

PRACTICE NOTE SC CL 3

Supreme Court Common Law Division - Administrative Law List

Commencement

1. This Practice Note commences on 16 July 2007.

Application

2. This Practice Note applies to proceedings in, or to be entered in, the Administrative Law List.

Definitions

3. In this Practice Note:

List means the Administrative Law List

SCA means the *Supreme Court Act 1970*

SCR means *Supreme Court Rules 1970*

UCPR means the *Uniform Civil Procedure Rules 2005*

Introduction

4. The purpose of this Practice Note is to explain the operation of the List which is provided for by UCPR r 45.3.

5. The Court exercises both common law and statutory jurisdiction with respect to public bodies and officials. The common law jurisdiction provides for judicial review of the actions and decisions of public bodies, officials and various tribunals. The statutory jurisdiction provides for appeals and applications to the Court from the decisions of various tribunals and quasi-judicial bodies.

Judicial review

6. The common law grounds for judicial review have been refined in recent years. They include:

- "ultra vires" - lack of jurisdiction;
- lack of procedural fairness;
- acting under dictation;
- real or apprehended bias;
- inflexible application of a policy;
- taking into account irrelevant considerations;
- failing to take into account relevant considerations;
- extraneous (improper) purpose;
- error of law on the face of the record;
- no evidence;
- bad faith; and
- "Wednesbury" unreasonableness.

Statutory appeals and applications

7. UCPR Schedule 8 provides that proceedings under sections 65-67 of the *Consumer, Trader and Tenancy Tribunal Act 2001* are assigned to the List.

8. Additionally, UCPR Schedule 8 assigns matters arising under a number of Acts to the List. These include:

- *Administrative Decisions Tribunal Act 1997*, ss 118 and 119;
- *Dividing Fences Act 1991*, s 19(2) or (3);
- *Freedom of Information Act 1989*, s 58A(1);
- *Independent Commission Against Corruption Act 1988*;
- *Motor Dealers Act 1974*, ss 38(2), 38(3B)(a), Part 5A;
- *Ombudsman Act 1974*, ss 21A, 35A, 35B;
- *Police Integrity Commission Act 1996*;
- *Racial Discrimination Act 1975 (Cth)*;
- *Royal Commissions Act 1923*, s 18B; and
- *Supreme Court Act 1970*, s 70 (ouster of office).

9. As a general rule, all proceedings for review or in the nature of appeals from administrative bodies or administrative decision makers are assigned to the List, but not appeals from the Local Court, whether in committal proceedings, summary jurisdiction or civil claims, or from any other court presided over by a Magistrate, such as the Coroner's Court, Licensing Court or Mining Wardens' Court. Such matters are not assigned to the List.

10. Notwithstanding UCPR Schedule 8, proceedings in the nature of appeals from bodies presided over by a Judge (e.g. of the District Court) are not assigned to the List, but to the Court of Appeal (SCA, s 48).

11. Matters which were formerly assigned to the List under the *Taxation Administration Act 1996* (e.g. stamp duty, payroll tax and land tax appeals) are assigned to the Equity Division (see UCPR r 1.19(f)). However, claims for debts under that Act are dealt with in the Common Law Division pursuant to UCPR r 1.18(a), but are not assigned to the List.

12. Judicial Proceedings with respect to environmental and planning laws are within the exclusive jurisdiction of the Land and Environment Court.

13. Grounds of appeal and applications from administrative tribunals depend on the terms of the statute setting up the particular tribunal, but invariably include excess of jurisdiction and denial of natural justice, whilst in some cases (e.g. Administrative Decisions Tribunal Appeal Panel and the Consumer, Trader and Tenancy Tribunal) error of law is also available.

Commencing proceedings in the List

14. Proceedings appropriate for the List should be commenced in accordance with UCPR 6.2. Upon commencement, the proceedings are automatically entered in the List pursuant to UCPR r 45.3. If not so commenced, they may be transferred to that list pursuant to UCPR r 45.2 or SCA s54. Proceedings are generally commenced by summons although on occasions where there is an extensive challenge to the decision of a public official or public body they may be commenced by statement of claim. In either case the words, "Administrative Law List" should be added immediately under the words, "Common Law Division" on the front page of the originating process. These words should also be included in the Appearance and all other documents filed in the proceedings. In either case they will be given a date for a directions hearing before the registrar on a weekday at 9.00 am.

15. As to proceedings for prerogative relief, it should be noted that the prerogative writs have been replaced by judgments and orders to a similar effect (SCA s69). Such applications often seek other administrative relief such as declarations or injunctions.

16. Proceedings by way of statutory appeal from an administrative tribunal pursuant to the provisions of the Act constituting the relevant tribunal are governed by UCPR Part 50. Such appeals must be instituted within 28 days (UCPR r 50.3), and there must be served with the summons, a statement of the grounds relied on (UCPR r 50.4). Provision is also made for cross-appeals (UCPR r 50.10) and notices of contention (UCPR r 50.11). Where the appeal is only on a question of law and there is no allegation of denial of natural justice or procedural fairness or excess of jurisdiction, the only evidence necessary is an affidavit annexing or exhibiting a copy of the relevant judgment, and where appropriate, a transcript of the evidence before the tribunal and a copy of the exhibits (see UCPR 50.14).

17. In relation to both applications for prerogative or other administrative law relief and statutory appeals, the relevant tribunal, public body or official must be made a party to the proceedings and served with a copy of the summons, except in the case of the Administrative Decisions Tribunal Appeal Panel. Where such tribunal or public body or official files a submitting appearance save as to costs not less than 2 clear days before the first directions hearing, such tribunal, public body or official need not be represented at such directions hearing but will be automatically excused from further attendance. If another party wishes to seek an order for costs against a submitting defendant, it must prior to such directions hearing, or within such further time as the Court may allow, give notice in writing to such submitting defendant setting out the grounds upon which such costs order will be sought (UCPR r6.11).

