

PRACTICE NOTE SC Eq 3

Supreme Court Equity Division - Commercial List and Technology and Construction List

Commencement

1. This Practice Note commences on 1 September 2006.

Application

2. This Practice Note applies to new and existing proceedings in, or to be entered in, the Commercial List or the Technology and Construction List in the Equity Division.

Definitions

3. In this Practice Note:

Court Book means the documents that a party intends to rely upon at the trial or hearing of an application.

CPA means the *Civil Procedure Act 2005*.

UCPR means the *Uniform Civil Procedure Rules 2005*.

SCR means the *Supreme Court Rules 1970*.

Lists means the Commercial List or the Technology and Construction List.

List Judge means a judge of the Equity Division assigned to administer the Lists.

Introduction

4. The purpose of this Practice Note is to set out the case management procedures employed in the Lists for the just, quick and cheap disposal of proceedings.
5. Practice Note SC Eq 1 shall not apply to proceedings in the Lists.
6. Parts 14 and 14A of the SCR remain in force (with certain amendments), but it is expected that this Practice Note will be observed by way of additional provision for the conduct of proceedings entered in either of the Lists.
7. A party who considers that compliance with this Practice Note will not be possible, or will not be conducive to the just, quick and cheap disposal of the proceedings, may apply to be relieved from compliance on the basis that an alternative proposed regime will be more conducive to such disposal.

Pleadings and Entry in the Lists

8. A matter in the Lists shall be commenced in the general form of Summons prescribed under the UCPR. There is to be filed with the Summons a List Statement, for the Commercial List a "Commercial List Statement" and for the Technology and Construction List a "Technology and Construction List Statement", setting out, in summary form, in the form of Annexure 1:

- the nature of the dispute;
- the issues which the plaintiff believes are likely to arise,
- the plaintiff's contentions;
- the questions (if any) the plaintiff considers are appropriate to be referred to a referee for inquiry and report; and
- a statement as to whether the parties have attempted to mediate **and** whether the plaintiff is willing to proceed to mediation at an appropriate time.

9. The plaintiff's contentions should:

- avoid formality;
- state the allegations the plaintiff makes with adequate particulars; and

- identify the legal grounds for the relief claimed.

10. A defendant shall file and serve a List Response, in the Commercial List a “Commercial List Response” or in the Technology and Construction List a “Technology and Construction List Response”, setting out, in summary form in the form of Annexure 1:

- the nature of the dispute;
- the issues which the defendant believes are likely to arise
- the defendant's response to the plaintiff's contentions including the legal grounds for opposition to the relief claimed in the Summons ;
- the questions (if any) the defendant considers are appropriate to be referred to a referee for inquiry and report; and
- a statement as to whether the parties have attempted to mediate **and** whether the defendant is willing to proceed to mediation at an appropriate time.

11. The defendant's contentions should:

- avoid formality;
- admit or deny the allegations the plaintiff makes;
- in so far as they do not already appear state the allegations the defendant makes including adequate particulars of those allegations; and
- identify the legal grounds for opposition to the relief claimed in the Summons.

12. Any Cross-Claim shall be made in the general form of Cross-Summons prescribed under the UCPR. There is to be filed and served with any Cross-Summons a List Cross-Claim Statement, in the Commercial List a “Commercial List Cross-Claim Statement” or, in the Technology and Construction List a “Technology and Construction List Cross-Claim Statement” setting out the matters listed in paragraphs 8 and 9 above in the form of Annexure 1.

13. A Cross-Defendant shall file and serve a List Cross-Claim Response, in the Commercial List a “Commercial List Cross-Claim Response” or, in the Technology and Construction List, a “Technology and Construction List Cross-Claim Response” setting out the matters listed in paragraphs 10 and 11 above in the form of Annexure 1.

14. At the time of service of any Cross-Summons the Cross-Claimant is to serve on the Cross-Defendant copies of the Summons and any other Cross-Summons together with any relevant List Statement and List Response and any List Cross-Claim Statement and List Cross-Claim Response that have been served on or by the Cross-Claimant.

15. Any party moving for an order for entry of any proceedings in either of the Lists shall move by Notice of Motion at the earliest possible time and shall file and serve with the Notice of Motion a relevant List Statement or List Response.

