Practice Note No 4 of 2004
(as amended by Practice Note No 6 of 2007)

COMMERCIAL LIST

The Chief Justice has authorised the issue of the following Practice Note:

1. INTRODUCTION

1.1 The Commercial List is a list of cases within the Commercial and Equity Division of the Trial Division of the Court. Proceedings in the List are intensively managed with maximum expedition and tried by specialist Judges experienced in commercial law. Two Judges of the Court have been nominated by the Chief Justice as Commercial List Judges.

1.2 The contact details for the Associates of the List Judges can be found at the Commercial List page on the Court website at www.supremecourt.vic.gov.au. The Commercial List web page may be found by selecting from the Court Home Page, *Lists and Sittings* and then, *Specialist Lists* and then, *Commercial.*

1.3 This Practice Note replaces the *Guide to Commercial List Practice* published in 1992 and revised in 1996 and Practice Note No 1 of 1986, *Commercial List.* The practices and procedures set out in this Practice Note (as amended by Practice Note No 6 of 2007) will apply as from 1 January 2008 to all proceedings in the List.

1.4 References in this Practice Note to the Chapter I Rules are references to the *Supreme Court (General Civil Procedure) Rules 2005* as amended from time to time. References to the List Rules are references to the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998* as amended from time to time, and in particular to Order 2 of those Rules.

1.5 The objective of the List is to provide for the just and efficient determination of commercial disputes, by the early identification of the substantial questions in controversy and the flexible adoption of appropriate and timely procedures for the future conduct of the proceeding which are best suited to the particular case.

1.6 The details contained in this Practice Note must be read and understood in the light of the List's objective, which is paramount. The practices and procedures contained in this Practice Note are those which the Court expects practitioners conducting proceedings in the List to adhere to in order to resolve or determine the proceeding efficiently and justly. These practices and procedures may be modified or abrogated by order of the Court in order to suit the requirements of a particular case.

1.7 In general, the Chapter I Rules will apply to a proceeding in the List. Notwithstanding this, the practice of the List and the achieving of the objective of the List involve certain departures from and restraints upon the rights of litigants under the Chapter I Rules. These are set out in this Practice Note and include the following:

(a) Pursuant to Rule 2.02(5) of the List Rules, all applications for substituted service are referred to the Commercial and Equity Division Master, who will accord them priority.

(b) If a party seeks to enter default judgment:

i. it may do so in default of appearance pursuant to the Chapter I Rules without leave;

ii. it may do so in default of pleading only by leave.

(c) All pleadings will be filed and served pursuant to the directions of the Managing Judge. The Chapter I Rules with respect to the form and content of pleadings shall apply. "Holding defences" are neither necessary nor acceptable in the List. Evasive pleading will not be tolerated and parties will be expected to join issue properly in a responsive pleading. For example, a defence which, without good cause, merely denies or does not admit allegations may be struck out and the defendant required to plead again, with proper particulars and to pay any costs thrown away.

(d) Proper particulars should be provided in all pleadings as required by Rule 13.10 of the Chapter I Rules. A party in breach of this requirement may expect to be ordered to bear the costs of the request for and the provision of further and better particulars.

(e) An amendment to a pleading may be made by consent before the proceeding is set down for trial and, thereafter, only by leave.

(f) As a general rule, service of interrogatories is not permitted in proceedings in the List. If an application for leave to interrogate is made, it must be supported by an affidavit setting out the circumstances relied on and exhibiting a draft of the proposed interrogatories. Service of interrogatories will normally only be permitted if required to establish some fact or facts which cannot satisfactorily be proved in some other way. As an alternative to permitting interrogatories, the Court may order that particulars be provided or the early exchange of witness statements.

1.8 Proceedings in the List will be managed by a List Judge. Management involves the adoption of one or more of the following procedures where appropriate to achieve the objective of the List:

(a) encouraging the parties to cooperate with each other in the conduct of the proceeding;

(b) identifying the questions in issue at an early stage;

(c) deciding promptly which questions need full investigation and trial and disposing summarily of the others;

(d) deciding the sequence in which the questions are to be determined;

(e) encouraging the parties to use alternative dispute resolution procedures;

(f) encouraging and helping the parties to settle all or part of the dispute;

(g) fixing timetables or otherwise controlling the progress of the proceeding;

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the proceeding as possible on the same occasion;

(j) managing the proceeding by making interlocutory orders on the papers, that is, upon written application and material without the necessity of appearance before the Court;

(k) making use of technology; and

(1) giving directions to ensure that the trial proceeds quickly and efficiently.

1.9 To this end:

(a) All pleadings should focus on the real or substantial issues in dispute, supported by proper particulars.

(b) Practitioners are expected to be familiar with their case, to ensure that the Court's directions are followed, to ensure that their clients focus on the real issues and to ensure that the proceeding moves without delay towards determination, by trial or settlement.

(c) The proceeding will, unless there is a good reason to the contrary, be handled with expedition. Ordinarily, the proceeding should be fixed for trial on the third or fourth directions hearing. Practitioners must be aware that short time periods will be permitted for interlocutory steps and, in relation to Court hearings, time limits may be imposed by the Court for the examination and cross-examination of witnesses and oral submissions.

(d) The Court will make orders and give directions appropriate to the situation, but which will be designed to meet the objective of the List.

