

The Victorian Commercial Arbitration Scheme

USER GUIDE

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1 Introduction

- 1.1 The Victorian Commercial Arbitration Scheme ("**VCAS**") addresses the growing demand for quick and cost-effective ways to resolve civil and commercial disputes.
- 1.2 VCAS deals with the resolution of disputes by means of arbitration and not litigation in Court. Arbitration is a private process where parties agree to resolve a dispute by referring it to an Arbitrator who makes a binding decision on the dispute ("**Award**") which can be enforced in Court.
- 1.3 VCAS has the following important features.
 - (a) VCAS is designed for a speedy resolution of the dispute between the parties. A quick resolution of the dispute will save costs compared with litigation which may take much longer.
 - (b) The simplicity of procedure in the VCAS Rules (set out in this "**User Guide**") for arbitration makes it convenient for parties to submit their dispute to the VCAS.
 - (c) Parties to a dispute who agree to have their dispute determined pursuant to the VCAS Rules will usually agree to select one of the Arbitrators from the Panel of Arbitrators established and maintained by the Victorian Bar Council on behalf of the Victorian Bar Inc ("**Panel**"); or, if they cannot agree, the President of the Victorian Bar (or their delegate) will appoint an Arbitrator and notify the parties; or the parties may decide to appoint another person (not on the Panel) as Arbitrator. The advantage of appointing an Arbitrator from the Panel is that each member of the Panel is a qualified Arbitrator and member of the Victorian Bar practising as a commercial barrister. However, all Arbitrators must agree to any cap on their fees imposed by the VCAS Rules and to conduct arbitral hearings in accordance with those rules. The Panel Arbitrators can be found at the VCAS website here: www.vcas.net.au.
 - (d) Arbitrations involving a sum in dispute not exceeding \$50,000 are usually conducted on a "Documents-Only" basis. This is to ensure that the cost of the arbitration is kept low (as no fees will be incurred in connection with any hearing) and commensurate with the sum in dispute. However, if an Arbitrator decides not to conduct an arbitration on a documents-only basis, for a sum not exceeding \$50,000.00, the applicable cost and fee caps shall continue to apply.
 - (e) Under the VCAS Rules, Arbitrators' fees are fixed according to a scale set by VCAS for disputes involving sums less than \$1 million. The current VCAS Scale Fees can be found in section 8 of this User Guide.

- 1.4 The VCAS Rules are designed to be simple and flexible enough to accommodate the determination of a wide range of disputes¹ expeditiously. They may be adopted in an arbitration agreement entered into at any time before or after a dispute has arisen, being an agreement which provides that any dispute between the parties (including one that is presently on-foot before the courts or the Victorian Civil and Administrative Tribunal (“**VCAT**”)) shall be referred to arbitration in accordance with the VCAS Rules.
- 1.5 VCAS arbitration is suitable for the determination of most types of civil and commercial disputes. Besides the traditional areas of arbitration, including commercial and building disputes, VCAS can also be used to arbitrate disputes with respect to contracts, partnerships, supply agreements, commercial leases, franchises, mortgages and securities, farm debts, trusts, corporations matters, renovation works, media, sports law, entertainment and travel, amongst others.
- 1.6 There are limitations on the referral to arbitration of some specific civil or commercial matters. For example, VCAT has jurisdiction to hear and determine Domestic Building Disputes (as defined) under the *Domestic Building Contracts Act 1995* (Vic) (“**DBCA**”). Section 14 of the DBCA prohibits parties from referring any disputes which may arise (in the future) to arbitration. However, the parties may agree that a Domestic Building Dispute that is already on foot should be referred to arbitration². This means that parties to a Domestic Building Dispute that is underway in VCAT³ may decide, by agreement, to have that dispute resolved by arbitration instead. Retail tenancy disputes, on the other hand, may not be referred to arbitration⁴ and must instead be determined by VCAT, regardless of any agreement either before or after the dispute arises. In addition, there will be other types of disputes that are not readily capable of resolution by arbitration⁵. Nevertheless, the vast majority of civil or commercial disputes are capable of resolution by arbitration under the VCAS Rules.
- 1.7 The arbitration is to be conducted and completed within the time frame set out in the Rules. Under the Rules, parties can expect to have the arbitration heard and an Award

¹ Subject to the proviso that the power of the Court to enforce an arbitral award will only arise where there is a “domestic commercial arbitration” to which the *Commercial Arbitration Act 2011* (Vic) applies: *Tayar v Feldman* [2020] VSC 66.

