



Supreme Court of Victoria

Commercial Court

Practice Note 1 of 2010

TABLE OF CONTENTS

1.	GENERAL.....	1
2.	COURT OBJECTIVE AND POLICIES	3
3.	ENTRY OR REMOVAL OF PROCEEDINGS INTO OR FROM THE COMMERCIAL COURT	5
4.	ALLOCATION OF PROCEEDINGS	7
5.	COMMUNICATIONS WITH THE COMMERCIAL COURT.....	8
6.	URGENT APPLICATIONS	10
7.	CASE MANAGEMENT CONFERENCE	11
	<i>Pre-conference arrangements</i>	11
	<i>Case Management Bundle</i>	11
	<i>Case Memorandum</i>	12
	<i>Draft list of Issues</i>	12
	<i>Case Management Information Sheet</i>	12
	<i>Pre-trial timetable and directions</i>	12
8.	DIRECTIONS HEARINGS.....	15
	<i>First Directions Hearing</i>	15
	<i>Matters for consideration at the first directions hearing</i>	15
	<i>Further Directions Hearings</i>	16
	<i>Taxation Appeals</i>	17
	<i>Liberty to Apply</i>	17
	<i>Final Directions Hearings</i>	17
9.	OTHER APPLICATIONS.....	18
	<i>Applications on notice and not by summons</i>	18
	<i>Application by summons</i>	19
	<i>Applications to be brought before List Judges</i>	19
	<i>Applications to be brought before List Associate Judges</i>	19
	<i>Filing and service of inter partes interlocutory applications</i>	20
	<i>Hearing of applications</i>	21
	<i>Orders on the Papers</i>	21
	<i>Usual undertaking as to damages</i>	22
	<i>Costs</i>	22
	<i>Applications to join Third Parties or Other Parties</i>	22
	<i>Applications for Preliminary Discovery</i>	23
10.	ALTERNATIVE DISPUTE RESOLUTION	24
11.	EARLY NEUTRAL EVALUATION.....	25
12.	PLEADINGS, PARTICULARS, DISCOVERY AND INTERROGATORIES	27
	<i>Pleadings</i>	27
	<i>Particulars</i>	27
	<i>Discovery</i>	27
	<i>Interrogatories</i>	28
13.	EVIDENCE AT TRIAL	29

<i>Court Books</i>	29
<i>Witness Statements</i>	30
<i>Expert Evidence</i>	32
14. SETTING DOWN FOR TRIAL; TRIAL.....	33
<i>Use of Authorities at Trial</i>	34
15. ORDERS.....	35
16. APPEAL	36
17. MISCELLANEOUS	37
SCHEDULE 1 HEADING TO PROCEEDINGS IN THE COMMERCIAL COURT.....	39
SCHEDULE 2 CASE MANAGEMENT INFORMATION SHEET	40
SCHEDULE 3 PRE-TRIAL CHECKLIST	43
SCHEDULE 4 STANDARD VALUATION ORDER.....	44
SCHEDULE 5 MATTERS FOR CONSIDERATION AT A FINAL DIRECTIONS HEARING	46
SCHEDULE 6 STANDARD MEDIATION ORDER	47
SCHEDULE 7 STANDARD REFERENCE TO SPECIAL REFEREE	48
SCHEDULE 8 STANDARD JOINT EXPERTS ORDER	52

**PRACTICE NOTE NO 1 OF 2010
(Version. 1.0)**

COMMERCIAL COURT

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

1. GENERAL

- 1.1. The Commercial Court commenced operation on 1 January 2009. This Practice Note applies to all proceedings in the Commercial Court as from 1 January 2010.
- 1.2. The Commercial Court comprises specialist Judges and Associate Judges within the Commercial and Equity Division of the Trial Division of the Court, appointed by the Chief Justice from time to time to manage and try the commercial business of the Court.
- 1.3. The Chief Justice may from time to time appoint Judges and Associate Judges as judicial officers of the Commercial Court.
- 1.4. The Chief Justice may from time to time appoint one of the judges of the Commercial Court to be the Judge in Charge of the Commercial Court.
- 1.5. All judges of the Commercial Court are judges responsible for arbitration business for the purposes of Practice Note No. 7 of 2006 – Arbitration Business.
- 1.6. A list of the judicial officers of the Commercial Court and their associates' contact details appear on the Commercial Court website: www.commercialcourt.com.au. An officer in the office of the Prothonotary, whose identity and contact details may be found on the website, has been appointed as Registrar of the Commercial Court.
- 1.7. As this Practice Note will be amended from time to time, practitioners are advised to check the Commercial Court website for the up-to-date version.
- 1.8. In this Practice Note:
 - 1.8.1. “Arbitration proceeding” means any proceeding to which RSC Ch II O 9 applies other than a TEC case within the meaning of RSC Ch II O3;
 - 1.8.2. “Commercial proceeding” means a proceeding arising out of ordinary commercial transactions, including a taxation proceeding and an arbitration proceeding, but not including a Corporations proceeding;

- 1.8.3. “Corporations proceeding” means any proceeding to which the Supreme Court (Corporations) Rules 2003 apply;¹
 - 1.8.4. “Taxation appeal” means any proceeding to which RSC Ch II O 7 applies;
 - 1.8.5. “Taxation proceeding” includes a taxation appeal and any proceeding which raises a substantial issue as to taxation, including a taxation recovery proceeding, a proceeding for damages against a taxation adviser and a dispute with respect to GST.
- 1.9. The application of this Practice Note is set out in paragraphs 17.2 and 17.3 below.

¹ See RSC Ch V Rule 1.3.

2. COURT OBJECTIVE AND POLICIES

- 2.1. The objective of the Commercial Court 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 proceeding.
- 2.2. The practices and procedures set out in this Practice Note and used by the Commercial Court must be read and understood in the light of the Court Objective, which is paramount. These practices and procedures may be modified or abrogated to suit the requirements of a particular proceeding.
- 2.3. Proceedings will be handled with expedition unless there is good reason to the contrary. Short time periods will be permitted for interlocutory steps. At trials, time limits may be imposed for the examination and cross-examination of witnesses and for oral submissions. The Commercial Court aims to bring proceedings not otherwise resolved to trial within 9 months of issue.
- 2.4. With a view to achieving the Court Objective, the judicial officers of the Commercial Court will approach the management and trial of proceedings as follows:
 - 2.4.1. They will be ready, in the appropriate case, to try new procedures suggested either by the profession or by law reform bodies or as have been adopted in other jurisdictions;
 - 2.4.2. Procedures will be designed to ensure that, so far as is practicable, the cost and the work involved will not be disproportionate to the complexity of the issues and the value or importance of the matters in dispute in the proceeding;
 - 2.4.3. Parties will be encouraged to consider whether their dispute might be better resolved by methods other than judicial adjudication in an adversarial proceeding.² Such methods might include negotiated settlement, mediation, early neutral evaluation, conciliation and the like.³

² See Paras 8.9.5 and 10.1 below.

³ See Chapters 10 and 11 below.

- 2.5. Parties before the Commercial Court, and their practitioners, will be expected at all times:
 - 2.5.1. to approach their case co-operatively with a view to achieving the Court Objective;
 - 2.5.2. to assist the Court in the management of the proceeding to achieve the Court Objective;
 - 2.5.3. not to use the resources of the Court and of the parties needlessly or in a manner that is out of proportion to the matters in issue;
 - 2.5.4. to avoid burdening the Court with unnecessarily voluminous papers;
 - 2.5.5. to be familiar with their client's case;
 - 2.5.6. to ensure that the Commercial Court's directions are followed;
 - 2.5.7. to ensure that their client focuses on the real issues;
 - 2.5.8. to ensure that the proceeding moves without delay towards determination whether at trial or otherwise;
 - 2.5.9. to identify any matters which are suitable for determination by an Associate Judge; and
 - 2.5.10. to consider whether the proceeding might benefit from the adoption of the procedures set out in Practice Note No. 1 of 2007 – *Guidelines for the Use of Technology in any Civil Litigation Matter* and, if so, to what extent.
- 2.6. The Commercial Court will normally sit on Monday to Thursday, reserving Fridays for directions and applications. Directions dates for each list are published on the Commercial Court website.
- 2.7. Dispensation from the requirements of RSC Ch I Rule 1.17, that a corporation may not take a step in a proceeding save by a legal practitioner, will be granted only in exceptional cases.

