

EXPLANATORY STATEMENT

Issued by the authority of the Judges of the Federal Court of Australia

Federal Court (Criminal Proceedings) Rules 2016

Authority for Federal Court Rules

Section 59 of the *Federal Court of Australia Act 1976* permits the Judges of the Court, or a majority of them, to make rules of Court not inconsistent with that Act. The rules may provide for the practice and procedure to be followed in the Court and in Registries of the Court. They may extend to all matters incidental to any such practice or procedure that are necessary or convenient to be prescribed for the conduct of the business of the Court.

Under sub-section 59(4) of the *Federal Court of Australia Act 1976*, the *Legislation Act 2003* (other than sections 8, 9, 10 and 16 of that Act) applies in relation to rules of court made by the Court under the *Federal Court of Australia Act 1976* or another Act:

- (a) as if a reference to a legislative instrument were a reference to a rule of court; and
- (b) as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Judges of the Court; and
- (c) subject to such further modifications or adaptations as are provided for in regulations made under section 59A of the *Federal Court of Australia Act 1976*.

Background to the *Federal Court (Criminal Proceedings) Rules 2016*

Before 2009 the Federal Court of Australia had summary criminal jurisdiction under a number of Commonwealth Acts but did not have jurisdiction to deal with indictable offences against Commonwealth law.

In 2009 the Court was given indictable criminal jurisdiction as a result of amendments to what was then the *Trade Practices Act 1974* but which became the *Competition and Consumer Act 2010*. The Court has jurisdiction to deal with indictable offences against sections 44ZZRF and 44ZZRG of that Act.

In 2009 amendments were made to the *Federal Court of Australia Act 1976* to deal with the commencement and management of indictable criminal proceedings.

The *Federal Court (Criminal Proceedings) Rules 2016* will facilitate the exercise of the indictable criminal jurisdiction.

The *Federal Court (Criminal Proceedings) Rules 2016* are designed, as far as practicable, to provide a single set of rules for the conduct of criminal proceedings before the Federal Court. The Rules address most of the issues which are likely to arise on a day to day basis in criminal proceedings.

To that end, rules for the conduct of summary prosecutions and rules dealing with criminal appeals from the Supreme Court of a Territory have been moved from the *Federal Court Rules 2011* to the *Federal Court (Criminal Proceedings) Rules 2016*. The rules for summary prosecutions are in Part 2 of the Rules. The rules for criminal appeals from the Supreme Court of a Territory are in Part 4.

Consequential changes will be made to the *Federal Court Rules 2011* under the *Federal Court Legislation Amendment (Criminal Proceedings) Rules 2016*.

Interim rules

On 7 July 2016 the Court adopted interim rules for the conduct of criminal proceedings. Those rules are the *Federal Court (Criminal Proceedings) (Interim) Rules 2016*.

Those rules will be repealed when the *Federal Court (Criminal Proceedings) Rules 2016* come into force. That will be done under the *Federal Court Legislation Amendment (Criminal Proceedings) Rules 2016*.

Relationship with other Rules

Rule 1.05(2) of the *Federal Court (Criminal Proceedings) Rules 2016* provides that the other rules of the Court apply to criminal proceedings, to the extent that they are relevant and not inconsistent with the *Federal Court (Criminal Proceedings) Rules 2016*.

Rules 1.06 and 1.07 of the *Federal Court (Criminal Proceedings) Rules 2016* provide that the Court can dispense with compliance with any rule, or make an order inconsistent with a rule.

Consultation

The Federal Court sought comments on draft Rules from the Law Council of Australia and the Commonwealth Director of Public Prosecution. The Comments received were taken into account in developing the *Federal Court (Criminal Proceedings) Rules 2016*.

Human Rights Scrutiny

Subsection 8(8) of the Legislation Act provides that Rules of Court made for the Federal Court are not legislative instruments for the purposes of that Act. As a result the *Human Rights (Parliamentary Scrutiny) Act 2011* does not apply to any such Rules of Court and no statement of compatibility for the purposes of that latter Act is included in this Explanatory Statement.

Commencement

The *Federal Court (Criminal Proceedings) Rules 2016* will come into effect the day after they are registered and will apply to criminal proceedings commenced in the Court on or after that day.

Attachment

The *Federal Court (Criminal Proceedings) Rules 2016* are explained in the Attachment.