(e) Notwithstanding that most interlocutory steps in the proceeding will be taken pursuant to Court order, practitioners are encouraged to anticipate such orders rather then leave the initiative entirely to the Managing Judge.

1.10 Where appropriate, practitioners should adopt the procedures set out in the Practice Note No. 1 of 2007, *Guidelines for the Use of Technology in any Civil Litigation Matter*. If difficulties arise between the parties in the implementation of that Practice Note, practitioners should bring the matter before the Court for a prompt resolution.

1.11 Communications with the Court should be directed to the Associate of the Managing Judge or to the Associate of the Judge in charge of the List and may be by telephone, facsimile or email. Documents which are directed to be filed may, unless the Chapter I Rules or the List Rules otherwise require, be filed electronically with the Associate. All communications with the Court should be disclosed to all parties.

1.12 The complexity of cases in the List and the determination of the Court to achieve the objective of the List dictate that a dispensation from the requirements of Rule 1.17 of the Chapter I Rules, that a corporation, whether or not a party, may not take a step in the proceeding or be represented in Court save by a practitioner, will be granted only in exceptional cases.

2. ENTRY INTO THE COMMERCIAL LIST

2.1 A proceeding is appropriate for entry into the List where the issues in dispute arise out of ordinary commercial transactions or in which there is a question which has importance in trade or commerce.

2.2 Debt collection proceedings are generally not considered appropriate for entry into the List unless the claim or the defence to it involves additional matters appropriate for entry into the List.

2.3 Group proceedings pursuant to Part 4A of the *Supreme Court Act 1986* are generally not considered appropriate for entry in the List unless a common question in the proceeding is one appropriate for the List.

2.4 A proceeding may be entered into the List in one or more of the following ways:

(a) by an endorsement of the originating process pursuant to Rule 2.03(1) of the List Rules; or

(b) by application for entry into the List pursuant to Rule 2.03(2) of the List Rules.

2.5 Practitioners are advised, in case of doubt whether their proceeding is appropriate for entry in the List, to commence the proceeding in the Commercial and Equity Division and to apply for entry into the List pursuant to Rule 2.03(2) of the List Rules at an early opportunity.

2.6 If a plaintiff expects to seek summary judgment against a defendant, the proceeding should not be entered into the List until such time as the application for summary judgment has been determined, so that the commercial dispute underlying the proceeding has been identified.

2.7 Once a proceeding is entered into the List, all Court documents should be endorsed in the top left-hand corner, under the name of the Commercial and Equity Division, with the words "Commercial List" together with the Folio number (allocated by the Registry).

2.8 Every proceeding will ordinarily be allocated to a List Judge who will be the Managing Judge responsible for managing the proceeding. Where this is not possible, and subject to the state of the List from time to time and in consultation with the Listing Master, another Judge from the Commercial and Equity Division will be requested pursuant to Rule 2.02(4) of the List Rules, to manage the proceeding through its interlocutory stages and to conduct the trial. Notwithstanding that the pressures upon the Court are such that a List Judge will not ordinarily be able to conduct the trial of a case which is expected to last more than 10 days, the Court will make every effort to ensure that the Managing Judge or another List Judge is the Trial Judge of every proceeding in the List.

2.9 A prescribed fee is payable upon entry of a proceeding into the List. The amount of the fee may be found on the Court's website. The fee is not refundable if the proceeding is removed from the List.

2.10 When an order for entry into the List is made, the Court will require that the practitioner seeking entry undertakes to the Court on behalf of the applicant to pay the prescribed fee. Practitioners should have the appropriate instructions to give such an undertaking.

2.11 If a proceeding is removed from the List due to any conduct by a party which causes the removal:

(a) the Court may make an order requiring that party to pay the entry fee to the non-defaulting party who paid the fee; but

(b) where the defaulting party is the party who brought the matter into the List, the Court may order that the defaulting party bear the cost of the entry fee, regardless of the eventual outcome of the proceeding.

2.12 If a proceeding is removed from the List because of the conduct of both, or all parties, the cost of the entry fee may be treated as a cost in the proceeding.

3. DIRECTIONS HEARINGS

3.1 Directions hearings in the List will be held each Friday except during vacations. Dates and times of directions days are listed on the Court's website, and published in the Court's daily list.

First directions hearing

3.2 Represented parties are expected to attend the first directions hearing by their legal practitioner. Unrepresented parties should appear in person. In addition, the Court may require a party or a senior officer of a corporate party to attend at any stage. Consent orders will not normally be made on the papers on the first directions hearing.

3.3 Each party should be ready, if requested by the Court, to explain, by brief oral outline, the nature of the dispute and the substantial questions in controversy, and to assist the Court to determine the course to be followed in order to achieve the objective of the List.

3.4 The Court expects that a party's practitioner will be properly briefed and familiar with the proceeding, in order to deal fully with all issues that might arise at the hearing.

3.5 It is essential that practitioners ensure, as far as it is reasonably practicable, that all parties are served with the originating process before the first directions hearing, in reasonable time to enable the parties to provide instructions to their practitioners and for the practitioners to understand the substantial questions in controversy. In this regard, where parties are located interstate or overseas, sufficient time should be permitted to those parties to ensure they are appropriately served and have an opportunity to retain and instruct practitioners prior to the first directions hearing.

