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SUPREME COURT PRACTICE NOTE SC EQ 4

Supreme Court Equity Division– Corporations List

Commencement

1. This Practice Note was issued on 19 May 2023 and will commence on 22 May 2023. It replaces former Practice Note SC Eq 4 issued on 18 December 2018.

Introduction

2. This Practice Note relates to the structure and operation of the Corporations List in the Equity Division.
3. All proceedings and applications in the Corporations List (except those in the Corporations Registrar's List) will be case managed by the Corporations List Judge with the aim of achieving a speedy resolution of the real issues in the proceedings. There will also be a Corporations Duty Judge available at all times to hear any urgent applications in Corporations Matters.

Application

4. This Practice Note applies to new and existing Corporations Matters in the Equity Division.

Definitions

5. In this Practice Note:

Corporations Judges means the List Judge and each other Judge of the Equity Division for the time being listed to hear Corporations Matters

Corporations List means the List administered by the List Judge

Corporations Matters include any proceedings or applications pursuant to or in respect of any matter relating to the *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth), the *Cross-Border Insolvency Act 2008* (Cth) or the Supreme Court (Corporations) Rules 1999 and any proceedings or applications relating to other incorporated bodies such as co-operatives and incorporated associations

List Judge means the Corporations List Judge

Corporations Registrar includes the Registrar in Equity and a Senior Deputy or Deputy Registrar

Corporations Registrar's List means the List into which matters referred to in paragraph 11 of this Practice Note are entered

Rules means the Supreme Court (Corporations) Rules 1999 (NSW)

Statutory Demand cases means applications under s 459G of the *Corporations Act*

Corporations Judges

6. The List Judge and at least one other Judge of the Equity Division will be listed on a continuing basis to hear Corporations matters (the Corporations Judges).

Corporations Duty Judge

7. A Corporations Judge will be available as the Corporations Duty Judge to deal with urgent applications in Corporations Matters.
8. Contact should be made in the first instance with the Associate to the List Judge (or the Acting List Judge in the List Judge's absence) by telephone or email (email is preferable during court hours, as the Associate can deal with emails while in court). The Associate will indicate which Corporations Judge should be approached.

Entry into the Lists

9. All Corporations Matters, except those mentioned in paragraph 10, will be made returnable before the List Judge in the Corporations List on Mondays.
10. Statutory Demand cases and matters wholly within the delegated powers of the Registrar under s 13 of the *Civil Procedure Act* (see Schedule 1 to this Practice Note) will be returnable in the Corporations Registrar's List on any Monday through Thursday.
11. Any matter to be entered in the Corporations Registrar's List must include the words "Corporations Registrar's List" prominently on the front sheet of any Originating Process or Interlocutory Process.

Process and Affidavits

12. The form of Originating Process, Interlocutory Process and affidavits in Corporations Matters are as provided for in the Rules.

Case Management

13. The List Judge will case manage matters in the Corporations List on Monday of each week with the aim of ensuring the speedy resolution of the real issues between the parties. Interlocutory applications will be listed at 9.15am for the purpose of calling through the matters in that list and, if appropriate, allocating a hearing time on that day before one of the Corporations Judges. Directions will be listed from 10.00am.
14. When matters in the Corporations List, other than those matters to be heard on Mondays, are ready for the allocation of a hearing date the List Judge will fix the matter for hearing and make appropriate directions for the hearing.
15. Where a matter is placed in the Corporations List on Monday solely for the allocation of a hearing date, the parties, *acting together*, may, instead of appearing, forward to the List Judge's Associate by 12 noon on Friday:
 - (a) any agreed directions for the hearing (which should include appropriate directions for the hearing);
 - (b) an agreed estimate of the time required;
 - (c) the mutually available dates during the following three months of all legal representatives who are to appear; and
 - (d) the email addresses of all legal representatives.

The List Judge will then allocate hearing dates in Chambers instead of requiring attendance in Court. Dates so allocated will be notified to the legal representatives by email, usually within three working dates. This procedure will be appropriate only where the parties are agreed that the matter is ready for hearing and on the directions to be made.

