



PRACTICE NOTE SC CL 3

SUPREME COURT COMMON LAW DIVISION – ADMINISTRATIVE AND INDUSTRIAL LAW LIST

Commencement

1. This Practice Note was issued on 21 May 2020 and commences on 25 May 2020.

Application

2. This Practice Note applies to proceedings in, or to be entered in, the Administrative and Industrial Law List (the List).

Introduction

3. The Court exercises statutory and supervisory jurisdiction by way of judicial review with respect to public bodies and officials and various tribunals either by way of appeal or by application. *Uniform Civil Procedure Rules 2005* (UCPR) Part 59 applies to judicial review proceedings in this Court. The Court also exercises jurisdiction with respect to those matters which were formerly dealt with by the Industrial Court, which are included in the List.
4. The purpose of this Practice Note is to explain the operation of the List.

Proceedings that are to be allocated to the List

5. There are three categories of case that are dealt with in the List:
 - statutory appeals (where the jurisdiction of the Court depends on an error of law, or a question of law), other than appeals from the Local or District Courts;
 - proceedings under s 69 of the *Supreme Court Act 1970* (NSW): specifically challenges based on an error of law on the face of the record; or jurisdictional error (“administrative law matters”); and
 - matters under the *Industrial Relations Act 1996* (NSW) that were formerly dealt with by the Industrial Court (also known as the Industrial Commission in Court Session) (“industrial matters”).

Commencing proceedings in the List

6. Proceedings in administrative matters are generally commenced by summons.
7. In administrative matters, the words, "Administrative Law List" should be added immediately under the words, "Common Law Division" on the front page of the originating process and all other documents filed. In industrial matters, the words: "Administrative Law List – Industrial" should be added immediately under the words, "Common Law Division" on the front page of the originating process and all other documents filed.

8. Upon commencement, administrative law proceedings are automatically entered in the List pursuant to UCPR r 45.3. If not so commenced, they may be transferred to that list pursuant to UCPR r 45.2.

Urgent applications

9. Urgent applications, such as applications for ex-parte injunctions and/or leave to serve short notice of proceedings which on commencement will be appropriate for entry in the List, should be made to the Administrative and Industrial Law List Judge or, if he or she is not available, to the Common Law Duty Judge for that week. Depending on the urgency of the matter, the Judge who deals with the urgent application will normally make the proceedings returnable in the ordinary Directions List before the Registrar and will require a summons and affidavit to be filed and served.

Directions hearings

10. When the proceedings come before the Court for directions, all parties should be represented by someone familiar with the case so that the Court can give directions to enable the case to be prepared for hearing. Such directions will typically include dates for the filing of affidavits, particulars and/or production of documents (if necessary) and the determination of any interlocutory issues, as well as directions for the filing of written submissions. Any timetable fixed should be adhered to so as to avoid unnecessary appearances in the Directions List and the costs occasioned with such appearances. If a party is in default in adhering to the timetable set and such default necessitates additional appearances in the Directions List, consideration may be given to ordering the party in default to pay the costs of the additional appearances.
11. Any matters that are not ready for referral to obtain a hearing date within 3 months of the first directions date are to be referred to the Administrative and Industrial Law List Judge who shall case manage such matters until they are ready to be fixed for hearing.

PROCEDURE IN ADMINISTRATIVE MATTERS

Time limit for commencing proceedings in administrative matters

12. Proceedings by way of statutory appeal from an administrative tribunal pursuant to the provisions of the Act constituting the relevant tribunal are governed by UCPR Part 50. Such appeals must be instituted within 28 days: UCPR r 50.3. In such cases a statement of the grounds relied on must be served with the summons: UCPR r 50.4.

Parties in administrative matters

13. Unless there is a statutory provision to the contrary, the relevant tribunal, public body or official must be made a party to the proceedings and served with a copy of the summons. Where such tribunal or public body or official files a submitting appearance such tribunal, public body or official need not be represented at any directions hearing or substantive hearing and is automatically excused from further attendance: UCPR rr 6.10 and 6.11. If another party wishes to seek an order for costs against a submitting defendant, it must prior to such directions hearing, or within such further time as the Court may allow, give notice in writing to such submitting defendant setting out the grounds upon which such costs order will be sought: UCPR r 6.11.

Evidence in administrative matters

Statutory appeals concerning errors, or questions of law

14. In the case of statutory appeals concerning errors of law the parties are referred to UCPR r 50.14. Where there is no allegation of denial of procedural fairness, in the ordinary course (bearing in mind the limited nature of the appeal) the only evidence necessary is a copy of the reasons below, a copy of the transcript in the proceedings in the Court below and a copy of any exhibit or affidavit or other documents from the proceedings below “that the plaintiff wishes to be considered at the hearing of the appeal” (UCPR r 50.14(c)).

