

Working towards a faster resolution

The Commercial Division of the County Court aims to provide a fast, cost-effective and fair alternative for the resolution of commercial disputes. BY JUDGE MAREE KENNEDY, SHARON BURCHELL AND MY ANH TRAN

Towards the overarching purpose

“The overarching purpose . . . in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.”¹

Underlying the overarching purpose is the concept of proportionality.² It recognises that a relentless focus on attaining the truth may reduce the likelihood of a just result in a proceeding, not to mention consume a disproportionate amount of public resources. The vast majority of cases are resolved without a judicial determination on the merits.³ In this context, it is of crucial importance to provide appropriate, proportionate interlocutory procedures. After all, for most litigants, these interlocutory procedures are their only experience of the Court.

Since 1 January 2007, there has been no monetary limit on the County Court’s jurisdiction in civil disputes. Its jurisdiction is therefore effectively concurrent with the jurisdiction of the Supreme Court of Victoria. The Commercial Division of the County Court aims to provide a low cost, high speed alternative for the resolution of commercial disputes, with an emphasis on reducing the need for appearances, trials within six months of first administrative mention, and trials presided over by a judge with experience in commercial law.

Nearly 50 per cent of all civil initiations in the County Court are now within the Commercial Division. It is a high volume jurisdiction, with more than 2600 initiations last year.

SNAPSHOT

- The Commercial Division of the County Court is aiming to reduce the need for appearances and the waiting time for trials, and have judges with experience in commercial law presiding.
- The appointment of Judicial Registrars Burchell and Tran has led to some changes of procedure and a renewed focus on the provision of appropriate dispute resolution.
- This article explains the approach adopted by the County Court to case management and updates the profession on the interlocutory procedures to be applied.

Targeted case management

Case management can be a powerful tool for courts in the pursuit of the overarching purpose. However, over-enthusiastic case management itself carries risks:

“The challenge is in getting the balance right by ensuring that case management processes do not generate their own unnecessary work for legal practitioners, court staff and judicial officers. There is no ‘best’ model of case management . . .”⁴

In the Commercial Division, case management is used as a targeted tool to ensure the proportionate resolution of disputes. Throughout the interlocutory process, litigants can expect a pragmatic focus on minimising unnecessary expense and getting disputes ready for trial within six months.



Appointment of judicial registrars

On 5 May 2015, Sharon Burchell and My Anh Tran were appointed judicial registrars of the County Court under a work-share arrangement. They come to the Court with many years' experience in commercial litigation and are both trained mediators. Through these appointments, the Commercial Division aims to increase its capacity to provide targeted case management, free up judicial resources and renew its focus on the provision of appropriate dispute resolution.

The appointment of two women to work-share the position demonstrates the Court's understanding of the need for solutions to be found for women wishing to achieve a balance between work and family life. The Court also recognises the benefits of enhancing the diversity of the judiciary.⁵

Structure of the Commercial Division

The Commercial Division is divided into four lists:

- General Cases List
- Expedited Cases List
- Banking and Finance List
- Building Cases List.

Practice notes concerning list operation can be found on the County Court website.⁶ These practice notes have recently been updated. Practitioners should also refer to the Directions Group Guidelines 2015 and the Standard Orders for Trial Timetables.⁷

Reduced need for appearances

The Commercial Division focuses on reducing the need for costly court appearances. Where possible, orders are made "on the papers". In the first instance, this is achieved through the administrative mention procedure, which applies in the General Cases List, Building Cases List and Banking and Finance List.

Once an appearance has been filed by the defendant, parties are sent a notice requiring consent orders to be submitted to the

County Court of Victoria

Court. Standard orders are available on the County Court website.⁸ Consent orders are reviewed by a judicial registrar. Ordinarily these orders can be made on the papers and the proceeding set down for trial without the need for an appearance. Once made, the orders are loaded on to Court Connect by the Directions Group and can be accessed electronically by practitioners.⁹ The Directions Group aims to process all orders on the papers within two weeks of receipt. If an order is requested more urgently, practitioners must include the word “Urgent” in the subject matter of the email which attaches the proposed orders.

Other orders that can be made on the papers include:

- orders for substituted service
- orders for extension of time to serve a writ
- orders extending the timetable for interlocutory steps
- consent orders for adjournment (subject to case management considerations)
- orders permitting practitioners to cease to act
- orders pursuant to s28R of the *Building and Construction Industry Security of Payment Act 2002*.

The Court expects that parties will “cooperate in completing interlocutory processes so that the proceeding is brought to trial as quickly, fairly and efficiently as possible”.¹⁰ If parties do so, it is possible for proceedings to be brought to trial within six months of administrative mention without any requirement for an interlocutory appearance. If parties do not, their proceeding will be subject to targeted case management by the judicial registrars at the next available directions hearing.

The Court also expects that parties will comply with its orders. Consent extensions can usually be made expeditiously on the papers. As noted in *Eaton v ISS Catering Services Pty Ltd*,¹¹ disobeying directions orders may be contrary to the overarching obligations. Repeated or serious breaches of orders raise the possibility of adverse cost orders against the parties and their practitioners.¹²

Interlocutory disputes

Where parties cannot agree on an interlocutory matter, a hearing may be necessary. Unless the rules specifically require a summons, an application can be made by email (copied in to all parties) without the need to file a summons. For cases in the General Cases List, correspondence should be sent to the Directions Group. In the specialist lists, applications can be made by email to the associate to the judge in charge of the list. In the Expedited Cases List, applications can be made by email to the associate to the judicial registrars.

