



# Supreme Court of Victoria

## Practice Note SC CL 9

### Judicial Review and Appeals List

#### 1 INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note.
- 1.2 The purpose of this Practice Note is to describe the procedures to be followed in the Judicial Review and Appeals List. The List is a case management list within the Common Law Division of the Court.
- 1.3 Invariably, procedure in the List will be affected by relevant statutory provisions and/or Rules of Court. Enactments of potential relevance include, in particular, the *Administrative Law Act 1978*, section 109 of the *Magistrates' Court Act 1989*, section 272 of the *Criminal Procedure Act 2009*, section 148 of the *Victorian Civil and Administrative Tribunal Act 1998*, Order 56 or Order 58 (Part 3 or Part 7) of the *Supreme Court (General Civil Procedure) Rules 2015*, Order 4 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2018* or Order 3A of the *Supreme Court (Criminal Procedure) Rules 2017*. Nothing in this Practice Note is intended to derogate from any time limits or other applicable requirements of any Act or of the Rules of Court. However, in the interests of efficiency the Court may, at an initial directions hearing or otherwise, exercise (where applicable) the case management powers conferred on it by the *Civil Procedure Act 2010* or the power conferred on it by Rule 2.04 of the Chapter I Rules to dispense with compliance with the requirements of particular Rules of Court.

#### 2 DEFINITIONS

- 2.1 In this Practice Note:

*ALA* means the *Administrative Law Act 1978*;

*Chapter I Rules* means the *Supreme Court (General Civil Procedure) Rules 2015*;

*Chapter II Rules* means the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2018*;

*Chapter VI Rules* means the *Supreme Court (Criminal Procedure) Rules 2017*;

*List* means the Judicial Review and Appeals List;

*List directions day* means the regular day on which the Court sits to give directions in the List as published on the List page on the Court's website;

*VCAT* means the Victorian Civil and Administrative Tribunal.

### **3 COMMENCEMENT**

- 3.1 This Practice Note commenced on 12 September 2018, as revised, and will apply to all proceedings in the List whenever commenced.

### **4 PROCEEDINGS SUITABLE FOR INCLUSION IN THE LIST**

- 4.1 Subject to paragraph 4.3, the List covers proceedings in the Trial Division of the Court relating to the conduct or decisions of lower courts, tribunals and other external persons or bodies, being proceedings in the nature of judicial review or being statutory appeals (usually limited to questions of law) or referrals of questions of law, and including applications for leave to appeal or for an extension of time in such a proceeding.
- 4.2 Without limiting the generality of paragraph 4.1 but subject to paragraph 4.3, the following proceedings should be initiated in the List:
- a) Judicial review applications made pursuant to the ALA<sup>1</sup> or Order 56 of the Chapter I Rules;
  - b) Appeals from a final order of the Magistrates' Court on a question of law pursuant to section 109 of the *Magistrates' Court Act 1989* or section 272 of the *Criminal Procedure Act 2009*;
  - c) Appeals from an order of VCAT on a question of law pursuant to section 148 of the *Victorian Civil and Administrative Tribunal Act 1998*;
  - d) Appeals from a final order of the Children's Court on a question of law pursuant to section 329 of the *Children, Youth and Families Act 2005*; and
  - e) Referrals for the determination of a question of law under section 33 of the *Charter of Human Rights and Responsibilities Act 2006*.<sup>2</sup>
- 4.3 Inclusion in the List is not appropriate for proceedings which fall within another case management list of the Court. For example, and without limiting the foregoing:

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<sup>1</sup> By virtue of s 4 of the ALA, an application for review under that Act is to be made ex parte within the time specified in s 4 supported by evidence on affidavit showing a prima facie case for relief under s 7 of the ALA. The application is made orally, to an Associate Judge or, exceptionally, to a Judge of the Court. See Thomson Reuters, *Victorian Administrative Law*, vol 2 (at update 176) [JR.260]; Rule 77.01(2)(a)(ii) and (3) of the Chapter I Rules.

<sup>2</sup> See also Order 23 of the Chapter II Rules and Practice Note SC Gen 14 – *Notification of Matters Arising under the Charter of Human Rights and Responsibilities Act 2006*.