Matters for consideration at directions hearings

3.6 At the first directions hearing, or otherwise as the Court considers appropriate, orders will be made and directions given with a view to ensuring the just and efficient determination of the dispute. All parties are expected to have considered whether orders or directions should be made which relate to:

(a) the filing and service of pleadings;

(b) the provision of proper particulars;

(c) joinder of any further parties and/or claims between parties;

(d) the filing and service of a statement of agreed facts and/or issues;

(e) the making of any admissions, pursuant to any notices to admit or otherwise;

(f) the filing and service of lists of documents generally or in relation to specific categories of documents;

(g) the provision of copies of documents;

(h) the early delivery or exchange of experts' reports and the holding of any conferences between experts;

(i) the appointment of an expert as a Court expert and the provision of any orders, directions or instructions to the expert;

(j) the reference to a special referee for inquiry and report on any issue in the proceeding at the request of any party or on the Court's own motion;

(k) the filing and service of any affidavits or witness statements by specified dates;

(l) whether an order should be made for the separate trial of any question;

(m) whether the proceeding is appropriate to be conducted in accordance with the procedures set out in the Practice Note No. 1 of 2007, *Guidelines for the Use of Technology in any Civil Litigation Matter* and, if so, to what extent; and

(n) whether the matter should be referred to mediation and, if so, when.

Orders on the papers

3.7 Other than at the first directions hearing and at the directions hearing at which it is expected that the proceeding will be fixed for trial, consent orders may be submitted to the Court and may be made on the papers. Where parties consider orders should be made on the papers, without the necessity of attendance by the parties, they should follow the following steps:

(a) They should have agreed the form of the proposed orders.

(b) The proposed orders signed by or on behalf of all parties should be sent to the Associate of the Managing Judge a reasonable time in advance of the directions hearing (and in any event, not later than noon before the day of the directions hearing).

(c) Where the form of the proposed orders cannot be finalised by noon before the day of the directions hearing, practitioners should expect to attend Court unless they are notified to the contrary by the Court.

(d) Notwithstanding that the parties have agreed and submitted proposed orders, the Court may require the attendance of practitioners and may not make the proposed orders.

(e) Where the parties attend Court in circumstances where it would have been reasonable to make an order on the papers, the Court may decline to award any party the costs of its attendance.

3.8 Where the proposed orders not sought by consent are unopposed, the party proposing the orders should submit them to the Court with written material which discloses that the making of the proposed orders are unopposed. The Court may make such orders on the papers or require the attendance of the parties. The Court may set aside or vary an unopposed order made on the papers upon application by a respondent.

Interlocutory applications

3.9 Interlocutory applications will ordinarily be managed, heard and determined by the Managing Judge at the next directions hearing. Where that is not appropriate, a date will be fixed by the Judge for the determination of the application.

3.10 Where an interlocutory dispute arises, the Court will expect practitioners to make an appropriate endeavour to resolve it. All parties have liberty to apply to the Court for orders if resolution is not possible between parties and they are encouraged to do so promptly to avoid unnecessary delay in the interlocutory process.

3.11 Upon an interlocutory application the following procedure should ordinarily be adopted:

(a) routine applications may be made upon notice; they need not be made by summons;

(b) it will not be necessary to file an affidavit reporting the progress of the proceeding since the last directions day, nor setting out orders previously made by the Court in the proceeding or the transcript of proceedings previously before the Court in the proceeding;

(c) correspondence passing between the parties or their practitioners may be tendered in evidence in a paginated bundle without formal proof by affidavit or otherwise unless receipt is in issue;

(d) the orders sought by a party and the material upon which that party relies must have been clearly notified to all other parties by 4.00pm on the Wednesday before the directions date on which the orders are sought, and all other parties must notify the applicant of their response by 4.00pm on the Thursday before the directions date on which the orders are sought;

(e) in notifying the Court of an application to be made on a directions day,

(i) the practitioner for the applicant should, by 4.00pm on the Wednesday before the directions day on which the orders are sought, provide the Associate of the Managing Judge with a clear statement in writing of the orders and directions sought and, if known, the attitude of the other parties;

(ii) where the correspondence between the practitioners succinctly states each party's position, the applicant need not provide the Court with other material in support of its application;

(iii) where an application is expected to exceed two hours or to involve a consideration of voluminous material, the practitioner for the applicant should advise the Court of this fact so that sufficient time may be set aside for the hearing of the application; and

(iv) all correspondence or other material passing between a party and the Court must be disclosed to all other parties;

(f) applications seeking orders which involve non-parties should be made by summons supported by affidavit in accordance with the Chapter I Rules.

(g) Where an applicant for an interlocutory order offers, the Court accepts or an order or other Court document records, the giving of “the usual undertaking as to damages”, this shall be taken to mean the following undertaking given to the Court:

> to abide by any order which this Court might make as to damages, in case this Court shall be of opinion that the defendant [or as the case may be] shall have sustained any, by reason of this order, which the plaintiff [or as the case may be] ought to pay.

Practitioners must ensure that, when this, or any, undertaking is given, the full text of the undertaking is set out in the order under the heading “Other Matters”.