² *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307 at [37], [38], [43], [49]-[51] and [56]-[57]; and see *ASADA v 34 Players and Support Person* [2014] VSC 635; see also *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* [2018] VSC 221. Parties seeking to refer a Domestic Building Dispute that is currently on-foot before VCAT (or which would otherwise fall within VCAT’s jurisdiction) may do so by agreement including by using the “VCAS Dispute Referral Notice” identified at paragraph 5 below.

³ Or which would otherwise be commenced in VCAT.

⁴ See sections 89 and 94 of the *Retail Leases Act 2003* (Vic) and *Subway Systems Australia v Ireland* [2013] VSC 550 (18 October 2013) per Croft J at [64].

⁵ Certain matters, like, for example: citizenship, marriage, some aspects of intellectual property rights (for example, whether a patent or trade mark ought be granted), competition, taxation, workplace disputes, bankruptcy and corporate insolvency, illegality and fraud, and possibly trade practices and consumer protection, are likely to be outside the realm of arbitration. See Hockley J, Croft C, Hickie, K and KQ Ho, W, *Australian Commercial Arbitration*, LexisNexis Butterworths, 2015, at p 200.

published within 120 days from the commencement of arbitration, subject to adjustments by the Arbitrator. As a speedier alternative, parties may elect under the Rules to conduct the dispute on a "Documents-Only" basis, in which case parties can expect an Award within 90 days from the commencement of arbitration, subject to adjustments by the Arbitrator.

- 1.8 The **Rules** are found separately in the VCAS Rules document.
- 1.9 The Rules provide for an Arbitrator to be appointed by agreement of the parties within 7 days from the commencement of the arbitration (i.e. from service of the Notice of Arbitration on the Respondent(s)). As to the selection of an Arbitrator, parties arbitrating their dispute under the VCAS can:
 - (a) choose an Arbitrator from the Panel;
 - (b) elect for the President of the Victorian Bar or their delegate to choose an Arbitrator from the Panel (if the parties cannot agree on who to choose); or
 - (c) agree to appoint their own Arbitrator and thereby maintain party autonomy (provided that the Arbitrator chosen by the parties agrees to conduct the arbitration pursuant to the Rules).
- 1.10 All Arbitrators from the Panel have satisfied the minimum requirements of Arbitrator accreditation set by the VCAS. All of the members of the Panel are members of the Victorian Bar and as such are subject to the rules, regulations and policies that apply to barristers, including requirements of ongoing professional development and following high ethical and professional standards of conduct. The list of Panel members is available at the VCAS website: www.vcas.net.au. All Panel members meet the minimum requirements for Panel Membership as specified in the VCAS Panel of Arbitrators Membership Criteria available at the VCAS website: www.vcas.net.au. All panel members agree to be bound by the Chartered Institute of Arbitrators' code of conduct.
- 1.11 For disputes concerning sums up to \$1 million, the Arbitrator will be remunerated by the parties in accordance with the VCAS Scale Fees (see section 8 below) which will be reviewed periodically.
- 1.12 The overriding objective of the VCAS is to resolve civil disputes fairly, simply, expeditiously and cost-effectively.

2 Referral of disputes to arbitration

- 2.1 Disputes can be referred to arbitration under the VCAS Rules by two methods. First, the parties to an agreement can agree that any dispute that arises in connection with the agreement be referred to arbitration under the VCAS Rules. This method of referral, and a

model clause for use in agreements so as to refer disputes under the agreement to arbitration via the VCAS Rules, is discussed in section 3 below.

- 2.2 Second, parties to an existing dispute, whether before the Courts (or VCAT) or not, can agree to have their dispute determined by arbitration under the VCAS Rules⁶. This method of referral can be achieved simply by the parties agreeing, in writing, to refer their dispute to arbitration. This method, and a model agreement for referral of existing disputes to arbitration, is discussed in section 5 below.