3. ENTRY OR REMOVAL OF PROCEEDINGS INTO OR FROM THE COMMERCIAL COURT

- 3.1. The following proceedings are suitable for entry into the Commercial Court:
 - 3.1.1. any Commercial proceeding unless the proceeding is more suitable for one of the other specialist lists, or unless it is more appropriately managed and tried in the Commercial & Equity Division outside the Commercial Court;
 - 3.1.2. all Corporations proceedings;
 - 3.1.3. such other class of proceedings as the Chief Justice may from time to time direct.
- 3.2. A proceeding will not be refused entry to the Commercial Court by reason only that it is expected to require a trial of more than 10 days or by reason only of its character as a group proceeding.
- 3.3. Entry may be refused to a proceeding where the plaintiff is self-represented.
- 3.4. All proceedings which were in the Commercial List, or the list of Corporations cases, on 1 January 2009 were automatically entered in the Commercial Court.
- 3.5. All Corporations proceedings are automatically entered in the Commercial Court.
- 3.6. All Taxation appeals are automatically entered in the Commercial Court.
- 3.7. Other suitable proceedings may be entered into the Commercial Court:
 - 3.7.1. by including in the heading of the initiating process at the time of commencement, the words “Commercial Court”; or
 - 3.7.2. by order of a Commercial Court Judge.
- 3.8. Practitioners should note the following:
 - 3.8.1. the heading of all Commercial Court documents should conform with **Schedule 1**;
 - 3.8.2. where a proceeding is entered in the Commercial Court upon commencement, the initiating process should not specify a particular list. The allocation of a proceeding to a list will be effected by the Registrar and the parties notified;

- 3.8.3. once a proceeding has been allocated to a list, all Court documents filed in the proceeding should bear in the heading the list identifier in accordance with **Schedule 1**.
- 3.9. Any party to a suitable proceeding that has not been entered in the Commercial Court may apply for entry upon summons seeking entry and directions. An application for entry of a proceeding into the Commercial Court shall be filed with the Registrar of the Commercial Court who will nominate a time and date for hearing, and allocate the application to a Commercial Court Judge. Such applications will usually be granted if the proceeding is suitable for entry into the Commercial Court.
- 3.10. All proceedings in the Commercial Court, other than those specified below, will be treated as Commercial List cases for the purposes of the **Supreme Court (Fees) Regulations 2001**. They attract an entry fee pursuant to item 1.8. The following proceedings do not attract an entry fee:
- 3.10.1. Corporations proceedings;
- 3.10.2. Taxation appeals;
- 3.10.3. Arbitration proceedings.
- 3.11. The entry fee is payable by the plaintiff or, where the proceeding was not entered in the Commercial Court upon commencement, by the applicant for entry, and shall form part of that party's costs of the proceeding.
- 3.12. When an order for entry is made, the Court will require from the practitioner for the applicant an undertaking to pay the prescribed fee, and practitioners should have instructions to give such an undertaking.
- 3.13. On the application of any party, or upon the Court's own motion, a proceeding in the Commercial Court, other than a Corporations proceeding or a Taxation appeal, may at any time be removed from the Commercial Court if it is or has become one which, by reason of its size or for any other reason is more appropriately managed and tried outside the Commercial Court or in another of the specialist lists.

4. ALLOCATION OF PROCEEDINGS

- 4.1. A proceeding in the Commercial Court will be allocated to one of several lists identified by letter (List A, B, C etc). A Judge and an Associate Judge will be assigned to each list and will manage and try the proceedings within that list.
- 4.2. In general, the business of the lists will be allocated as follows:
 - 4.2.1. List E – Corporations proceedings;
 - 4.2.2. List F – Taxation proceedings;
 - 4.2.3. List G – Arbitration proceedings;
 - 4.2.4. Lists A, B, C and D – other proceedings.
- 4.3. The allocation of a proceeding to a particular list will be effected as follows:
 - 4.3.1. Where the proceeding is entered upon commencement, by the Registrar;
 - 4.3.2. Where the proceeding is entered by order of a Commercial Court Judge, by the Judge.⁴
- 4.4. A proceeding in the Commercial Court may be transferred from one list to another list by order of the List Judge of the transferor list.

⁴ See paragraph 3.9 above.

5. COMMUNICATIONS WITH THE COMMERCIAL COURT

- 5.1. Communication between parties or their representatives and the associates to judicial officers is often necessary for the smooth running of the Commercial Court. All such communications must be undertaken with care to ensure that the impartiality and integrity of the Court is not undermined.
- 5.2. Communications to the Commercial Court should be directed to:
- (a) the registrar, where the communication concerns a registry matter;
 - (b) the associate of the List Judge, where the communication concerns a matter in a list, or if this is not possible, to the associate of the List Associate Judge; or
 - (c) otherwise to the associate of the Judge in Charge of the Commercial Court.
- 5.3. All communications with an associate shall be open and confined to uncontroversial matters. It is not part of the function of the associate to give advice upon procedural or legal matters. Persons communicating with them should not request such advice.
- 5.4. Wherever possible, communication with an associate should be in writing and preferably by e-mail or fax. Documents which are directed to be filed may, unless the Rules otherwise require, be filed electronically with the associate. Any person writing to an associate must, except for communications relating to an ex parte application, simultaneously send a copy to each other party to the proceeding. Communication with an associate by telephone should be avoided in all but purely administrative or routine matters.
- 5.5. Persons communicating with an associate must ensure that the associate does not become part of a dispute between the parties or their representatives. Associates may be contacted in relation to the following:
- 5.5.1. The listing of applications, or the listing of directions;
 - 5.5.2. Whether a summons is required or whether an application can be listed informally;
 - 5.5.3. The filing of material for the judicial officer in addition to filing with the Registry.⁵
- 5.6. Before consulting an associate to fix a date for a hearing, parties should first consult on the time for hearing of an application (except in ex parte hearings, or where otherwise unavoidable), and endeavour to reach an agreement.⁶

⁵ See paragraphs 9.15, 9.16 and 9.22 below.

- 5.7. The following questions should only be raised in open court and should not be directed to associates:
- 5.7.1. whether the judicial officer will fix a proceeding for trial early, within a specified period or before pre-trial steps are completed;
 - 5.7.2. whether another judicial officer is available to hear a trial or application at an early date.

⁶ See paragraph 9.2 below.

6. URGENT APPLICATIONS

- 6.1. Commercial Court Judges and Associate Judges are ordinarily available to hear all urgent applications, including, if required, outside normal Court hours.
- 6.2. Applicants seeking to make an urgent application before the commencement of a proceeding to be entered in the Commercial Court should contact the Registrar of the Commercial Court, for an appointment. If this is not practicable the applicant should contact the associate to the Judge in the Practice Court.
- 6.3. Where the urgent application is to be made in a proceeding already entered in the Commercial Court, the applicant should contact -
 - 6.3.1. the associate to the List Judge or the List Associate Judge as is appropriate;⁷ or if this is not possible
 - 6.3.2. the associate to the Judge in Charge of the Commercial Court; or if this is not possible
 - 6.3.3. the associate to the Judge in the Practice Court.
- 6.4. If the application is one that is properly made ex parte, this should be clearly stated in all communications with the associate to the Judge and such communications need not be copied to the respondent until the interim determination of the application.
- 6.5. Practitioners are referred to paragraph 9.24 regarding undertakings as to damages.

⁷ See paragraphs 9.6 and 9.7 below.

7. CASE MANAGEMENT CONFERENCE

- 7.1. The Court may order a Case Management Conference at any time..
- 7.2. A conference is not merely another directions hearing. The leading counsel for each party who will have the conduct of the proceeding at trial is required to attend.
- 7.3. The purpose of a conference is:
 - 7.3.1. to identify, define and refine the issues requiring judicial resolution;
 - 7.3.2. to determine the interlocutory steps necessary for the preparation of a proceeding; and
 - 7.3.3. to determine how the trial might best be conducted.

Pre-conference arrangements

- 7.4. Within two weeks after the close of pleadings, the solicitors for the plaintiff will provide the List Judge with the Case Management Bundle.
- 7.5. Following delivery of the Case Management Bundle, the associate to the List Judge will arrange a convenient date for the conference.