16. Any motion for an order for entry of proceedings in either of the Lists shall be made returnable before the List Judge on a Friday.

17. For ease of reference all List Statements and Responses (including in relation to Cross-Claims) must include a Front Sheet identifying the names of the parties and their designation as plaintiff or defendant or Cross-Claimant or Cross-Defendant. This paragraph does not apply to a Summons or Cross-Summons.

Removal from the Lists

18. Upon an order being made removing proceedings from either of the Lists and subject to paragraph 19, this Practice Note shall not apply to the proceedings from the making of that order.

19. The Court may direct that this Practice Note shall continue to apply to the proceedings to the extent stated in the direction.

20. The making of an order removing proceedings from either of the Lists shall not affect any orders made or directions given prior to such removal.

Motions and Directions

21. All proceedings in the Lists are case managed by the List Judge with the aim of ensuring a speedy resolution of the real issues between the parties. The Lists are administered in Court on Friday of each week. Motions are listed at 9.15 am and are called through for the purpose of ascertaining the length of the hearing and allocating a time for hearing on that or some other day. Directions in the Commercial List commence at 9.45am and directions in the Technology and Construction List commence at 12 noon. The times for the commencement of the Motions and Directions hearings may change and Practitioners should always check the daily court lists as published prior to attendance at Court on a Friday.

22. The Court's expectation of Practitioners appearing in the Lists includes that:

- careful review of the case will be made as early as practicable for the purpose of informing the Court of its suitability for mediation, for reference out of all or some of the issues, and/or for the use of a single expert, or a Court Appointed Expert or the use of an appropriate concurrent evidence process;
- at the time the matter is set down for hearing trial counsel will provide to the Court: (1) a considered opinion of the realistic estimate of the time required for trial; and (2) the allocation of time for their client's evidence and submissions in the stopwatch system for trial.
- agreement will be reached on a timetable for the preparation of matters for trial and/or reference and/or mediation and Consent Orders will be handed up during the directions hearing;
- if there is slippage in an agreed timetable, further agreement will be reached without the need for the intervention of the Court; and
- requests for Court intervention in relation to timetabling will only be sought rarely when, for good reason, agreement has proved to be impossible;

23. To facilitate the just, quick and cheap resolution of matters Consent Orders will be made by the List Judge in Chambers on days other than Friday by application in writing to the List Judge's Associate. When Consent Orders are to be made either in Chambers or in Court varying a timetable, it is imperative that those Orders include the vacation of any date for directions hearings or the hearing of Motions that the parties no longer wish to maintain. If the proceedings settle, it is necessary to have the List Judge make Orders finalising the litigation, rather than filing Terms or Orders with the Registry. Those Orders may also be made by consent in Chambers.

24. The Lists close at 12 noon on Thursday. Any application to add a matter to the List or remove a matter from the List must be made prior to 12 noon on Thursday. Such applications are to be made in writing to the List Judge's Associate.

25. At the first and/or subsequent directions hearings orders will be made and directions given with a view to the just, quick and cheap disposal of the proceedings. The orders or directions may relate to:

- the filing of a Summons, List Statements, List Responses or other documents;
- the filing of a Cross-Summons, List Cross-Claim Statements or Responses;
- the filing of a statement of agreed issues and the result in the proceedings according to the determination of those issues;
- the provision of any essential further particulars that are not contained in the List Statements or Responses;
- the making of admissions, pursuant to a notice to admit facts or otherwise;
- the appointment of a single expert or a Court Appointed Expert;
- the holding of conferences of experts including with a view to providing joint reports and/or agendas for use in the concurrent evidence method at trial;
- the filing of lists of documents either generally or with respect to specific matters;
- the preparation of a Scott Schedule;
- the provision of copies of documents;
- the administration and answering of interrogatories either generally or with respect to specific matters;
- the service and/or filing of affidavits or statements of evidence by a specified date or dates;
- the reference to a referee for inquiry and report of the whole of the proceedings or any question arising therein;
- the obtaining of the assistance of any person specially qualified to advise on any matter arising in the proceedings.

