma Appearance and Concise Response

Notice of Appearance

Companies Auditors Disciplinary Board

NOTICE OF APPEARANCE AND CONCISE RESPONSE

Applicant: [Insert details as for Application]

Respondent

Application date:

Profession: Auditor

Location:

Matter Number:

ASIC/APRA

Contact:

The **Respondent** [insert full name of **Respondent**] appears.

The **Respondent** has received a copy of the **Application** and Concise Outline dated [insert date].

The **Respondent's** contact details for the purposes of all communications during the course of this matter are as follows:

Name of legal representative: [If applicable]

Phone:

Email:

Address:

[Insert **Respondent's** telephone number, email address and address at which documents may be served **or if the Respondent wishes contact to take place through his or her legal representative** insert name of legal representative, and the representative's telephone number, email address and address at which documents may be served].

The RESPONDENT'S CONCISE RESPONSE is attached. [Delete if not relevant]
See Annexure G **PN1** for guidance on preparing Concise Response]

.....

.....

Signature of the **Respondent**

Date

PN1 ANNEXURE F - Guidance on preparing Concise Response

The primary purpose of a **Concise Response** is to allow the **Respondent** to identify which matters alleged in the **Concise Outline** are disputed and why they are disputed and to set forth any other facts or matters that he/she asserts is relevant to **Determination** of the **Application**.

By reference to each disputed allegation a **Concise Response** must therefore:

Identify each fact alleged in the **Concise Outline** that the **Respondent** disputes;

Specify why the fact is disputed;

Describe any additional facts the Respondent alleges are relevant to CADB's consideration of the allegation and specify:

Why the fact is relevant; and

What evidence the **Respondent** intends to rely on to prove each fact e.g.: a brief description/outline of the relevant documents and/or proposed witness evidence.

Identify in the **Concise Response** any other matter/s or basis/es the **Respondent** asserts is relevant to **Determination** of the **Application** and briefly describe why and how the matter is relevant to **CADB's Determination** of the **Application**, including if relevant a précis of any legal arguments the **Respondent** wishes to advance.

To the extent facts are not disputed it will be assumed those facts are not in issue between the **Parties**.

The **Respondent** should attach key documentary evidence upon which the **Respondent** will seek to rely at the hearing.

PN1 ANNEXURE G - Process for applying for automatic extension of 5 business days to file Concise Response in Conduct Matters

1. This process is only available in A **Conduct Matter**.
2. If a **Respondent** to an **Application** regarding a **Conduct Matter** wishes to take advantage of the opportunity to appear at the hearing of the **Application**, but there are circumstances that the **Respondent** anticipates will prevent service of a **Concise Response** within the usual timeframe, one **automatic extension** of **5** business days is available, on **Application** to **CADB**.
3. An **automatic extension** will be granted if, within **8** business days of the **Respondent** being served with the **Application and Concise Outline**, the **Respondent** contacts the **Registrar** by email, with a copy to the **Applicant**, and
 - (a) Provides/confirms current contact details including email address, mobile telephone number and postal address and current employment; and
 - (b) Specifies whether legal representation has been retained, or is to be retained and if relevant provides relevant contact details of the legal representative; and
 - (c) Confirms whether the **Respondent** wishes to appear at a hearing of the matter; and
 - (d) Outlines the relevant circumstances causing the need for a further **5** business days to file a **Concise Response**.

PN1 ANNEXURE H - Examples and guidance on matters CADB expects it will be necessary for the Parties to discuss prior to the Pre-hearing Conference.