Case Management Bundle

- 7.6. A Case Management Bundle shall be prepared by the solicitors for the plaintiff for the purpose of the conference and must contain:
 - 7.6.1. all pleadings;
 - 7.6.2. the Case Memorandum;
 - 7.6.3. the draft list of issues;
 - 7.6.4. the completed Case Management Information Sheets;⁸
 - 7.6.5. the principal orders in the proceeding; and
 - 7.6.6. any other document which a party may consider necessary and relevant to the conference.

⁸ See Schedule 2 below.

Case Memorandum

- 7.7. The solicitors for the plaintiff shall be responsible for agreeing, producing and filing an agreed Case Memorandum for the use of the List Judge at the conference. The Case Memorandum must contain:
- 7.7.1. a short and uncontroversial description of what the proceeding is about; and
- 7.7.2. a very short and uncontroversial summary of the material procedural history of the proceeding.
- 7.8. The failure of the parties to agree a Case Memorandum may be taken into account by the Court when dealing with the costs of the conference.

Draft list of Issues

- 7.9. The practitioners will produce an agreed draft list of the important issues in the proceeding.
- 7.10. The purpose of the list of issues is not to supplant or override the pleadings but, rather, to identify precisely what issues are in dispute having regard to the pleadings. It is expected that the list of issues will (subject to the pleadings) form the basis of the further procedural steps to be undertaken in the expeditious management of the proceeding.
- 7.11. The draft list of issues should include issues both of fact and of law.
- 7.12. A separate section of the document should list those matters in which there is common ground between the parties.
- 7.13. The draft list of issues may be settled at the conference in consultation with the List Judge.

Case Management Information Sheet

- 7.14. All parties required to attend a conference must have completed a Case Management Information Sheet which is to be included within the Case Management Bundle. The standard form of Case Management Information Sheet is **Schedule 2** to this Practice Note.

Pre-trial timetable and directions

- 7.15. At the conference, directions may be made in relation to the following matters:
- 7.15.1. a date for trial;

- 7.15.2. mediation or alternative dispute resolution procedures;⁹
- 7.15.3. the manner in which evidence will be given;
- 7.15.4. the preparation of a statement of agreed facts;
- 7.15.5. the making of admissions, whether by notice to admit or otherwise;
- 7.15.6. the time for preparation of any witness statements and statements of the substance of the evidence proposed to be given by a witness;
- 7.15.7. the preparation of any expert reports and the manner in which evidence will be given by experts;
- 7.15.8. discovery including any limitation upon its scope, timing, inspection, copying and the resolution of discovery disputes;
- 7.15.9. the preparation of a court book;¹⁰
- 7.15.10. notice of objection to evidence;
- 7.15.11. preparation of a chronology;
- 7.15.12. preparation of opening submissions;
- 7.15.13. a statement of the issues for trial;
- 7.15.14. the separate trial of a preliminary question;¹¹
- 7.15.15. the date and time of any further directions hearing;
- 7.15.16. what, if any, applications should be heard and determined by an Associate Judge;
- 7.15.17. any special orders in relation to evidence to be given by video link;
- 7.15.18. return of any subpoenas;
- 7.15.19. the determination of any other interlocutory disputes such as security for costs, provision of particulars and disputes in relation to the production and inspection of documents.

⁹ See Chapter 10.

¹⁰ See Chapter 13.

¹¹ See paragraph 14.3 below.

- 7.16. The pre-trial timetable may also include the fixing of a progress review date by which each of the parties must send to the List Judge a statement indicating:
 - 7.16.1. whether that party has complied with the pre-trial timetable in all respects;
 - 7.16.2. in what respect, if any, that party has not complied with the pre-trial timetable;
 - 7.16.3. whether that party will be ready for trial commencing on the fixed date; and
 - 7.16.4. if that party is not ready for trial on the fixed date, a statement of why that is so.
- 7.17. Not later than three weeks before the date fixed for trial, each party must send to the associate to the List Judge (with a copy to all other parties) a completed Pre-Trial Checklist confirming the final details for trial in the form attached as **Schedule 3**.

8. DIRECTIONS HEARINGS

- 8.1. All directions hearings will be conducted by the List Judge or the List Associate Judge. Directions hearing will normally be conducted on Fridays except during vacations.
- 8.2. Notwithstanding that most interlocutory steps will be taken pursuant to Court order, practitioners are encouraged to anticipate such orders rather than leave the initiative entirely to the Court.

First Directions Hearing

- 8.3. Where a proceeding is entered into the Commercial Court upon commencement, the Registrar shall appoint a date for the first directions hearing before the List Judge. This directions hearing will be conducted by the List Judge.
- 8.4. Plaintiffs must ensure, as far as practicable, that all other parties are served with the originating process a reasonable time before the first directions hearing.
- 8.5. At the first directions hearing the parties, if represented, will be expected to appear by their legal practitioner. They should be ready to explain briefly, if requested, 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 Court Objective.
- 8.6. In shareholder oppression proceedings, partnership disputes and any other proceeding where the value of a business is likely to be in issue, the Commercial Court will usually direct the immediate appointment of a valuer. A standard valuation order appears in **Schedule 4**.

Matters for consideration at the first directions hearing

- 8.7. At the first directions hearing, orders will be made and directions given with a view to achieving the Court Objective. All parties are expected to have considered whether orders or directions should be made relating to:
 - 8.7.1. the filing and service of pleadings;
 - 8.7.2. the provision of proper particulars;
 - 8.7.3. the joinder of any further parties or claims between parties;
 - 8.7.4. whether an order should be made for the separate trial of any question;
 - 8.7.5. whether the proceeding is appropriate to be conducted in accordance with the procedures set out in Practice Note No. 1 of 2007 –

Guidelines for the Use of Technology in any Civil Litigation Matter and, if so, to what extent;

- 8.7.6. whether the proceeding or any matter arising in the proceeding should be managed by an Associate Judge;¹²
- 8.7.7. whether the matter should be referred to mediation, or to some other alternative dispute resolution procedure;¹³ and
- 8.7.8. whether any of the procedures referred to in paragraph 8.9 should be adopted.

Further Directions Hearings

- 8.8. Further directions hearings will be heard by the List Judge or the List Associate Judge, as the Commercial Court directs. The number of directions hearings should be kept to a minimum.
- 8.9. At directions hearings, the Commercial Court may adopt one or more of the following procedures as are considered appropriate to achieve the Court Objective:
 - 8.9.1. encouraging the parties to cooperate with each other in the conduct of the proceeding;
 - 8.9.2. identifying the questions in issue at an early stage;
 - 8.9.3. deciding promptly which questions need full investigation and trial and disposing summarily of others;
 - 8.9.4. deciding the sequence in which questions are to be determined;
 - 8.9.5. encouraging the parties to use alternative dispute resolution procedures;¹⁴
 - 8.9.6. encouraging and helping the parties to settle all or part of the dispute;
 - 8.9.7. fixing timetables or otherwise controlling the progress of the proceeding;

¹² See paragraph 9.7 below.

¹³ See Chapter 10 below.

¹⁴ See Chapter 10 below.

- 8.9.8. considering whether the likely benefits of taking a particular step justify the cost of taking it;
- 8.9.9. dealing with as many aspects of the proceeding as possible on the same occasion;
- 8.9.10. 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;¹⁵
- 8.9.11. making use of technology.

Taxation Appeals

- 8.10. In the ordinary course of events the List Judge will, at the first directions hearing, set the appeal down for hearing and give the appropriate directions for the hearing, including outlines of argument.
- 8.11. In an application to appeal from VCAT, the List Judge will normally set the application down to be heard with the appeal. It should not be assumed that this will always occur and the applicant should be prepared to state in summary form at the directions hearing why the application should proceed.¹⁶

Liberty to Apply

- 8.12. Parties are encouraged to avail themselves of the general liberty to apply implied in every interlocutory order. Parties 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 List Judge or List Associate Judge to arrange a suitable time.¹⁷

Final Directions Hearings

- 8.13. A proceeding may be listed for a final directions hearing shortly prior to the scheduled start of the trial. Such a directions hearing may be listed by the List Judge or List Associate Judge or at the request of any party. Matters that may be addressed are set out in **Schedule 5**.

¹⁵ See paragraphs 9.18ff below.

¹⁶ See Secretary to the *Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 at [8]–[17].

¹⁷ See paragraph 15.2 below.

