



## **Trial Division**

### **Practice Note No. 4 of 2009**

#### **Judicial Review and Appeals List**

## **1. INTRODUCTION**

- 1.1 This Practice Note will apply in substitution for Practice Note No. 4 of 2008 from 2 November 2009.
- 1.2 The Judges-in-Charge of the Judicial Review and Appeals List (“the List”) are Justices Cavanough and Kyrou. Their Honours are assisted by the Associate Judges-in-Charge of the List, Associate Justices Lansdowne and Daly. The Listing Associate Justice (Associate Justice Kings) is principally responsible for the fixing of dates for the final hearing of proceedings in the List. Contact details for the Judges’ and Associate Judges’ Associates can be found on the List webpage on the Supreme Court website: [www.supremecourt.vic.gov.au](http://www.supremecourt.vic.gov.au). The List webpage may be found by navigating from the Court homepage to *Lists and Sittings*, then to *Specialist Lists*, and then to *Judicial Review and Appeals List*.
- 1.3 References in this Practice Note to the Chapter I Rules are references to the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* as amended from time to time. References to the Chapter II Rules are references to the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Vic)* as amended from time to time.

1.4 Practitioners are referred, in particular, to Order 56 and Part 3 of Order 58 of the Chapter I Rules, and to Order 4 of the Chapter II Rules, the provisions of one or other of which will be relevant to most proceedings in the List. Nothing in this Practice Note is intended to derogate from any applicable requirements of the Rules.

## 2. INCLUSION IN THE LIST

2.1 Subject to paragraph 2.3 of this Practice Note, inclusion in the List is appropriate for the following types of proceedings in the Trial Division of the Court:

- judicial review applications made pursuant to the *Administrative Law Act 1978* (Vic) or Order 56 of the Chapter I Rules;
- appeals from a final order of the Magistrates' Court on a question of law pursuant to s 92 or s 109 of the *Magistrates' Court Act 1989* (Vic) or (when it comes into operation on 1 January 2010) s 272 of the *Criminal Procedure Act 2009* (Vic).<sup>1</sup>
- appeals from an order of the Victorian Civil and Administrative Tribunal ("VCAT") on a question of law pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic); and
- other proceedings of a similar nature, being proceedings in the nature of judicial review or appeals to the Trial Division of the Court on a question of law,

including applications for leave to appeal to the Court or for extensions of time in such proceedings where required.

<sup>1</sup> Section 272 of the *Criminal Procedure Act 2009* (Vic) provides for appeals on a question of law in criminal proceedings and will replace s 92 of the *Magistrates Court Act 1989* (Vic) on 1 January 2010.

- 2.2 Examples of “other proceedings of a similar nature” include, non-exhaustively, appeals from a final order of the Children’s Court on a question of law pursuant to s 329 or s 427 of the *Children, Youth and Families Act 2005* (Vic), appeals on a question of law under Part 7 of the *Coroners Act 2008* (Vic), cases stated by a tribunal or references of a question of law by a tribunal, and referrals for the determination of questions of law under s 33 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)<sup>2</sup> by a court or tribunal.
- 2.3 Inclusion in the List is not appropriate for proceedings which would otherwise fall within another specialist List of the Court, such as the Victorian Taxation Appeals List or the Valuation, Compensation and Planning List.
- 2.4 All proceedings appropriate for inclusion in the List pursuant to paragraph 2.1 of this Practice Note are to be included in the List. The heading of the originating process and all documents filed in the proceeding should be endorsed “Judicial Review and Appeals List.”
- 2.5 No additional fees are payable for the inclusion of proceedings in the List.

### **3. GENERAL CONDUCT OF PROCEEDINGS**

- 3.1 Proceedings in the List are managed by the Judges-in-Charge and the Associate Judges-in-Charge. Management includes the adoption of one or more of the following procedures where appropriate:
- a. encouraging the parties to cooperate with each other in the conduct of the proceeding;
  - b. fixing timetables and otherwise controlling the progress of the proceeding;

<sup>2</sup> Practitioners are also referred to Practice Note No 3 of 2008 – “Notification of Matters Arising Under the *Charter of Human Rights and Responsibilities Act 2006*”.

- c. managing the proceeding by making interlocutory orders on the papers, that is, upon written application and material without the parties having to appear;
- d. encouraging the parties to use alternative dispute resolution procedures;
- e. encouraging and helping the parties to settle all or part of the dispute;
- f. encouraging the parties to identify and focus on the critical question or questions of law at an early stage of the proceeding; and
- g. giving directions to ensure that the matter proceeds quickly and efficiently.