Federal Court (Criminal Proceedings) Rules 2016

Part 1 - Preliminary

Division 1.1 - Introduction

Rules 1.01, 1.02 and 1.03 deal with formal matters including the name of the Rules, the commencement date, and the source of authority to make rules.

Rule 1.04 sets out the purpose of the Rules. The overarching purpose of the Rules is to facilitate the fair, efficient and timely determination of criminal proceedings in the Court. However, the Rules are not inflexible. The Court has power, under Rules 1.06 and 1.07, to dispense with compliance with the Rules or make orders inconsistent with the Rules.

"Criminal proceedings" is defined in the Dictionary to mean:

- criminal appeal proceedings;
- indictable primary proceedings; and
- summary criminal proceedings.

Rule 1.05 deals with the other rules of the Court. The Rules apply to criminal proceedings started on or after the commencement day but other rules of the Court can apply, provided they are relevant and not inconsistent. If a topic which is not covered by the Rules is covered by the *Federal Court Rules 2011*, those rules can potentially apply to fill the gap. However the Court has power to dispense with any rule if the application of that rule would produce an inappropriate result.

Division 1.2 - General powers of the Court etc.

Rules 1.06, 1.07 and 1.08 outline the general powers of the Court. These include power to dispense with compliance with a rule and to make an order inconsistent with a rule. The Court can exercise power under the rules at any stage in criminal proceedings either of its own initiative or on the application of a party.

Rule 1.09 deals with management of criminal proceedings. The Court may, at any stage, direct the parties to attend a hearing for the purpose of managing criminal proceedings. Each party to the proceedings, or their lawyer, must attend the hearing unless excused by the Court.

Rule 1.10 sets out the powers of the Court that can be exercised by a Registrar. They include power to make orders in relation to documents held by the Court, power to make orders for deemed and substituted service in Australia, and power to make orders in relation to subpoenas including an order giving leave to issue a subpoena. Registrars also have power to vary the conditions of a bail order.

Division 1.3 - Interpretation

Rule 1.11 provides that a word or expression which is defined in the Dictionary has the meaning given in the Dictionary.

Rule 1.12 provides that the Chief Justice may approve forms for the purpose of the Rules. Approved forms are available on the Court's website. Forms approved under the Rules are given the prefix CP before the number of the form to distinguish them from other forms used by the Court.

Division 1.4 - Time

Rule 1.13 sets rules for calculating time for the purpose of the Rules. This rule is similar to Rule 1.61 of the *Federal Court Rules 2011*.

Division 1.5 - Documents

Rules 1.14 and 1.15 provide that a document filed in criminal proceedings must be in accordance with any approved form, but that substantial compliance will suffice.

Rule 1.16 sets rules for the title of documents in criminal proceedings.

Rule 1.17 applies once the Court has assigned a number to a criminal proceeding. That number must be endorsed on every subsequent document filed in the proceedings.

Rule 1.18 requires that a document filed by a party must be signed by the party's lawyer, or by the party personally if the party is not represented. The rule does not apply to an affidavit, or to an annexure or exhibit attached to another document.

This rule does not apply to the Commonwealth Director of Public Prosecutions ("the CDPP"). Documents filed by the CDPP must be signed in a way that meets the requirements of the *Director of Public Prosecutions Act 1983*.

Subrule (3) provides that the signing requirement can be met by an electronic signature fixed to a document at the direction of the person required to sign.

Rule 1.19 provides that a District Registrar has custody and control of documents filed in criminal proceedings and the records of the Registry relating to criminal proceedings.

Subrule (2) provides that a person can remove a document from the Registry if the Court has given leave or if a Registrar has given written approval so that the document can be transferred to another Registry.

Rule 1.20 deals with the inspection of documents.

A party to a criminal proceeding can inspect any document in the proceedings, except the documents listed in subrule (1).

A person who is not a party can inspect any of the documents listed in the subrule (2) unless there is an order to the contrary.

Subrule (3) provides that a person can apply for leave to inspect a document which they do not have a right to inspect.

Subrule (4) provides that, with one exception, a person who is entitled to inspect a document can obtain a copy if they pay any fee prescribed under the *Federal Court and Federal Circuit Court Regulations 2012*. The exception is that a person who wants transcript must obtain a copy through the Court's transcript provider. Details of the Court's transcript provider are on the Court's website.