Evidence and best method for adducing evidence:

- (a) The most appropriate method for leading evidence at the **CADB Hearing**. In this regard, **Parties** must bear in mind the overriding consideration that each party is entitled to know, with sufficient notice and clarity, the evidence on which the other intends to rely, having regard to the objectives of necessity, practicality, effectiveness and cost efficiency. Depending on the nature of the witness evidence, it may be most practical, effective and cost efficient to proceed on the basis of exchanging (sufficiently detailed) outlines of evidence before the **CADB Hearing** on the basis that oral evidence from those witnesses under oath or affirmation will be led at the hearing. In **CADB's** view this method is preferable in cases of contested oral evidence or contested state of mind evidence.
- (b) In terms of written evidence, the **Parties** are asked to consider carefully the relevance of evidence proposed and eliminate unnecessary or prolix statements. If the **Parties** provide unsworn outlines of evidence to show the case to be met, **CADB** expects they would not be tendered at the **CADB Hearing** or cross-examined upon.
- (c) Different approaches may be utilised for different evidence in the same proceedings, for example relatively uncontentious evidence is usually better adduced in writing.

The proper choice of what evidence to lead and the best way to do that is a key responsibility of the Parties and their legal representatives. Both Parties:

- (d) Must allow appropriate time to clearly formulate their respective views and consult and identify areas of dispute and consensus before the **pre-hearing conference**. The number of witnesses should be limited to the minimum necessary to prove or disprove the issues truly in dispute consistent with the objectives of a just and quick disposal of proceedings.
- (e) Are asked to bear in mind when preparing evidence that **CADB** considers evidence probative to the extent it relates to a witnesses' own observations of relevant fact (rather than statements involving hearsay, comment or argument) or, where appropriate, the witnesses' own beliefs or opinions. If either party foresees the need to
- (f) Must apply to **CADB** to issue a **Summons** to a person to attend to give evidence at the hearing if necessary. Ideally, whether any Summons are required should be identified to the **Chair** at the **pre-hearing conference**. The process for applying to **CADB** to issue a Summons is set out in paragraphs **10.6-10.10** of this practice note.
- (g) Must utilise pre-hearing time to collaborate on tools for the presentation of the evidence to facilitate a streamlined **CADB Hearing**. For example:
 - i. Cross-party **Statements of Agreed Facts** or an agreed chronology.
 - ii. An agreed index of documents relevant to each matter in contest.

- iii. Making appropriate admissions in relation to facts and matters that are not seriously in dispute before the hearing commences.
- iv. Agreeing on the time to be allocated for the hearing and how it may be divided (e.g.: a “chess-clock” approach).
- v. Agreeing in advance a cap on the quantum of costs recoverable by either party should **CADB** make orders.
- vi. Considering the use of and timing for any alternative dispute resolution such as **Mediation** within the usual time for case preparation with a view to achieving the objectives set out in [PN2](#).

With respect to any evidence of a **technical nature** identified within the matters in dispute between the **Parties, Parties** must:

- (h) Bear in mind that **CADB** is a specialist tribunal, which is acquainted with the expectations of the accounting and business communities, and is informed, by experience, with the practices of those communities. In making its **Determinations**, **CADB** has regard to, among other things, generally accepted professional standards, evidence of which it is relevant for either party to identify and lead in the proceedings. The need to call expert evidence is in **CADB’s** view therefore limited and is a matter that needs careful consideration particularly given its cost and potential to create delay.
- (i) If a party nevertheless considers it appropriate to seek to adduce expert opinion that party is expected to diligently and collaboratively advance appropriate arrangements for that evidence to be adduced at the hearing from an appropriately qualified, and impartial expert and consult with the other party in the course of its preparation to ensure that the issues identified for expert opinion are directly relevant to the matters identified as in dispute.

Should one party wish to adduce expert evidence, but the **Parties** cannot agree on parameters to include in the draft timetable, the party wishing to adduce that evidence must, not less than **5 business days** before the **pre-hearing conference**, notify **CADB** that a direction for expert evidence will be sought at the **pre-hearing conference** and provide the following details:

- a. The precise issue or issues in respect of which a direction to adduce expert evidence is being sought;
 - b. Why it is required;
 - c. From whom it will be obtained and their availability, credentials and impartiality;
- (j) **Parties** will be invited to make submissions on the utility of the evidence proposed at the **pre-hearing conference** on the basis of the information provided.