Final directions hearing

3.12 In appropriate cases, the Trial Judge or the Managing Judge may list the proceeding for a final directions hearing shortly prior to the scheduled start of the trial and after a setting down order has been made. Such a directions hearing may be listed by the Judge or at the request of any party. Matters to be addressed may include the following:

(a) a confirmation that the parties will be ready for trial on the appointed trial date and that the estimated trial duration remains accurate;

(b) the order of opening submissions by all parties prior to evidence from witnesses;

(c) the length of opening submissions;

(d) the filing and service of agreed statements of facts;

(e) the filing and service of an agreed statement on any expert evidence, identifying the issues which remain in dispute between the parties' experts;

(f) the procedure for and time for notices of objection to evidence and responses;

(g) the exchange of written outlines of opening submissions;

(h) the exchange of written outlines of closing submissions;

(i) time limits to be imposed on parties for:

(i) opening addresses;

(ii) presentation of a party's case including cross-examination;

(iii) closing addresses; and

(j) the mode of proof of any particular facts in dispute.

Failure to comply with Court orders

3.13 (a) If a party fails to comply with an order, the Court may, in addition to any course otherwise available, impose a costs penalty on that party or the practitioner representing that party, it may refuse to extend the time for compliance but require the party in default to catch up with the remaining timetable, or it may remove the proceeding from the List.

(b) Where a party is experiencing difficulties in meeting the timetable, the problem should be immediately notified to the Associate of the Managing Judge so that the difficulties can be properly managed and consequential delays avoided or minimised.

4. URGENT APPLICATIONS AND LIBERTY TO APPLY

4.1 List Judges will ordinarily be available to hear all urgent applications, including applications for injunctive relief.

4.2 Parties are encouraged to avail themselves of the general liberty to apply included or implied in every interlocutory order. They may cause a proceeding to be listed for urgent directions on a date other than a directions day. A party seeking to do so should make prior arrangements with, or give appropriate notice to, all other parties, and should contact the Associate of the Managing Judge (or Trial Judge) to arrange a suitable time when the proceeding will be listed for directions.

4.3 In the first instance, all such inquiries should be directed to the Associate of the Managing Judge or, if the proceeding is fixed for trial, the Associate of the Trial Judge. If for any reason the Judge is unavailable, the party should contact the Associate of the Judge in charge of the List. Subject to the availability of a List Judge, the Judge in charge of the List may, in consultation with the Listing Master, refer the proceeding to another Judge in the Commercial and Equity Division or to the Judge in the Practice Court.

4.4 List Judges will be available, if required, to hear urgent applications outside normal Court sitting hours. Very urgent applications may be made in the usual way to the Judge sitting in the Practice Court if it is not practicable or possible to list the hearing before a List Judge.

5. APPLICATIONS TO JOIN THIRD PARTIES AND OTHER PARTIES

5.1 A third party or another party may be joined only by leave.

5.2 An application for leave to join a third party or another party should be brought by summons supported by an affidavit setting out the basis for the joinder and including a proposed statement of claim against the party to be joined.

5.3 Any such application must be brought as soon as practicable. The Court might fix a date within which such an application must be brought. Where an application is made in breach of this requirement, the application may be refused or orders made so that the joinder will not affect the management of the proceeding. In addition, the Court may make costs orders against a party which unnecessarily delays making such an application.

5.4 The summons and supporting affidavit must be filed and served on all existing parties and the proposed third party or other party within sufficient time to permit the third party or other party to file a notice of appearance and otherwise to determine whether to appear on the hearing of the application and to enable the party, if joined, to seek or to be subject to directions.

5.5 The applicant must inform the proposed third party, or other party, that if that party does not appear at the hearing of the application, the Court may, in addition to granting leave for the joinder, make directions consequent upon the joinder and may make other interlocutory orders affecting the parties generally, including the party joined.

6. DISCOVERY

6.1 Subject to the provisions of this Practice Note, discovery will comply with the requirements of Order 29 of the Chapter I Rules. Parties are encouraged to agree upon orders for discovery and to consider whether limited categories of discovery should be exchanged.

6.2 Practitioners are expected to comply with the following procedures:

(a) Discovery is made pursuant to an order of the Court; not by notice for discovery.

(b) Discovery is normally made by the filing and delivery of an unsworn list of discoverable documents.

(c) Where appropriate, discovery should be made in electronic form in compliance with Practice Note No. 1 of 2007, *Guidelines for the Use of Technology in any Civil Litigation Matter*.

(d) The list of discoverable documents should include the following descriptive identifying fields:

i. **document discovery number** (to use numeric, not alphabetical numbering (for example, 001, 002, 003 etc and where extra documents are to be inserted in a list, the numeric numbering should read, for example, 010.1, 010.2, 010.3 etc);

ii. **document date;**

iii. **document description** (for example, "original contract between X and Y");

iv. **document source or provenance** (for example, the particular file and from which party a document was discovered or from what person the document was obtained under subpoena).

7. SEPARATE TRIAL OF QUESTIONS

7.1 A feature of the List procedure is the identification of and the trial of separate questions in the proceeding pursuant to Rule 47.04 of the Chapter I Rules.

7.2 Practitioners should at all times consider whether such a trial is possible and should co-operate with the Managing Judge to implement the procedure.

7.3 Questions as to the quantum of damages or of the claim will ordinarily be tried after other questions in the proceeding.

8. MEDIATION

8.1 All proceedings will be referred to mediation unless there is a good reason to the contrary.

8.2 From the first directions hearing, practitioners are expected to consider when mediation would be most appropriate. In addition, practitioners are expected to have discussed the desirability of mediation with each other and where possible, agree on when a mediation ought to take place.