Division 1.6 - Lodging and filing documents

Rule 1.21 sets out the ways in which a document can be lodged in a criminal proceeding. A document can be:

- presented physically to a Registry
- posted to a Registry
- faxed to a Registry
- lodged electronically

If a document is not lodged physically, it must either be lodged with the proper Registry or be accompanied by a letter asking that it be sent to the proper Registry.

"Proper Registry" is defined in the Dictionary to have the same meaning as in the *Federal Court Rules 2011*.

Rule 1.22 sets the requirements that apply if a document is lodged by fax. The sender must keep the original document and a transmission report. The sender must produce the original document or the transmission report if ordered to do so.

Rule 1.23 sets the requirements that apply if a document is lodged electronically. The document must be sent by using the Courts website and must be in a format approved by a Registrar for the relevant Registry.

A document must be capable of being printed in the form in which it was created without any loss of content and an affidavit must be sent as an image. The sender must keep a paper or electronic copy of the document and must produce a hard copy of the document if ordered to do so.

Rule 1.24 states what will happen if a document that is lodged electronically is accepted by a Registry. If the document must be signed or stamped, the Registry will insert either a notice of filing and hearing, or a notice of filing, as the first page of the document.

Rule 1.25 sets rules for when a document will be taken as having been filed.

A document which is faxed or lodged electronically will be taken to have been filed when it is received, provided it is received before 4:40 pm on a business day. Otherwise it will be taken to have been filed on the next business day.

Division 1.7 - Lawyers

Rule 1.26 provides that this Division does not apply to the CDPP. A lawyer representing the CDPP will need to comply with the provisions of the *Director of Public Prosecutions Act 1983*.

Rule 1.27 provides that a party in criminal proceedings can be represented by a lawyer.

Subrule (2) provides that a corporation can only appear through a lawyer. However, the Court has power under Rule 1.06 to dispense with compliance with this Rule. It follows that the Court can, if appropriate, allow a corporation to appear through someone other than a lawyer.

One result of subrule (2) is that if a Rule requires an accused to appear in person, a corporation can appear through a lawyer.

Rule 1.28 provides that a lawyer acting for a party can do anything that the party is required or permitted to do unless the context or subject matter indicates otherwise.

That Rule is subject to the operation of Rule 1.41, which sets out how a corporation can enter a plea in criminal proceedings.

Rules 1.29 and 1.30 set the procedure under which a party can appoint a lawyer or terminate the appointment of lawyer.

Rule 1.31 sets the procedure under which a lawyer can terminate their retainer.

Division 1.8 - Affidavits

Division 1.8 applies in cases where the Federal Court Act or the Rules permit evidence to be given by affidavit. An example is Rule 9.01, which provides that an application for an interlocutory order must be accompanied by a supporting affidavit. Division 1.8 does not override the normal rules about how evidence must be given in criminal proceedings.

The rules in Division 1.8 are similar to the rules which apply in civil proceedings under Division 29.1 of the *Federal Court Rules 2011*.

Rule 1.32 sets the formal requirements for an affidavit.

Rule 1.33 sets out the procedures which apply if the deponent for an affidavit is illiterate, blind or incapable of signing an affidavit due to physical disability.

Rule 1.34 deals with the service of exhibits and annexures. A copy of any document exhibited or annexed to an affidavit must be served with the affidavit.

Rule 1.35 provides that an affidavit can be accepted for filing despite an irregularity in form. This reflects the general principle that it is sufficient for a document to substantially comply with formal requirements.

Rule 1.36 deals with the service of an affidavit. As far as practicable, an affidavit must be served on every other party to the proceedings at least 3 days before the occasion for using it arises.

Rule 1.37 deals with the cross examination of the deponent to an affidavit. A party who wants to cross-examine a deponent can give notice to the party who filed the affidavit or who proposes to use it. If the deponent does not appear, the affidavit cannot be used unless the Court gives leave, applying Rule 1.05. If the deponent appears and is cross-examined, the party using the affidavit can re-examine the deponent.

Division 1.9 - Address for service

Rule 1.38 sets out the formal requirements for an address for service.

If a party other than the CDPP is represented by a lawyer, the party's address for service must be the address of the lawyer.

Subrule (6) provides that an address for service of a corporation must be filed by a lawyer.