A direction for expert evidence will only be made in circumstances where the **Chair** is satisfied it will not add unduly to the cost and time needed to hear the matter and will provide evidence of a technical nature that is directly

relevant to the issues identified by the **Parties** as in dispute from an impartial and appropriately qualified expert.

Document requests

- (k) **Parties** may seek directions at the **pre-hearing conference** for the production of documents or categories of documents if necessary (i.e. in the unlikely the **Parties** have not been able to obtain them from each other by request) and there is a basis for needing them. **CADB** expects that directions for the production of documents between the **Parties** will usually be unnecessary. It is each party's responsibility to ensure that the other can accurately identify and has appropriate access to documents on which the allegations in the Concise Outline or matters relevant to the Concise Response, are based. The **Chair** may strike out allegations at the **pre-hearing conference** to the extent they are based on documentary evidence that has not been sufficiently identified.

- (l) All documents relevant to the **CADB Panel's** consideration of the matters in dispute must be identified by each party in a **bundle of documents** exchanged and/or agreed before the hearing. The bundle/s of documents must be indexed and cross-referenced to the Concise Outline/Concise Response.

PN1 ANNEXURE I - Pro forma Notice of Hearing

Notice of CADB Hearing – issued by CADB 14 days before date fixed for hearing

COMPANIES AUDITORS DISCIPLINARY BOARD (CADB)

NOTICE OF HEARING

Corporations Act 2001, s1294

Australian Securities and Investments Commission Act, 2001 s216

Applicant

Respondent

Location and venue

Matter Number ASIC/APRA Contract

Respondent Contact

CADB notifies the above-named **Parties** about the following matters with respect to the forthcoming hearing of the **Application** (*insert details*):

1. Section 210A(2) of the **ASIC Act**, 2001, the **Chairperson** of **CADB** has determined that the following Board **Members** are to constitute the **CADB Panel** to hear the above matter: [*insert names of Board Members to constitute Panel*].
2. The **CADB Panel** has determined that a hearing with respect to the above matter will take place at [**address**] **commencing at 10:00am on [date] and expected to conclude at [period]**.
3. Both **Parties** are entitled to appear at the hearing and to make submissions to and adduce evidence before the Board in relation to the matter in accordance with the provisions of the **Corporations Act** 2001 and the Australian Securities and Investments Commission Act, 2001. If a party does not wish to appear at the hearing, that party may **before the day of the hearing** lodge with the Board in writing any submission that [*he/she/it*] wishes the Board to take into account in relation to the matter.
4. If the **Respondent** does not appear at the hearing and does not lodge any submission, the Board may proceed to make a decision in [*his/her*] absence on the facts presented at the hearing without further notice to [*him/her*].
5. A **Panel** of **CADB Panel** has power (under section 223 **ASIC Act**) to make an order for costs against the unsuccessful party in the proceedings. The relevant procedures are set out in [PN2](#).
6. Attached is a **Case Summary for Hearing**. **Parties** are asked to complete and return the Certificate by email to the **Registrar** by close of business on [*date*]

[Registrar CADB]

[Insert date]

PN1 ANNEXURE J - Parties Case Summary for Hearing

Companies Auditors and Liquidators Disciplinary Board

[APPLICANT/RESPONDENT*] CASE SUMMARY FOR HEARING

Applicant:

Respondent:

Application date:

Profession:

Location:

Matter Number:

ASIC/APRA Contact:

Respondent Contact:

1. List of documents filed by the [**Applicant/Respondent***] on which the [**Applicant/Respondent***] intends to rely at the hearing including:
[List by reference to filing date if relevant: **Application**/Concise Outline or Concise Response, each witness statement or outline of evidence, any agreed Bundle of documents (including index), any agreed statement of issues and/or agreed statement of facts]
2. Names of witness(es) proposed to be called by the [**Applicant/Respondent***]:
3. Having regard to oral evidence and submissions, the [**Applicant/Respondent***] provides the following estimate of the length of [*its/his/her**] case:
4. Names of the person(s) who will represent the [**Applicant/Respondent***] at the hearing (see s 218(3) of the **ASIC Act**):
5. Names of any other person(s) whom the [**Applicant/Respondent***] seeks to have present at the hearing (see s 216(4) of the **ASIC Act**):
6. The [**Applicant/Respondent***] is ready for hearing now. As at the date hereof, all documents upon which the [**Applicant/Respondent***] intends to rely at the hearing have been filed and served and the number of copies notified by the **Registrar** have been filed.