16. All matters in the Corporations Registrar's List will be conducted in the Online Court unless excluded by the Online Court Protocol (Corporations List) set out in Schedule 3 to this Practice Note.
17. The Court's expectation of Practitioners appearing in Corporations Matters includes that:

- (a) Agreement will be reached on a timetable for the preparation of matters for trial and/or mediation and/or reference out and Consent Orders will be handed up during the directions hearing;
 - (b) If there is slippage in an agreed timetable, further agreement will be reached without the need for the intervention of the Court and Consent Orders will be filed with the List Judge;
 - (c) Requests for Court intervention in relation to timetabling will only be sought rarely when, for good reason, agreement has proved to be impossible;
 - (d) Trial Counsel will be briefed at the earliest possible time;
 - (e) Careful review of the case will be made as early as practicable for the purpose of informing the Court of its suitability for mediation, for reference out of all or some of the issues, and/or for the use of a single expert, or a Court appointed expert or the use of an appropriate concurrent expert evidence process;
 - (f) Agreement will be reached on the real issues in dispute between the parties so that a speedy resolution of those issues may be achieved; and
 - (g) Trial Counsel will appear at the directions hearing when the matter is set down for hearing and provide to the Court a considered opinion of the realistic estimate of the time required for trial; and if a stopwatch system for trial is to apply, a considered opinion as to the appropriate allocation of time for evidence and submissions.
18. To facilitate the just, quick and cheap resolution of Corporations Matters, by written application to the List Judge's Associate, the List Judge will make Consent Orders in Chambers on days other than Monday. When Consent Orders varying a timetable are to be made either in Chambers or in Court, it is imperative that those orders include the vacation of any date for directions hearings, or the hearing of interlocutory applications that the parties no longer wish to maintain. If the proceedings settle, it is necessary to have the List Judge make Order finalising the litigation, rather than filing Terms or Orders with the Registry. Those orders may also be made by consent in Chambers.
19. The Corporations List closes at 12 noon on Friday. Any application to add a matter to the List or remove a matter from the List must be made prior to 12 noon on Friday. Such applications are to be made in writing to the List Judge's Associate.

Statutory Demand cases

20. All Statutory Demand cases will be entered into the Corporations Registrar's List for case management, Consent Orders and/or if necessary, referral to the List Judge.
21. The parties to a Statutory Demand case must agree on a timetable that makes it ready for hearing promptly after its first return date before the Corporations Registrar.
22. A plaintiff in a Statutory Demand case must include in its outline of submissions:
 - (a) in a genuine dispute case under s 459H(1)(a), a succinct statement of:
 - (i) its understanding of the basis on which the debt is alleged by the defendant to be owing, due and payable in the amount stated in the demand; and
 - (ii) why that basis is disputed; and
 - (b) in an offsetting claim case under s 459H(1)(b), a succinct statement of:
 - (i) the precise facts and circumstances giving rise to the claim; and
 - (ii) the amount of the claim and the way in which it is calculated.

Court Appointment of Liquidators

23. The arrangements outlined in Schedule 2 to this Practice Note apply to the appointment of liquidators by the Court.

Schemes of Arrangement

24. In any proposed application under Part 5.1 of the *Corporations Act* (schemes of arrangement) and any other matter in which it is considered commercially important to obtain definite hearing dates before filing, contact may be made with the Associate to the List Judge for those dates.
25. The process for approval of schemes of arrangement is intended to be as simple as possible and the Court is generally supportive of simplification so far as it is consistent with the Court's statutory responsibilities and binding authority. Scheme proponents may proceed on the basis that, subject to the applicable duties in such an application, which has an ex parte character:

Form of affidavits

- (a) The Court will generally accept a simplification of affidavit evidence led in respect of scheme hearings, consistent with proof of compliance with the applicable statutory requirements. There is no mandated form for scheme affidavits.
- (b) The Court will generally be prepared to dispense with the requirement under r 2.4(2) of the Rules for the initial affidavit filed in support of the application to state the facts in support of the Originating Process, where that will be addressed by later evidence.
- (c) The consent of the chair and alternate chair scheme meeting can be proved by evidence led on information and belief.
- (d) It is generally not necessary to file a separate affidavit from an independent expert verifying his or her report that is included in the explanatory statement for the scheme.
- (e) It is generally not necessary to exhibit all correspondence between the scheme proponent's solicitors and the Australian Securities and Investments Commission ("ASIC") to an affidavit read at the second Court hearing, where ASIC gives a statement indicating that it does not raise any objection to the scheme.

Notice of the second Court hearing

- (f) The Court will generally be prepared to dispense with the publication of a notice of the second Court hearing in a newspaper, if notice can be given by an announcement made on the Australian Securities Exchange or by an announcement on the scheme proponent's website if it is not listed.