- appeals from the Planning and Environment List of VCAT are managed in the Valuation, Compensation and Planning List (see Practice Note SC CL 8);
- certain appeals and applications in the nature of judicial review from the Magistrates' Court, VCAT and other tribunals in relation to employment are managed in the Employment and Industrial List (see Practice Note SC CL 11);
- appeals from VCAT in taxation matters are managed in the Taxation List of the Commercial Court (see Practice Note SC CC 1); and
- appeals from commercial arbitrators under the *Commercial Arbitration Act 2011* or corresponding legislation are managed in the Arbitration List of the Commercial Court (see Practice Note SC CC 3).

## 5 PROCEDURE FOR ENTRY INTO THE LIST

- 5.1 Proceedings of the nature set out in paragraph 4.1 should be initiated in the List. With the exception of applications under the ALA,<sup>3</sup> this should be done by endorsing the heading of the originating process "Judicial Review and Appeals List". The heading of all subsequent documents filed in the proceeding should also be endorsed "Judicial Review and Appeals List".
- 5.2 If at any time after the initiation of a proceeding it appears to the Court that it is appropriate to have the proceeding managed in the List, the proceeding may be transferred into the List on the Court's own motion.<sup>4</sup>
- 5.3 Conversely, a proceeding initiated in the List may be transferred out of the List on application or on the Court's own motion if it appears to the Court that it is appropriate to have the proceeding managed in a different list.
- 5.4 No additional fees will be payable for the initiation of a proceeding in the List or for a transfer into the List.

## 6 PRE-TRIAL MANAGEMENT

### *Obtaining a return date for first hearing*

- 6.1 Except in relation to applications for review under the ALA,<sup>5</sup> the first Court hearing in a proceeding in the List will usually be a directions hearing. In some circumstances the Court will fix a first (or subsequent) directions hearing of its own motion, but, under the relevant Rules of the Court, it is usually the responsibility of the moving party (plaintiff, appellant or applicant) to obtain a

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<sup>3</sup> Applications for review under the ALA do not involve a written originating process in the usual sense. Rather, they are commenced by oral application to an Associate Judge (see footnote 1 above). However, the affidavit(s) in support should be endorsed "Judicial Review and Appeals List".

<sup>4</sup> An example may be a proceeding commenced by writ which is or turns out to be, in substance, in the nature of an application for a judicial review.

<sup>5</sup> See footnotes 1 and 3 above.

date for the first directions hearing. This will usually need to be done by filing and serving a summons for directions.

- 6.2 In order to be accepted for filing, any summons for directions or other summons must be endorsed with a hearing date. In order to obtain a hearing date, the applicant should forward a completed “Judicial Review and Appeals List Hearing Date Information Form” (available on the List page on the Court’s website) together with a draft of the proposed summons via email to [judicialreview@supcourt.vic.gov.au](mailto:judicialreview@supcourt.vic.gov.au). The applicant will be advised by email of the hearing date to be endorsed on the summons. The summons should be filed within 48 hours of this advice or the hearing date may not be guaranteed. A copy of the advice must be filed together with the summons.

*Procedure on first hearing*

- 6.3 With the exception of urgent applications (e.g. for a stay), the first hearing in a proceeding in the List will generally be for directions only and no substantive applications will be entertained.
- 6.4 Generally speaking, new proceedings will be listed for first directions on a List directions day.<sup>6</sup> At the directions hearing, the Court:
- (i) will fix a timetable for interlocutory steps and final hearing date in most matters and make orders in relation to the hearing of any application for an extension of time or for leave to appeal or of any other foreshadowed interlocutory applications;
  - (ii) may order, pursuant to the relevant Rules, that an application for an extension of time or for leave to appeal be referred to the Court which, if an extension or leave is granted, is to hear the substantive proceeding.

