

PRACTICE NOTE SC Eq 4

Supreme Court Equity Division - Corporations List

Introduction

1. The purpose of this Practice Note is to explain the operation of the Corporations List, and the hearing arrangements for corporations matters. The Practice Note also contains information about the appointment of liquidators by the court, disclosure of fees by insolvency practitioners, and the use of interlocutory processes and pleadings.

Commencement

2. This Practice Note commences 1 May 2006. It replaces the existing Practice Note SC Eq 4.

Application

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

Definitions

4. In this Practice Note:

Act means the *Corporations Act 2001 (Cth)*;

Corporations matters include proceedings and interlocutory applications that arise out of the Act or the Rules, or seek relief under any of those provisions, and proceedings relating to other incorporated bodies such as co-operatives and incorporated associations;

Rules means the *Supreme Court (Corporations) Rules 1999*.

The Corporations Judge

5. Commencing on 1 May 2006, a Judge of the Equity Division is assigned to corporations matters as Corporations Judge, on a full-time basis.

6. The names of the Judges designated to be the Corporations Judge from time to time, and their periods of service as Corporations Judge, will be displayed in the Court's Corporations Matters webpage. The webpage will be updated from time to time. A Judge will normally sit as the Corporations Judge for a continuous period of several months.

7. The Corporations Matters webpage contains other information about the Corporations List. Go to <http://www.lawlink.nsw.gov.au/sc> (click on Practice & Procedure on the left-hand side menu and then click on the Corporations Matters page link).

8. E-mail communications to the Corporations Judge should be directed to Corporations_Judge@courts.nsw.gov.au. That e-mail address is accessed by the Corporations Judge for the time being and his or her staff, during normal office hours.

Listing arrangements for corporations matters

(a) *The Registrar's Corporations List*

9. Corporations matters are usually made returnable in the Registrar's 11 a.m. Corporations List (see "Registrar's Lists" in Practice Note SC Eq 1).

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, on the Corporations Matters webpage.

11. Applications are listed before the Registrar each day, except Wednesday, in the Registrar's 11 a.m. Corporations List. The Registrar has delegated powers in respect of certain corporations matters (such as the winding up of corporations, leave to proceed against a corporation under external administration (where the claim against the corporation is, or includes, a claim for damages for personal injury), the release of a liquidator and dissolution of a corporation, the reinstatement of a corporation and the determination of a liquidator's remuneration), as well as various procedural matters. 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. Corporations matters are usually referred to the Corporations Judge, but they may be referred to the Duty Judge or (for routine matters) an Associate Judge if appropriate. Where it is appropriate for a corporations matter to be heard or case managed by a Judge, and the matter is sufficiently ready for that purpose, the Registrar will normally refer the matter to the Corporations Judge in the Monday Corporations List. Urgent corporations matters requiring the attention of a Judge are usually referred to the Corporations Judge.

13. Corporations matters that have been placed in the Registrar's General List Callover, with an estimate of three days or fewer, will (ordinarily and subject to availability) be set down by the Registrar for hearing by the Corporations Judge. No corporations matter will appear in the Registrar's General Callover List unless placed there by the Corporations Judge.

(b) The Monday Corporations List

14. Corporations matters to be dealt with by a Judge are usually made returnable before the Corporations Judge in the Monday Corporations List. Except in urgent cases, referrals of corporations matters by the Registrar are usually placed in the Monday list.

15. The Monday List operates principally as a callover list for corporations matters, dealing with such matters as general case management, directions for the filing of evidence and resolution of procedural issues.

16. Short procedural applications (for example, disputes about pleadings, discovery, subpoenas and joinder of the parties) will normally be heard in the Monday List, provided that the time estimate is less than two hours, and subject to the other demands of the List. Parties should expect that such applications will proceed on the appointed day and they should prepare accordingly. Where this would assist the Corporations Judge, brief submissions should be sent to his or her Associate in advance, if practicable.

17. Other short applications of two hours or less (for example, liquidators' applications for judicial advice or approval of contracts, termination of winding up, reinstatement of a company (where the matter has been referred to the Judge) and leave to commence a derivative action) will normally come before the Corporations Judge in the Monday List. Such matters may be heard on that day or set down for hearing before the Corporations Judge on other days.