26. Orders or directions relating to the provision of particulars, the filing of lists of documents and the administration of interrogatories will be made only upon proof of necessity.

27. With the exception of evidence in support of interlocutory applications, the former practice of filing evidence as case preparation occurs is to cease. Timetables for case preparation should include provision for the serving of evidence on the other parties but not filing it with the Court. Evidence to be relied upon at trial will only be filed with the Court at the time provided for in the Usual Order for Hearing.

28. Evidence to be relied upon in support of interlocutory applications is to be served on the other parties and filed with the Court. Timetables for preparation of such applications should include provision for that process.

Orders for reference

29. Consideration should be given throughout the course of proceedings as to whether any questions are appropriate for referral to a referee for inquiry and report.

30. Where questions are appropriate to be referred to a referee for inquiry and report, the parties should:

- formulate the questions with precision; and
- inform the Court of:
 - the identity of an agreed referee or, if no agreement can be reached, the referee each suggests;
 - the date on which the referee can commence the reference;
 - the expected duration of the reference; and
 - the anticipated date for delivery of the report.

31. An order made for reference to a referee for inquiry and report will normally be in the form of the Usual Order for Reference set out in Annexure 2.

32. Consent Orders for amendment to the matters referred to the Referee in the Schedule to the Usual Order for Reference may be filed with the List Judge's Associate in writing for the making of such order in Chambers. Any contested amendments are to be heard in the Motions List on Fridays.

Representation

33. Each party not appearing in person shall be represented at any directions hearing by a barrister or a solicitor familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.

34. Practitioners should have communicated prior to the directions hearing with a view to agreement on directions to propose to the Court and preparation of short minutes recording the directions.

Urgent applications and liberty to apply

35. A party seeking ex parte or urgent orders or directions prior to the commencement of proceedings or in the course of the proceedings should telephone the Commercial List Judge's Associate, who will advise the party of the Judge to whom application should be made.

36. Parties have general liberty to apply and may cause proceedings to be listed at a directions hearing prior to a specified future directions hearing. A party seeking to do so should make prior arrangement with, or give appropriate notice to, any other party, and should send a fax to the List Judge's Associate who will advise the date for listing.

Listing for hearing

37. Where the whole, or any part, of the proceedings is/are to be heard by the Court, a date for hearing may be fixed prior to completion of interlocutory steps.

38. Proceedings will be fixed for hearing during a directions hearing in the Lists on Friday at which time the Court should be provided with a realistic estimate of the hearing time required and where there is to be an application for a stopwatch hearing, paragraphs 39 to 42 are applicable. Upon fixing a date for hearing the Court will normally direct that the Usual Order for Hearing set out in Annexure 3 shall apply, with or without modification.

Stopwatch Hearings

39. An option for matters that are heard by the Court and/or referred to Referees is the stopwatch method of trial or reference hearing. In advance of the trial or reference, the Court will make orders in respect of the estimated length of the trial or reference and the amount of time each party is permitted to utilise. The orders will allocate blocks of time to the aspects of the respective cases for examination in chief, cross-examination, re-examination and submissions. If it is in the interests of justice, the allocation of time will be adjusted by the Court or the Referee to accommodate developments in the trial or reference.

40. This method of hearing is aimed at achieving a more cost effective resolution of the real issues between the parties. It will require more intensive planning by counsel and solicitors prior to trial including conferring with opposing solicitors and counsel to ascertain estimates of time for cross-examination of witnesses and submissions to be built in to the estimate for hearing.

41. Any party wishing to have a stopwatch hearing must notify the other party/parties in writing prior to the matter being set down for hearing or reference out. At the time the matter is set down for hearing or referred out to a Referee it is expected that solicitors or counsel briefed on hearing will be able to advise the Court:

- whether there is consent to a stopwatch hearing;
- if there is no consent, the reasons why there should not be a stopwatch hearing.

42. If there is consent to a stopwatch hearing counsel and/or solicitors must be in a position to advise the Court of:

- the joint estimate of the time for the hearing of the matter; and
- the way in which the time is to be allocated to each party and for what aspect of the case.