*Consent minutes*

- 6.5 In most cases where each party is legally represented, for the convenience of the parties, the Court will, in the week prior to the first directions hearing, forward to the parties a proposed form of order incorporating a timetable (including final hearing date) for their consideration as a prospective consent order.
- 6.6 Should parties wish to submit alternative minutes for the Court’s consideration, the minutes should nevertheless be modelled on the appropriate form of standard orders available on the List page on the Court’s website including an agreed timetable and “not before” date for final hearing.
- 6.7 In order to avoid the need for an appearance at a directions hearing, consent minutes should be sent via email in both signed PDF and editable formats no later than 4:00pm on the Monday preceding the directions day, or at another time as directed by the Court, to [judicialreview@supcourt.vic.gov.au](mailto:judicialreview@supcourt.vic.gov.au). Parties

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<sup>6</sup> Proceedings under the ALA in which an order for review under ss 4 and 5 of the ALA has already been granted will generally be listed for further directions on a List directions day.

are nevertheless required to appear at all listed hearings unless advised to the contrary.

#### *Interlocutory Applications*

- 6.8 Prior to filing a summons for an interlocutory application, the proposed applicant must obtain a return date by forwarding a completed “Judicial Review and Appeals List Hearing Date Information Form” (available on the List page on the Court’s website) together with a draft of the proposed summons and also a copy or a draft of a supporting affidavit (without exhibits) via email to [judicialreview@supcourt.vic.gov.au](mailto:judicialreview@supcourt.vic.gov.au). The applicant will be advised by email of the return date. The summons should be filed within 48 hours of this advice or the return date may not be guaranteed. A copy of this advice should be filed with the summons.

#### *Summary Judgment Applications*

- 6.9 The Court expects that the prospect of any application for summary judgment should be raised at the first directions hearing or at the earliest possible stage thereafter.

## **7 AFFIDAVITS**

- 7.1 Almost always, the proceeding will be heard and determined on affidavit and the moving party will be required to file and serve an affidavit in support of the claim at the outset or at an early stage.
- 7.2 Affidavits and exhibits of any party should be limited to what is necessary for the proper hearing and determination of the proceeding. With limited exceptions, it will be inappropriate to refer to or to exhibit material that was not before the Court, tribunal or other external person or body concerned.

## **8 CONSENT ORDERS SETTING ASIDE A DECISION OR REMITTING A MATTER**

- 8.1 Where proposed consent orders would set aside or vary a decision under review or appeal or would involve the remittal of any matter or would otherwise affect the conduct or the result of a proceeding or matter before an external decision-maker, judicial power is engaged in relation to the functions of a public authority, and the Court may need to consider for itself whether the orders should be made, particularly where the proceeding or matter affected is executive or administrative in nature.<sup>7</sup> Where orders of such a kind are sought “on the papers”, a joint memorandum explaining the legal justification for the proposed orders must be provided to the Court. The Court may nevertheless require the attendance of practitioners. Even if satisfied that the proposed

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<sup>7</sup> See *Irwin v Military Rehabilitation and Compensation Commission* (2009) 174 FCR 574 at 577 [12]-[16] and cases there cited, especially *Kovalev v Minister for Immigration and Multicultural Affairs* (1999) 100 FCR 323.

consent orders are appropriate, the Court may consider it necessary to publish reasons for the making of the orders or at least to direct that a copy of the joint memorandum be served on the decision-maker affected together with a copy of the orders made.<sup>8</sup>

## **9 COURT BOOKS AND AUTHORITIES**

- 9.1 A court book is required for any proceeding in the List.
- 9.2 The purpose of the court book is to provide to the Court and the parties an accessible bundle of copy documents which will be used at the substantive hearing of the proceeding.
- 9.3 Practitioners will be expected to agree upon the contents of the court book. The Court will usually make an order for the party preparing the court book to provide an index to the other party for the purposes of consultation and agreement about the contents of the court book.
- 9.4 As a general principle, the court book should include copies of all documents which a party reasonably expects will be relevant to the Court's decision. Copies of the official record of the conduct or decision under review or appeal (where available) or a statement of the conduct or decision, and copies of critical documents relating to it, including any relevant statement of reasons and/or transcript, must be included. In addition, the court book should generally include the originating process in the JRA proceeding itself, all affidavits (including exhibits) which bear substantively upon the JRA proceeding (as finally amended), key orders made in the JRA proceeding and the written submissions of the parties filed in the JRA proceeding.
- 9.5 Unnecessary or duplicated documents are not to be included. However, if it appears that a necessary document has been omitted from the court book, the tender of that document in evidence at the hearing will not be rejected for that reason.
- 9.6 The court book should contain copies of documents only and not original documents.
- 9.7 A document in the court book may be tendered as authentic without formal proof unless a party objects. If a party intends to object to the authenticity of a document, it should notify all other parties as soon as practicable.
- 9.8 Generally:
  - a) the court book should contain an index of its contents and each page of the court book should be paginated;
  - b) the index should list the documents in chronological order; and
  - c) the index should include at least the following descriptive fields or categories:

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<sup>8</sup> See the cases referred to in the previous footnote.