Rules 1.39 and 1.40 set out the requirement for filing and serving a notice of address for service or a notice of change of address for service.

Division 1.10 – Pleas by corporations

Rule 1.41 sets out how a corporation can enter a plea of guilty or not guilty.

The plea must be entered in writing signed by a representative of the corporation. If the representative has not been appointed under seal, the plea must be accompanied by a written statement which is signed by a person having the management of the affairs of the corporation and which states that the representative is a representative of the corporation.

Part 2 - Summary criminal proceedings

The Federal Court has summary criminal jurisdiction under a number of Commonwealth Acts including the *Bankruptcy Act 1966*, the *Competition and Consumer Act 2010*, the *Copyright Act 1968* and the *Fair Work Act 2009*. Summary criminal proceedings are heard by a Judge sitting alone.

"Accused" is defined in the Dictionary to the Criminal Proceedings Rules to include the respondent in summary criminal proceedings.

Rule 2.01 sets out how an applicant can start summary criminal proceedings. The applicant must file and serve an information and a summons which are in the approved form.

Rule 2.02 provides that a person who has been served with an information and summons must, as soon as practicable, file a notice of address for service.

Rule 2.03 sets out what happens if the accused does not appear on the return date or does not plead guilty on the return date. The Court will give any necessary orders for the conduct of the prosecution and defence and fix a date for hearing or a date for further orders. The Rule confirms that the Court can proceed ex parte if an accused does not appear.

Subrule (3) confirms that Court can make orders for pre-trial or ongoing disclosure.

Part 3 - Indictable primary proceedings

Indictable primary proceedings will normally start when the CDPP, or another prosecutor, files an indictment in the Federal Court. However section 23AB of the Federal Court Act identifies four other ways in which indictable primary proceedings can be commenced:

- a prosecutor applies for an extension of time to file an indictment (section 23BF of the Federal Court Act provides that an indictment must be filed within 3 months after a committal order is made);
- an accused applies to be discharged on the basis that an indictment has not been filed in time;
- the accused or the prosecutor, or both, appear before the Federal Court as the result of an order made by a committing court; and
- the accused or the prosecutor, or both, appear before the Federal Court in response to a bail order made by a State or Territory court.

If an accused is committed to the Federal Court for sentencing, section 23GB of the Federal Court Act will apply. The accused will be treated as they have been committed for trial and pleaded guilty before the Federal Court at the first opportunity. That means the prosecutor must file an indictment against the accused in the same way as if the accused had been committed for trial.

Part 3.1 - Indictments and applications

Rule 3.01 deals with the filing and form of indictments.

Subrule (1) provides that an indictment must be filed electronically. The prosecutor will retain the original indictment so it can be produced to the Court when the accused is arraigned.

Subrules (2) to (6) deal with the form of an indictment.

Subrule (7) requires that an indictment be accompanied by an indictment information notice. That notice will provide information about the background to the case. This is an important document given that the Court may have no information about the case until an indictment is filed.

Rule 3.02 deals with the service of an indictment and accompanying papers. The documents must be served personally. Rules dealing with service are in Part 7.

Rule 3.03 deals with the form of an application for an extension of time to file an indictment. The application must be in the approved form, and must be accompanied by an affidavit saying why an indictment cannot be filed in time. Subrule (3) provides that an application for an extension of time can be made without notice.

Rule 3.04 deals with committal papers. If there have been committal proceedings, and the committal papers are available to the prosecutor, the Court can direct the prosecutor to provide some or all of the committal papers to the Court.

"Committal papers" is defined in the Dictionary to include the evidence relied on in committal proceedings and the orders made in committal proceedings.

Rule 3.05 provides that a person who has been served with an indictment must, as soon as practicable, file a notice of address for service.

Rule 3.06 deals with the form of an application for an order discharging the accused on the basis that an indictment has not been filed in time. The application must be in the approved form, and must be accompanied by an affidavit supporting the application. Subrule (2) provides that the application must be served on the prosecutor.

Rule 3.07 sets out the procedure which applies if the prosecutor amends or replaces an indictment that has been filed in the Federal Court. Section 23BH of the Federal Court Act sets out when an indictment can be amended or replaced and when leave is required.

If the prosecutor amends an indictment before the start of a trial, the prosecutor must make the amendment on the original indictment and file, and serve, an electronic copy of the amended indictment.