Matters to be addressed in evidence

- (g) The Court will generally expect a scheme proponent to lead evidence at the first Court hearing concerning due diligence and verification processes in respect of the explanatory statement, any break fee as a percentage of the implied equity value of the scheme proponent and the general nature of any exclusivity provisions.
- (h) The Court will generally expect a scheme proponent to lead evidence at the second Court hearing of the dispatch of scheme documents in accordance with the Court's orders and as to voter turnout at scheme meetings. Evidence of the use of technology at scheme meetings is not generally required, unless any issue in that regard needs to be brought to the Court's attention.

- (i) As practitioners would understand, the Court's approach to substantive issues arising in scheme applications will necessarily be guided by the existing and developing case law, for example as to communications by a scheme proponent to its shareholders or unitholders, proof of due execution of a deed poll by a foreign bidder and proof of financial arrangements supporting bids by special purpose bidding vehicles.
26. When making an order under subsection 411(1) of the *Corporations Act* the Court will require that the explanatory statement or a document accompanying the explanatory statement prominently display a notice in the following form or to the following effect:

"IMPORTANT NOTICE ASSOCIATED WITH COURT ORDER UNDER SUBSECTION 411(1) OF *CORPORATIONS ACT 2001* (Cth)

The fact that under subsection 411(1) of the *Corporations Act 2001* (Cth) the Court has ordered that a meeting be convened and has approved the explanatory statement required to accompany the notices of the meeting does not mean that the Court:

- (a) has formed any view as to the merits of the proposed scheme or as to how members/creditors should vote (on this matter members/creditors must reach their own decision); or
- (b) has prepared, or is responsible for the content of, the explanatory statement."

The Hon. A S Bell

Chief Justice of New South Wales

19 May 2023

Amendment history

19 May 2023: The Practice Note issued on 18 December 2018 and commencing on that date is replaced. The amendment provided, inter alia, for simplified evidence in applications concerning schemes of arrangement and updated Schedule 3 Online Court Protocol.

17 December 2018: The Practice Note issued on 10 May 2011 and commencing on 1 June 2011 is replaced. The amendment provided, inter alia, for the Registrar's online Court list.

10 May 2011: the Practice Note issued on 5 November 2010 is replaced; paragraphs 17, 20 and 21 are altered to dispense with the need for court attendance when seeking orders and hearing dates by consent.

5 November 2010: the Practice Note issued on 12 April 2010 is replaced; paragraph 30 is added to Practice Note SC Eq 4.

12 April 2010: an amended version of Practice Note SC Eq 4 is issued announcing substantial changes in case management practices with effect from 31 May 2010.

11 March 2009: paragraph 32 of Practice Note SC Eq 4 deleted following the commencement of Practice Note SC Eq 6 - Cross Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives.

17 October 2008: provisions about remuneration of insolvency practitioners were removed from Practice Note SC Eq 4 following the enactment of the *Corporations Amendment (Insolvency) Act 2007* (Cth), facilitating co-operation between courts in light of the *Cross-Border Insolvency Act 2008* (Cth), and reflecting new arrangements in the Registrar's Corporations List.

27 April 2006: Practice Note SC Eq 4 was amended to reflect new arrangements consequent on the assignment of a Judge of the Equity Division to Corporations matters as Corporations Judge on a full-time basis with effect from 1 May 2006

16 November 2005: paragraphs 26-30 added to Practice Note SC Eq 4

19 October 2005: formal errors corrected

17 August 2005: Practice Note SC Eq 4 replaced former Practice Note Nos. 111, 117 and 126.

SCHEDULE 1
REGISTRARS' POWERS
Applications *Corporations Act 2001* (Cth)

<i>CORPORATIONS ACT 2001 (Cth)</i>		
Section 425	Fix a receiver's remuneration	
Subsection 429 (3)	Extend the period for submission of a controller's report	
Section 440D (1)	Grant leave to begin or proceed with a proceeding in a court against a company which is in administration, or in relation to any of its property	Where the application is not opposed
Section 449C	Appoint an administrator of a company in administration where there is a casual vacancy	Where the application is not opposed
Former subsection 449E (1)	Fix the remuneration of an administrator of a company, or of a deed of company arrangement	
Sections 459A and 459B (except in respect of applications under s 234)	Order that an insolvent company be wound up in insolvency on an application made under s 459P, s 462 or s 464.	Where the application is not opposed
Section 459R	Extend the period within which an application for a company to be	

