



Précis Paper

The Commercial List of the NSW Supreme Court

In this presentation, the Honourable Justice David Hammerslag, head of the Commercial List of the NSW Supreme Court, shares his views about case management, practice and procedure, and evidence in the Commercial List.

Discussion Includes

- History of the Commercial List
- Case management in the Commercial List and the obligations of practitioners
- Practice & procedure in the Commercial List
- Evidence in the Commercial List
- Future developments
- Unrepresented litigants
- The use of technology

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The Commercial List of the NSW Supreme Court

1. In this edition of BenchTV, the Honourable Justice David Hammerschlag (Justice of the NSW Supreme Court) and Ian Benson (Solicitor, AR Conolly and Company) discuss the practice of the Commercial List of the NSW Supreme Court.

The History of the Commercial List

2. The Commercial List of the NSW Supreme Court has its origins in the English Commercial List, which was created in 1895 in order to assist in the resolution of mercantile disputes. The quick resolution of mercantile disputes was seen as being valuable to commerce and the economy. In *Baerlein v Chartered Mercantile Bank* [1895] 2 Ch 488, Lindly LJ stated:

The commercial court has no more power to dispense with strict evidence, or to depart from the administration of the law in the ordinary way, than any other judge or court ... If in a particular case the court is satisfied that the judges having peculiar knowledge of commercial matters and habitual practice in dealing with commercial matters and habitual practice in dealing with commercial documents and correspondence with commercial men will greatly facilitate the trial of that particular case, that is a reason for a transfer ... [T]his case is likely to be fixed far better, far more quickly, far more economically and far more advantageously in every sense if it comes before a judge who has special skill and knowledge as to transactions of this nature, than if it keeps its place in one of the general lists.

3. Justice Hammerschlag considered that this quote remains as relevant today as it was when it was originally made. The Commercial List in NSW was first established in 1970, and the aim of the List has always been to facilitate the expeditious resolution of commercial disputes in aid of commerce. It was part of the Common Law Division under the early 1980s, after which time it became its own division, the Commercial Division. In the 1990s, the Commercial List became a list again, this time assigned to the Equity Division. These changes did not change the substance of the List.
4. The general Equity Division covers a range of cases including corporations, trusts, real property, insurance, general mercantile disputes, joint venture disputes, minority oppression cases, shareholder disputes, and other general commercial cases. Any matters with a commercial or mercantile flavour go to the Commercial List.

Case Management

5. Following the publication of the Woolf report in the United Kingdom on Access to Justice, dramatic changes to case management were introduced and techniques were adopted to facilitate the more efficient resolution of commercial disputes.
6. In Justice Hammerschlag's opinion, there are four drivers of good case management:
 - A judge who is skilled in the art of managing a case;
 - Flexibility, so that cases are viewed on a case-by-case basis;
 - A culture of compliance; and
 - Directions which are specifically tailored to the case in question.
7. In NSW, s 56 of the *Civil Procedure Act 2005* (NSW) requires a party and its legal representative not to bring about a default in the directions of the Court. The section directly involves the legal profession in the achievement of the overall purpose of the Act, namely the just, quick and cheap disposition of the real issues in the case. Justice Hammerschlag indicated that the existence of the section and its enforcement by the Court has had a significant effect on the profession, and s 56 is regularly referred to by judges. Justice Hammerschlag reminded practitioners that directions are made for a purpose and are tailor-made to suit the case under consideration; therefore unless there is a good reason to depart from the direction, directions should not be disregarded. However, Justice Hammerschlag indicated that the profession generally understands its compliance obligations in the Commercial List.

Practice and Procedure in the Commercial List

8. Matters are allocated to the Commercial List by party filing. There is a special form of summons used in the Commercial List and a party selects the jurisdiction of the Commercial List by filing a summons in accordance with Practice Note SC Eq 3: Supreme Court Equity Division - Commercial List and Technology and Construction List. Sometimes, applications are made to transfer matters from the general Equity Division to the Commercial List, or cases may be transferred to and from the Common Law Division, which arises more frequently with cases in the Technology and Construction List.
9. The Commercial List has its own duty judge, and so for an urgent interlocutory application for a matter in the Commercial List, a practitioner must phone the associate to the Commercial List duty judge, the details of whom are published in the Court List every day.
10. Discovery in the Commercial List has been affected profoundly by Practice Note SC Eq 11: Disclosure in the Equity Division. This Practice Note provides that there will be no discovery, other than in exceptional circumstances, before evidence is filed. If discovery is required

before evidence is put on, a motion is required under the Practice Note and the party must specify in detail the categories of documents required. After evidence, discovery orders are routinely made without a motion, however a motion may be required if the orders are contested. The cases in which general discovery will be ordered are limited by Part 21 of the *Uniform Civil Procedure Rules 2005* (NSW). Practice Note SC Eq 11 does not affect a party's right to preliminary discovery.

11. The Usual Orders as to Hearing, found in Practice Note SC Eq 3: Supreme Court Equity Division - Commercial List, provides that two working days before a hearing, the parties are to exchange brief written outlines together with a Statement of Issues. The length of these documents are generally not limited, however in hearings or short matters, written submissions may be curtailed to one to three pages. Justice Hammerschlag reminded practitioners that written submissions are an art, and should be brief and targeted, without long quotations from judgments. In large cases, evidentiary references are important in written submissions. Finally, significant matters should not be hidden in footnotes but rather the judge's attention should be specifically drawn to important matters in submissions.
12. Justice Hammerschlag noted that the size of court books, and the amount of evidence included that turns out to play no role in the case, is a perennial problem. The Court tries to restrict the size of court books by only allowing them to contain documents that are centrally relevant. However, solicitors would rather be criticised for having included material that is not relevant, than having not included material that turns out to be relevant, and so court books continue to contain excessive documents. Fundamentally, however, court books should not contain multiple copies of the same document, including email chains that are put in repeatedly just to add one additional email. Court books should be chronological and consecutively numbered. In extreme cases, costs may be disallowed or adverse costs orders may be made where a court book is wholly inadequate.
13. Mediation plays a significant role in the Commercial List, and parties usually undertake some form of process to try to settle proceedings before they get to hearing. The question of when to hold mediation is often debated between the parties. Justice Hammerschlag's view is that mediation should be held earlier rather than later, because parties in large commercial transactions generally know the respective position of the opposing parties early on, and even if the mediation fails at an early stage, there is no reason why a second mediation could not be held later.