3.2 The first hearing in a proceeding in the List will generally be listed before one of the Associate Judges-in-Charge. A date for the first hearing will be allocated by Registry staff. However, in cases where the first hearing is expected to exceed 2 hours in duration, parties are encouraged to contact the Associate to the Associate Judge-in-Charge before whom the first hearing is initially fixed to arrange for a special fixture to be allocated on a date convenient to the parties and the Court. The first hearing will usually include the hearing of any application for leave to appeal if required, and of any application for summary dismissal. Interlocutory directions will be given as required. Usually the proceeding will then be referred forthwith to the Listing Associate Justice in Court 4 for the fixing of a trial date. See Part 4 and Annexure A of this Practice Note in relation to directions that may be given.

3.3 The Applicant/Plaintiff/Appellant should ensure that the Associate Judge-in-Charge is provided with the following documents not later than two business days prior to the first hearing:

- (a) a copy of the order sought to be appealed from, or of the record of the decision sought to be reviewed;

- (b) (where written reasons for the decision have been provided) a copy of the reasons for decision of the relevant court, tribunal, or other decision maker; or (where oral reasons are provided) a note or account of the oral reasons;
- (c) in the case of applications for leave to appeal from VCAT, a draft notice of appeal.

The parties will be permitted to file exhibits to affidavits with the Registry, at least to the extent necessary to ensure that the Associate-Judge-in-Charge is provided with the documents referred to above before the first hearing.

- 3.4 (a) In the case of applications for leave to appeal from VCAT, it will be assumed that the application is opposed unless the Court is otherwise informed, and the first hearing will be scheduled accordingly.
- (b) Where leave to appeal or an extension of time is not required, it will be assumed that the parties will merely be seeking directions for the conduct of the proceeding unless the Court is otherwise informed, and the first hearing will be scheduled accordingly.
- (c) Where an application is to be made pursuant to rule 23.01 or rule 58.10 of the Chapter I Rules for summary dismissal of the proceeding, the party intending to make the application should provide the opposing party or parties and the Court with written notice of the application, including a summary of the grounds upon which the application is to be made, at least two business days before the first hearing.

- 3.5 After the first hearing, the proceeding may be allocated to one or other of the Judges-in-Charge of the List or to another Judge. That Judge would thereafter

act as the “Managing Judge” for the proceeding, and would generally hear the substantive application or appeal himself or herself.

- 3.6 Communications with the Court, which should preferably be made via email, should generally be directed to the Associates to the Associate Judges-in-Charge of the List or to the Associate to the Managing Judge if a Managing Judge has been appointed. All communications with the Court should be disclosed to all parties.
- 3.7 The parties are encouraged to file and serve all material printed double-sided, pursuant to rule 27.03 of the Chapter I Rules.

#### **4. DIRECTIONS**

- 4.1 Directions may vary depending on the nature of the particular proceeding. The efficient management of the numerous and varied proceedings in the List requires flexibility.
- 4.2 In some cases, directions may be given in relation to mediation or other alternative means of resolving the dispute.
- 4.3 A template of standard directions which can generally be expected to be given (usually at the first hearing) in a proceeding is set out in Annexure A to this Practice Note.

#### **5. APPEALS FROM ORDERS OF ASSOCIATE JUDGES**

- 5.1 Where an Associate Judge makes an order on an application or deemed<sup>3</sup> application for leave to appeal, an application for an extension of time, an application for an order nisi for review under sections 3, 4, 5 and 6 of the

<sup>3</sup> An appeal from a final order of the Magistrates’ Court commenced out of time is deemed to be an application for leave to appeal: see ss 92(5) and 109(4) of the *Magistrates’ Court Act* 1985 and s 272(7) of the *Criminal Procedure Act* 2009.

*Administrative Law Act 1978* (Vic) or an application for summary dismissal, any party may, pursuant to rule 77.06 of the Chapter I Rules, appeal to a Judge from the Associate Judge's order, whether the order involves the granting of the application or its refusal or the imposition of terms. Subject to rule 77.06 and to the Rules generally, an appeal from such an order in a matter in the List should continue to be made returnable in the Practice Court and in accordance with the time limits applicable under the rule. However, the parties should liaise with the Practice Court Co-ordinator from the outset. If the appeal is expected to take 2 hours or less, it will usually remain in the Practice Court. If not, it will usually be referred to the Listing Associate Justice for the fixing of a date for hearing. A Managing Judge may then be appointed.

- 5.2 Whether or not the appeal remains in the Practice Court, the Court may direct the parties that they should be prepared to argue both the appeal against the Associate Judge's order and the substantive matter itself at a single hearing. This may be done where, on the papers, the Court considers that there is a substantial prospect that the appeal will result in a grant of leave or the grant of an extension of time or the grant of an order nisi (as the case may be) or where the Court otherwise considers that such a direction is appropriate<sup>4</sup>.

## **6. ORDERS**

- 6.1 Practitioners are encouraged to prepare draft orders for all hearings in the List.
- 6.2 Consent orders may be made "on the papers" where the requirements of rule 59.07 are satisfied and where the orders sought are otherwise appropriate.