If the prosecutor replaces an indictment before the start of a trial, the prosecutor must file, and serve, an electronic copy of the new indictment. Subrule (4) provides that the new indictment must not show on its face that it replaces an earlier indictment. There must be a separate document which notes that the old indictment has been replaced. That will avoid any risk of a jury speculating about why an earlier indictment has been replaced.

If the prosecutor amends or replaces an indictment after a trial has started, the Court may give directions about filing and service of the amended or replaced indictment. In some cases there may be little point in requiring the prosecutor to file and serve an amended or replacement indictment, especially if the prosecutor amends or replaces an indictment as the result of a direction given in the course of a trial.

Subrule (7) provides that the Court may direct the prosecutor to file a new indictment instead of amending an indictment. The Court may exercise that power if, for example, proposed amendments would be lengthy or otherwise make an indictment difficult to read.

Division 3.2 - Pre-trial matters — hearings and disclosure

Rule 3.08 deals with pre-trial hearings. Section 23CA of the Federal Court Act provides that the Court can order the prosecutor and the accused to attend a pre-trial hearing. If the Court makes an order for a pre-trial hearing, the parties must attend.

Rule 3.09 applies if the Court makes an order for pre-trial disclosure under section 23CD of the Federal Court Act. The Rule provides that the Court can also make an order requiring the parties to file a copy of some or any documents disclosed during the disclosure process. Copies of the relevant documents can be filed electronically.

Rule 3.10 deals with the form of a notice of particulars in support of an alibi.

Rule 3.11 deals with the form of a notice of particulars in support of a claim of mental impairment.

Division 3.3 – Juries and arraignment

Rule 3.12 deals with the form of a jury summons and the requirements for service. Unless the Court otherwise directs, a jury summons must be served at least 21 days before the person is required to attend court.

Rule 3.13 deals with the procedure for arraigning an accused.

Unless the Court otherwise directs, the prosecutor must produce the signed indictment to the Court, each count in the indictment must be read to the accused in the presence of the jury, and the accused must be directed to enter a plea to each count that relates to the accused. Unless the Court otherwise directs, a copy of the indictment must be given to the jury.

If the accused is a corporation it can enter a plea in accordance with the procedure set out in Rule 1.41.

The accused must be placed in the charge of the jury if the accused pleads not guilty, fails to enter a plea, or is given leave to change a plea of guilty to a plea of not guilty.

Subrule (5) applies if the accused is a corporation, and the corporation does not appear for arraignment. The Court may enter a plea of not guilty on behalf of the corporation and give any necessary orders for the further conduct of the proceedings. It will be matter for the trial Judge to decide what orders are appropriate to progress the matter, and whether he or she has power to make those orders.

Rule 3.14 deals with the forms of oath and affirmation for potential jurors, jury officers and assistant jury officers.

A person who has been empanelled for a jury will be a potential juror up until the point where they have taken an oath or made an affirmation (see section 23DU(6) of the Federal Court Act).

Division 3.5 - Order of addresses

Rule 3.15 gives an accused a right to address the Court, if they wish to do so, after the prosecutor has opened the case to the jury. The accused can, if they choose to do so, outline what issues are in contention between the prosecution and the accused. If the accused does not exercise that right, the prosecutor must not comment to the jury about the failure to do so.

Rule 3.16 applies if an accused intends to adduce evidence. The Rules gives the accused a right to address the Court, if they wish to do so, after the prosecution has closed its case.

Subrule (2) provides that if more than one accused wants to adduce evidence, the Court may give directions about the order in which the evidence is to be adduced.

Rule 3.17 deals with the order of addresses after the evidence has concluded. The prosecutor must go first. If more than one accused wants to address the Court, the Court will give directions about the order in which they should do so.

Division 3.6 - Fitness for trial

Rule 3.18 deals with fitness to plead in indictable primary proceedings. It provides that a Judge must determine whether a person is fit to stand trial. It follows that if fitness to plead becomes an issue, it can potentially be resolved at the pre-trial stage.

Part 4 – Criminal appeal proceedings etc.

Section 30AA of the Federal Court Act is the primary provision dealing with criminal appeals. Section 30AD is also relevant. It gives the Court jurisdiction to hear an appeal, or a further appeal, if the Attorney-General gives consent. If the Attorney-General gives consent the appeal should proceed in the same way as any other criminal appeal.