9. OTHER APPLICATIONS

- 9.1. Applications:
- 9.1.1. should be made returnable before the List Judge or the List Associate Judge as is appropriate;
 - 9.1.2. should not be brought unless the parties have already made appropriate endeavours to resolve their disputes. Where the parties cannot resolve them, they should co-operate in the listing of the application and the preparation of material to be handed up at the hearing of the application;
 - 9.1.3. will normally be made returnable on the date of the next directions hearing provided that the List Judge or List Associate Judge may fix another date in the appropriate case.
- 9.2. To list an inter partes interlocutory application, other than an application for entry into the Commercial Court or for preliminary discovery,¹⁸ the parties should first consult to agree on a suitable date for the hearing and then contact the associate to the relevant judicial officer (e-mail is preferred) to ascertain if the agreed date is convenient to the Court.

Applications on notice and not by summons

- 9.3. Except in the circumstances described below, routine applications may be made upon notice and need not be made by summons. As a guide, the Commercial Court considers the following to be routine:
- 9.3.1. directions as to the timing of interlocutory steps;
 - 9.3.2. applications and disputes concerning particulars;
 - 9.3.3. applications and disputes concerning discovery;
 - 9.3.4. applications for extension of time; and
 - 9.3.5. applications for the minor amendment of pleadings or other documents.
- 9.4. Where an application is made on notice and not by summons, the applicant must file and serve a clear statement in writing of the orders and directions sought.

¹⁸ See paragraphs 9.30ff below.

Application by summons

- 9.5. Applications shall be made by summons in the following circumstances:
- 9.5.1. where a respondent to the application is not legally represented;
 - 9.5.2. where a respondent to the application is not a party to the proceeding;
 - 9.5.3. applications to enter a proceeding in the Commercial Court;
 - 9.5.4. applications for security for costs;
 - 9.5.5. applications for strike out of a pleading, for summary judgment, for summary stay or dismissal of a claim or similar applications;
 - 9.5.6. applications to join a party;¹⁹
 - 9.5.7. applications for significant amendments to pleadings or other documents;
 - 9.5.8. applications to vacate a trial date;
 - 9.5.9. applications for injunctive relief;
 - 9.5.10. cross-vesting and other forum-related applications; and
 - 9.5.11. where the parties have been unable to reach agreement in accordance with paragraph 9.2.

Applications to be brought before List Judges

- 9.6. Unless a Judge orders otherwise, applications other than those described in paragraph 9.7 should be brought before the List Judge.

Applications to be brought before List Associate Judges

- 9.7. The following applications are to be brought before the List Associate Judge unless a Judge orders otherwise:
- 9.7.1. applications for substituted service;
 - 9.7.2. applications concerning discovery, including non-party discovery and preliminary discovery;²⁰

¹⁹ See paragraphs 9.26 – 9.29 below.

²⁰ See paragraphs 9.30 – 9.32 below.

- 9.7.3. applications concerning particulars;
 - 9.7.4. applications for security for costs;
 - 9.7.5. applications for assessment of damages;
 - 9.7.6. applications concerning subpoenas;
 - 9.7.7. other applications within the power conferred on an Associate Judge by or under RSC Ch I O77;
 - 9.7.8. applications within the power conferred on an Associate Judge by RSC Ch V Rule 16.1(1).
- 9.8. Where this is permitted by the Rules,²¹ an application may be referred for hearing and determination by a List Judge to the List Associate Judge and by a List Associate Judge to the List Judge.

Filing and service of inter partes interlocutory applications

- 9.9. Applications and supporting material should be filed and served as early as possible to enable the respondent to prepare for the hearing and file and serve responsive material in a timely manner, and to enable the judicial officer hearing the application to read the material before the hearing.
- 9.10. Where an application is listed for hearing on a Friday directions day then, except for particularly complicated or voluminous applications where more time should be allowed, the following deadlines should be observed:
- 9.10.1. the applicant's material should be filed and served:
 - 9.10.1.1. by 4.00 pm on the preceding Tuesday, where the proceeding is not already listed for the following Friday;
 - 9.10.1.2. by 4.00 pm on the preceding Wednesday, where the proceeding is already listed for the following Friday;
 - 9.10.2. the respondent's material should be filed and served by 4.00 pm on the Thursday.
- 9.11. Where an application is listed for hearing on a day other than Friday, material should be filed and served in advance of the hearing, with equivalent time lines.

²¹ See RSC Ch I Rule 77.04 and RSC Ch II Rules 1.11 and 1.23.

- 9.12. Contrary to the normal practice of the Prothonotary, in Commercial Court proceedings original exhibits are to be filed together with affidavits. Exhibits that are no longer required will be returned to the parties in Court.
- 9.13. It is not necessary to file an affidavit reporting the progress of the proceeding, exhibiting the transcript in the proceeding, orders previously made or other Court documents in the proceeding.
- 9.14. Correspondence between practitioners that is sought to be put before the court need not be exhibited to an affidavit. Where the applicant intends to rely on such correspondence, the applicant should file a bundle of all relevant correspondence between the practitioners for the parties in chronological order.
- 9.15. Parties should contact the associate to the judicial officer allocated to hear the application for instructions as to whether material should be filed at the Registry or with the associate.

Hearing of applications

- 9.16. In substantial contested applications, the applicant should provide the Court with a small application book containing working copies of the key documents.
- 9.17. Paragraphs 14.13–14.15 below with respect to the provision of authorities at trial apply equally to applications.

Orders on the Papers

- 9.18. Other than at the first directions hearing and at the case management conference, consent orders may be submitted to the Court and may be made on the papers without the necessity of an appearance.
- 9.19. Consent orders, signed by each party, should be faxed or e-mailed to the associate by **12.00 noon** on the **day** before the directions hearing. Where consent orders are not received by 12.00 noon the day before the directions hearing, parties should assume that they will be required to appear unless notified otherwise by the Court.
- 9.20. Notwithstanding that the parties have agreed and submitted proposed consent orders, the Commercial Court may require the attendance of practitioners and may not make the proposed orders.
- 9.21. Where the parties attend court in circumstances where it would have been reasonable to make a consent order on the papers, the Commercial Court may decline to award any party the costs of its attendance.
- 9.22. Where orders are not sought by consent but are unopposed, the party seeking the orders should submit them to the associate to the List Judge or the List Associate

Judge, as the case may be, with written material which discloses that the proposed orders are unopposed. The Commercial Court may make such orders on the papers or may require the attendance of the parties. The Commercial Court may set aside or vary an unopposed order made on the papers upon application by a respondent.

- 9.23. Where the parties consent in writing, the Commercial Court may entertain an application other than a consent application on the papers and may give directions for that purpose.

Usual undertaking as to damages

- 9.24. Where an applicant for an interlocutory order offers, or 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 any person shall have sustained any loss, by reason of this order, which the party giving the undertaking ought to pay.

Costs

- 9.25. The Commercial Court may fix the costs awarded on an interlocutory application to save the parties the cost and time of taxation. To this end the Court may from time to time publish a document setting out the ordinary range of party and party costs which may be fixed on an interlocutory application.

Applications to join Third Parties or Other Parties

- 9.26. 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.
- 9.27. Any such application must be brought as soon as practicable. The Commercial Court may 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 Commercial Court may make costs orders against a party which unnecessarily delays making such an application.
- 9.28. 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.

- 9.29. At the time of service 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 Commercial 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.

Applications for Preliminary Discovery

- 9.30. An application for preliminary discovery under RSC Ch I Rule 32.03 or Rule 32.05 in a commercial matter should be made returnable before an Associate Judge of the Commercial Court.²²
- 9.31. The applicant should, in the first instance, contact the Registrar for a date and time for the hearing of the application. The Registrar will make enquiries as to the availability of an Associate Judge to hear the application and will notify the applicant accordingly.
- 9.32. An application for preliminary discovery shall be made by originating motion and summons on originating motion and served upon each party from whom preliminary discovery is sought.

²² See paragraph 9.7.2 above.

