



Supreme Court of Victoria Common Law Division

Practice Note No. 9 of 2015 Judicial Review and Appeals List

1. INTRODUCTION

- 1.1 This Practice Note takes effect from 1 January 2015. It replaces *Practice Note No. 4 of 2009 – Judicial Review and Appeals List*. It overtakes *Notice to the Profession 2009 – Judicial Review and Appeals List* and *Notice to the Profession 2012 – Judicial Review and Appeals List*. It provides updated guidance on the operation of the Judicial Review and Appeals List (**JRA List**), a specialist case management list within the Trial Division of the Court.
- 1.2 The Judges in Charge of the JRA List are Justices Cavanough and Ginnane. Their Honours are assisted by the associate judges of the Court, who conduct the pre-trial management of proceedings in the JRA List.
- 1.3 Invariably, procedure in the JRA 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*, Order 56 or Order 58 (Part 3) of the *Supreme Court (General Civil Procedure) Rules 2005 (Chapter I Rules)*, Order 4 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Chapter II Rules)* or Order 3A of the *Supreme Court (Criminal Procedure) Rules 2008 (Chapter VI Rules)*. Nothing in this Practice Note is intended to derogate from any applicable requirements of any Act or of the Rules of Court.

2. PROCEEDINGS SUITABLE FOR INCLUSION IN THE JRA LIST

- 2.1 Subject to paragraph 2.3, the JRA 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 Trial Division in the nature of judicial review or being statutory appeals to the Trial Division (usually limited to questions of law) or referrals of questions of law.
- 2.2 Without limiting the generality of paragraph 2.1 but subject to paragraph 2.3, the following proceedings should be initiated in the JRA List:
- a) Judicial review applications made pursuant to the *Administrative Law Act 1978 (ALA)* 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 the Victorian Civil and Administrative Tribunal (*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 or section 427 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*.¹
- 2.3 Inclusion in the JRA List is not appropriate for proceedings which fall within another specialist case management list of the Court. For example, appeals from the Land Valuation List or the Planning and Environment List of VCAT are managed in the **Valuation, Compensation and Planning List**, and should not be initiated in the JRA List: see *Practice Note No. 8 of 2015*. Likewise, appeals from VCAT in taxation matters are managed in the **Taxation List**. Similarly, appeals from commercial arbitrators under the *Commercial*

¹ See also Order 23 of the Chapter II Rules and *Practice Note No. 3 of 2008 – Notification of Matters Arising under the Charter of Human Rights and Responsibilities Act 2006*.

Arbitration Act 2011 or corresponding legislation are managed in the **Arbitration List**.

3. PROCEDURE FOR ENTRY INTO THE JRA LIST

- 3.1 Where a proceeding is intended to be initiated in the JRA List, the heading of the originating process should be endorsed “Judicial Review and Appeals List”. The heading of all subsequent documents filed in the proceeding should also be endorsed “Judicial Review and Appeals List”.
- 3.2 A proceeding not initiated in the JRA List may be transferred into the List on application or on the Court’s own motion if it appears to be suitable to be managed in the List.²
- 3.3 Conversely, a proceeding initiated in the JRA 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.
- 3.4 No additional fees will be payable for the initiation of a proceeding in the JRA List or for a transfer into the List.

4. AFFIDAVITS

- 4.1 The appropriate manner of commencing and conducting a proceeding in the JRA List will vary according to the applicable statutory provisions and/or Court Rules and according to whether or not leave to appeal or an extension of time is required.³ However, 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 an early stage.

² 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.

³ The most common form of commencement is by originating motion.

- 4.2 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.

5. PRE-TRIAL MANAGEMENT

First Hearing

- 5.1 Generally, the first hearing in a proceeding in the JRA List will be before an associate judge sitting in the Associate Judges' Court 2. In arranging and preparing for this hearing, parties should follow the procedures set out in *Notice to the Profession – Applications in Associate Judges' Practice Court (Court 2)*. All enquiries should be directed to the Court 2 Listings Coordinator (court2applications@supremecourt.vic.gov.au or 03 9603 9288).
- 5.2 At the first hearing, the associate judge may, if appropriate, hear any application for leave to appeal, for an extension of time or for summary determination of the proceeding. Alternatively, such applications may be adjourned to be heard by that associate judge at a later date or may be referred to a judge for consideration together with the substantive proceeding. In particular, an application for leave to appeal may be referred to the judge who would hear the substantive appeal pursuant to one of the expedition rules, such as rule 4.14 of the Chapter II Rules or rule 3A.08 of the Chapter VI Rules.
- 5.3 Directions given at the first hearing will vary depending on the nature of the particular proceeding. Where appropriate, the parties are encouraged to prepare proposed consent orders in advance of the first hearing, with a view to obtaining orders by consent without the need for an appearance. The parties should email minutes of consent to court2applications@supremecourt.vic.gov.au, by 4.00pm on the day prior to the first hearing. Any proposed orders should be in the form set out in **Schedule 1**, with amendment as required, and should be sent in both Word

and signed PDF format. Parties are required to appear at the first hearing unless otherwise advised by the Court.

