



Insight

Commercial Dispute Resolution

February 2009

Fast Track Litigation: The Way of the Future?

In May 2008, the Victorian Law Reform Commission produced its Civil Justice Review Report, identifying the need to reduce the length and costs of litigation. Already, changes are being made in Victoria with the introduction of the Supreme Court Commercial Court in January 2009 which aims to be a flexible, judge-managed list where trials are to be commenced no later than 9 months after the date of issue. Like the Federal Court Fast Track list (May 2007), the new Victorian Commercial Court is an attempt by government to curb the significant delays and costs of litigation.

Federal Court Fast Track List

A trial in the "Fast Track List" can be expected to be held within 3½ to 6½ months of the proceeding being commenced and the Court will endeavour to deliver the judgment within 6 weeks of the trial. That is, a total of 5 to 8 months from commencement of the proceeding to receipt of judgment.

Costs and Procedure

Costs are also substantially less in the Federal Court "fast track list". Parties are only required to provide case summaries rather than formal pleadings, which means no more costly disputes about pleadings and particulars of pleadings. Case summaries will include statements of a party's claim or cross-claim, points of defence and points of reply.

A party is only allowed to request limited discovery of documents from another party, and discovery may only be allowed after affidavit evidence has been filed. Parties are obligated to undertake a good faith, proportionate search of their documents and records. A 'good faith proportionate search' requires a party to make a good faith effort to locate discoverable documents, while bearing in mind that the cost of the search should not be excessive having regard to the nature and complexity of issues raised by the proceeding, as well as the type of relief sought and the quantum claimed.

Federal Court Fast Track List trials are considerably more cost effective as they are conducted according to the "chess-clock" style. That is, each party is allocated a fixed amount of time for submissions and examinations of witnesses etc, thereby reducing trial times to achievable minimums.

Should a party not comply with the time limits for procedural steps set by the court in the Fast Track List they face either:

- Removal of the case from the List
- Adverse cost orders
- Dismissal of the claim or rejection of the defence (in extreme cases)

What type of matter can be heard in the Fast Track List?

Any proceeding (subject to it attracting Federal jurisdiction) can be entered in the List if it arises out of, or relates to:

- Commercial transactions
- An issue that has importance in trade and commerce
- The construction of commercial documents
- An issue that has importance in personal insolvency
- Intellectual property rights (except for patents)
- Other commercial matters as a judge may direct, but excluding proceedings:
 - that would otherwise be allocated to the admiralty panel, the taxation panel or the corporations panel; or
 - the trial of which is likely to exceed eight days

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Victorian Supreme Court Commercial Court

Proceedings in the Commercial Court are commenced by way of a writ accompanied by a summons requiring the parties to attend court within a week to make directions about procedural steps. Matters should be ready for trial within 8-12 weeks from the issue date. This timeframe is an obvious advantage of the Commercial Court. Compared with (possibly) years to proceed to trial in a regular court or even 5-8 months in the Fast Track List, going to trial within 3 months from the date of issue significantly minimises the costs and delay sometimes experienced in regular trial preparation.

Costs and Procedure

A characteristic of practice in the Commercial Court is its flexibility; directions will be tailored and may vary to suit the management appropriate to specific disputes and the views of the judicial officers to whom cases have been allocated so as to achieve the objective of providing for the just and efficient determination of commercial disputes. The Commercial Court will seek to ensure that the cost of and the work involved in any procedure adopted will be proportional to the issues and the amount at stake. The Court will expect that the lawyers will cooperate creatively in this endeavour.

Other advantages of the Commercial Court in terms of speed and cost effectiveness include:

- Pleadings may be dispensed with in appropriate cases
- Witness statements may not necessarily be required
- Parties will be encouraged to present routine interlocutory applications to the Court for determination in writing, thereby avoiding the need to appear at a hearing
- The Court may be ready to fix the costs awarded upon interlocutory applications to save the parties the cost and time of preparing a taxable bill

What type of matter can be heard in the Commercial Court?

Generally, proceedings which usually will be heard by the Court are those which arise out of 'ordinary commercial transactions' or in which there is a question 'that has importance in trade or commerce'. Cases fixed for trial of more than 10 days duration and claims that are more than 1 year old are likely to be deemed 'stale' and therefore ineligible for the Commercial Court.

Implications for Clients

The thought of investing enormous amounts of money and time can often be the deciding factor in determining whether to commence or settle a court proceeding. Having regard to the recent global financial crisis and the likelihood that the Australian economy will go into recession, businesses will need ways to more effectively protect and enforce their legal rights. Therefore, anyone who is considering whether to pursue a claim through the courts and is concerned about the cost and length of litigation, should now give serious consideration to bringing the proceeding in the "fast track list" if the dispute is within the jurisdiction of the Federal Court or Victorian Supreme Court.

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References

1. Notice to Practitioners – Commercial Court, Victorian Supreme Court 2008
2. Notice to Practitioners – Directions for the Fast Track List, Federal Court, 2008
3. Federal Court of Australia Website: www.fedcourt.gov.au
4. Victorian Supreme Court Website: www.supremecourt.vic.gov.au

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