10. ALTERNATIVE DISPUTE RESOLUTION

- 10.1. At any stage of a proceeding (including during trial) the Court may direct that the proceeding be referred for such alternative form of dispute resolution as may seem appropriate to the circumstances of the proceeding with a view to disposing of the proceeding more efficiently, quickly and economically than by trial.²³
- 10.2. Practitioners in all proceedings in the Commercial Court should consult with their clients and with the legal practitioners for other parties as to the possibility of attempting to resolve the proceeding as a whole or particular issues in the proceeding by alternative dispute resolution and should ensure that their clients are fully informed as to the most cost-effective means of resolving the proceeding.
- 10.3. All proceedings will be referred to mediation unless there is a good reason to the contrary.
- 10.4. The Judge may refer the proceeding or any question or application arising in the proceeding to an Associate Judge for mediation.
- 10.5. A standard mediation order appears in **Schedule 6**.
- 10.6. Practitioners are encouraged to identify whether questions in the proceeding should be referred to a Special Referee pursuant to RSC Ch I O 50 and, if so, at what stage.
- 10.7. A standard order for reference to a Special Referee appears in **Schedule 7**.

²³ See paragraph 2.4.3 above.

11. EARLY NEUTRAL EVALUATION

- 11.1. The parties to a proceeding in the Commercial Court may by consent seek a without prejudice, confidential and non-binding early neutral evaluation (“evaluation”) of the proceeding or of one or more questions in the proceeding with a view to assisting them to resolve by agreement those questions or the proceeding as a whole.
- 11.2. With the consent of the parties, the List Judge may direct that there be an evaluation. Parties applying for an evaluation shall provide to the List Judge a written statement identifying precisely the matter sought to be referred and recording the party’s consent to the procedure.
- 11.3. In requesting an evaluation, the parties are taken to agree that the evaluation will be a confidential process, and that unless otherwise agreed all aspects of the process will be without prejudice. Nothing said in or produced for the evaluation may be communicated or relied upon outside of the evaluation except as required by law.
- 11.4. The process and conduct of an evaluation shall be in the discretion of the Judge or other person appointed by the Judge in charge of the Commercial Court to conduct the evaluation (“the evaluator”) but, unless otherwise directed, the process shall be as follows:
 - 11.4.1. the parties shall produce a common folder or folders of only the key documents which are necessary for the evaluation;
 - 11.4.2. each party shall provide a written submission of no more than 10 pages on facts and law;
 - 11.4.3. the common folder(s) and written submissions must be provided on the date determined by the evaluator as notified to the parties;
 - 11.4.4. the evaluator will appoint a date to meet with the parties (“the hearing”) to answer any questions which the evaluator may have or, at the evaluator’s discretion, to hear any further submissions which a party may seek to make;
 - 11.4.5. the hearing with the evaluator will be held in private, shall not exceed half a day and any further submissions shall be confined to one hour for each party;

- 11.4.6. the evaluator may give an evaluation at the conclusion of the hearing or at such other time as the evaluator may determine and may do so orally or in writing at the discretion of the evaluator.
- 11.5. The parties may seek from the evaluator different and particular directions to suit the particular case, where the process and conduct described in paragraph 11.4 above would not be appropriate.
- 11.6. Parties seeking directions from the evaluator under paragraph 11.5 shall each provide to the evaluator a written statement:
 - 11.6.1. identifying precisely the matters sought to be referred for evaluation;
 - 11.6.2. identifying precisely the particular directions sought for the process and conduct of the evaluation including:
 - 11.6.2.1. whether the parties propose to lead evidence and, if so, whether that is sought to be done orally, or in writing, and whether with, or without, cross-examination;
 - 11.6.2.2. the length of any oral hearing;
 - 11.6.2.3. whether the parties will seek to make submissions and, if so, the time limits to be imposed on any oral submissions or the page limits on any written submissions;
 - 11.6.2.4. whether the parties propose to provide key documents on which they rely;
 - 11.6.2.5. whether there will be any expert report; and
 - 11.6.2.6. whether the evaluator will be asked to provide a written evaluation.
- 11.7. The costs of an evaluation shall be borne by the parties equally in the first instance unless otherwise agreed between them. The costs, however, may be included in the costs of the proceeding when these are determined.

12. PLEADINGS, PARTICULARS, DISCOVERY AND INTERROGATORIES

Pleadings

- 12.1. Pleadings should focus on the real or substantial issues in dispute, supported by proper particulars.
- 12.2. Evasive pleading will not be tolerated and parties will be expected to join issue promptly in a responsive pleading. Holding defences are not acceptable.
- 12.3. Pleadings may be dispensed with where the Commercial Court considers that this would assist the Court Objective.
- 12.4. Judgment may be entered in default of pleading only by leave.

Particulars

- 12.5. Proper particulars should be provided in all pleadings as required by RSC Ch I Rule 13.10. 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.

Discovery

- 12.6. Parties are encouraged to agree upon orders for discovery and to consider whether limited categories of discovery should be exchanged.
- 12.7. Parties are expected to comply with the following procedures:
 - 12.7.1. discovery is made pursuant to an order of the Court, not by notice for discovery;
 - 12.7.2. discovery is normally made by the filing and delivery of a list of discoverable documents;
 - 12.7.3. 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*;
 - 12.7.4. The list of discoverable documents should include the following descriptive identifying fields:
 - 12.7.4.1. **document discovery number** (using 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);

12.7.4.2. **document date;**

12.7.4.3. **document description** (including identifying documents as copies or originals for example, original contract between X and Y);

12.7.4.4. **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).

Interrogatories

- 12.8. Service of interrogatories is not permitted in the Commercial Court except by leave. If an application for leave to serve interrogatories is made, it must be supported by an affidavit setting out the circumstances relied on and exhibiting a draft of the proposed interrogatories. Leave to serve interrogatories will normally only be given if they are required to establish some fact or facts which cannot satisfactorily be proved in some other way. As an alternative to interrogatories, the Court may order the provision of further particulars or the early exchange of witness statements.

13. EVIDENCE AT TRIAL

Court Books

- 13.1. The parties will normally be directed to prepare a court book of documents for use at the trial.
- 13.2. The purpose of the court book is to provide to the court, the parties and witnesses an accessible bundle of the documents which will be deployed at trial.
- 13.3. As a general principle, the court book will include, together with the current pleadings, requests for particulars and particulars, notices to admit and notices of dispute (or a summary of admissions), a legible copy of all documents in date order which any party intends to tender in evidence in chief or reasonably expects to refer to in cross-examination (the relevance test). Parties must ensure that, as far as possible, all such documents are included in the court book and that unnecessary documents are not included. An application to tender a document in evidence will not be refused only by reason of the fact that it was omitted from the Court Book.
- 13.4. The contents of the court book will be inclusive; parties 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.
- 13.5. Where any dispute as to the court book arises between the parties, the matter should be listed before the List Judge or List Associate Judge without delay.
- 13.6. The attention of practitioners is drawn to paragraph 14.12 below, 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.
- 13.7. The court book should contain no unnecessary duplication of documents.
- 13.8. E-mail chains should be avoided and e-mail messages should be included once each as single messages, unless the associated chain has evidentiary significance.
- 13.9. Parties 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 that included those documents or that the costs be paid by that party in any event.
- 13.10. The court book shall contain an index of its contents:

- 13.10.1. Each page of the court book shall be numbered sequentially;
- 13.10.2. The index will normally list the documents in chronological order. Where an affidavit is included in the court book, the exhibits shall be included in the chronological order of the exhibits themselves and not as if they came into existence only at the time the affidavit was sworn;
- 13.10.3. The index shall include at least the following descriptive fields:
 - 13.10.3.1. court book document number;
 - 13.10.3.2. document date (as set out in the list of discoverable documents if the document was discovered);
 - 13.10.3.3. document description (as set out in the list of discoverable documents if the document was discovered);
 - 13.10.3.4. document source or provenance (as set out in the list of discoverable documents if the document has been discovered);
 - 13.10.3.5. court book page number at which the document commences; and
 - 13.10.3.6. court book page number at which the document ends.
- 13.10.4. Ordinarily, documents in the court book should not be separated by dividers.