8.3 An order for mediation will be based on the standard form, a copy of which is set out as Schedule 1 to this Practice Note.

9. COURT BOOKS

9.1 The trial order will normally direct that documents for use at trial be included in a court book.

9.2 The purpose of the court book is to provide to the Court, the parties and witnesses an accessible bundle of documents which will be deployed at trial.

9.3 Practitioners will be expected to agree upon the contents of the court book. The usual trial order will require that practitioners consult between themselves in order to settle the contents of the court book.

9.4 As a general principle, the court book will include, together with the current pleadings, requests for and particulars, notices to admit and responses to such notices (or a summary of admissions), a legible copy of all documents in date order which a party intends to tender in evidence in chief and which that party reasonably expects will be referred to in cross-examination (the relevance test). Practitioners must ensure that, as far as possible, all such documents are included in the court book and that unnecessary documents not be included. If it appears that a necessary document has been omitted from the court book, the acceptance of that document into evidence will not be refused for that reason.

9.5 The contents of the court book will be inclusive; practitioners have an entitlement to add documents into the book provided each document satisfies the relevance test, but not to insist that another party excludes documents from the court book.

9.6 Where any dispute as to the court book arises between the parties, the matter should be listed before the Managing Judge or Trial Judge without delay.

9.7 The attention of practitioners is drawn to para 14.9 under which a document in the court book may be tendered as authentic without formal proof unless a party objects. If it is intended that a document be treated otherwise, this should be identified and any agreement as to this clearly recorded.

9.8 There should be no unnecessary duplication of documents.

9.9 The application of the relevance test in settling the contents of the court book will be subject to review by the Court should the need arise for a different approach to be adopted in particular cases, consistent with the just and efficient conduct of the trial. Practitioners should expect that, where unnecessary or irrelevant documents are included in the court book, an order may be made that the costs associated with the inclusion of such documents not be recoverable by the party which included those documents or that they be paid by that party in any event.

9.10 The trial order may make provision for the form, the content and the timetable for the preparation and delivery of the court book.

9.11 (a) The court book will contain an index of its contents and each page of the court book will be paginated.

(b) The index will normally list the documents in chronological order.

(c) The index shall include at least the following descriptive fields or categories:

i. court book number (which must run sequentially from beginning to end);

ii. document date (being the date attributed to the document in the list of discoverable documents if the document was discovered);

iii. document description (being the description attributed to the document in the list of discoverable documents if the document has been discovered);

iv. document source or provenance (being the source or provenance attributed to the document in the list of discoverable documents if the document has been discovered);

v. court book page number at which the document commences; and

vi. court book page number at which the document ends.

(d) Ordinarily, the documents in the court book should not be separated by dividers.

9.12 [deleted]

10. WITNESS STATEMENTS

10.1 The trial order will normally direct a trial by witness statement. Where such an order is made and a party desires to call evidence from a witness, that party must, before trial, file and serve a witness statement or a summary of the evidence which the witness is expected to give.

10.2 A witness statement is in written form the evidence that a witness would otherwise give orally. Subject to any order to the contrary, the witness statement will, when adopted, stand as the evidence-in-chief of the witness. It should therefore be in a form which would satisfy the evidentiary requirements for the oral evidence of the witness.

10.3 Practitioners are expected to ensure that witness statements truly represent the evidence of a witness and have not been "wordsmithed".

10.4 A party will be taken to have waived for the purpose of the proceeding legal professional privilege to the content of a witness statement which has been served in that proceeding. Legal professional privilege attaching to the content of an unserved draft witness statement, including an expert's witness statement, is not taken to be waived merely by the filing and service of the final form of such witness statement.

10.5 A party may refer to or use the contents of a witness statement served by another party before it is adopted by the intended witness and put into evidence, for the purposes of the proceeding, for example, for the preparation of the case to be answered, in opening submissions and in adducing evidence from a witness. A party receiving a witness statement is taken to have done so subject to an implied undertaking to the Court that the witness statement and its contents will not be used for any purpose other than for the legitimate purposes of the proceeding.

10.6 The following are the requirements in relation to the preparation of witness statements:

(a) each witness statement, subject to any order to the contrary, will when adopted, stand as the evidence-in-chief of the witness;

(b) each witness statement must be in admissible form, taking close account of the rules of evidence, including the rule against hearsay evidence;

(c) each witness statement before it is filed or served, must include at the end of the statement, the following verification:

> I verify that I have read the contents of this my witness statement and the documents referred to in it and that I am satisfied that this is the evidence-in-chief which I wish to give at the trial of the proceeding.

(d) except by leave, a party is precluded from adducing from a witness evidence-in-chief, other than that which is included in the witness statement of that witness;

(e) each witness statement shall be directed only to matters in issue; and

(f) copies of witness statements, as tendered, should be provided to the parties and to the Trial Judge in electronic format.

11. EXPERT EVIDENCE

11.1 The requirements of Order 44 of the Chapter I Rules and Form 44A entitled "Expert Witness Code of Conduct" apply to a proceeding in the List.

11.2 The Court expects expert witnesses to express an opinion arrived at independently from any pressure brought to bear by or on behalf of the party engaging the expert.

11.3 The expert's evidence-in-chief shall be given by an expert report in writing. The expert's report must include:

(a) the expert's relevant qualifications and experience;

(b) the questions for opinion;

(c) the facts and assumptions underlying the expert opinion(s); and

(d) the reason for the expert opinion(s).