3 Suggested model clauses for the use of parties

- 3.1 Parties wishing to arbitrate under the VCAS Rules may insert into their contract an arbitration clause in the following terms:

Any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination, shall be determined by arbitration in Victoria in accordance with the Victorian Commercial Arbitration Scheme Rules applicable at the commencement of the arbitration.

- 3.2 Where parties wish specifically to elect for a "Documents-Only" arbitration, they may wish to insert the following provision into their contract:

Any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination, shall be determined by arbitration in Victoria in accordance with the Victorian Arbitration Scheme Rules applicable at the commencement of the arbitration. The arbitration shall be conducted as a "Documents-Only" arbitration under the Victorian Arbitration Scheme Rules.

4 The Victorian Arbitration Scheme Rules

- 4.1 The VCAS Rules are set out in the VCAS Rules document.
- 4.2 A PDF version of this document is available for download at the VCAS website here: www.vcas.net.au.

5 Referral of Existing Dispute

- 5.1 Set out below is a sample agreement, using the VCAS Dispute Referral Notice, for arbitration under the VCAS.

⁶ However, see paragraph 1.5 above. Paragraph 5 below provides a proforma form for transferring disputes from a court or from VCAT to arbitration under the VCAS Rules.

- 5.2 This Notice can be used to refer an existing dispute⁷, even if that dispute is currently before the Courts or VCAT⁸, to arbitration under the VCAS. For disputes referred from the County Court of Victoria, parties should use the form contained in Annexure A to this User Guide.

VCAS Dispute Referral Notice and Arbitration Agreement

We,

(1) _____

[name of first party]

and

(2) _____

[name of second party]

[add names of any additional parties]

who are parties to proceeding number _____ commenced in the *[insert name of Court or Tribunal]*, hereby agree that all disputes and differences arising out of or in connection with:

*[insert short description of the dispute including identifying any underlying contract] (**Dispute**) be determined by arbitration in Victoria in accordance with the VCAS Rules applicable at the commencement of the arbitration.*

The parties hereby agree that the Supreme Court of Victoria/County Court of Victoria [select one option only and delete the option not used] is to have jurisdiction under the Commercial Arbitration Act 2011 (Vic).

The parties: [complete as applicable – delete whichever of options (a), (b) or (c) below are **not** used]:*

- (a) *Have agreed to appoint [insert name] from the Panel as the Arbitrator to arbitrate the Dispute in accordance with the VCAS Rules and the Arbitrator has agreed to accept the appointment;**

⁷ Subject to issues of arbitrability – briefly discussed at paragraph 1.5 above.

⁸ Note that some disputes before the Courts or VCAT may not be capable of resolution by arbitration. See for example sections 89 and 94 of the *Retail Leases Act 2003* (Vic) and *Subway Systems Australia v Ireland* [2013] VSC 550 (18 October 2013) per Croft J at [64]. Other types of disputes may also be incapable of resolution by arbitration: see paragraph 1.6 above.

- (b) *Hereby request that the President of the Victorian Bar or their delegate choose an Arbitrator from the Panel to be appointed as Arbitrator to arbitrate this Dispute in accordance with the VCAS Rules;**
- (c) *Have agreed to appoint [insert name] being a person not on the Panel who has agreed to arbitrate this Dispute according to the VCAS Rules.**

Dated this _____ day of _____

<p>_____</p> <p>Name:</p> <p>_____</p> <p>Signature:</p> <p>For and on behalf of Claimant</p> <p>Witness:</p>	<p>_____</p> <p>Name:</p> <p>_____</p> <p>Signature:</p> <p>For and on behalf Respondent</p> <p>Witness:</p>
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[If there are more than two parties, insert or amend as applicable]

A copy of this agreement must be sent to:

- (a) *VCAS by email to VCAS@vicbar.com.au; and*
- (b) *the selected Arbitrator.*

5.3 A Word version of is this document is available for download at the VCAS website:
www.vcas.net.au.

6 Sample Notice of Arbitration

- 6.1 The following is a sample Notice of Arbitration, to be used to commence the arbitration, under the VCAS Rules.

**NOTICE OF ARBITRATION
UNDER THE VICTORIAN COMMERCIAL ARBITRATION SCHEME**

Complete this section if Claimant is represented by a solicitor:

We act for [Name of Claimant], and hereby give Notice of Arbitration on behalf of our client to [Name of Respondent] under VCAS.