Witness Statements

- 13.11. The evidence in chief of witnesses in the Commercial Court will ordinarily be given by verified witness statement unless and to the extent that it concerns a contested issue of fact involving the evidence of that witness or where the List Judge otherwise orders.
- 13.12. A witness statement is in written form the evidence that a witness would otherwise give orally and, subject to any contrary order, 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.
- 13.13. Practitioners who draft witness statements should bear in mind that a witness statement that is not written in the witness's own words is unlikely to assist either the Commercial Court or the witness.
- 13.14. Witness statements should comply with the following requirements:

- 13.14.1. each witness statement must be in admissible form, in accordance with the rules of evidence, including the rule against hearsay evidence;
- 13.14.2. 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.”;
- 13.14.3. each witness statement shall be directed only to matters in issue; and
- 13.14.4. copies of witness statements, as tendered, should be provided to the parties and to the List Judge in electronic format.
- 13.15. 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.
- 13.16. 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.
- 13.17. 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.
- 13.18. Where witness statements are not ordered in respect of one or more witnesses, or where a witness will not provide a witness statement, the party proposing to call the witness will be required to file and serve a summary of the evidence to be given by the witness.
- 13.19. A summary of evidence shall clearly identify the topics in respect of which evidence will be given and the substance of the evidence.
- 13.20. Where a witness will prove or refer to a document, the witness statement or summary of evidence shall identify each such document by description and either by page number in the court book or, if the court book has not been prepared by the time of service of the witness statement or summary of evidence, by discovery number.

- 13.21. Where an order for witness statements is made, a party may not without leave adduce from the witness evidence-in-chief other than evidence included in the witness statement of that witness or, where the witness will not provide a witness statement, the evidence referred to in a summary of the evidence to be given by the witness.

Expert Evidence

- 13.22. The Commercial Court may give directions that:
- 13.22.1. expert evidence at trial follow factual evidence upon which the expert evidence is predicated;
 - 13.22.2. two or more experts engaged by the respective parties be sworn and present their evidence concurrently.
- 13.23. Where contentious expert evidence is to be adduced, the Commercial Court will almost invariably direct pursuant to RSC Ch I Rule 44.06 that experts confer before trial. Typical directions appear in **Schedule 8**.
- 13.24. Where a conference of experts is directed:
- 13.24.1. subject to any direction of the Commercial Court, the procedure adopted at the conference is a matter for the experts themselves, and not for the parties or their practitioners;
 - 13.24.2. neither the parties nor practitioners should seek to restrict the freedom of the experts at the conference to identify and acknowledge the matters upon which they agree;
 - 13.24.3. following any conference, the experts shall prepare a joint memorandum for the Court stating:
 - 13.24.3.1. that they have met and discussed each matter upon which they have been directed to confer;
 - 13.24.3.2. the matters on which they agree;
 - 13.24.3.3. the matters on which they disagree; and
 - 13.24.3.4. in brief summary the reasons for their disagreement.

14. SETTING DOWN FOR TRIAL; TRIAL

- 14.1. A proceeding may only be set down for trial by order. A typical form of trial order is set out in **Schedule 9**.
- 14.2. The List Judge will consider whether the proceeding or any question in the proceeding should be referred for trial to an Associate Judge for hearing pursuant to RSC Ch I Rule 77.05.
- 14.3. The List Judge or the List Associate Judge may order pursuant to RSC Ch I Rule 47.04 that a separate question be the subject of a preliminary trial and may give directions accordingly. Questions as to the quantum of damages will ordinarily be tried after all other questions in the proceeding.
- 14.4. The Commercial Court will facilitate early hearings and, for this purpose, may place an appropriate proceeding on standby for a particular date when time might become available.
- 14.5. Parties should expect that a trial fixed for hearing will commence on the date fixed and that a trial which is not finished within the estimated duration will be adjourned part-heard to the next date convenient to the Commercial Court.
- 14.6. Practitioners for parties other than the plaintiff should expect to be required to make an opening statement after the plaintiff's opening.
- 14.7. Where this is necessary to achieve the Court Objective, the Trial Judge 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.
- 14.8. 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.
- 14.9. Where court books are not ordered, a party shall provide a working copy for the Trial Judge of any exhibit tendered at trial, and of the current pleadings.
- 14.10. The practices set out in this chapter are in addition to those available under RSC Ch I or at law and, in each case, subject to any direction of the Trial Judge.
- 14.11. During the opening of their case practitioners are expected to identify the core documents in the proceeding.

- 14.12. 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 taken²⁴ or the parties have otherwise agreed.²⁵

Use of Authorities at Trial

- 14.13. The attention of practitioners is drawn to Practice Note No. 1 of 2006, dealing with the citation of unreported judgments.
- 14.14. Parties must consult to eliminate duplication in copies of reports of authorities provided to the Commercial Court. Costs for excessive photocopying will not be allowed. Parties should restrict copying to the part or parts of each case report relevant to the issues in the proceeding.
- 14.15. Parties should not hand up case reports that group all references in end-notes but instead provide the Commercial Court with reports that give references in the text or in footnotes on each page. For reports taken from the Austlii website when an authorised report is not available, parties should follow the Download link at the top of the report and select Rich Text Format where available.

²⁴ As to the evidentiary consequence of this see *Evidence Act 2008*, s.60.

²⁵ See para 13.6 above.

15. ORDERS

- 15.1. Practitioners should prepare draft orders for all relevant hearings in the List.
- 15.2. It is not necessary to reserve liberty to apply in any interlocutory order made in a Commercial Court proceeding.
- 15.3. As a general rule, orders will be authenticated pursuant to RSC Ch I Rule 60.02. In circumstances where practitioners seek the Judge to sign an order, they should comply with the provisions of RSC Ch I Rule 60.04.
- 15.4. The Registry aims to send to each of the parties authenticated orders within five working days of their receipt from the associate.
- 15.5. If a party fails to comply with an order, the Commercial Court may, in addition to any course otherwise available, impose a costs penalty on that party or the practitioner representing that party the Court 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 Commercial Court.
- 15.6. Where a party is experiencing difficulties in meeting a timetable, the problem should be immediately notified to the associate of the judicial officer who set the timetable so that the difficulties can be properly managed and consequential delays avoided or minimised.

16. APPEAL

- 16.1. The attention of Practitioners is drawn to the Rules of Court relating to appeals from judgments given or orders made by Associate Judges and, in particular to the restriction on the right of appeal contained in:
 - 16.1.1. RSC Ch I Rule 77.06(2) and Rule 77.06(2.1); and
 - 16.1.2. RSC Ch V Rule 16.5.
- 16.2. An appeal pursuant to RSC Ch I Rule 77.06 from any judgment given or order made by an associate judge in a proceeding allocated to a list will normally be heard by the judge assigned to that list.

17. MISCELLANEOUS

17.1. This Practice Note supersedes the following Practice Notes, Notices to Practitioners and Notices to the Profession which are hereby revoked:

Notice to Practitioners No 1 of 2004 – Victorian Taxation Appeals

Notice to Practitioners No 2 of 2004 – Victorian Taxation Appeals

Notice to Practitioners No 3 of 2007 – Victorian Taxation Appeals

Practice Note No 4 of 2004 – Commercial List Practice Note (Green Book), as amended by Practice Note No 6 of 2007

Notice to the Profession 2008 – Commercial Court

Notice to the Profession No 2 of 2009 – Associate Judges

Notice to the Profession No 3 of 2009 – Transfer of Cases into the Commercial Court

Notice to the Profession No 4 of 2009 – Urgent and Interlocutory Applications

Notice to the Profession No 5 of 2009 – Witness Statements

Notice to the Profession No 6 of 2009 – Communications with Associates

Notice to the Profession No 7 of 2009 – Judge in Charge

Notice to the Profession No 8 of 2009 – ADR

Notice to the Profession No 9 of 2009 – Case Management Conferences

Notice to the Profession No 10 of 2009 – ENE

Notice to the Profession No 11 of 2009 – Taxations Cases – List F

17.2. Only Chapters 1 to 7 and paragraph 8.6 of this Practice Note apply to Corporations proceedings which will be conducted in accordance with RSC Ch V.

17.3. Subject to this Practice Note:

17.3.1. RSC Ch I applies to all proceedings;

17.3.2. RSC Ch II O 2 applies to Commercial proceedings;

17.3.3. RSC Ch II O 9 applies to Arbitration proceedings;

- 17.3.4. RSC Ch II O 7 applies to Taxation appeals.
- 17.4. Parties and practitioners are referred to the following Practice Notes:
 - 17.4.1. Practice Note No 4 of 1999 – Supreme Court Divisional List;
 - 17.4.2. Practice Note No 3 of 2002 – Transcript in Civil Proceedings;
 - 17.4.3. Practice Note No 7 of 2006 – Arbitration Business;
 - 17.4.4. Notice to Profession 2006 – Applications pursuant to s.588FF of the *Corporations Act 2001 (Cth)*;
 - 17.4.5. Practice Note No 1 of 2007 – Guidelines for the Use of Technology in any Civil Litigation Matter (Silver book).

