



INDUSTRIAL COURT CRIMINAL PRACTICE NOTE NO. 1

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

Issued pursuant to Section 185A of the *Industrial Relations Act 1996*

WORK HEALTH AND SAFETY ACT PROSECUTIONS

COMMENCEMENT

1. This Practice Note commenced on 1 July 2024 and was amended effective 24 September 2024.

APPLICATION

2. This Practice Note applies to all criminal proceedings commenced in the Court pursuant to s229B(1)(b) the *Work Health and Safety Act 2011* (**the WHSA**) (**WHS prosecutions**).

INTRODUCTION

3. The purpose of this Practice Note is to explain the administrative and case management procedures followed in the Court for WHS prosecutions.

COMMENCEMENT OF SUMMARY PROCEEDINGS

4. Summary Proceedings are to be commenced pursuant to s246 *Criminal Procedure Act 1986* (**CPA**) and Rule 7C of the Industrial Relations Commission Rules.
5. The Summons will be made returnable on the Monday following 8 weeks from the date of issue.
6. The Summons and a copy of this practice note is to be served on the defendant within 7 days of the issue of the summons in accordance with Rule 7C.2(4) of the Industrial Relations Commission Rules.
7. The defendant or the defendant's legal representative is to file with the Court and serve on the prosecutor a Notice of Appearance (in the approved form) within 7 days of the service of the Summons.

SERVICE OF THE BRIEF OF EVIDENCE

8. The prosecutor is to serve the brief of evidence and a statement of facts on the defendant or the defendant's legal representative within 2 weeks of service of the Notice of Appearance or within 28 days of the issuing of the Summons, whichever is the later.

BEFORE THE FIRST MENTION

9. The parties are to take the following steps before the first mention to assist with the efficient progress of the matter:
 - a. Retain solicitors and/or counsel who will be appearing in the matter to allow for meaningful and binding forensic decisions to be made;
 - b. The defendant is to consider the plea that it intends to enter to the charge;
 - c. The defendant is to consider any representations that it might wish to make to the prosecutor regarding the particulars of the charge and the facts that will facilitate a plea of guilty. The defendant should be available on the first mention date to commit to a timetable for the submission of representations;
 - d. The defendant is to consider whether the defendant intends to make an application to the regulator for an Enforceable Undertaking.

AT THE FIRST MENTION

10. The prosecutor is to advise whether service of the brief and the statement of facts has been given in accordance with the requirements of this practice note.
11. The defendant is to advise the court of whether it is in a position to enter a plea, and if so, the nature of that plea, and the following procedure then applies:
 - a. If the defendant enters a plea of guilty, the matter will be listed for a sentence hearing;
 - b. If the defendant enters a plea of not guilty, the matter will be listed for defended hearing;
 - c. If the defendant needs further time to consider the brief of evidence and/or seek further particulars, the matter will be stood over for 9 weeks, with any request for particulars to be sent within 2 weeks and responded to within 3 weeks from the date that it was received.
12. Upon entry of the plea, the parties should be prepared to provide estimates for the length of any hearing (either interlocutory, sentence or defended) and any special requirements or directions required for such hearing (eg. service of expert evidence, requirement for an interpreter).
13. Where a plea of guilty is likely to be entered, subject to an agreement on the particulars of the charge and the facts alleged, the following procedure applies:
 - a. A direction will be made for the defendant to make representations to the prosecutor relating to the particulars of the charge and the facts alleged;

- b. A direction will be made for the prosecutor to respond to the defendant's representations;
 - c. The matter will be listed for mention, at which time the defendant is to enter a plea of guilty or not guilty to the charge;
 - d. In the event that there is still a dispute between the parties as to some of the facts and/or particulars alleged by the prosecutor, the defendant can enter a plea of guilty and the matter will be listed for sentence hearing on the basis that the disputed facts and/or particulars will be determined at the sentence hearing.
14. Where a plea is entered, and the parties identify the need for an interlocutory hearing, that hearing will be listed and a timetable imposed.
 15. If the defendant intends to make an application to the regulator for an Enforceable Undertaking, the procedure at paragraphs 43-46 applies.