Complete this section if Claimant is self-represented:

I, [Name of Claimant], hereby give Notice of Arbitration to [Name of Respondent] to commence arbitration under the VCAS.

Parties to the Dispute

Name of the Claimant:	_____
Mailing Address:	_____
Claimant's Solicitor (if any):	_____
Mailing Address:	_____
Email address for delivery of documents:	_____
Name of Respondent:	_____
Mailing Address:	_____
Respondent's Solicitor (if any):	_____
Email address for delivery of documents:	_____

Short Statement of Dispute The Dispute

[Describe the underlying contract or subject matter that gives rise to the dispute]

Reference to the agreement by which the dispute is to be arbitrated under the VCAS

[Insert arbitration clause here, whether it is based on a clause in the parties' contract, the completed VCAS Dispute Referral Notice or an agreement recorded in correspondence or in any other document]

Names and contact details of 3 Arbitrators nominated by the Claimant

- (1) [Name & contact details of 1st Arbitrator].
- (2) [Name & contact details of 2nd Arbitrator].
- (3) [Name & contact details of 3rd Arbitrator].

**Note: Please indicate if the names of the above Arbitrators are in order of preference.*

A copy of the Arbitration Agreement

[If there is an arbitration clause in the agreement or contract]

Please **enclose** a copy of your Arbitration Agreement.

[If the agreement or contract is without the arbitration clause]

Please **enclose** the completed VCAS Dispute Referral Notice or the agreement recorded in correspondence or in any other document which refers the dispute to arbitration.

A copy of the concise Statement of Case signed by on or behalf of Claimant

Please enclose a copy of concise Statement of Case.

Dated:

Name of Claimant/Claimant's Solicitor:

Designation:

For and on behalf of Claimant:

To:

- (1) Respondent and/or Respondent's Solicitor.
- (2) The Victorian Commercial Arbitration Scheme – c/ the Victorian Bar Inc, Owen Dixon Chambers East, Level 5, 205 William Street, Melbourne, VIC 3000.

A copy of this agreement must be sent to:

- (a) VCAS by email to VCAS@vicbar.com.au; and
- (b) the selected Arbitrator.

- 6.2 A Word version of this document is available for download at the VCAS website here: www.vcas.net.au.

7 Guidelines on Referral of Disputes to the VCAS after Commencement of Legal Proceedings in Court

- 7.1 These guidelines are designed to help parties who agree to refer a claim or dispute in an existing Court or VCAT action to arbitration under the VCAS Rules (subject to the issues raised at paragraph 1.6 above). They are suggestions that parties may follow for a smooth and cost-efficient transition from Court proceedings (or VCAT proceedings) to VCAS arbitration.
- 7.2 The VCAS Rules will apply to any proceeding referred from a Court or VCAT to arbitration or any proceeding where the parties have agreed to arbitrate after a Court or VCAT proceeding has been commenced. However, the procedures in the VCAS Rules may be modified by agreement of the parties, or by order of the Arbitrator, to suit the circumstances, bearing in mind the overriding aims of fairness, speed and cost-effectiveness. Rule 29 also empowers the Arbitrator to conduct the arbitration as is considered appropriate and consistent with the *Commercial Arbitration Act 2011* (Vic).
- 7.3 Upon reaching the agreement to arbitrate, the parties should decide whether the Court or VCAT action is to be discontinued or stayed. In some cases, parties may wish to preserve the action for the purpose of avoiding time bars, but it is open to parties to agree that arbitration is deemed to have commenced on the issue of the writ in the Court action for the purpose of any time bar point. The parties should also consider any practice applicable as to stay or discontinuation of proceedings in the jurisdiction where the Court or VCAT proceeding has been commenced.
- 7.4 Unless the Arbitrator directs otherwise, steps having already been undertaken in the proceeding prior to the referral to VCAS will be taken to be steps also taken in the arbitration.
- 7.5 As to the appointment of an Arbitrator, Rules 21 and 22 of the VCAS Rules shall apply.
- 7.6 As noted, where the sum in dispute is less than \$50,000 (including any counterclaims), the arbitration will usually be conducted on a "documents only" basis. The parties may also elect to conduct the arbitration on this basis to avoid the costs of hearings.
- 7.7 For arbitration that are not conducted on this basis, the Arbitrator should convene a status hearing (in person or by video link) as soon as possible after his or her appointment. At this status hearing, the Arbitrator and the parties should consider the manner in which the disputes are to be raised, heard and determined in the arbitration, including the matters described in Rule 50 of the VCAS Rules, without prejudice to the Arbitrator's discretion to

order a further status hearing if he or she deems it appropriate. The following may also be considered at the status hearing:

- (a) where the sum in dispute is not more than \$50,000, whether Rules 45 and 46 of the VCAS Rules shall apply;
- (b) the Arbitrator may take into account the extent of the proceedings in the Court and whether the pleadings and other documents filed can and should represent the positions of the parties in the Arbitration;
- (c) the Arbitrator may consider whether it is more appropriate or efficacious to the arbitration for the parties to submit fresh Statements of Case, Statements of Defence (and Counterclaim) and Statements of Reply (and Defence to Counterclaim) according to the requirements of Rules 31 to 44 of the VCAS Rules;
- (d) the Arbitrator should give directions for the further conduct of the Arbitration, so as to resolve the dispute in a fair, speedy and cost-effective manner with the objective of obtaining an arbitral Award within 120 days from the commencement of the arbitration.

8 The VCAS Scale Fees for Arbitrators

- 8.1 The Arbitrator's fees for sums in dispute (claim plus counterclaim) of not more than \$50,000 shall be no more than 10% of the total sum in dispute, subject to a minimum of \$3,000 (ex. GST). Therefore, the maximum payable for such a dispute is \$5,000.00 and the minimum is \$3,000.00. Where the arbitration is terminated before the Final Award is published, the Arbitrator may charge a reduced fee, taking into account the circumstances of the case, including the stage at which the arbitration is terminated.
- 8.2 The Arbitrator's fees (ex. GST) for the sums in dispute (claim plus counterclaim) of more than \$50,000 are set out in Part 1 of Annexure B to this User Guide.
- 8.3 The Arbitrator's fees (ex. GST) for disputes up to \$150,000 (claim plus counterclaim) that have been referred to VCAS from the County Court of Victoria are set out in Part 2 of Annexure B to this User Guide.
- 8.4 In each case the Arbitrator's total fees are subject to a maximum of 10% of the amount in dispute (claim plus counterclaim).
- 8.5 Claims and counterclaims are added for the determination of the amount in dispute. The same rule applies to any set-off defence or cross-claim, unless the Arbitrator, after consulting with the parties, concludes that such set-off defence or cross-claim will not require significant additional work.

- 8.6 An interest claim shall not be taken into account for the calculation of the amount in dispute, unless the Arbitrator, after consulting with the parties, concludes that doing so would be appropriate.
- 8.7 If the amount in dispute is not quantified, the Arbitrator's fees shall be fixed by agreement between the Arbitrator and the parties.
- 8.8 Where the Arbitrator and the parties agree there are exceptional circumstances the Arbitrator's fees may depart from the amounts set out in Annexure B to the User Guide.
- 8.9 Emergency Arbitrator's Fees and Deposits: The Emergency Arbitrator's fees shall be fixed in accordance with the tables set out in Part 1 and Part 2 of Annexure B (as applicable), unless VCAS determines otherwise.
- 8.10 Any fees paid to an Emergency Arbitrator do not count towards the 10 percent cap on Arbitrator's fees stipulated in paragraph 8.4 above.
- 8.11 The deposits towards the Emergency Arbitrator's fees and expenses shall be fixed in accordance with the tables set out in Part 1 and Part 2 of Annexure B (as applicable), unless VCAS determines otherwise.
- 8.12 For the avoidance of doubt, the Arbitrator's fees listed in this section and in Annexure B do not include GST.

9 Code of Conduct for Arbitrators

- 9.1 Arbitrators who conduct arbitrations under the VCAS Rules shall at all times comply with The Chartered Institute of Arbitrator's Code of Conduct.
- 9.2 The Chartered Institute of Arbitrator's Code of Conduct shall not form part of the VCAS Rules.