SCHEDULE 1

HEADING TO PROCEEDINGS IN THE COMMERCIAL COURT

[Non-Corporations Proceeding]
IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

See Para 3.8

BETWEEN:

#

- and -

#

LIST xx
No. 0000 of 0000

Plaintiff

Defendant

[Corporations Proceeding]

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

LIST XX
No. 0000 of 0000

IN THE MATTER OF XY Pty Ltd (ACN 111 111 111)

BETWEEN:

#

- and -

#

Plaintiff

Defendant

SCHEDULE 2

CASE MANAGEMENT INFORMATION SHEET

(including standard mediation order)

See Para 7.6

The information supplied should be printed in bold characters and provided to the List Judge with the Case Management Bundle

[Proceeding Heading]

Party lodging information sheet:

Name of solicitors:

Name(s) of advocates [Counsel?] for trial:

1. By what date can you give discovery of the following:
 - (i) the documents on which you will rely;
 - (ii) documents which:
 - adversely affect your case;
 - adversely affect another party's case;
 - support another party's case; and
2. Do you contend that discovery of any category or class of document would be unreasonable? If so, what is the category or class and on what grounds do you so contend?
3. Is specific discovery required on any issue? If so, please specify.
4. By what dates can you –
 - (a) give general inspection; and
 - (b) any and if so what preliminary inspection?
5. Do you propose amendments to a pleading or a request for particulars? Are any requests for particulars outstanding? Please give brief details of what is proposed, required and outstanding?
6. Can you make any additional admissions? If yes, please give brief details of the additional admissions.

7. Are any of the issues in the proceeding suitable for trial as preliminary issues?
8. Witnesses and evidence
 - (a) How many witnesses of fact do you propose to call to give evidence at trial? Please give their names and topics of evidence.
 - (b) Will an interpreter be required for any witness?
 - (c) Do you wish any witness to give oral evidence by video link? Please give his or her name, or explain why the name is not given. Please state the country and city from which the witness will be asked to give such evidence.
 - (d) Do you intend to apply [*this needs further discussion; it would appear to assume a prima facie position of oral evidence*] at the Case Management Conference that the evidence of any witness of fact be given by a signed witness statement and if so:
 - (i) give the name of each such witness;
 - (ii) state briefly the issues which the witness statement is expected to cover;
 - (iii) state why the evidence is sought to be given by witness statement and how it will facilitate the management of the trial.
 - (e) What documents can be tendered in evidence at trial as an agreed common bundle without the need for formal proof?
9. Expert evidence
 - (a) On what issues may expert evidence be required?
 - (b) Is this a proceeding in which the use of a joint expert might be suitable?
 - (c) On the evidence of how many expert witnesses do you propose to rely at trial? Please give their names, or explain why the name is not given. Please identify each expert's field of expertise.
 - (d) By what date can you serve signed expert reports?
 - (e) When will your experts be available for a meeting or meetings of experts?
 - (f) How many of your expert witnesses do you propose should give oral evidence in chief at trial? Please explain why?

- (g) Do you wish any expert witness to give evidence by video link? Please give his or her name, or explain why this is not being done. Please state the country and city from which the witness will be asked to give evidence by video link.
10. What are the advocates' [counsel's?] Present provisional estimates of the minimum and maximum lengths of the trial?
11. What is the earliest date by which you believe you can be ready for trial?
12. Is this a proceeding in which a pre-trial review is likely to be useful?
13. Is there any way in which the court can assist the parties to resolve their dispute or particular issues without the need for a trial or a full trial?
14. Alternative dispute resolution
- (a) Might some form of Alternative Dispute Resolution procedure assist to resolve or narrow the dispute or particular issues?
- (b) Has your client been informed of the range of available Alternative Dispute Resolution options?
- (c) Have you discussed Alternative Dispute Resolution options with the other parties in the proceeding?
- (d) Do you request that the proceeding be adjourned while the parties try to settle the proceeding by means of one or other Alternative Dispute Resolution option?
- (e) Are any other special directions needed to allow for Alternative Dispute Resolution?
15. What interlocutory applications do you anticipate might be made before trial?
16. Does provision need to be made in the pre-trial timetable for any other procedural step not otherwise dealt with above? If yes, please specify the application or procedural step.
17. Are there, or are there likely in due course to be, any related proceedings? Please give brief details.

[Signature of solicitors]

SCHEDULE 3
PRE-TRIAL CHECKLIST

See Paras 7.17, 8.13 and
Schedule 9 par 27.

(Information supplied should be in bold characters)

[Proceeding Heading]

- (a) Trial date:
- (b) Party lodging checklist:
- (c) Name of solicitors:
- (d) Name of barristers:

[Note: this checklist should be completed with the involvement of counsel instructed for trial.]

1. Have you completed preparation of a court book in accordance with all relevant directions?
2. If not, when will the preparation be completed?
3. Which witnesses of fact do you intend to call?
4. Which expert witnesses do you intend to call?
5. Will an interpreter be required for any witnesses and if so, have any necessary directions already been given?
6. Have directions been given for any witnesses to give evidence by video link? If so, have all necessary arrangements been made?
7. What are counsel's confirmed estimates of the length and minimum lengths of the trial? You are required to attach a confirmed estimate of the length signed by each counsel.

Solicitors for the Plaintiff/s

Solicitors for the Defendant/s

SCHEDULE 4
STANDARD VALUATION ORDER

See Para 8.6

[PROCEEDING HEADING]
GENERAL FORM OF ORDER

JUDGE:	The Honourable Justice/Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

THE COURT ORDERS THAT:

1. An independent person (“the Valuer”) be appointed to express an opinion as to the value of the assets, including goodwill, of # (“the Company”).
2. The Valuer be a person agreed upon by the parties by 4.00 pm on # or, in default of such agreement, an official liquidator nominated by the Prothonotary who consents to act.
3. Pursuant to s.247A of the *Corporations Act 2001* (Cth), the Plaintiff and one representative of each of his or her legal and accounting advisers is authorised to inspect the books of the Company (as that term is defined in s.9 of the *Corporations Act 2001* (Cth)).
4. The defendant by its officers and employees, including #, shall make the books of the Company available for inspection and copying in accordance with paragraph 3 of these orders between the hours of 9.00 am and 5.00 pm commencing on # and ending on #.
5. The Plaintiff provide to the Valuer a copy of each document which the parties or either of them wish the Valuer to see for the purposes of the valuation by 4.00 pm on #.
6. Any submission which either party wishes to make to the Valuer be in writing and provided to the Valuer and to the other party by 4.00 pm on #.

7. The Valuer may inspect all or any of the books of the company (as the terms “books” is defined in s.9 of the *Corporations Act 2001* (Cth)) for the purposes of the valuation.
8. Each party shall comply with the reasonable requests of the Valuer, including for the provision of any information or documents including copy documents, as soon as reasonably practicable after the making of such a request.
9. The Valuer shall complete the valuation and provide a copy to the parties and the Court by 4.00 pm on #.
10. The parties shall pay the costs of the Valuer in equal shares in the first instance.
11. The further hearing of the summons for directions is adjourned to #.
12. Liberty to apply is reserved to the parties and the Valuer on reasonable notice.
13. Costs reserved.

DATE AUTHENTICATED:

PROTHONOTARY

SCHEDULE 5

MATTERS FOR CONSIDERATION AT A FINAL DIRECTIONS HEARING

See Para 8.13

1. Confirmation that the parties will be ready for trial on the appointed trial date and that the estimated trial duration remains accurate.
2. The order of opening submissions by all parties prior to evidence from witnesses.
3. The length of opening submissions.
4. The filing and service of agreed statements of facts.
5. The filing and service of an agreed statement on any expert evidence, identifying the issues which remain in dispute between the parties' experts.
6. Where witness statements have been ordered or affidavits are to be relied upon, the procedure for and time for notices of objection to evidence and responses.
7. The exchange of written outlines of opening submissions.
8. The exchange of written outlines of closing submissions.
9. Time limits to be imposed on parties for:
 - a. opening addresses;
 - b. presentation of a party's case including cross-examination; and
 - c. closing addresses.
10. The mode of proof of any particular facts in dispute.²⁶

²⁶

Green Book [3.12].