Urgent applications

18. Urgent applications, e.g. for ex-parte injunctions and/or leave to serve short notice of proceedings, which on commencement will be appropriate for entry in the List should be made to the Administrative Law List Judge or, if he or she is not available, the Judge designated to assist the List Judge, or if both are unavailable, to the Common Law Duty Judge for that week. Depending on the urgency of the matter, the Judge who deals with the urgent application will normally make the proceedings returnable in the ordinary directions list before the Registrar and will require a summons and affidavit to be filed and served.

19. Urgent interlocutory relief, including stays of orders for possession of the Consumer, Trader and Tenancy Tribunal normally require the plaintiff to give the usual undertaking as to damages under UCPR r 25.8.

20. In cases involving stays of execution in appeals from the Consumer, Trader and Tenancy Tribunal where the plaintiff is unrepresented, an order is commonly made for service of the summons, affidavit and notice of the stay on the estate agent who appeared for the landlord in the Tribunal. This generally has the effect of ensuring that the respondent is aware of the proceedings and someone appears on his or her behalf at the directions hearing.

Directions hearings

21. When the proceedings come before the Court for directions, all parties should be represented by someone familiar with the case so that the Court can give directions to enable the case to be prepared for hearing. Such directions will typically include dates for the filing of affidavits, discovery, particulars and/or production of documents (if necessary) and the determination of any interlocutory issues. In the ordinary case the only directions necessary are dates for the filing of affidavits. Any timetable fixed should be adhered to so as to avoid unnecessary appearances in the Directions List and the costs occasioned with such appearances. If a party is in default in adhering to the timetable set and such default necessitates additional appearances in the Directions List, consideration may be given to ordering the party in default to pay the costs of the additional appearances.

22. Only in exceptional cases will directions be given for the filing of Points of Claim and Points of Defence, but in appropriate cases, orders for particulars may be made e.g. where a plaintiff seeks orders in the nature of prohibition or certiorari but does not specify the grounds on which such relief is sought.

23. Where proceedings have been taken to challenge the decision of a public body or public official, because of the difficulties which at times arise in ascertaining the decision making process and the reasons for the decision, the Court may, at a directions hearing direct the body or person whose decision has been challenged to furnish to the plaintiff within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the body's

or person's understanding of the applicable law and the reasoning processes leading to the decision (compare *Administrative Decisions Tribunal Act 1997 (NSW)*, s49). Otherwise in appropriate cases, orders may be made for such matters to be ascertained by way of particulars, discovery or interrogatories. Subject to this, orders for discovery or interrogatories will only be made in exceptional cases, and such orders will then generally be confined to particular issues. Evidence in matters in the List is normally by affidavit.

24. Interlocutory motions such as for summary judgment, to strike out the claim or any part thereof or for an expedited hearing should be made by notice of motion returnable in the Directions List. Unless such orders are consented to, they will generally not be heard on the return date, but a date will be fixed for hearing, possibly before the Duty Judge, if that Judge is available. If they are going to be lengthy, or the Duty Judge will not be available within a reasonable time, they may be referred to the Common Law List Judge to obtain a special fixture.

25. When the proceedings are ready for a final hearing they are allocated dates by the Common Law Case Management Registrar, although when the hearing has been expedited such matters will be referred to the Common Law List Judge to fix a hearing date. Except in cases of extreme urgency, this will not be done until all affidavits have been prepared and the matter is otherwise ready for hearing.

26. There is express power in the to refer an appeal from, or an application for prerogative or declaratory relief relating to a tribunal to an Associate Judge. The List Judge will consider each matter on a case by case basis. An appeal from a Local Court, or an appeal from, or an application for prerogative relief or declaratory relief relating to, the Consumer, Trader and Tenancy Tribunal will be heard by an Associate Judge (SCR Schedule D, Part 3, paragraph 5). In such cases the Registrar examines the issues in the case at the first directions hearing, gives directions for the preparation of the case and then lists the matter for further directions in the Associate Judge's List before the registrar at 9.00 am on a suitable day. When the matter is ready for a hearing, the registrar allocates a hearing date before the Associate Judge. In such cases there is no right of appeal from an Associate Judge to a Judge in the Division, but only to the Court of Appeal, and usually only by leave of the Court of Appeal (SCR Pt 60 r 17 and UCPR r 49.4).

27. Proceedings in the List will not be stood over generally, even by consent. If parties require time to consider their position or negotiate a possible settlement, proceedings may, with the Court's approval, be adjourned for a comparatively lengthy period, but always to a fixed date with (if appropriate) liberty to restore the matter to the Directions List within that time.

J J Spigelman AC

Chief Justice of New South Wales

16 July 2007

Related Information

Practice Note SC CL 3 was issued and commenced on 9 July 2007.

See also:

Practice Note SC Gen 1 Supreme Court – Application of Practice Notes

Practice Note SC Gen 4 Supreme Court – Affidavits

Supreme Court Rules 1970

Supreme Court Act 1970

Uniform Civil Procedure Rules 2005

Amendment History

This Practice Note replaces SC CL 3 issued on 9 July 2007.

Practice Note SC CL 3 issued on 9 July 2007 replaced SC CL 3 issued on 17 August 2005.

Practice Note SC CL 3 issued on 17 August 2005 replaced Former Practice Note No. 119.