Division 4.1 - Leave to Appeal

Under section 30AB of the Federal Court Act leave to appeal is required unless an appeal is solely on a question of law or the decision relates to bail.

If a party wants to appeal against an interim decision in indictable primary proceedings the party must get leave from the Judge who made the decision (see section 30AB(2) of the Federal Court Act).

The appeal period for criminal cases is prescribed in section 30AF of the Federal Court Act and is normally 28 days. However, the 28 days does not always start running immediately a judgment or decision is made.

Rule 4.01 deals with an application for leave to appeal.

Subrule (2) provides that a party who wants to appeal against an interim decision can apply for leave orally when the decision is made, or by written application.

In all other cases an application for leave to appeal must be made in accordance with the approved form. Subrules (3) and (4) set out formal requirements for an application for leave to appeal. Among other things, the application must be accompanied by a draft notice of appeal.

If the Court gives leave to appeal, Rule 4.10 will require the appellant to file a notice of appeal, unless the Court dispenses with that requirement.

If it is appropriate to do so, the Court can deal with an application for leave to appeal and an appeal at the same time.

Rule 4.02 deals with an application for an extension of time to seek leave to appeal.

An appellant can apply for an extension of time and leave to appeal at the same time, and in the same document. If the Court grants an extension of time, it will treat the document as an application for leave to appeal.

Subrule (4) requires that an application for an extension of time must include a draft notice of appeal.

If the Court grants an extension of time, and gives leave to appeal, Rule 4.10 will require the appellant to file a notice of appeal, unless the Court dispenses with that requirement.

If it is appropriate to do so, the Court can deal with an application for an extension of time and an application for leave to appeal at the same time. The Court can also proceed to deal with the appeal if it is appropriate to do so.

Rule 4.03 specifies which District Registry a notice or application under Division 4.1 must be filed in.

Rule 4.04 sets out rules for service of a notice or application under Division 4.1. The documents must be served personally on the respondent. Rules dealing with service are in Part 7.

Rule 4.05 provides that a person who has been served with a notice or application under Division 4.1 must file a notice of address for service as soon as practicable.

Rule 4.06 outlines the procedure under which a party can withdraw a notice or application under Division 4.1.

Subrule (4) provides that a withdrawal by one party does not affect the position of any other party who has filed a notice or application. That could apply, for example, if more than one accused has filed a notice or application in relation to an interim decision that affects them all.

Rule 4.07 sets out the circumstances in which a respondent can apply to have a notice or application under Division 4.1 struck out for want of prosecution or another reason.

Rule 4.08 sets out the procedure which will apply if a party is absent when a notice or application under Division 4.1 is called on for hearing.

Rule 4.09 provides that a respondent can apply to the Full Court for a review of a decision to give leave to appeal.

Division 4.2 - Institution of appeals

Rule 4.10 deals with notices of appeal. A notice of appeal must be in the approved form.

Rules 4.10(3) and (4) set out formal requirements for a notice of appeal. Among other things, a notice of appeal must outline the reasons if the appellant wants the appeal dealt with urgently.

Rule 4.11 deals with an application for an extension of time to file a notice of appeal

An application for an extension of time must be in the approved form, and it must include a draft notice of appeal.

If the Court grants an extension of time Rule 4.10 will require the appellant to file a notice of appeal, unless the Court dispenses with that requirement.

If it is appropriate to do so, the Court can deal with an application for an extension of time and an appeal at the same time.

Rule 4.12 identifies the District Registry in which a notice or application under Division 4.2 must be filed.

Rule 4.13 sets rules for the service of a notice or application under Division 4.2. The documents must be served personally on the respondent. Rules about service are in Part 7.

Rule 4.14 provides that a person who has been served with a notice or application under Division 4.2 must file a notice of address for service as soon as practicable.

Rule 4.15 provides that a criminal appeal does not act as a stay of proceedings unless the Court orders that the proceedings be stayed.

Rule 4.16 provides that if criminal appeal proceedings are commenced, each party to the primary proceedings who may be affected by the appeal must be joined as a party. That could apply, for example, if more than one accused has commenced appeal proceedings in relation to an interim decision that affects them all.

Division 4.3 - Preparation and conduct of appeals

Rule 4.17 provides that Rules 4.18 to 4.20 apply to all appeals unless the Court decides that an appeal should be dealt with urgently. That could happen if, for example, an appeal could delay a trial or if a person is in custody.