SCHEDULE 6
STANDARD MEDIATION ORDER

See Para 10.3

[PROCEEDING HEADING]

GENERAL FORM OF ORDER

JUDGE:	The Honourable Justice/Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

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 7

STANDARD REFERENCE TO SPECIAL REFEREE

See Para 10.6

[PROCEEDING HEADING]

GENERAL FORM OF ORDER

JUDGE:	The Honourable Justice/Associate Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

Pursuant to Rules of the Supreme Court Chapter 1 Rule 50.01(1)(b) it is ordered that the questions set out in Annexure 1 [or as the case may be] be referred to a Special Referee.

1. #is nominated as the Special Referee.
2. The Special Referee may indicate the acceptance of the nomination by filing with the Prothonotary, Supreme Court, William Street, Melbourne within 7 days of the date of this Order a written consent to act. The Special Referee must thereupon deliver to each of the parties a copy of the consent to act and a statement of proposed remuneration for so acting.
3. Subject to the filing by the nominee of a written consent to act as Special Referee under this Order, and provided no party objects to the proposed remuneration within 7 days after the date of the filing of the consent to act, the nominee is appointed as the Special Referee under this Order such appointment to be effective on the date of the filing of the consent to act.
4. The Special Referee must make a report in writing to the Court on each of the questions. The report must state the opinion of the Special Referee upon each of the questions giving reasons for this opinion. The report together with a copy for each of the parties must be delivered to the Prothonotary not later than # or by such later date as the Court may direct.

5. Within 14 days after the date of the filing of the consent to act the parties must provide security for the payment of the remuneration of the Special Referee by the payment into court or if all parties agree in writing by payment into an interest bearing account in the names of the solicitors for the parties. The amount of security shall be the amount proposed by the Special Referee or such other sum as the Court may from time to time direct. In the event that this direction be not complied with the reference shall be stayed pending further order.
6. Security for the payment of the remuneration of the Special Referee be provided in the first instance in equal shares by the parties. All other questions as to the remuneration of the Special Referee, including its final determination and which party or parties should ultimately bear it, be reserved.
7. The sum provided by way of security for the remuneration of the Special Referee, including interest, be not disbursed otherwise than pursuant to an order of the Court.
8. At the time of giving the report pursuant to this Order the Special Referee must deliver to each of the parties a signed memorandum setting out the remuneration claimed including any disbursements and file a copy with the Court.
9. Each of the parties and the Special Referee have liberty to apply.
10. Costs of this application be reserved.

ANNEXURE 1 - QUESTIONS REFERRED

ANNEXURE 2 - CONDUCT OF THE REFERENCE

1. The following directions are given pursuant to Rule 50.02:
2. Subject to the requirements of the rules of natural justice and the following directions and any further directions which may be given by the Court, the Special Referee may conduct the reference in such manner as is appropriate for the efficient and economical implementation of this Order.
3. Within 21 days after the date of appointment the Special Referee must conduct a preliminary conference with the parties or their legal representatives to determine the manner of conducting the reference.
4. The Special Referee is authorised for the purposes of the reference to have and use the following material in addition to any material which may be tendered and received as evidence in the reference:
 - (i) a copy of this Order;
 - (ii) a copy of the pleadings including any particulars;
 - (iii) the following exhibits tendered at the trial -
ExA copy of each of the above must be delivered to the Special Referee by the plaintiff within 14 days after the date of appointment
5. The Special Referee may make such enquiry and inspection of any document or thing and apply such personal knowledge and expertise as is reasonably necessary for the purpose of the reference.
6. The Special Referee is not bound by the rules of evidence.
7. The attendance of witnesses and the production of documents may be compelled by the issue of subpoena in accordance with RSC Ch I O42.
8. Each of the parties must comply with any lawful direction that the Special Referee considers necessary for the reference.
9. Where a party wishes to rely upon the opinion of an expert the Special Referee may direct that a copy of the expert's opinion and the reasons in support be provided to the other parties and may direct that the experts meet in the absence of the Special Referee and the parties with a view to settling any points of difference between them and to

presenting a joint report for use in the reference. Except as all the parties whose experts have participated in such a meeting in writing agree, no evidence shall be admitted in the reference or otherwise in this proceeding of anything said or done at the meeting.

10. The parties may be represented on the reference by legal practitioners.
11. The Special Referee may administer an oath or take an affirmation for the purpose of the reference.

SCHEDULE 8
STANDARD JOINT EXPERTS ORDER

17.5. See Para 13.23

[PROCEEDING HEADING]

GENERAL FORM OF ORDER

JUDGE: The Honourable Justice/Associate Justice #

DATE MADE:

ORIGINATING PROCESS:

HOW OBTAINED:

ATTENDANCE:

OTHER MATTERS:

THE COURT ORDERS THAT:

1. On or before #, each of the Plaintiff and the Defendants must nominate an expert (“the experts”) and provide that expert with a copy of the Expert Witness Code of Conduct (“the code”).
2. The parties shall each provide the experts with copies of or access to all documents, and any other information, requested by the experts to complete their joint report referred to below.
3. By #, the experts shall confer and provide to the Court and to the parties a joint report (“the joint report”) containing their joint opinion as to each of the following questions:

#INSERT QUESTIONS#

4. If the experts are unable to express a joint opinion on any of the questions, the joint report shall describe the difference between them and set out their respective reasons for disagreeing.

5. The experts conference is intended to be a consultation of experts without any influence from a party to the proceeding. To that end, subject to paragraph 6:
 - (a) The conference of experts and all further communications between them in relation to the preparation of the joint report shall be conducted in the absence of the parties, their employees or agents, or any practitioner for or associated with any party;
 - (b) None of the experts shall in the preparation of the joint report consult with any party, their employees or agents, or any practitioner for or associated with any party; and
 - (c) Notwithstanding (a) and (b) the experts may jointly request further information or direction by letter signed by them directed to the practitioner for each of the parties and may receive such further information.
6. Save as contained in the joint report, unless the parties agree in writing no evidence shall be admitted of anything said or done by any person at the conference between the experts.

SCHEDULE 9
TYPICAL FORM OF TRIAL ORDER

See Para 14.1

[PROCEEDING HEADING]

GENERAL FORM OF ORDER

—

JUDGE:	The Honourable Justice #
DATE MADE:	#
ORIGINATING PROCESS:	#
HOW OBTAINED:	#
ATTENDANCE:	#
OTHER MATTERS:	#

THE COURT ORDERS THAT:

Trial date

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

Discovery

2. The plaintiff's list of discoverable documents be filed and served on or before #.
3. The defendant's list of discoverable documents be filed and served on or before #.
4. Inspection of discovered documents be completed by #.

Mediation

5. See schedule 8 – standard mediation order

Court Book

6. 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.
7. 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 #.

8. 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

9. Subject to any order of the trial judge, evidence in the trial be by witness statement.
10. The plaintiff file and serve its witness statements by 4:00 pm on #.
11. The defendant file and serve its witness statements by 4:00 pm on #.
12. Each party have available for use by the trial judge a copy of all its witness statements in paper form and in electronic form.
13. 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.”
14. 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.

15. 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.
16. 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.
17. The plaintiff have available at the hearing a further copy of the court book for the exclusive use of witnesses during their examination.
18. The plaintiff file and serve a chronology of the relevant facts and events by 4:00 pm on #.
19. The parties file and exchange written outlines of opening submissions, limited to # A4 pages, 1.5 spaced text in font size 12, by 4:00 pm on #.
20. 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 contents 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.

21. 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.
22. The list judge will, before the witness is sworn, determine any unresolved issues arising out of any such notice.

23. The list 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.
24. 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.
25. 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.
26. 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.

Pre-trial checklist

27. Each party shall send to the associate to the list judge (with a copy to each other party) a completed pre trial checklist²⁷ on or before #.

Counsels' joint estimate of trial duration

28. Counsel for the parties must provide to the list 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.

²⁷ See Schedule 4 – Pre-Trial Checklist.

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

29. The joint memorandum is to be filed by email to the associate to the list judge by 4:00 pm on #.
30. 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 list judge immediately.
31. Costs are reserved.