Appeals limited to errors of law on the face of the record

15. In proceedings where the grounds of review are limited to errors of law on the face of the record (such as proceedings under s 69 of the *Supreme Court Act*), the evidentiary material should be limited to material that constitutes the “record”: *Craig v State of South Australia* (1995) 184 CLR 163 at 180-183; [1995] HCA 58. Usually the record does not include the evidence that was adduced before the decision-maker or the transcript of the hearing, but does include the reasons, if any, of the “court or tribunal for its ultimate determination”: s 69(4) of the *Supreme Court Act*.

Appeals based on jurisdictional error

16. If a plaintiff contends that a decision or action is affected by jurisdictional error then that error should be identified as such in the summons. If reliance is sought to be placed on material beyond that which constitutes the record, the body of the affidavit to which such material is annexed or exhibited must identify the jurisdictional error alleged and the connection between the additional material and the alleged error.

“No evidence” ground

17. Where the plaintiff relies on a “no evidence” ground, it is not necessary, in the absence of a direction to that effect, for the plaintiff to tender all the evidence before the decision maker in order to prove the absence of evidence to support a finding. Instead, in the summons, the plaintiff should identify with particularity the finding of the tribunal or decision-maker which the plaintiff contends was not supported by any evidence.
18. At the first return date, the parties are to confer about a direction by which any evidence relied on by the defendant in support of the finding is to be adduced. Failing agreement, the parties are to raise the matter before the Court.

Consequences of non-compliance

19. Failure to comply with these principles regarding the evidence to be adduced in such proceedings may result in special costs orders. The parties are referred to *Insurance Australia Ltd t/a NRMA Insurance v Milton (No 2)* [2016] NSWCA 173 at [7]-[12].

PROCEDURE IN INDUSTRIAL MATTERS

Originating process

20. UCPR r 6.3 provides that statement of claim is required to commence the following proceedings under the *Industrial Relations Act*:
 - (1) a claim for an order under s 106 that a contract is unfair (UCPR r 6.3(i));
 - (2) proceedings to recover a civil penalty under s 357 (UCPR r 6.3(j)); and
 - (3) a claim for remuneration or other amounts under Part 2 of Chapter 7 (UCPR r 6.3(k)).
21. The statement of claim for proceedings for a civil penalty under s 357 must be verified and state the matters set out in SCR, Sch J.
22. Applications under Chapter 5 of the *Industrial Relations Act* are to be commenced by summons: UCPR r 6.4(h1).
23. Proceedings under s 139 (for applications concerning contraventions of dispute orders) of the *Industrial Relations Act* require two summons: a commencement summons, which is filed, and a show cause summons (a draft of which is filed with the commencement summons): SCR, Sch J. A precedent of the show cause summons is available on the Supreme Court website. A supporting affidavit must be filed with the commencement summons. Where an application is urgent, the application is to be made before the Duty Judge or, by prior arrangement and subject to availability, before the Administrative and Industrial Law List Judge.

Conciliation required for recovery proceedings under Part 2 of Chapter 7

24. As the Court is not to make an order under Part 2 of Chapter 7 of the *Industrial Relations Act* until the parties satisfy the Court that they have unsuccessfully attempted to settle the matter by a conciliation conducted by the Industrial Relations Commission (s 371 of the *Industrial Relations Act*), the parties are to approach the Commission for conciliation and attempt to settle the matter by conciliation. If they fail to do so, the Court will refer the proceedings to the Commission for conciliation: UCPR, Part 20, Division 3A.

Costs of recovery proceedings under Part 2 of Chapter 7

25. Where proceedings under Part 2 of Chapter 7 that could have been commenced in the Local Court have been commenced in the Supreme Court, a costs order will not ordinarily be made unless the Court is persuaded that the commencement and continuation of the proceedings in this Court was warranted: UCPR 42.34(2)(b).

T F BATHURST AC

Chief Justice of New South Wales

21 May 2020

Related Information

See also:

Practice Note SC Gen 1 Supreme Court – Application of Practice Notes

Practice Note SC Gen 4 Supreme Court – Affidavits

Supreme Court Rules 1970

Supreme Court Act 1970

Uniform Civil Procedure Rules 2005

Amendment History

21 May 2020: This Practice Note replaces the previous version of SC CL 3 that was issued on 8 December 2016.

8 December 2016: This Practice Note replaces the previous version of SC CL 3 that was issued on 16 July 2007.

16 July 2007: This Practice Note replaced the previous version of SC CL 3 that was issued and commenced on 9 July 2007.

9 July 2007: This Practice Note replaced the previous version of SC CL 3 that was issued and commenced on 17 August 2005.

17 August 2005: This Practice Note replaced Former Practice Note No.119.