11.4 In an appropriate case, the Court may give directions that;

(a) the expert evidence in the case follow the lay evidence (that is, factual evidence to be adduced by the parties to the proceeding upon which the expert evidence is predicated);

(b) the experts engaged by the respective parties be sworn and present their evidence in a panel format (sometimes colloquially referred to as in a “hot tub” manner);

(c) the experts have the opportunity to ask questions of each other following the making by each expert of a short presentation summarising their opinion.

11.5 In each case in which contentious expert evidence is to be adduced, the Court will almost invariably direct pursuant to Rule 44.06 that experts confer before trial.

11.6 With respect to conferences of experts:

(a) subject to any direction of the Court, the procedure to be adopted at the conference is a matter for the experts themselves, and not for the parties or their legal representatives;

(b) neither the parties nor their legal representatives should seek to restrict the freedom of the experts at the conference to identify and acknowledge the matters upon which they agree;

(c) following any conference, the experts will prepare a joint memorandum for the Court recording:

i. the fact that they have met and discussed the matters upon which they have been directed to confer;

ii. the matters on which they agree;

iii. the matters on which they disagree; and

iv. a brief summary of the reasons for their disagreement.

12. REFERENCE TO SPECIAL REFEREE PURSUANT TO ORDER 50

12.1 Practitioners are encouraged to identify whether questions in the proceeding should be referred to a Special Referee and if so, when the reference should take place.

13. SETTING DOWN FOR TRIAL

13.1 The objective of the Court in managing proceedings in the List is that the trial will commence not more than nine months from the date of issue of the proceeding.

13.2 A proceeding may not be set down for trial otherwise than by order of the Court.

13.3 Court books, witness statements and a joint memorandum of counsel will ordinarily be ordered to be prepared by the parties prior to the allocation of a trial date. Schedule 2 contains the standard form of pre-trial order.

13.4 Prior to the allocation of a trial date, counsel for each party must provide to the Trial Judge a joint memorandum, signed by all counsel, containing a detailed estimate of the duration of the trial, broken down as follows:

a) time in opening submissions of each party;

b) time for any objections to evidence;

c) time for the evidence of each witness;

d) time for final submissions of each party.

The estimate is to be in two parts:

a) on the assumption that the trial proceeds on all issues, including quantification of damage;

b) on the assumption that the trial proceeds on liability issues only, excluding any issues concerning quantification of damage.

If there is any disagreement between counsel, this should be stated in the joint memorandum and the rival positions or estimates set out.

If, after the report is delivered, a barrister or solicitor for a party has reason to believe that the information provided is no longer accurate, it is the responsibility of that lawyer to bring this to the attention of the Managing Judge immediately.

13.5 Prior to the allocation of a trial date, the solicitors for each party must provide to the Managing Judge a signed statement that their respective clients are ready for trial, and that if there is any reason that the trial cannot proceed on its allocated date, including as to the unavailability of witnesses, they will inform the Managing Judge without delay.

13.6 When the proceeding is set down for trial, the Court will normally make the standard form of trial order, a copy of which is Schedule 3 to this Practice Note. In the ordinary course, the trial of the proceeding in the first instance will be limited to the question of liability (not damages), unless otherwise directed by the Court.

13.7 At this directions hearing the nature and the mode of proof of the questions in controversy will be considered so that the trial order may be moulded to suit the particular case. In particular, practitioners should consider:

(a) whether facts might be proved by notice to admit or affidavit or otherwise;

(b) whether the Court should make an order pursuant to Rule 40.03 of the Chapter I Rules dispensing with strict rules of evidence with respect to non-controversial facts;

(c) whether the evidence of witnesses with respect to particular matters should be given orally notwithstanding that witness statements are directed;

(d) whether and to what extent the trial will be conducted electronically.

13.8 Where the estimated duration of the trial is 10 days or less the Managing Judge or another List Judge will normally conduct the trial. Where the estimate is greater than 10 days the proceeding may be referred to the Listing Master for fixing for trial before another Judge of the Commercial and Equity Division. Where the proceeding is so referred, leave is hereby granted to the Listing Master pursuant to Rule 2.02(5) of the List Rules, to exercise the powers of the Court in relation to the proceeding.

14. DOCUMENTARY EVIDENCE AT TRIAL

14.1 The practices set out in this paragraph are in addition to those available under the Chapter I Rules or at law and, in each case, subject to any direction of the Trial Judge.

14.2 Trials of proceedings in the List commonly involve a good deal of documentary evidence. Having regard to para 9.4 it will be expected that the documents tendered in evidence will have been included in the court book but if it appears that a necessary document has been omitted from the court book, the acceptance of that document into evidence will not be refused for that reason.

14.3 During the opening of their case practitioners are expected to identify the core documents in the proceeding.

14.4 Practitioners should avoid unduly technical objections to the tender of documents.

14.5 [deleted]

14.6 [deleted]

14.7 The tender of large numbers of documents or of complex documents without explanation as to their relevance or evidentiary purpose should be avoided.

14.8 Copy documents will be accepted in evidence unless there is good reason to require the tender of the original. Where a copy document is tendered or sought to be tendered the original must be in Court or readily available to be brought into Court.

