PRACTICE NOTE SC Eq 4

Supreme Court Equity Division - Corporations List

Commencement

1. This Practice Note commences 16 November 2005. Paragraphs 26 – 30 are taken to have commenced on 17 August 2005.

Application

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

Definitions

3. In this Practice Note:

Act means the *Corporations Act 2001 (Cth)*
Corporations matters means proceedings and interlocutory applications that arise out of the Act or the Rules, or seek relief thereunder
CPA means the *Civil Procedure Act 2005*
Rules means the *Supreme Court (Corporations) Rules 1999*
SCR means the *Supreme Court Rules 1970*

Introduction

4. The purpose of this Practice Note is to explain the operation of the Corporations List.

Case management in the Corporations List

5. Corporations matters are usually dealt with in the Corporations List. Matters relating to other incorporated bodies such as co-operatives and incorporated associations may also be dealt with in this List.

6. Corporations matters to be dealt with by a judge may be made returnable before the Corporations List Judge on any Monday during term. At the present time the judicial work of the Corporations List is shared principally by the judge in charge of the List along with a second judge designated for that purpose. They are assisted where necessary by the Equity Division judge assigned to the Probate List (also a Monday list) with further access to other judges in the Equity Division if need be. There is also a Friday list for special fixtures of one day or less. Matters may be placed in the Friday list by the judge presiding in the Monday list by the Duty Judge, or by an Associate Judge or Registrar.

7. A party who seeks an abridgment of service for originating or interlocutory process in a Corporations matter may approach the Corporations List judge directly on a Monday (but not Friday) during court hours, without notice. The Equity Division Duty Judge is able to deal with Corporations matters at times between Mondays, with facility to place the matter for further direction in the Monday list.

8. The parties should expect that if a matter has been placed in the Corporations List for a particular Monday, the hearing will ordinarily proceed on the appointed day. They should prepare accordingly. Where this would assist the Corporations List Judge, brief skeleton submissions should be sent in advance if practicable. Commercial circumstances normally demand that Corporations matters be heard and resolved swiftly. While the demands of the List cannot be fully anticipated, experience shows that short Corporations matters (of up to two hours hearing time) can usually be dealt with on the appointed day or may be allocated to a Friday list in the near future.

9. Longer Corporations matters are 'managed' within the Corporations List in preparation for hearing. Depending on the subject matter and the degree of urgency involved, and the availability of judges, the matter may be set down before one of the usual Corporations List judges for hearing or before another judge of the Equity Division. Otherwise the matter may be allocated as appropriate to the Expedition List, the Duty Judge List, the Short Matters List or the General List, drawing on the expertise of the whole Equity Division including judges assigned to the Commercial List. The Court has video conferencing facilities for Corporations matters involving interstate or overseas elements.

10. Routine insolvency proceedings and applications are dealt with by the Registrar. Examinations under Part 5.9 of the Act are heard before a Deputy Registrar. Available dates are posted on the Supreme Court website (www.lawlink.nsw.gov.au/sc).

11. Applications are listed before the Registrar each day, except Wednesday, at 11am in the Registrar's Corporations List. Orders sought include the winding up of corporations, the appointment of a receiver or provisional liquidator, the release of liquidator and dissolution of a corporation, and the determination of a liquidator's remuneration. Final orders for winding up a corporation, setting aside a winding up order or reinstating a corporation are prepared by the Registry and are sent out in the DX later on the day of hearing.

12. At the commencement of the list the Registrar deals with referrals to the Corporations List Judge, the Duty Judge or an Associate Judge. The Registrar may refer matters to the Corporations List Judge for case management. Matters are referred by the Registrar to the Corporations List Judge each Monday and on other days, except Wednesday, to the Duty Judge.

13. Certain short matters (such as applications to set aside statutory demands, where any cross-examination is generally curtailed) are usually referred to an Associate Judge. Referrals to the Associate Judge take place each day except Wednesday. The Associate Judge endeavours to determine the referrals on the day of referral. However, if the matter is estimated to take more than two days it is specially fixed for the earliest available date. Depending on the Associate Judge's workload, matters may be referred to the Corporations List Judge on the following Monday.

14. The powers of the Associate Judge and the Registrar are to be found in Schedule D the SCR and s 13 of the CPA respectively.

Appointment of liquidators by the Court

15. The following arrangements apply to the appointment of a liquidator:

- The Registrar will continue to maintain a list of registered official liquidators who have consented in writing to accept all appointments as liquidator made by the Court. This list is sorted alphabetically by firm for liquidators located in metropolitan Sydney, and by individuals located in regional centres. -;
- The plaintiff in winding-up proceedings may nominate for appointment a registered official liquidator whose name appears in the Court's list. A nomination is effected by filing with the originating process a consent in Form 8 of the Rules, signed by the nominee, certifying that he or she is not aware of any conflict of interest or duty and serving it in accordance with Rule 5.5(3)(b).
- The Court will appoint the plaintiff's nominee in the normal case but is not obliged to do so. An obvious ground for the Court declining to appoint the plaintiff's nominee is that the Court considers there is an actual or potential conflict between the duties of a liquidator and the nominee's personal interest or some other duty (for example, a person who has acted as receiver and manager of the company for a secured creditor will almost never be appointed liquidator).
- Unless the consent in proper form of a registered official liquidator whose name appears in the Court's list is filed with the originating process for winding up, the Registry will select a liquidator by rotation from the Court's list. The plaintiff must obtain the consent in proper form of the liquidator selected by the Court, and file and serve that consent in accordance with Rule 5.5(3).
- If the liquidator declines to consent to the appointment (which the liquidator may do, after having given his or her consent to accept all court appointments, only on grounds such as conflict of interest), the plaintiff must:
  - nominate a registered official liquidator, whose name appears on the Court's list, by filing and serving the liquidator's consent in accordance with Rule 5.5(3); or
  - approach the Registry for selection of another liquidator by rotation, and then file and serve that liquidator's consent in accordance with Rule 5.5(3).