Trial Date

- 5.4 Shortly after directions are made for trial, an associate judge will fix a trial date for the proceeding. The fixing of a trial date will generally take place administratively without the need for an appearance.

Interlocutory Applications

- 5.5 Interlocutory applications in proceedings not yet fixed for trial are generally heard by an associate judge in Court 2, at the first hearing or thereafter as appropriate. Interlocutory applications in proceedings which are fixed for trial are heard by the associate judge responsible for pre-trial applications. In either case, parties should contact the Court 2 Listings Coordinator (**court2applications@supremecourt.vic.gov.au** or **(03) 9603 9288**) to obtain a suitable hearing date.

Appeals from Associate Judges

- 5.6 The procedure for any appeal from an order made by an associate judge in relation to any proceeding in the JRA List is governed by *Practice Note No 4 of 2012 – Appeals from Associate Judges to a Judge of the Trial Division*.

6. CONSENT ORDERS SETTING ASIDE A DECISION OR REMITTING A MATTER

- 6.1 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.⁴ 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 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.⁵

7. COURT BOOKS AND BOOKS OF AUTHORITIES

- 7.1 A court book is required for any proceeding in the JRA List.
- 7.2 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.
- 7.3 Practitioners will be expected to agree upon the contents of the court book.
- 7.4 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, 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

⁴ 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.

⁵ See the cases referred to in the previous footnote.

submissions of the parties filed in the JRA proceeding.

- 7.5 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.
- 7.6 The court book should contain copies of documents only and not original documents.
- 7.7 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.
- 7.8 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:
 - 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.
- 7.9 The Court will generally order that a single joint book of authorities be prepared by the plaintiff/applicant/appellant for the use of the judge, 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.

8. COMMUNICATIONS WITH THE COURT

8.1 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.

8.2 Communications should be directed to court2applications@supremecourt.vic.gov.au (prior to the case being allocated to a trial judge) or to the associate to the trial judge (once allocated). Contact details for all associates are on the Court website.

Vivienne Macgillivray
Executive Associate to the Chief Justice
28 November 2014

SCHEDULE 1
Judicial Review and Appeals List
Standard directions

Leave to appeal*

1. The applicant/appellant have leave to appeal against the decision/order of [*insert name of decision-maker*] in [*insert name of court or tribunal or other external body*] proceeding [*insert proceeding reference number*] made on [*insert date*] in respect of the following questions of law: [].

Extension of time*

2. Time be extended pursuant to [*insert relevant provision*] so far as necessary to authorise the commencement by the plaintiff/applicant/appellant of this proceeding.

Leave to amend*

3. The plaintiff/applicant/appellant have leave to file and serve an amended application/notice of appeal/originating motion by 4.00pm on [e.g. first directions hearing + 2 weeks].

Affidavits

4. The plaintiff/applicant/appellant file and serve any further affidavits upon which he/she/it intends to rely by 4.00pm on [e.g. first directions hearing + 4 weeks].
5. The defendant/respondent file and serve any affidavits upon which he/she/it intends to rely by 4.00pm on [e.g. first directions hearing + 6 weeks].

Adjournment of directions hearing/summons*

6. The directions hearing/summons filed [*insert date of filing of summons*] be adjourned to the Associate Judges' Court 2 at 10.30am on [*insert date*].

Submissions and lists of authorities

7. The plaintiff/applicant/appellant file and serve a written outline of submissions and list of authorities by 4.00pm on [e.g. first directions hearing + 8 weeks].
8. The defendant/respondent file and serve a written outline of submissions in response and a list of authorities, and serve copies of all authorities not also relied upon by the plaintiff/applicant/appellant, by 4.00pm on [e.g. first directions hearing + 10 weeks].
9. The plaintiff/applicant/appellant file and serve a written outline of submissions in reply and any additions to the list of authorities by 4.00pm on [e.g. first

directions hearing + 12 weeks].

Court book

10. The plaintiff/applicant/appellant file and serve a court book and a combined book of authorities by 4.00pm on [e.g. first directions hearing + 12 weeks].
11. Original exhibits to all affidavits filed are to be made available to the Court at the hearing.

Hearing

12. The Notice of Trial shall be in Form 48B.
13. The proceeding be referred to the Listing Associate Judge to be listed for trial on an estimate of [] day(s), not before [e.g. first directions hearing + 13 weeks].

Costs

14. Costs be reserved/The costs of the parties be costs in the proceeding.

Liberty to apply

15. The parties have liberty to apply.

**Omit if inapplicable.*