AT THE SECOND MENTION

16. The defendant is to advise the court of whether it is in a position to enter a plea, and if so, the nature of that plea, and the following procedure then applies:
 - a. If the defendant enters a plea of guilty, the matter will be listed for a sentence hearing;
 - b. If the defendant enters a plea of not guilty, the matter will be listed for a defended hearing.
17. Upon entry of the plea, the parties should be prepared to provide estimates for the length of any hearing (either interlocutory, sentence or defended) and any special requirements or directions required for such hearing (eg. service of expert evidence, requirement for an interpreter).
18. Where a plea is entered, and the parties identify the need for an interlocutory hearing, that hearing will be listed and a timetable imposed.
19. Where a plea of guilty is likely to be entered, subject to an agreement on the particulars of the charge and the facts alleged, the procedure set out at paragraph 13 applies. The Court may have regard to a failure at the second mention to indicate that a plea of guilty is likely to be entered when assessing the utilitarian value of any plea of guilty entered at a later time.
20. If the defendant has made an application to the regulator for an Enforceable Undertaking, the procedure at paragraphs 45-46 applies.
21. Where no plea is entered the Court will allocate the matter for hearing on the basis of a not guilty plea unless the Defendant or their legal representative satisfies the Court that the interests of justice dictate a further adjournment, in which case the matter will be listed for a third mention within 4 weeks.

AT THE THIRD MENTION

22. Where a plea of guilty is likely to be entered, subject to an agreement on the particulars of the charge and the facts alleged, the procedure set out at paragraph 13 applies.
23. Subject to any order being made by the Court, in the absence of a plea being entered, the matter will be allocated for hearing on the basis of a not guilty plea.
24. No further adjournments, other than by operation of paragraph 22, will be allowed except in exceptional circumstances and where the interests of justice dictate. Any such application should be made by notice of motion supported by evidence on affidavit.

EXPERT EVIDENCE

25. Unless the Court otherwise orders, an expert witness' evidence in chief must be given by the tender of one or more reports.
26. The provisions of Part 31 rules 23 and 27 *Uniform Civil Procedure Rules 2005* apply to the evidence of expert witnesses and any report of an expert witness.

PREPARATION FOR FINAL HEARINGS

27. Unless the Court otherwise orders, the prosecution should file and serve a tender bundle of the material upon which it intends to rely at hearing no later than 3 weeks before the first day on which the matter is listed for hearing.
28. Unless the Court otherwise orders, the defence should indicate whether it intends to object to any of that material no later than 1 week before the first day on which the matter is listed for hearing.

PREPARATION FOR SENTENCE HEARINGS WHERE PROSECUTOR'S FACTS ARE NOT IN CONTEST

29. Unless the Court otherwise orders, paragraphs [30]-[37] apply in respect of sentence hearings. Sentence hearings where the prosecutor seeks to prove disputed particulars or facts will require bespoke directions on a case by case basis.
30. Where a plea of guilty is entered, the prosecutor is to file and serve any sentence bundle on the defendant no later than 4 weeks before the date on which the matter is listed for sentence. The sentence bundle should not include documents that are wholly addressed by agreed facts.
31. If the prosecutor or the defendant seeks an order referred to in ss236-241 WHSA, the prosecutor or the defendant is to notify the other party in writing of the terms of the order sought and is to file and serve any affidavit evidence in support of the order, by no later than 4 weeks before the date on which the matter is listed for sentence.
32. The defendant is to file and serve any affidavit and supporting documentation relevant to the issue of capacity to pay a fine (s6 *Fines Act 1996*) no later than 4 weeks before the date on which the matter is listed for sentence.