Experts

43. The use of a single expert or a Court Appointed Expert and/or the concurrent evidence of experts is encouraged in suitable cases. The parties are to confer as early as practicable with a view to reaching agreement as to whether the use of such an expert or the concurrent evidence of experts is appropriate and, if agreed, the inclusion of such appointment and/or adoption of concurrent evidence should be accommodated in the timetable for the preparation for hearing.

44. Where experts' reports have been or are to be served (whether or not pursuant to an order or direction of the Court) the Court will, unless otherwise persuaded, direct, upon such terms as it thinks fit, that the parties cause the experts or some of them to confer with a view to identification of and a proper understanding of any points of difference between them and the reasons therefor and a narrowing of such points of difference. The Court may, at the same time or subsequently, direct that the parties and/or the experts prepare an agreed statement of the points of agreement, and of difference remaining, between experts following such conference and the reasons therefore (see Schedule 7 of the UCPR).

Proportionate Liability

45. Any party in proceedings involving an apportionable claim, who has reasonable grounds to believe that a particular person may be a concurrent wrongdoer in relation to the claim(s) must, as soon as practicable, give written notice to all other parties to the proceedings of: (1) the identity of that person; and (2) the alleged circumstances that may make that person a concurrent wrongdoer.

Costs

46. Unless otherwise ordered, a party in whose favour an order for costs is made may proceed to assessment of such costs forthwith.

47. The cost of unnecessary photocopying and assembly of documents is unacceptable. It is incumbent on the lawyers for the parties to carefully consider the documents necessary to be included in the tender bundle. Excessive documents may attract adverse costs orders.

Mediation

48. The parties should be aware of the provisions of Part 4 of the CPA and relevant parts of the UCPR relating to mediation.

49. It is expected that prior to the commencement of proceedings in the Lists, the parties will have considered referral of their disputes to mediation. It is also expected that the lawyers, or the litigant if not legally represented, will be in a position to advise the Court on the first return date of the Summons whether: (a) the parties have attempted mediation; and (b) their respective clients are willing to proceed to mediation at an appropriate time.

50. If a matter is referred to mediation by consent and/or by an order pursuant to the section 26 of the CPA, the parties are to ensure that the person(s) who is (are) able to make a decision as to whether the matter settles is present personally or by authorised nominee(s) at the mediation.

Summary judgment

51. As a general rule applications to strike out or for summary judgment will not be entertained. Sometimes applications are appropriate, but Practitioners should expect strictness in declining to entertain such applications.

Use of technology

52. The use is encouraged, where appropriate, of technology permitting the taking of evidence in, or other conduct of, proceedings by video link or conference telephone and the management of documents and transcript. Practitioners should propose the use of such technology when appropriate, and the Court may give directions involving its use: for example, in major cases with a view to statements, documents and transcript being available to all concerned on a common data base.

J J Spigelman AC
Chief Justice of New South Wales
15 August 2006.

Related Information

Practice Note SC Eq 3 was issued and commenced on 1 September 2006.

See also:

Supreme Court Practice Note SC Gen 1 – Application of Practice Notes
Supreme Court Practice Note SC Gen 6 - Mediation
Supreme Court Practice Note SC Gen 7 – Use of technology
Supreme Court Practice Note SC Gen 12 – Joint conferences of expert witnesses
Civil Procedure Act 2005
Uniform Civil Procedure Rules 2005
Supreme Court Rules 1970

Amendment History

This Practice Note replaces SC Eq 3 issued on 17 August 2005.

Practice Note SC Eq 3 issued on 17 August 2005 replaced Former Practice Note No. 100 on 17 August 2005.

ANNEXURE 1

[LIST] STATEMENT [OR] LIST CROSS CLAIM STATEMENT

[LIST] RESPONSE [OR] LIST CROSS CLAIM RESPONSE

A. NATURE OF DISPUTE

B. ISSUES LIKELY TO ARISE

C. PLAINTIFF'S [or CROSS CLAIMANT'S] CONTENTIONS

[or C DEFENDANT'S [or CROSS DEFENDANT'S] RESPONSES TO CONTENTIONS which should include reference to any relief claimed in the Summons or Cross Summons that are admitted, not admitted or denied.