<sup>4</sup> Practitioners and parties are reminded that under rule 58.13(3) of the Chapter I Rules and rule 4.14(3) of Chapter II Rules the Court may order that an application for leave to appeal be heard and determined by the Court which, if leave is granted, is to hear and determine the appeal and may give directions accordingly.

Emailed draft orders should be provided in Word format to expedite the authentication process.

- 6.3 Where proposed consent orders would set aside the decision under review or appeal and/or would involve the remittal of any matter, judicial power is engaged in relation to the functions of other public authorities, and the Court may need to consider for itself whether the orders should be made, particularly where the decision below is executive or administrative in nature.<sup>5</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 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 below together with a copy of the orders made.<sup>6</sup>

## **7. COURT BOOKS AND BOOKS OF AUTHORITIES**

- 7.1 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 application or appeal.
- 7.2 Practitioners will be expected to agree upon the contents of the court book.
- 7.3 As a general principle, the court book will include copies of all documents which a party reasonably expects will be relevant to the Court’s decision. This will generally include the originating process and pleadings in the proceeding, all

<sup>5</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* (2000) 100 FCR 323.

<sup>6</sup> See the cases referred to in the previous footnote.



affidavits (including exhibits) which bear substantively upon the proceeding (as finally amended), key orders made in the proceeding, the official record of the decision under review or appeal (where available) or a statement of that decision, and critical documents relating to that decision, including any statement of reasons for the decision. The written submissions of the parties filed in the proceeding should also be included.

- 7.4 Parties must ensure that, as far as possible, copies of all such documents are included in the court book and that unnecessary or duplicated documents are not 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.
- 7.5 The court book should contain copies of documents only and not original documents.
- 7.6 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.
- 7.7 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.

7.8 The Court will generally order that a single 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.

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Vivienne Macgillivray  
Executive Associate to the Chief Justice

27 October 2009

**ANNEXURE A TO PRACTICE NOTE NO – OF 2009.**  
**STANDARD DIRECTIONS IN THE JUDICIAL REVIEW AND APPEALS LIST**

**Entry to List (if not already included)**

1. The proceeding be entered in the Judicial Review and Appeals List.

**Leave to appeal (if required)**

2. [From VCAT or from the Magistrates' Court where an appeal would be out of time]. The Applicant/Plaintiff/Appellant have leave to appeal against the decision/order of [judicial officer] \_\_\_\_\_ in [Court/Tribunal] proceeding \_\_\_\_\_ made on \_\_\_\_\_ in respect of the following questions of law:  
\_\_\_\_\_.

**Extension of time under Order 56 (if required and where “special circumstances” exist)**

3. Time be extended pursuant to rule 56.02 of the *Supreme Court (General Civil Procedure) Rules 2005* so far as necessary to authorise the commencement by the Plaintiff of this proceeding.

**(Amended) originating process and further affidavits**

4. The Applicant/Plaintiff/Appellant file and serve an [amended] notice of appeal/[amended] originating motion by 4 pm on [e.g. directions hearing + 2 weeks].
5. The Applicant/Plaintiff/Appellant file and serve any further affidavits upon which it intends to rely by 4 pm on [e.g. directions hearing +4 weeks].

6. The Respondent/Defendant file and serve any affidavits upon which it intends to rely by 4 pm on [e.g. directions hearing + 6 weeks].

### **Adjournment of directions hearing (only if essential)**

7. The proceeding be adjourned to Court 2 10.30 am on [date before same Associate Judge].

### **Submissions and list of authorities**

8. The Applicant/Plaintiff/Appellant file and serve a written outline of submissions and list of authorities by 4 pm on [e.g. directions hearing + 8 weeks].
9. The Respondent/Defendant file and serve a written outline of submissions in response and list of authorities, and serve copies of all authorities not also relied upon by the Applicant/Plaintiff/Appellant, by 4 pm on [e.g. directions hearing + 10 weeks].
- 10 (If required) The Applicant/Plaintiff/Appellant file and serve a written outline of submissions in reply and additions to the list of authorities by 4 pm on [e.g. directions hearing + 12 weeks].

### **Court book**

11. The Applicant/Plaintiff/Appellant file and serve a court book in accordance with the Judicial Review and Appeals Practice Note [...] of 2009 and a combined book of authorities by 4 pm on [e.g. directions hearing + 12 weeks].
12. Original exhibits to all affidavits filed are to be made available to the Court at the hearing.

### **Hearing**

13. The proceeding be referred to Associate Justice Kings in Court 4 forthwith to be listed for trial on an estimate of \_\_\_ day(s) not before [e.g. directions hearing + 13 weeks].

**Costs**

14. The parties' costs be costs in the proceeding.

OR

- 14A. (If appropriate)

The \_\_\_\_\_ pay the \_\_\_\_\_ costs of today/The costs of today be reserved/The costs of the application for an extension of time/summary dismissal be paid by \_\_\_\_\_.

**Liberty to apply**

15. The parties have liberty to apply.