Disclosure by insolvency practitioners of fees to be charged

16. The Insolvency Practitioners Association of Australia no longer publishes a Scale of Rates in respect of fees.

17. Where application is made to the Court for an order that a company be wound up or for an official liquidator to be appointed as a provisional liquidator of a company, an official liquidator must consent in writing to be appointed: see the Act, subs 532(9) and the Rules, 6.1(1). The consent must be in accordance with Form 8 to the Rules: see r.5.5(2); 6.1(2). Form 8 requires disclosure of the hourly rates currently (as at the signing of the consent) charged in respect of work done as a liquidator or provisional liquidator (as the case may be) by the person signing the consent, and by that person's partners and employees who may perform work in the administration in question.

18. The provisions referred to in paragraph 17 have no application, however, to appointments of persons as external administrators:

- otherwise than by the Court; or
- by the Court otherwise than as liquidator or as liquidator provisionally.

19. Even in the case of appointments as liquidator or as liquidator provisionally, the provisions referred to in paragraph 17 above do not touch on changes in the hourly rates after the signing of the Form 8 consent.

20. Various provisions of the Act empower the Court, in certain circumstances, to determine or review the remuneration of insolvency practitioners when they are filling the office of various forms of external administrator: see ss 425; 449E; 473(2) (3), (5), (6); 504.

21. With the exception of Form 8, where it is applicable, the provisions referred to in paragraph 17 do not indicate a standard of disclosure of fees to be charged which the Court might regard as appropriate in any situation in which it may be relevant for the Court to take into account whether an insolvency practitioner has followed a practice of making adequate disclosure of such fees.

22. The guidelines in paragraphs 23 and 24 below are intended to fill that gap. These guidelines are not, however, intended to limit the judicial discretion available in any particular case, or to require that non-observance of the guidelines be taken into account where that would not be relevant to the exercise of a judicial discretion.

23. All external administrators (including persons appointed as liquidators or as liquidators provisionally) should, in their first report to creditors:

- disclose the hourly rates of fees which are being charged by them and by any of their partners and employees who may work in the administration; and
- give their best estimate of the cost of the administration to completion or to a specified milestone identified in the report.

24. If, at any time after an external administrator has reported in accordance with paragraph 23, the hourly rates are to change, or the administrator has reason to believe that the estimate given to creditors is no longer reliable, he or she should report to creditors, disclosing the new hourly rates and giving a revised estimate.

25. These guidelines are not intended:

- to prevent an external administrator from changing hourly rates or revising estimates if he or she is otherwise lawfully permitted to do so; or
- to authorise an external administrator to change hourly rates or revise estimates if he or she is not otherwise lawfully permitted to do so.

Interlocutory Process and Pleadings

26. Rule 2.2(1) provides as follows:

'Unless these Rules otherwise provide, a person must make an application required or permitted by the Corporations Act to be made to the Court:
(a) if the application is not made in a proceeding already commenced in the Court – by filing an originating process; and
(b) in any other case, and whether final or interlocutory relief is claimed - by filing an interlocutory process.'

27. The words, 'and whether final or interlocutory relief is claimed', were inserted with effect from 24 June 2005.

28. The purpose of that amendment is to make it clear that the form of interlocutory process under the Rules (Form 3) is required to be used where subparagraph 2.2(1)(b) applies, even where final relief is claimed. Leaving aside the originating process and any amended originating process, all claims for relief properly brought forward in a proceeding already on foot, to which the Rules apply, are required to be made by interlocutory process.

29. Two examples of claims for final relief which are required to be brought by interlocutory process are:
(1) a claim by a defendant which would, if the general rules of court applied, be brought by way of cross-claim;
(2) a claim by the Commissioner of Taxation under s 588FGA(4) of the Act (see *Condon v Commissioner of Taxation* [2004] NSWSC 481).

30. Where a claim for final relief has been made in a proceeding to which the Rules apply, whether the claim is made by originating process or by interlocutory process, any subsequent application for an order for pleadings should be made by interlocutory process. Where a claim for final relief is to be made in a contemplated proceeding to which those Rules will apply, an application for an order for pleadings may be made either in the originating process, or by an accompanying interlocutory process. An originating or interlocutory process should not be amended so as to be converted into a pleading.

J J Spigelman AC
Chief Justice of New South Wales
16 November 2005

Related information

Practice Note SC Eq 4 was issued and commenced on 16 November 2005 and replaces Practice Note SC Eq 4 issued on 17 August 2005.
This Practice Note now incorporates Former Practice Note 130 – see paragraphs 26 – 30, which are taken to have commenced on 17 August 2005.

See also:

Practice Note SC Gen1 Supreme Court - Application of Practice Notes
Practice Note SC Gen3 Supreme Court – Use of technology
Practice Note SC Eq1 Supreme Court Equity Division - Case management
Corporations Act 2001 (Cth)
Supreme Court (Corporations) Rules 1999
Civil Procedure Act 2005
Supreme Court Rules 1970

Amendment History:
Practice Note SC Eq 4 was originally issued on 17 August 2005 and replaced Former Practice Note Nos. 111, 117 and 126 on 17 August 2005. It was amended on 19 October 2005 to correct formal errors. It was further amended on 16 November 2005 to add paragraphs 26 – 30 (formerly Practice Note 130), taken to be effective from 17 August 2005.