- i. court book number (which must run sequentially from beginning to end);
- ii. document date;
- iii. document description;
- iv. document source or provenance;
- v. court book page number at which the document commences; and
- vi. court book page number at which the document ends.

9.9 The Court will generally order that a single combined indexed electronic book of authorities be prepared by the plaintiff/applicant/appellant for the use of the Court, following an exchange of lists of authorities between the parties. Where only a short part of a lengthy authority is relied upon, that part should be identified in the index of authorities and the parties should use their discretion as to the part or parts to be included in the book of authorities.

9.10 One or more of the standard authorities listed in Schedule 1 may be referred to in the index of authorities if relevant, but no copies of those standard authorities are to be included in the combined electronic book of authorities provided to the Court. Parties may assume that the Court has access to the authorities in Schedule 1.

## **10 USE OF TECHNOLOGY**

10.1 The provisions of Practice Note SC Gen 5 “Technology in Civil Litigation” apply to proceedings in the List.

10.2 For the purposes of paragraph 9.11 of that Practice Note, documentary evidence in excess of 1500 pages is to be considered a large amount of documentary evidence.

## **11 TRANSCRIPT**

11.1 Practice Note SC Gen 7 is applicable to the requirements for transcript in relation to proceedings in the List.

11.2 For the purposes of Practice Note SC Gen 7, unless in a particular case parties are advised otherwise:

- a) ‘Real-Time’ transcript is not required for any proceeding in the List;
- b) ‘Running’ transcript (as distinct from ‘Real-Time’ transcript and from ‘Deferred’ transcript) is required for all trials and appeals in the List; and
- c) transcript is not required at all for directions hearings or interlocutory applications.

## **12 COMMUNICATIONS WITH THE COURT**

- 12.1 At all stages of the proceeding, communications with the Court should be by email with a copy to all other parties, and should be confined to uncontroversial matters.
- 12.2 Communications should be directed to [judicialreview@supcourt.vic.gov.au](mailto:judicialreview@supcourt.vic.gov.au).
- 12.3 Parties are reminded that pursuant to rule 27.03(11)(b) of the *Supreme Court (General Civil Procedure) Rules 2015*, all court documents must include the name and email address of an individual to whom reference can be made in respect of the proceeding.

## **13 FURTHER INFORMATION**

- 13.1 The Court's website ([www.supremecourt.vic.gov.au](http://www.supremecourt.vic.gov.au)) includes [a page dedicated to the List](#) with up to date information about the operation of the List including:
- a) Judicial officers managing the List;
  - b) Links to this Practice Note in Word and PDF formats;
  - c) Samples of standard directions orders;
  - d) Dates for List directions days.

## **AMENDMENT HISTORY**

30 January 2017: This Practice Note was issued on 30 January 2017 and replaced Practice Note No 9 of 2015.

22 March 2018: Amendments to paragraphs 1, 3, 4, 5, 6 and 9.

12 September 2018: Amendments to paragraphs 1, 2, 3, 6, 9, 11, 12 and 13.

Vivienne Macgillivray  
Executive Associate to the Chief Justice  
12 September 2018



## SCHEDULE 1

### Judicial Review and Appeals List Standard authorities that are not to be included in books of authorities

1. *Craig v South Australia* (1995) 184 CLR 163
2. *Kable v Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51
3. *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531
4. *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24
5. *R v Hardiman; Ex parte Australian Broadcasting Tribunal* (1980) 144 CLR 13
6. *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480
7. *Ebner v Official Trustee* (2000) 205 CLR 337
8. *Department of Premier and Cabinet v Hulls* [1999] VSCA 117
9. *House v The King* (1936) 55 CLR 499
10. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223