If the Court decides that an appeal should be dealt with urgently, the Court will give directions about how the appeal is to proceed.

Rules 4.18, 4.19 and 4.20 set out the requirements for appeal books, written submissions and lists of authorities.

Rule 4.21 sets out the procedure that applies if a party wants the Court to receive further evidence at the hearing of an appeal.

Rule 4.22 provides that the Court may request a report from a Judge or court for the purpose of criminal appeal proceedings. A party can apply for an order allowing access to the report.

Rule 4.23 provides that a party can apply for directions from a single Judge in relation to the management, conduct and hearing of an appeal.

Division 4.4 - Ending appeals early

Rule 4.24 outlines the procedure under which a party can withdraw a notice of appeal or an application for an extension of time in which to appeal.

Subrule (3) provides that a withdrawal by one party does not affect the position of any other party who has filed a notice of appeal or an application for an extension of time. That could apply, for example, if more than one accused has filed a notice or application in relation to an interim decision that affects them all.

Rule 4.25 sets out the circumstances in which a respondent can apply to have a notice of appeal or an application for an extension of time to appeal struck out for want of prosecution or another reason.

Rule 4.26 sets out the procedure which will apply if a party is absent when an appeal or for an application for an extension of time in which to appeal is called on for hearing.

Division 4.5 - Questions of law referred after trial

This Division deals with proceedings under section 30CB of the Federal Court Act, which allows a prosecutor to apply for leave to seek a ruling from a Full Court on a question of law. These proceedings are commonly known as a precedent appeal. The outcome of a precedent appeal does not affect the status of the acquitted person, but can provide guidance for future cases.

Rule 4.27 deals with the form of an application for leave to refer a question of law to a Full Court.

Among other things, the prosecutor must set out proposed arrangements to ensure that the acquitted person will be represented if they want to make submissions, or to ensure that both sides of the question are argued if the acquitted person does not want to make submissions.

That may involve the prosecutor providing financial assistance to the acquitted person or arranging for counsel to appear to assist the Court.

Rule 4.28 deals with the requirements for filing and serving an application for leave to refer a question of law. The application must be served personally on the acquitted person. Rules about service are in Part 7.

Rule 4.28(1)(a) provides that there is a 28 day time limit on an application for leave to refer a question of law.

Rule 4.29 provides that an application for leave to refer a question of law will be heard by a single Judge unless the Court otherwise directs.

Rule 4.30 deals with the form a referral must take if the Court grants leave to refer a question of law.

The referral must be served personally on the acquitted person. Rules about service are in Part 7.

Rule 4.31 applies if an acquitted person wants to appear at the hearing of an application for leave to refer or at the hearing of a referral. The person must file a notice of intention to appear and a notice of address for service. The person must serve copies of those documents on the prosecutor.

Division 4.6 - Cases stated and questions reserved

This Division applies if a Judge or a court wants to state a case under section 30AE(6) or 30CA of the Federal Court Act.

Rule 4.32 deals with the form of a stated case.

Rule 4.33 sets out the procedure for settling a stated case.

Rule 4.34 provides that a party can apply to the Court for directions in relation to the management, conduct and hearing of a stated case.

Part 5 - Bail

Provisions about bail appear in Part VIB of the Federal Court Act.

Rule 5.01 deals with the form and contents of a bail application. An application for bail can be made in writing or orally at a hearing of the Court. However, an application for bail can only be made orally if the Court gives leave.

A written application for bail must be accompanied by an affidavit which complies with any practice note dealing with applications for bail. Practice notes are available on the Court's website.

Rule 5.02 deals with an application for bail to be varied or revoked on the basis that the accused has failed to comply with conditions of bail. The application must be made in accordance with the approved form, must be supported by an affidavit, and must be served on the accused.

Rule 5.03 sets out what happens if money or other property is deposited with the Court as security for bail. Money must be paid into the Litigants Fund unless the Court makes an

order to the contrary. Property which is not money must be dealt with in accordance with a direction of the Court or a Registrar.

Rule 5.04 deals with the form of a bail undertaking. The rule includes provisions designed to ensure that the person who signs a bail undertaking understands the effect of the undertaking.