When a party requests a hearing for an interlocutory dispute they must provide an estimate of the likely duration of the hearing. Parties should

ensure these estimates are accurate (and consult counsel if appropriate) as the time permitted for submissions may be restricted to the estimate given. Parties’ representatives should also be prepared to be questioned on the interlocutory steps to be completed, the issues in dispute and the likely duration of the trial. Any contested interlocutory hearing may be used as an opportunity for targeted case management.

Every month one of the Commercial Division judges is nominated as the Commercial Division Duty Judge. The interlocutory workload is divided between this duty judge and the judicial registrars. Some matters, such as applications for injunctions, cannot be heard by a judicial registrar. Matters which will now be listed before a judicial registrar include:

- ex parte applications for orders on the papers including applications for substituted service and for extension of writs
- directions hearings listed because of timetable issues or “slippage”
- applications for judgment pursuant to terms of settlement
- assessments of damages
- applications for enforcement of judgments and orders.

Where permitted by the Rules, other matters, including summary judgment applications and trials of short duration, may be referred to the judicial registrars by the duty judge or the judge in charge of the Commercial Division.

Appropriate dispute resolution (judicial resolution conferences)

The judicial registrars are trained mediators and one of the purposes of their appointment is to increase the availability of appropriate dispute resolution through the provision of judicial resolution conferences (JRCs) in appropriate cases.

Appropriate dispute resolution is defined in s3 of the *Civil Procedure Act 2010* (Vic) as “a process attended, or participated in, by a party for the

purposes of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute”. JRCs will usually be conducted by the judicial registrars as mediations on the facilitative model, including through the provision of private sessions.

Court ordered mediations have been a feature of the Commercial Division standard directions orders for many years. The starting point remains that parties have an obligation to fund their own mediation. However, there are particular benefits in the provision of JRCs which may make them appropriate in particular circumstances as an alternative, or in addition to, privately run mediations.

JRCs provide the parties with the benefit of a judicial officer presiding over the mediation: “. . . the parties can draw on the authority, knowledge and experience of a judicial officer to assist them to negotiate a settlement based on their interests, in addition to their legal rights”.¹³

The timing of JRCs is also more flexible than court ordered mediations. JRCs can be provided at short notice when the timing for settlement negotiations is right, rather than according to a timetable agreed upon many months in advance. For example, a trial judge may make a referral to JRC during the course of a trial.

It is envisaged that JRCs will be particularly useful in the case of self-represented litigants. The difficulties faced by unrepresented litigants are not only a problem for those litigants but also for the court and the opposing party. Significant costs are incurred because unrepresented litigants do not effectively understand their case or lack the skills to effectively present it. JRCs provide a less formal forum in which self-represented litigants can have an opportunity to speak about their concerns, issues and problems without needing to frame them in legalistic language. They provide both self-represented litigants and their opponents the opportunity to negotiate a solution with the

assistance of a judicial registrar. If the JRC is successful, the extra expense and burden of trial involving a self-represented litigant is avoided. If a settlement is not reached, the issues can be defined and narrowed during the course of the JRC and directions given by a judicial registrar.

JRCs may also be valuable where:

- one or more parties have limited financial means
- private mediation has been unsuccessful
- a proceeding listed for trial is on the reserve list
- the cost or complexity of any trial will be disproportionate to the amounts in dispute.

Requests for a JRC in a proceeding can be made by email to the Directions Group, setting out the reasons why it is appropriate.

Conclusion

The Commercial Division of the County Court aims to provide a fast, cost-effective alternative for the resolution of commercial disputes. The appointment of judicial registrars and the revision of the practice notes have further enhanced the Commercial Division's processes. The Commercial Division will be constantly assessing the effectiveness of these measures and welcomes feedback from practitioners. ■

Judge Maree Kennedy is Judge in Charge of the Commercial Division of the County Court. A former silk, she joined the Court in 2007 when the Commercial List was a small pilot run by Judge Anderson. Over the last five years she has overseen its progression to a third Division of the County Court. **Sharon Burchell** is a judicial registrar for the Commercial Division of the County Court. Prior to her appointment she worked for 11 years as a barrister specialising in commercial law. In 2014, she won the Women in Law Awards Junior Counsel Award. **My Anh Tran** is a judicial registrar for the Commercial Division of the County Court. Prior to her appointment she practised as a barrister in commercial law. She holds a BCL from

Oxford and BSC/LLB (First Class Honours) from Melbourne University.

1. *Civil Procedure Act 2010* (Vic), s7(1).
2. Note 1 above, s9(1)(g).
3. Less than 3 per cent of proceedings are resolved by judicial determination: Productivity Commission, *Access to Justice Arrangements*, Productivity Commission Inquiry Report, Vol 1, No. 72, 5 September 2014, p384.
4. Productivity Commission, *Access to Justice Arrangements*, p15.
5. As to the lack of Asian representation in the judiciary, see Asian Australian Lawyers Association, Cultural Diversity Report 2015.
6. www.countycourt.vic.gov.au/practice-notes-commercial-list.
7. www.countycourt.vic.gov.au/civil-directions-group.
8. Note 7 above.
9. Court Connect can be accessed at cjep.justice.vic.gov.au.
10. Operation and Management of the General List of the Commercial Division (PNCI 6-2010), p2; Para 6 of the Commercial Division standard timetabling orders; see also Note 1 above, ss19, 20, 24, 25.
11. [2013] VSCA 361 at [55].
12. Note 1 above, ss28 and 29; *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337; *Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd* [2014] VSCA 78.
13. Second Reading Speech for the *Courts Legislation Amendment (Judicial Resolution Conference) Act 2009*, Victoria, Parliamentary Debates, Legislative Assembly, 28 July 2009, 2253 (Rob Hulls, Attorney-General).

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