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

E. A STATEMENT AS TO WHETHER THE PARTIES HAVE ATTEMPTED MEDIATION; WHETHER THE PARTY IS WILLING TO PROCEED TO MEDIATION AT AN APPROPRIATE TIME.

ANNEXURE 2

USUAL ORDER FOR REFERENCE

1 Pursuant to Part 20 rule 14 of the Uniform Civil Procedure Rules (the "UCPR"), refer to *[state name of referee]* for enquiry and report the matter in the Schedule hereto.

2 Direct that (without affecting the powers of the Court as to costs) the parties, namely *[state relevant parties]*, be jointly and severally liable to the referee for the fees payable to him.

3 Direct that the parties deliver to the referee forthwith a copy of this order together with a copy of Division 3 of Part 20 of the UCPR.

4 Direct that:

- (a) subject to paras (b) and (c) hereof the provisions of Pt 20 r 20 shall apply to the conduct of proceedings under the reference;
- (b) the reference will commence on *[date]* unless otherwise ordered by the referee;

(c) the referee consider and implement such manner of conducting proceedings under the reference as will, without undue formality or delay, enable a just determination to be made including, if the referee thinks fit:

(i) the making of inquiries by telephone;

(ii) site inspection;

(iii) inspection of plant and equipment; and

(iv) communication with experts retained on behalf of the party;

(d) any evidence in chief before the referee shall, unless the referee otherwise permits, be by way of written statements signed by the maker of the statement;

(e) the referee submit the report to the Court in accordance with Pt 20 r 23 addressed to the Equity Division Registrar on or before *[date]*.

5 Amendments to the Schedule, whether by agreement or on a contested basis, are to be the subject of an order made by the Court.

6 If for any reason the Referee is unable to comply with the Order for delivery of the report to the Court by the date in this Usual Order for Reference, the Referee is to provide to the List Judge an Interim Report setting out the reasons for such inability and an application to extend the time within which to deliver the report to the Court to a date when the Referee will be able to provide the Report.

7 Grant liberty to the referee or any party to seek directions with respect to any matter arising in proceedings under the reference upon application made on 24 hours' notice or such less notice ordered by the Court.

8 Reserve costs of the proceedings.

9 Stand the proceedings over for further directions on *[date]*.

SCHEDULE

The whole of the proceedings; or

The following questions arising in the proceedings, namely *[state the questions]*.

ANNEXURE 3

USUAL ORDER FOR HEARING

Experts' Reports

1 In any case in which there is expert evidence to be relied upon by the parties, the experts are to meet no later than 3 weeks before trial for the purpose of reaching agreement on as many issues as possible and producing: (a) a joint report; and (b) any separate report(s) dealing with those matters that are unable to be agreed.

2 The joint report and any separate report(s) are to be filed and served no later than 5 working days before trial.

3 In cases in which expert evidence is to be given concurrently, the experts are to meet no later than 3 weeks prior to trial for the purpose of producing: (a) a joint report; (b) any separate report(s) dealing with those matters that are unable to be agreed; and (c) a draft agenda for discussion of the contested issues in the concurrent evidence session at trial.

4 The joint report and any separate report(s) and the draft agenda are to be filed and served no later than 5 working days before trial.

Affidavits and Statements

5 Where no directions have been given for the service of affidavits or statements of evidence, each party shall, not less than 28 days before the date fixed for hearing, serve on each other party a statement of the

evidence proposed to be led from each witness to be called by that party, signed by the proposed witness, unless the Court otherwise orders.

6 Where directions have been given for the service of affidavits or statements of evidence, or where paragraph 2 of this order applies:

- (a) a party who fails to comply with an order made for the service of affidavits or statements of evidence, or with paragraph 2 of this order, may not adduce evidence to which the order, or paragraph 2 of this order, applies without the leave of the Court;
- (b) at least 14 days before the date fixed for hearing each party shall, by notice in writing to each other party, state whether he or she proposes to object to the whole or any part of any affidavit or statement of evidence and the grounds for the objections;
- (c) the Court may, on such terms as it thinks fit, direct that the statement of evidence served, or part of it, stand as the evidence in chief of the witness, or as part of such evidence;
- (d) if the affidavit is not read or the maker of the statement of evidence is not called as a witness, no other party may put the affidavit or statement in evidence without the leave of the Court;
- (e) if the affidavit is read or the maker of the statement of evidence called as a witness, then save in relation to new matters which have arisen in the course of the trial, the party serving the affidavit or statement may not lead evidence from the deponent or the maker of the statement of evidence (as the case may be), the substance of which is not included in the affidavit or statement of evidence served without the leave of the Court;
- (f) whether or not the affidavit or statement of evidence or any part of it is used in evidence by the party calling the witness, if the deponent or the maker of the statement of evidence is called as a witness any other party may use the affidavit or statement of evidence or any part of it in cross-examination of the witness unless the Court otherwise orders;
- (g) nothing in this order shall otherwise deprive any party of any proper objection to the admissibility of evidence.

Documents – Court Book

7 (1) By no later than 6 weeks before the date fixed for hearing each party shall, by notice in writing to each other party, specify what documents it proposes to have included in the Court Book at the hearing and, in the event that there has not been inspection, where the documents may be inspected.

7 (2) Within 10 working days thereafter, each party shall advise each other party in writing:

- (a) which of the specified documents may be included in the Court Book by consent;
- (b) whether the authenticity of any of the remaining documents, and if so which, is disputed; and
- (c) in so far as any document may not be included in the Court Book by consent, the grounds for the objection to its inclusion.

7 (3) Each party other than the plaintiff shall, not later than 3 weeks prior to the date fixed for hearing, deliver to the plaintiff 2 copies of all documents intended by such party to be included in the Court Book at the hearing which have not been specified in the plaintiff's notice referred to in subparagraph (1).

7(4) If any party intends to tender an original document that party shall, at least 3 weeks before the date fixed for hearing, give notice of that intention to all other parties. If any party requires another party to tender an original document that party shall, at least 3 weeks prior to the date fixed for hearing, give notice of that requirement to the other party.

7(5) The party in possession of any document the subject of a notice in accordance with subparagraph (4) shall make the document available for inspection prior to the date of hearing at the chambers of the barrister or office of the solicitor for that party giving the notice.

7(6) Where an order has been made for the filing of lists of documents:

- (a) until the conclusion of the hearing each party shall be under a continuing obligation to disclose any document relevant to any matter in issue with respect to the matters specified in the original order;
- (b) in the event that a party becomes aware that documents which have been in its possession have not been included in its list of documents, whether by reason of oversight or otherwise, that party shall forthwith include, and clearly identify, particulars of those

additional documents in a supplementary list and file and serve an affidavit specifying the reason for the failure to disclose the documents in the original list;
(c) at least 7 working days before the date fixed for hearing, each party shall file and serve a supplementary list of the documents (if any) with respect to the matters specified in the original order which have come into its possession since the time of serving its list of documents, but excluding copies of documents received pursuant to discovery from any other party and copies of subpoenaed documents to which all parties have been granted access, and shall give supplementary inspection.

Filing with the Court

8 No later than 10 working days before the hearing:

all parties' barristers or solicitors shall cause to be filed with the Court a folder of all affidavits, statements and reports to be relied upon at trial with an index setting out in alphabetical order (a) the name of the deponent or maker of the statement or report; (b) the date of the affidavit, statement or report; and (c) a short statement identifying the role of the deponent or the maker of the statement or report.

9. No later than 5 working day before the hearing:

9.1 The plaintiff shall file, paginated and indexed, two copies of the Court Book intended to be tendered at the hearing by any party. The index of documents should indicate documents the tender of which is agreed and, in relation to the documents as to which there is no agreement, which documents they are and whether lodged on behalf of the plaintiff or on behalf of any other party to the proceedings and, if so, which party.

10. No later than 2 workings day before the hearing:

10.1 Each barrister or solicitor shall cause to be filed and served a short outline of submissions; a statement of the real issues for determination; a list of authorities; and a chronology of relevant events.

11. Compliance with orders 9 and 10 is to be by delivery to the trial Judge's Associate or, if the identity of the trial Judge is unknown at the time for compliance, by delivery to the List Judge's Associate.