Dated 1 January 2022

Annexure A (County Court of Victoria Dispute Referral Notice)

Set out below is a Dispute Referral Notice, by which parties agree to refer a dispute which has been commenced in the County Court of Victoria for arbitration under the VCAS Rules. A Word version of this document is available for download at the VCAS website: www.vcas.net.au.

County Court of Victoria VCAS Dispute Referral Notice and Arbitration Agreement

We,

(1) _____
[name of first party]

and

(2) _____
[name of second party]

[add names of any additional parties]

who are parties to proceeding number _____ commenced in the County Court of Victoria hereby agree that all disputes and differences arising out of or in connection with:

[insert short description of the dispute including identifying any underlying contract] ("**Dispute**") shall be determined by arbitration in Victoria in accordance with the VCAS Rules applicable at the commencement of the arbitration, including the relevant scale of arbitrator's fees as recorded in the User Guide.

The parties hereby agree that the County Court of Victoria is to have jurisdiction under the Commercial Arbitration Act 2011 (Vic).

The parties: [complete as applicable – delete whichever of options (a), (b) or (c) below* are **not** used]

(a) Have agreed to appoint [insert name] from the Panel as the Arbitrator to arbitrate the Dispute in accordance with the VCAS Rules, and the Arbitrator has agreed to accept the appointment;*

(b) Hereby request that the President of the Victorian Bar or their delegate choose an Arbitrator from the Panel to be appointed as Arbitrator to arbitrate this Dispute in accordance with the VCAS Rules;*

(c) Have agreed to appoint [insert name] being a person not on the Panel who has agreed to arbitrate this Dispute according to the VCAS Rules.*

Dated this _____ day of _____

<p>_____</p> <p>Name:</p> <p>_____</p> <p>Signature:</p> <p>For and on behalf of Claimant</p> <p>Witness:</p>	<p>_____</p> <p>Name:</p> <p>_____</p> <p>Signature:</p> <p>For and on behalf Respondent</p> <p>Witness:</p>
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[If there are more than two parties, insert or amend as applicable]

A copy of this agreement must be sent to:

- (a) VCAS by email to VCAS@vicbar.com.au; and
- (b) the selected Arbitrator.

Annexure B (Arbitrator's Fees)

Part 1 – Disputes above \$50,000

Fees Applicable for Disputes above \$50,000 (ex. GST)				
Sums in dispute (claim + counterclaim)	> \$50,000, < \$250,000	> \$250,000, < \$500,000	> \$500,000, < \$1,000,000	> \$1,000,000
Rate payable to Arbitrator for work in arbitration	\$4,000 per day or \$400 per hour (max. 10 hours per day)	\$5,000 per day or \$500 per hour (max. 10 hours per day)	\$6,000 per day or \$600 per hour (max. 10 hours per day)	To be agreed between the Arbitrator and the parties

Fees payable to an Emergency Arbitrator				
Sums in dispute (claim + counterclaim)	> \$50,000, < \$250,000	> \$250,000, < \$500,000	> \$500,000, < \$1,000,000	> \$1,000,000
Rate payable to Emergency Arbitrator for work in arbitration	\$4,000	\$5,000	\$7,500	\$10,000

Part 2 - Disputes up to \$150,000 referred to VCAS from the County Court of Victoria

Fees Applicable for Disputes up to \$150,000 referred to VCAS from the County Court of Victoria (ex. GST)		
Sums in dispute (claim + counterclaim)	< \$100,000	> \$100,000, < \$150,000
Rate payable to Arbitrator for work in arbitration	\$2,000 per day or \$200 per hour (max. 10 hours per day) Subject to a minimum of \$3,000 and capped at 10% of the total amount in dispute.	\$2,400 per day or \$240 per hour (max. 10 hours per day) Capped at 10% of the total amount in dispute.

Fees payable to an Emergency Arbitrator for Disputes up to \$150,000 referred to VCAS from the County Court of Victoria (ex. GST)		
Sums in dispute (claim + counterclaim)	< \$100,000	> \$100,000, < \$150,000
Rate payable to Emergency Arbitrator for work in arbitration	\$2,000	\$2,400

Annexure C (The process for referring a case to VCAS from a Court or Tribunal)