	wound up in insolvency must be determined	
Section 461	Order the winding up of a company	Where the application is not opposed
Section 465B	Substitute an applicant or applicants in an application under s 459P, 462 or 464	
Section 465C	Grant leave to oppose an application under s 459P, 462 or 464 notwithstanding failure to file and serve notice of grounds of opposition and an affidavit verifying	
Subsections 466 (2) and (4)	Otherwise order in respect of reimbursement of the applicant's costs, and payment of the costs incurred by a company or liquidator as applicant	Where the Registrar makes the relevant winding-up order
Section 467	Dismiss, adjourn or make an interim order in a winding up application	Where the Registrar has power to make a final order on the application
Paragraph 470 (2) (b)	Direct service of copy of order on another person	Where the Registrar makes the relevant winding up order
Section 471B	Grant leave to begin or proceed with a proceeding in a court or enforcement process against a company being wound up by the Court or in relation to its property	Where the application is not opposed
Section 472 (1)	Appoint official liquidator	Where the Registrar makes the relevant winding up order
Section 472 (6)	Declare whether anything to be done by liquidator is to be done by all or any one of appointees, where more than one liquidator is appointed by the Court	Where the Registrar appoints the liquidator

Former subsection 473 (1)	Remove a liquidator appointed by the Court	Where the application is not opposed
Former subsection 473 (2)	Determine provisional liquidator's remuneration	
Former subsection 473 (3)	Determine remuneration of liquidator	
Subsection 473A (1)	Fill vacancy in office of official liquidator in a winding up by the Court	Where the application is not opposed
Subsection 473A (4)	Declare whether anything to be done by liquidator is to be done by all or any one or more of appointees, where more than one liquidator is appointed by the Court	Where the Registrar appoints the liquidators
Section 480	Release liquidator and deregister company	
Subsection 481 (1)	Order preparation of report on accounts of liquidator	
Subsection 482 (1)	Order staying the winding up of a company for a limited time	Where the winding-up order was made by a Registrar
Paragraph 484 (2) (b)	Fix remuneration of special manager	
Section 486	Order for inspection of books of company by creditors or contributories in a winding up by the Court	
Section 500 (2)	Leave to proceed with or commence action or other civil proceeding against company subject to creditors' voluntary winding up	Where the application is not opposed
Former paragraph 542 (3) (a)	Directions abridging the period for which books of the company must be retained	
Paragraph 585 (b)	Approval or direction in respect of manner of service of notice to Part 5.7 body of institution of action or proceeding against member	

Sections 596A, 596B	Summon a person for examination about a corporation's examinable affairs	
Section 596F	Directions about examination	
Section 597, except subsection (15)	Conduct of examination	
Subsections 601AH (2)	Order that ASIC reinstate registration of a company	Where notice of the application has been served on ASIC and the application is not opposed by ASIC or any other person
Subsection 601CC (9)	Order directing restoration of name of registered Australian body to the Register, and associated directions	Where notice of the application has been served on ASIC and the application is not opposed by ASIC or any other person
Subsection 601CL (10)	Order directing restoration of name of registered foreign company to the Register, and associated directions	Where notice of the application has been served on ASIC and the application is not opposed by ASIC or any other person
Section 1335	Require security to be given for costs	
Div 60 of the Insolvency Practice Schedule (Corporations)	Fix remuneration of external administrators	
Div 70 of the Insolvency Practice Schedule (Corporations)	Directions abridging the period for which books of the company must be retained	
Div 90 of the Insolvency Practice Schedule (Corporations)	Fill a vacancy in the office of an external administrator	Where the application is not opposed

Div 90 of the Insolvency Practice Schedule (Corporations)	Remove and replace external administrator	Where the application is not opposed
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SCHEDULE 2

COURT APPOINTMENT OF LIQUIDATORS

The plaintiff in winding-up proceedings may nominate for appointment a registered liquidator. A nomination is effected by filing with the originating process a consent in Form 8 of the Rules, signed by the nominee, certifying that he or she is not aware of any conflict of interest or duty and making proper disclosure of fee rates, and serving it in accordance with Rule 5.5(3)(b);

The Court appoints the plaintiff's nominee in the normal case, but is not obliged to do so. An obvious ground for the Court declining to appoint the plaintiff's nominee is that the Court considers there is an actual or potential conflict between the duties of a liquidator and the nominee's personal interest or some other duty (for example, a person who has acted as receiver and manager of the company for a secured creditor will almost never be appointed liquidator).