.....
Signature of [**Applicant/Respondent** or *Representative**]

.....
Name (please print)

.....
Date
[* *Delete where inapplicable*]

PN1 ANNEXURE K - Usual Format for CADB Hearings

1. Usual hearing hours are between 10am - 1pm and 2pm - 4pm on each sitting day. However, **CADB Panel's** are usually flexible and will, in consultation with the **Parties**, decide the most efficient hearing hours in individual cases.
2. After an introduction by the **Panel Chair**, and any submission from the **Parties** as to the format for the hearing, the **Applicant** is usually invited to give a general opening statement, which focuses on the key areas of dispute and presents an outline of proposed case presentation including the expected timing for the evidence to be adduced.
3. The **Respondent** then has an opportunity to provide a similar introduction and overview with a particular focus on the key issues for the **CADB Panel's Determination**.
4. Subject to any issues for discussion that may arise from the matters identified in the **Parties'** opening statements, either as to specific issues for **Determination** or with regard to the approach to the hearing, the **Applicant** will proceed with its case. This usually commences with the formal tender of the **Application** and **Concise Outline** and the **Applicant's** documents, including any witness statements, (but not outlines of evidence if evidence is to be adduced orally at the hearing). Subject to dealing with any objections by the **Respondent** as to any of this material, they will be marked as exhibits in the proceedings for the record. The **Applicant** may then call witnesses who, following their evidence in chief, may be cross-examined by the **Respondent**. The **Applicant** may re-examine any witness following cross-examination;
5. The **Respondent** will then present his or her case, following a similar format.
6. The **CADB Panel** may ask its own questions of any witness called by either party.
7. Documentary evidence relied on should be formally tendered at the hearing so that it may be marked as an exhibit in the proceedings for the record. The other party may object, but the procedures set out herein are designed to ensure that each party is already familiar with documentary evidence to be tendered at the hearing. Documentary evidence tendered must include a copy for the other party and a total of six (or four) copies for **CADB**.
8. A transcription of the hearing is prepared by an independent transcription service retained by **CADB** for each hearing. It is **CADB's** usual practice to arrange for a copy of the transcript to be emailed to the **Parties** at the end of each day. **Parties'** may submit transcript corrections for the record at the start of each hearing day.
9. When each party has concluded presenting their evidence, the **Applicant** and the **Respondent** may make final oral submissions. The **CADB Panel** may allocate times for these submissions if necessary. The **CADB Panel** will allow the **Parties** to file written submissions. **CADB** expects written submissions to be prepared prior to the commencement of oral submissions. Adjournments for the purpose of preparing final submissions are unlikely to be given. The **Parties** are asked to provide any written submissions in both PDF and Word form

PN1 ANNEXURE L - Guidance to Parties on matters usually addressed at Final hearing of a Conduct Matter if CADB's findings in Determination are that any allegations against Respondent have been relevantly established.

Costs

- a) As to general principles and approach to making costs orders, **Parties** are referred to the [PN3](#). In summary, **CADB's** powers to order costs include a power to order the unsuccessful party to pay the other party's costs and power to order the unsuccessful party to pay all or part of **CADB's** costs of and incidental to the **CADB Hearing**.
- b) The **Determination** provided to the **Parties** after the **CADB Hearing** will include a **Preliminary Costs Determination** in order to enable the **Parties**, before a **Final Hearing**, to prepare their relevant evidence with respect that includes a Costs Summary and Response (see paragraphs 4.2 and 4.3 [PN3](#))
- c) A **CADB Panel** will usually seek to deal with costs by making a quantified costs order based on relevant quantum evidence and submissions provided by the **Parties** following notification to them of the Panel's preliminary view in the **Determination**.
- d) It is usual for **Parties** to make submissions on matters relevant to costs to be ordered both with respect to costs as between **Parties** and any special considerations as to the basis on which a costs order may be appropriate with respect to **CADB's** costs.