Evidence in the Commercial List

14. Evidence in chief is generally given by affidavit, although sometimes parties will file written signed statements. In cases where the amount involved is relatively modest, Justice

Hammerschlag may order that the evidence be given orally. Where the case involves questions of credit, a more accurate picture may be gleaned from oral evidence rather than affidavits written by lawyers. Because it is rare that evidence be led orally, Justice Hammerschlag commented that the skills for doing so have been lost somewhat, and leading evidence orally is now largely in the province of the criminal jurisdiction.

15. When expert evidence is involved, concurrent evidence is now standard. Whether or not to have concurrent evidence will always depend on the nature of the case, however Justice Hammerschlag noted that his preference is for concurrent evidence and it usually works well. The practice requires extra work for the judge, who must be on top of the material, and his technique is to prepare an agenda for discussion between the experts. Justice Hammerschlag has found that the removal of the adversarial nature of the proceeding by concurrent evidence is more likely to lead to a common position being reached by the experts. The parties can also be directed to agree on the identity of a single expert or experts, whose evidence must be put on first before the parties are given leave to rely upon additional evidence. Single experts are particularly useful in the building and construction area.
16. In the Commercial List, objections are exchanged by parties before trial commences. Justice Hammerschlag's practice is to deal with objections as quickly as possible, and rule immediately. Rulings on objections may be reserved if there is a question of privilege. Section 192A of the *Evidence Act 1995* (NSW) enables the Court to make advance rulings as to the admissibility of evidence. This is particularly useful in complex cases, particularly where there is expert evidence, and a hearing may be set in advance of the trial to determine evidentiary questions. Evidence is usually admitted by Justice Hammerschlag subject to relevance to save time, and he considers that very few cases in the Commercial List turn on whether evidence was rightly or wrongly admitted.

Future Developments

17. There is a move on foot in various jurisdictions to create international commercial courts. An international convention, to which Australia may become a party, is currently being debated which would facilitate consent jurisdiction clauses. International conventions now govern foreign service and reciprocal enforcement of judgments. With the growth in transnational commerce, Australia may find itself as a preferable choice for consent jurisdiction clauses for the determination of international commercial disputes.

Unrepresented Litigants

18. There are not a significant number of unrepresented litigants in the Commercial List or the Technology and Construction List. Moreover, Justice Hammerschlag noted that some unrepresented litigants can be quite skilled, including directors of substantial corporations. However, where a party is unrepresented, judges must maintain a significant degree of firmness, but also a degree of flexibility so as to ensure that the litigant obtains a fair hearing.
19. Ensuring that an unrepresented litigant has a fair go is an art. Personal litigants may need assistance from the bench, as long as they do not obtain an advantage. Justice Hammerschlag indicated that he has, on occasion, asked questions that the unrepresented litigant was unable to articulate in an admissible form, so long as the opposing party consents.

The Use of Technology

20. The Commercial List often holds directions hearings via telephone or audio-visual link. The Court has the technology to conduct hearings in this way, and with the growth in interstate work, it is not uncommon for a party to be either interstate or in a regional area. Time and cost is saved by a directions hearing being held via telephone or audio-visual link.
21. The Supreme Court has the capability of conducting electronic trials, however it is uncommon for parties to want fully electronic trials. The default direction is for an electronic court book, but the parties invariably prefer paper versions. This may be because it is difficult for the lawyers, as well as the Court, to get on top of a large amount of material that is read only electronically. Moreover, some witnesses have difficulty when the only document they have before them is on a screen.

BIOGRAPHY

The Honourable Justice David Hammerschlag

Justice of the NSW Supreme Court

Justice Hammerschlag was born in Johannesburg, South Africa. He did two years full time compulsory military service in the South African Defence Force including a period as a military law advisor in which capacity he appeared in numerous courts martial. He was called to the South African Bar in 1982. He moved to Australia in 1986, and re-qualified in New South Wales by way of Solicitors Admission Board examinations. He worked for the law firm now known Herbert Smith Freehills (then Freehill Hollingdale and Page) and was admitted to the partnership in 1988. He was called to the New South Wales Bar in 1991 and took silk in 2000. He was a founder member and later Chairman of 11 St James Hall Chambers. He appeared in major commercial disputes and white collar criminal prosecutions, and in the HIH and Orange Grove Royal Commissions. He was appointed to the Supreme Court of New South Wales in 2007 and sat initially in the General List of the Equity Division. He was appointed Corporations List Judge in 2008 and head of the Commercial List and the Technology and Construction List in 2009. He is also the Commercial Arbitration List Judge. He has sat on the Court of Appeal and the Court of Criminal Appeal.

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Cases

Baerlein v Chartered Mercantile Bank [1895] 2 Ch 488

Legislation

Civil Procedure Act 2005 (NSW)

Uniform Civil Procedure Rules 2005 (NSW)

Evidence Act 1995 (NSW)

Practice Notes

Practice Note SC Eq 3: Supreme Court Equity Division - Commercial List and Technology and Construction List

Practice Note SC Eq 11: Disclosure in the Equity Division