SCHEDULE 3

ONLINE COURT PROTOCOL (CORPORATIONS LIST)

Commencement

1. This Protocol was issued on 19 May 2023 and will commence on 22 May 2023. It replaces the former Protocol issued on 18 December 2018.

Application

2. This Protocol applies to matters in the Corporations List in the Equity Division.

Definitions

3. In this Protocol:

Corporations Act means the *Corporations Act 2001 (Cth)*.

Judicial Officer means a Judge of the Equity Division or a Registrar.

Online Registry has the same meaning as in Part 3 of the Uniform Civil Procedure Rules 2005 (NSW).

PDF means Portable Document Format.

Registered User means a legal practitioner who has registered as a user of the Online Registry and the Online Court.

Request means a request using the Online Court for case management orders (including, but not limited to, timetables for the preparation of the matter for trial, referral to mediation, adjournment, referral to the List Judge, and scheduling a listing date).

UCPR means the Uniform Civil Procedure Rules 2005 (NSW).

Availability of Online Court

4. The Online Court is available to persons who are Registered Users.
5. Legal practitioners or self-represented litigants appearing in matters entered in the Corporations List must be Registered Users. Registration and access to the Online Court is at: <https://onlineregistry.lawlink.nsw.gov.au/>.

Procedure

6. All matters in the Corporations Registrar's List are automatically entered into the Online Court.
7. All eligible matters will be managed in the Online Court with the exception of:
 - the first return date in an application for winding up under Part 5.4 or 5.4A of the *Corporations Act*; and
 - any application for winding up under Part 5.4 or 5.4A in which a supporting creditor appears, and
 - the first return date in an application for reinstatement under s 601AH of the *Corporations Act*; and
 - any application under Section 471B or 500 (2) of the *Corporations Act*.
8. Registered Users must submit Requests to the Registrar by no later than 11.00am on the second day preceding the Online Court sitting. Counter requests and a consent to pending orders must be submitted by no later than 2.30pm on the second day preceding the Online Court sitting.
9. Failing to submit requests or consent orders in the Online Court in accordance with the timeframes described in this Practice Note will be treated as a non-appearance in the proceedings. The registrar will issue a notice pursuant to rule 13.6 of the UCPR that any further non-appearance may result in the proceedings being dismissed.

Conduct in an Online Court

10. The Online Court is a virtual courtroom and must only be used for issues requiring consideration and determination by a Judicial Officer.
11. The Online Court must not be used for communications solely between the parties.

12. It is expected that there will be adherence to professional etiquette and courtesy in the Online Court.
13. Undertakings given and orders made in an Online Court are binding as if given or made in open court.
14. All rules including those relating to contempt apply to proceedings conducted in the Online Court.

Terminating an Online Court

15. A Judicial Officer may at any time order that any or all further hearings be conducted in open court.

User Identification Code and Password

16. Each Registered User has a unique User Name and Password which must be kept secure.
17. When an Online Registry account is used to send a message or document using the Online Court, the person to whom that account was allocated is deemed to be the person who sent the message or document and is responsible for the contents.

Messages

18. Messages posted in an Online Court must be:
 - relevant to the topic under discussion;
 - concise; and
 - posted in a timely manner.
19. A Judicial Officer may, from time to time, give instructions as to:
 - the acceptable length of messages in an Online Court; and
 - the time and date by which messages must be received.

Documents

20. Documents may be attached to messages sent using the Online Court.
21. Documents cannot be filed using the Online Court. Documents must be filed in accordance with Parts 3 and 4 of the UCPR and may be filed using the Online Registry at: <https://onlineregistry.lawlink.nsw.gov.au/>.
22. If an Online Court message refers to a document that has been filed, the document should where possible be attached to the message. The message must indicate the date on which the document was filed. If the document was filed using the Online Registry, the message must indicate whether the Online Registry has given a notice of acceptance of the document.

23. Documents sent using the Online Court must be in PDF and must not be locked.
24. If the document contains draft consent orders, the message to which the document is attached must contain a certification that all the parties have seen and agreed to the terms.

Transcripts

25. A free official transcript of an Online Court can be requested by emailing the Online Registry.
26. Requests by non-parties for a transcript will be referred to the Judicial Officer presiding over the Online Court for consideration.