

An essential guide to the Commercial List

Rachel Piorun and Jonathon Moore

Introduction

The Commercial List is one of the specialist lists in the Supreme Court of Victoria and is perhaps the most frequently used. Like all specialist lists, there are requirements and procedures peculiar to the list. This article outlines those procedures, but does so by way of introduction only. Any practitioner involved in, or about to commence, a commercial list matter should consult both the rules pertaining to the list (Order 2, Chapter II), and the "Guide to Commercial List Practice" ("the Guide") which is available free of charge from the Prothonotary's office (the Guide was revised in 1996).

The Commercial List commenced in 1986 and is designed to provide expeditious and efficient resolution, so far as it is practicable, of general commercial litigation. It has, to a great extent, achieved this aim. This is due, in part, to the fact that the list is "judge controlled" - each case is allocated to a Commercial List judge as soon as the proceeding is entered into the list to hear and control all interlocutory procedures and applications.

Primarily the list is designed to cater for disputes between parties engaged in trade or commerce who have the resources to deal with the additional expenses which arise due to the procedures adopted to expedite proceedings.

Entry into the List

Ordinarily proceedings which are to be heard in the Commercial List are issued out of the Commercial Registry (a 'division' of the ordinary Registry, which is now located on Level 2, 436 Lonsdale Street, Melbourne). The Commercial Registry enters the proceeding in the list if the originating process and other appropriate documents (see below) are filed, and the fee for entry into the list (presently \$1,575) is paid. An order from a Judge in the list is not required for entry into the list. The Registry will not advise the party issuing the proceeding whether or not it is appropriate for the Commercial List. The issuing party should take care to ensure that the proceeding is appropriate (see below), as the fee for entry into the list is usually not refundable if the case is

later removed from the list by order of the court.

There are two additional documents which must be filed at the same time as the originating process. First, a summons requiring attendance before the court for directions as to how the matter is to further proceed must be filed and served upon each party. Secondly, the issuing party must file an undertaking to pay for transcripts of all directions hearings.

A proceeding commenced in another list may be entered into the Commercial List at a later stage by application of any party. The application is made by filing and serving a summons



seeking an order that the proceeding be entered into the list. It should be accompanied by an affidavit briefly setting out the background to the dispute and stating why the proceeding is an appropriate one for the list. The parties are not entitled as of right to an order for entry and therefore orders of this kind cannot be made by the registry. It is for the judge in the Commercial List to decide if the proceeding should be allowed to enter the list, and various factors are taken into account including the nature of the dispute and the length of time which has elapsed since the relevant facts occurred. The Guide provides further details of other matters to be considered upon such an application. If the proceeding is entered into the list in this manner, the summons filed by the applicant is taken thereafter to be the summons for directions, and the proceeding will be adjourned to another directions day, if appropriate.

Matters appropriate for the list

According to the Rules, those proceedings which are usually heard in the list arise out of 'ordinary commercial transactions' or where it is shown that there is an important question 'in trade or commerce'. Those phrases are explained in the Rules and the Guide. The most common disputes heard in the list relate to finance transactions, agency disputes, and contractual disputes between companies. A proceeding which is of a type falling within the Guide's explanation of "ordinary commercial transaction" may nonetheless be excluded from the list if the judge considers that the case is inappropriate. Some proceedings are also removed from the list because the plaintiff fails to comply with directions. Proceedings which are likely to take more than two sitting weeks (10 days) to be tried will usually not be tried by a judge in the list (except in exceptional circumstances). However if this is the case interlocutory proceedings may still be dealt with by a Commercial List judge and the proceeding thereafter transferred (at the judge's discretion) to another list for trial.

Proceedings which do not raise commercial issues, and those in which there is no genuine dispute (that is, it is not expected that the matter will be disputed) are generally not appropriate for the list. The Guide provides further details of the types of proceedings which will ordinarily be considered inappropriate.

Interlocutory Procedures and Directions days

All interlocutory steps are taken in accordance with directions given by a Commercial List judge. The Commercial List has directions hearings every Friday at 10am if that day is a Court sitting day. A matter may be listed for initial directions on the forthcoming Friday as long as the summons for directions is issued before 4pm on the preceding Tuesday and the Registrar is satisfied that the matter can be fixed for the chosen date. Exceptions can

be made for urgent cases but only with approval of the judge in charge of the list. Approval may be sought in such situations by contacting the Associate to that judge.

The same rule of practice applies to subsequent directions days. If the summons for directions is adjourned to some later time, but a party wishes to bring the matter on sooner for the purpose of seeking an interlocutory order, the matter may be listed for the forthcoming Friday upon the filing of a summons by 4p.m. on the preceding Tuesday. After this time, approval must be sought from the judge if the matter is to be heard on the forthcoming Friday. If this course is adopted, all other parties must be served with the summons and supporting material as soon as practicable. Alternatively permission may be sought from the judge to bring the matter on earlier. If permission is granted all other parties must be informed of the orders being sought by letter, a copy of which should be forwarded directly to the judge. Supporting material must also be filed and served.

Directions days are primarily used for timetabling purposes. At the first return of the summons for directions the judge will usually lay down a timetable for pleadings and discovery. The summons is usually adjourned to a later date for further directions or for setting down for trial. On each occasion the summons will in most circumstances be adjourned to a fixed date. The aim of directions hearings is to enable the judge to maintain constant control over the proceedings so that the trial can be brought on as quickly as possible.

On directions days, consent matters are usually dealt with first and contested matters are dealt with towards the end of the day's list. If the orders proposed are consented to by each party, minutes of the proposed orders should be handed up to the judge when the matter is called. Either the tipstaff or the Judge's Associate should be informed that the case is a consent matter. A helpful tip is to always prepare minutes of proposed orders for the judge to look at, whether it is a matter by consent or not. Of course, it is not always the case that consent orders will be

approved by the judge. An appearance at a directions hearing may be avoided if minutes of consent orders signed by all parties are provided to the judge (through his or her Associate) well before Friday morning, and the judge indicates that the orders are appropriate and that no appearance is required.

All affidavits or other material required to have been filed prior to a directions hearing must be filed and served by 4pm on the Wednesday preceding the hearing. If there is a need for late filing it will be accepted only if an affidavit is filed at the same time explaining why the document could not be filed earlier. The reason for the deadline is to give the judges in the list enough time to read the relevant

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