33. The defendant is to file and serve any other affidavit and supporting documentation no later than 2 weeks before the date on which the matter is listed for sentence.
34. The prosecution is to file and serve an outline of submissions no later than 3 weeks prior to the sentence date.
35. The defence is to file and serve an outline of submissions no later than 2 weeks prior to the sentence date.
36. The prosecution is to file any outline of submissions in reply no later than 1 week prior to the sentence date. The filing of reply submissions is optional.
37. If there is a change to the conduct or length of the sentence hearing, the parties are to notify the list judge or, once allocated, the Judge case managing the proceedings at the earliest possible stage.

BREACH OF THE COURT'S DIRECTIONS

38. If there is a breach of the Court's directions sufficient to cause slippage in the timetable that will impact upon the listing dates for the matter, the parties must, in accordance with paragraph 38 below, relist the matter in the next Monday list. The party in breach, or a legal practitioner with knowledge of the reasons for the breach, must send to the list Judge's associate, and serve, a letter by no later than 4pm on the preceding Thursday, identifying the breach, explaining the reasons for the breach and outlining the proposed directions to be made in consequence of the breach.

LIBERTY TO RESTORE

39. Parties have general liberty to restore to the Monday list on 2 working days' notice. A party seeking to do so is to make prior arrangement with, or give appropriate notice to, any other party and notify the List Judge or, once allocated, the Judge case managing the proceedings.

APPLICATIONS TO VACATE HEARINGS

40. Applications to vacate hearing dates by consent (other than as a consequence of a plea of guilty being entered by a defendant) are to be made by letter to the Judge's associate explaining the reasons for the application. Otherwise, applications to vacate hearing dates are to be by notice of motion with an affidavit in support explaining the circumstances giving rise to the application.

COURT TECHNOLOGY AND EVIDENCE

41. If a party intends to adduce electronic evidence during the sentence hearing, the party must consult the Associate to the Judge hearing the matter no later than 7 days before the sentence hearing or trial to confirm that the Court's technology resources are capable of playing the evidence.
42. Where the electronic evidence is not in a form that is compatible with the Court's technology resources, the evidence must either be converted to formats used by the Court or the party must bring their own devices to play the evidence.

APPLICATIONS FOR ENFORCEABLE UNDERTAKINGS

43. Applications to the regulator for an Enforceable Undertaking (EU) pursuant to Part 11 WHSA must be made by a defendant no later than 12 weeks after the service of the brief of evidence.
44. The Court will take into account an application for an EU made later than 12 weeks after the service of the brief of evidence which is unsuccessful, when assessing the utilitarian value of any plea of guilty entered at a later time.
45. Matters in which an application for an EU is made will be adjourned for a preliminary hearing on a date no later than the Monday following 2 weeks after the next meeting of the Enforceable Undertaking Panel or other convenient date in the EU process. The parties must, within 2 weeks of a decision by the regulator to reject an application for an EU, re-list a matter for mention.
46. The making of such an application will have the effect of pausing the timetable established by this practice note.

RECKONING OF TIME

47. The provisions of Part 1.11 of the *Uniform Civil Procedure Rules 2005* apply to criminal proceedings.

AFFIDAVITS

48. The provisions of Part 35 of the *Uniform Civil Procedure Rules 2005* apply to affidavits filed in criminal proceedings.

MOTIONS

49. The provisions of Part 18 of the *Uniform Civil Procedure Rules 2005* apply to motions filed in criminal proceedings.

SUMMONSES

50. The provisions of Part 33 of the *Uniform Civil Procedure Rules 2005* apply to the following summonses filed in criminal proceedings:
 - a. summonses to give evidence under s165(3)(b) of the *Industrial Relations Act 1986*; and
 - b. summonses for production under s165(3)(c) of the *Industrial Relations Act 1986*

JUSTICE I TAYLOR
PRESIDENT
24 SEPTEMBER 2024

REVISION HISTORY

First Issue Date:
Re-Issue Date:

1 July 2024
24 September 2024