18. If the matter is set down for hearing on another day, directions will normally be given for the provision to the Corporations Judge of working copies of evidentiary materials and written submissions before the hearing. Since it is possible that the matter may be heard forthwith, parties should prepare for hearing on the Monday on which the matter is listed and, where practicable, copies of evidentiary materials and written submissions should be provided to the Corporations Judge's Associate before that day.

19. The Corporations Judge may be assisted on Mondays by another Equity Division Judge.

20. Longer corporations matters (more than two hours) are "case managed" within the Monday Corporations List to prepare them for hearing. When they are ready for hearing they will usually be set down for hearing by the Corporations Judge, although in some cases it may be appropriate to allocate the matter to the

Expedition List, the Duty Judge List, the Short Matters List or the General List. As noted above, a Corporations Judge is available on a full-time basis.

21. Long corporations matters (more than three days) will be allocated for hearing by a Judge in the Equity Division after consultation between the Corporations Judge and the Chief Judge in Equity.

22. Since commercial circumstances demand that many corporations matters be heard and resolved swiftly, efforts will be made to allocate a hearing date as soon as practicable after any such matter is ready for hearing. The Court has video-conferencing facilities for corporations matters involving interstate or overseas elements.

(c) Duty applications in corporations matters

23. The Corporations Judge may be approached on any day for abridgment of service and/or interlocutory relief in urgent corporations matters, in cases that would warrant approaching the Duty Judge in other matters (see "Duty Judge List" in Practice Note SC Eq 1).

24. The Corporations Judge will be available to hear or give directions in relation to any duty applications at 10:00 a.m. and 2 p.m. each day, or otherwise by arrangement with the Judge's Chambers. See the Court's Corporations Matters webpage for contact particulars.

25. The Duty Judge or the Registrar may refer duty applications in corporations matters to the Corporations Judge.

(d) Statutory demand matters

26. Statutory demand matters, like other corporations matters, are usually returnable in the Registrar's Corporations List. When the Registrar forms the view that the matter is ready for trial, it is referred to the Monday Corporations List.

27. If satisfied that the matter is ready for hearing, the Corporations Judge sets it down for hearing, either before himself or herself, or another Judge, or an Associate Judge.

Appointment of liquidators by the Court

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

- the Registrar maintains 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 making proper disclosure of fee rates, and serving it in accordance with Rule 5.5(3)(b);
- the Court appoints 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

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

30. 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.

31. The provisions referred to in paragraph 30 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.

32. Even in the case of appointments as liquidator or as liquidator provisionally, the provisions referred to in paragraph 30 above do not touch on changes in the hourly rates after the signing of the Form 8 consent.

33. 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.

34. With the exception of Form 8, where it is applicable, the provisions referred to in paragraph 33 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.

35. The guidelines in paragraphs 36 and 37 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.

36. 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.

37. If, at any time after an external administrator has reported in accordance with paragraph 36, 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.

38. 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

39. 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.'

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

41. 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.

42. Two examples of claims for final relief which are required to be brought by interlocutory process are:

(a) a claim by a defendant which would, if the general rules of court applied, be brought by way of cross-claim;

(b) a claim by the Commissioner of Taxation under s 588FGA(4) of the Act (see *Condon v Commissioner of Taxation* [2004] NSWSC 481).

43. 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
27 April 2006

Related information

Practice Note SC Eq 4 commences on 1 May 2006 and replaces Practice Note SC Eq 4 issued on 16 November 2005.

This Practice Note now incorporates Former Practice Note 130 – see paragraphs 39 – 43, which are taken to have commenced on 17 August 2005.

See also:

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

Practice Note SC Gen 7 Supreme Court – Use of technology

Practice Note SC Eq 1 Supreme Court Equity Division - Case management

Corporations Act 2001 (Cth)

Supreme Court (Corporations) Rules 1999

Civil Procedure Act 2005

Uniform Civil Procedure Rules 2005

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 replaced on 16 November 2005, in order to add paragraphs 26 – 30 (formerly Practice Note 130), taken to be effective from 17 August 2005. It was replaced again on 27 April 2006, with effect from 1 May 2006, in order to reflect new arrangements consequent on the assignment of a Judge of the Equity Division to Corporations matters as Corporations Judge on a full-time basis.