14.9 A document in the court book may be tendered without formal proof and will be accepted in evidence as an authentic document unless objection to the tender is taken. The form of the tender is subject to the direction of the Trial Judge.

14.10 Where a number of documents are tendered at the same time the Trial Judge and other parties should be provided as soon as practicable with a list of documents so tendered.

14.11 A party wishing to tender a document which is not in the court book must give notice of that fact to all other parties prior to the trial or, at the latest, at the earliest practicable opportunity during the trial and must provide a copy to all other parties. Any party intending to object to the tender of any such document must give notice as soon as practicable to all other parties.

14.12 A party tendering a document which is not in the court book must have in Court a sufficient number of copies for all parties and for the Trial Judge.

14.13 Where a document which is not in the court book is accepted in evidence a copy may be paginated in numeric format and inserted in the court book.

14.14 The solicitors for each party must compile a daily cumulative list of all documents tendered by that party and accepted in evidence or marked for identification up to that day. This list is to be in the form of the index to the court book and will, as far as possible, contain with respect to each document the descriptive fields or categories contained in that index as well as the exhibit number. The list should also identify the party tendering the document, the date of tender, the transcript page where the tender was made and whether the document was tendered by consent or without objection or otherwise. A copy of this daily list is to be provided in electronic and in paper format to the Trial Judge and to all other parties prior to commencement of the next hearing day.

14.15 As soon as practicable after the conclusion of the evidence at trial, the solicitors for the plaintiff must provide in electronic and in paper format to the Trial Judge and to all other parties an exhibit list comprising a consolidation of the daily lists of the documents accepted in evidence during the trial. Those documents in the court book which are not included in the exhibit list,

including pleadings and other Court documents, will be removed from the court book and the culled court book then received in evidence as a single exhibit of the plaintiff.

14.16 Unresolved issues as to the admissibility or otherwise of documents will be dealt with by the Trial Judge as soon as possible.

15. TRIAL

15.1 Subject to any specific directions made by the Managing Judge or the Trial Judge, the trial procedures set out in Order 49 of the Chapter I Rules will be observed.

15.2 The Court will not ordinarily sit on Fridays for the trial of proceedings.

15.3 Practitioners for parties other than the plaintiff should expect to be required to make an answering statement after the plaintiff's opening.

15.4 The Court may limit the number of witnesses (including expert witnesses) that each party may call and the time to be taken at trial by each party including the time for cross-examination and for opening and closing addresses.

15.5 The Trial Judge may order, pursuant to Order 40.05 of the Chapter I Rules or otherwise, that evidence of any fact or event shall be given in a manner, whether by statement, by oral evidence or otherwise, and in such manner as the Trial Judge may direct.

15.6 Practitioners should comply with the rule in *Browne v Dunn* in a practical way having regard to the objectives of that rule and to the state of the evidence and the content of the witness statements which have been served at the time.

15.7 Practitioners must conduct the trial with all expedition which is consistent with their duty to their client and the achievement of a just trial. If at the expiration of the estimated time, the trial has not been completed it may be adjourned part heard to a later date.

15.8 If the pleadings or particulars have been amended after the preparation of the court book the solicitor for the plaintiff must, at the conclusion of the trial, file and serve an up to date copy of all pleadings including particulars.

15.9 The Court will aim to deliver judgment within 3 to 4 months after the conclusion of the trial.

16. ORDERS

16.1 Practitioners are encouraged to prepare draft orders for all relevant hearings in the List.

16.2 As a general rule, orders will be authenticated pursuant to Rule 60.02 of the Chapter I Rules. In circumstances where practitioners seek the Judge to sign an order, they should comply with the provisions of Rule 60.04 of the Chapter I Rules.

16.3 It is not necessary to reserve "liberty to apply" in any order made in a Commercial List proceeding. Liberty to apply is a right which is granted upon entering the List.

Schedule 1

STANDARD MEDIATION ORDER

THE COURT ORDERS THAT:

1. The proceeding be referred to a Mediator to be agreed between the parties or in default of agreement to be appointed by the Court, such mediation to take place by/not to take place before #.

2. Subject to the terms of this order, the solicitor for the Plaintiff shall, after consultation with all parties, deliver to the Mediator a copy of this order, all pleadings (including requests for and further particulars) and a copy of any other relevant information, and take all steps necessary to ensure that the mediation commences as soon as practicable.

3. The mediation shall be attended by those persons who have the ultimate responsibility for deciding whether to settle the dispute and the terms of any settlement and the lawyers who have ultimate responsibility to advise the parties in relation to the dispute and its settlement.

4. The Mediator not later than # report back to the Court whether the mediation is finished.

5. Subject to any further order, the costs of the mediation be paid in the first instance by the parties in equal shares.

Schedule 2

STANDARD PRE-TRIAL ORDER

THE COURT ORDERS THAT:

Court book

1. The Plaintiff prepare a court book containing the following documents:

    (a) the current pleadings including requests for and particulars;

    (b) all documents, in date order, which any party expects to tender in evidence-in-chief or to be referred to in cross- examination.

2. The Plaintiff by # serve on each other party a draft index for the proposed court book. Each of those other parties shall send a list of documents to be included or documents to be excluded from the proposed court book and all parties shall consult as to and agree upon the contents of the court book by #.

3. The Plaintiff by # serve on each other party and file for the use of the Judge a copy of the court book. The Plaintiff shall also provide the Judge with the index to the court book in electronic form.