Publicity

- e) If a **CADB Panel** decides to exercise its powers under Section 1292 of the **Corporations Act** then, as well as publishing its orders in the Commonwealth of Australia Gazette, **CADB** may take such steps, as it considers reasonable and appropriate to publicise the **Final Decision**.
- f) This usually includes making the **Final Decision** available via the **CADB** website and issuing a press release summarising the **CADB Panel's** orders and findings.
- g) **Parties** may make submissions concerning what steps it would be reasonable and appropriate for **CADB** to take to publicise the decision and the reasons at the **Sanctions Hearing**.

Sanction

- h) **CADB's** power under sub-sections 1292(1) and 1292(9) of the **Corporations Act** to sanction a registered auditor is discretionary.
- i) The relevant principles to be considered in determining appropriate sanctions were appropriately set out in **CADB's** decisions in **ASIC v**

McVeigh³⁸ and **ASIC v Fernandez**.³⁹ Key aspects of those principles may be summarised as follows:

- i. The principal purpose of the proceedings is protective rather than punitive and the guiding principle is the protection of the public;
 - ii. The protection of the public includes ensuring that those who are unfit to practise do not continue to hold themselves out as fit to practise;
 - iii. The protection of the public includes deterrence;
 - iv. It also includes the maintenance of a system under which the public can be confident that practitioners will know that breaches of duty will be appropriately dealt with and that the **Scheme** regulatory is effective in maintaining high standards of professional conduct;
 - v. The impact of the Board's orders on the registered auditor is to be given limited consideration, as the prime concern of the Board is the protection of the public;
 - vi. Relevant matters include the **Respondent's** recognition and acceptance of breaches of duty, attitude to compliance generally and willingness to improve. Genuine acceptance of failure, contrition and remorse are necessary prerequisites to rehabilitation;
 - vii. If a **Respondent** is considered not to be fit and proper, suspension is not appropriate unless the Board can be confident that the respondent would be fit and proper after the period of suspension.
- j) **Parties** may make submissions on these matters directed to assisting the **CADB Panel** to consider issues relevant to the exercise of its discretion. Character evidence from the **Respondent** may assist **CADB**.

³⁸ [ASIC v McVeigh](#) at paragraphs 12,13 and 14

³⁹ [ASIC v Fernandez](#) at paragraphs 352-363, 369 and 382

PN1 ANNEXURE M - Prescribed Documentation for CADB Decisions

1. **Notice** of the **CADB Panel's** decision and reasons will be served on the **Respondent** in writing after the final **CADB Hearing** (sub-section 1296(1)(a) and section 1296(2)(a)). **Notices** will include general information on **Parties'** rights to review. Where a **CADB Panel** decides to exercise any of its powers, it must, within 14 days, cause to be published in the *Commonwealth of Australia Gazette* a notice of the decision (section 1296(1)(c)). If a **CADB Panel** refuses to exercise any of its powers, there is no gazettal.
2. In the case of a decision by a **CADB Panel** to exercise its powers under section 1292 of the **Corporations Act** a copy of the decision is lodged with **ASIC** under sub-section 1296(1)(b) of the **Corporations Act** and is available for public inspection.
3. A decision by **CADB** to refuse to exercise its powers under section 1292 of the **Corporations Act** is also lodged with **ASIC** pursuant to 1296(2)(b). Documents lodged with **ASIC** under sub-section 1296(2)(b) are not available for public inspection (sub-section 1274(2)(a)(iii)).
4. **CADB's** decisions on costs and publicity are provided to the **Parties**. There is no statutory requirement to lodge these decisions with **ASIC**.