Witness statements

4. Subject to any order of the Trial Judge, evidence in the trial be by witness statement.

5. The Plaintiff file and serve its witness statements by 4.00pm on #.

6. The Defendant file and serve its witness statements by 4.00pm on #.

7. Each party have available for use by the Trial Judge a copy of all its witness statements in paper form and in electronic form.

8. Each witness statement satisfy the following formal requirements:

    (a) it should be set out in numbered paragraphs;

    (b) as far as possible, it should be expressed in the witness's own words;

    (c) it should contain evidence only in admissible form. For example, hearsay should be

avoided;

(d) where the witness statement contains conversations these should, if the witness's recollection permits, be expressed in direct speech. If this is not possible, this fact should be stated and the witness's best recollection or the substance of the conversation may be set out;

(e) it should contain at the end of the statement the following verification:

"I verify that I have read the contents of this my witness statement and the documents referred to in it and that I am satisfied that this is the evidence in chief which I wish to give at the trial of the proceeding."

9. Where the statement of the witness, if admitted in evidence, proves a document, a copy of the document may be annexed to the witness statement or the document may be identified and tendered separately whether in the Court Book or otherwise.

10. The content of a witness statement served pursuant to an order of the Court is subject to the same implied undertaking as to confidentiality as applies to a document produced upon discovery.

11. Where any witness is not willing to provide a witness statement, the party calling the witness shall, by the date fixed for the delivery of the witness statement of that witness, file and serve a statement of the substance of the evidence which the party expects that witness to give and shall be entitled to lead oral evidence-in-chief from that witness.

Mediation

12. The proceeding be referred to a Mediator to be agreed between the parties or in default of agreement to be appointed by the Court, such mediation to take place by/not to take place before #.

13. Subject to the terms of this order, the solicitor for the Plaintiff shall, after consultation with all parties, deliver to the Mediator a copy of this order, all pleadings (including requests for and further particulars) and a copy of any other relevant information, and take all steps necessary to ensure that the mediation commences as soon as practicable.

14. The mediation shall be attended by those persons who have the ultimate responsibility for deciding whether to settle the dispute and the terms of any settlement and the lawyers who have ultimate responsibility to advise the parties in relation to the dispute and its settlement.

15. The Mediator not later than # report back to the Court whether the mediation is finished.

16. Subject to any further order, the costs of the mediation be paid in the first instance by the parties in equal shares.

Counsels' joint estimate of trial duration

17. Counsel for the parties must provide to the Managing Judge a joint memorandum, signed by all counsel, containing a detailed estimate of the duration of the trial, broken down as follows:

    (a) time in opening submissions of each party;

    (b) time for any objections to evidence;

    (c) time for the evidence of each witness;

    (d) time for final submissions of each party.

    The estimate is to be in two parts:

    (a) on the assumption that the trial proceeds on all issues, including quantification of damage;

    (b) on the assumption that the trial proceeds on liability issues only, excluding any issues concerning quantification of damage.

    If there is any disagreement between counsel, this should be stated in the joint memorandum and the rival positions or estimates set out.

18. The joint memorandum is to be filed by email to the Associate to the Managing Judge by 4.00pm on #.

19. If, after the report is delivered, a barrister or solicitor for a party has reason to believe that the information provided is no longer accurate, it is the responsibility of that lawyer to bring this to the attention of the Trial Judge immediately.

20. The summons for directions is adjourned to #.

21. Costs are reserved.

Schedule 3

STANDARD TRIAL ORDER

THE COURT ORDERS THAT:

1. The proceeding is set down for trial and fixed for hearing on # on an estimated of duration of # days.

2. The Plaintiff have available at the hearing a further copy of the court book for the exclusive use of witnesses during their examination.

3. The Plaintiff file and serve a chronology of the relevant facts and events by 4.00pm on #.

4. The parties file and exchange written outlines of opening submissions, limited to # A4 pages, 1.5 spaced text in font size 12, by 4.00pm on #.

5. Any party receiving a witness statement may, not less than # working days before the witness is due to give evidence, give notice to the party proposing to call the witness stating:

    (a) that a specified part of the witness statement is objected to as being inadmissible;

    (b) that the witness is required to give oral evidence as to any part of the content of the witness statement.

    If no such notice is given the party calling the witness may take it that no part of the witness statement is objected to and that it will stand as the witness's evidence-in-chief if adopted by the witness.

6. If the party calling the witness accepts the requirement referred to in the preceding sub-paragraph, evidence of that part of the content of the witness statement shall be given orally.

7. The Trial Judge will, before the witness is sworn, determine any unresolved issues arising out of any such notice.

8. The Trial Judge may require the witness to give oral evidence as to any part of the content of the witness statement notwithstanding that no party has required this.

9. A copy of the witness statement after deletion of any inadmissible passages and passages as to which oral evidence is to be given shall be available at trial for use by the witness and for tender in evidence.

10. A witness when sworn and having given evidence of formal matters shall be asked whether the

content of the witness statement is true and correct. If an affirmative answer is given, the witness will be taken to have adopted the witness statement and the witness statement may be admitted into evidence.

11. The witness statement when adopted will stand as the evidence-in-chief of the witness subject to these orders. The party calling a witness may not, without leave, adduce further evidence-in-chief from that witness.

12. Costs are reserved.