A bail undertaking can be signed before the Judge who granted bail or a Registrar. If the person has been committed to a prison by the Court, a bail undertaking can also be signed before a person appointed or employed to assist in the management of the prison. That ensures that a person who has been granted bail, but who cannot immediately comply with the conditions of bail, does not have to be taken back to Court when they are able to comply with the conditions of bail.

Rule 5.05 deals with the form of a third party security undertaking. The rule includes provisions designed to ensure that the person who signs a security undertaking understands the effect of the undertaking. A third party security undertaking can be signed before the Judge who granted bail or a Registrar.

Rules 5.06 to 5.08 deal with the procedure if a prosecutor wants to seek forfeiture of bail security.

The procedure, under section 58FB of the Federal Court Act, involves the prosecutor applying to the Court for an order directing the Registrar to issue a notice of proposed forfeiture. A person who receives, or becomes aware of, a notice of proposed forfeiture can file a notice objecting to forfeiture.

Rule 5.06 deals with the form of an application for a direction to the Registrar.

Rule 5.07 deals with the form of a notice of proposed forfeiture.

Rule 5.08 deals with the form and contents of a notice objecting to forfeiture. It also sets out how the Court will go about dealing with an objection to forfeiture.

Part 6 – Expert evidence requirements

Rule 6.01 provides that a party to criminal proceedings who retains an expert, or who proposes to call an expert at trial, must give the expert a copy of any practice note dealing with guidelines for expert witnesses.

Practice notes are available on the Court's website.

Rule 6.02 sets out what must be contained in an expert's report. Among other things, the report must contain an acknowledgement that the expert has read, understood and complied with any practice note dealing with guidelines for expert witnesses.

Rule 6.03 provides that a party may only call an expert to give evidence at a trial if the party has delivered a copy of an expert report that complies with Rule 6.02 to all other parties. The copy reports must be delivered at least 21 days before the trial date, unless the Court sets a different time limit.

Part 7 — Service

Division 7.1—Personal service

Rule 7.01 deals with personal service on an individual.

A document in criminal proceedings can be served personally on an individual either by leaving the document with the individual or by serving it in accordance with a provision of Division 7.3.

If an individual refuses to accept a document, the document is taken to have been served personally if the person serving the document puts it down in the individual's presence and tells the individual what the document is.

Rule 7.02 deals with personal service on a corporation.

A document can be served personally on a corporation, or the liquidator or administrator of a corporation, either by serving it in accordance with subsection 109X(1) of the *Corporations Act 2001* or by serving it in accordance with a provision of Division 7.3.

Division 7.2 — Ordinary service

Rule 7.03 provides that a document that is not required to be served personally can be served by sending the document by pre-paid post addressed to the person at the person's proper address. Alternatively the document can be served in a way that amounts to personal service.

“Proper address” is defined in the Dictionary to have the same meaning as in the *Federal Court Rules 2011*.

Division 7.3 — Other methods of service

This Division sets out methods of service which, if used, will satisfy a requirement for personal service.

Rule 7.04 deals with service at a person's address for service.

Rule 7.05 allows a lawyer to acceptance service of a document for a person if the lawyer has authority to accept service. The lawyer must endorse a note on a copy of the document stating that the lawyer has accepted service of the document for the person.

Rule 7.06 deals with deemed service within Australia. A party to criminal proceedings can apply to the Court, without notice, for an order that a document is taken to have been served on a person if it is not practicable to serve the document in a way required by the Rules and the party provides evidence that the document has been brought to the attention of the person to be served.

Rule 7.07 deals with orders for substituted service within Australia. A party can apply for an order for substituted service if it is not practicable to serve a document on a person in a way required by the Rules

Rule 7.08 deals with service under agreement. If a person has agreed that a document may be served in a way or at a place mentioned in the agreement, the document may be served in accordance with the agreement.

Rule 7.09 applies in indictable primary proceedings if there were committal proceedings and the accused provided an address for service in the committal proceedings and that address has not been withdrawn. If the accused has not yet provided an address for service in the indictable primary proceedings, a document in the indictable primary proceedings can be served at the address provided for the committal proceedings.

Rule 7.10 applies in criminal appeal proceedings if the respondent provided an address for service in the primary proceedings and that address has not been withdrawn. If the accused has not yet provided an address for service in the criminal appeal proceedings, a document in the criminal appeal proceedings can be served at the address for service provided for the primary proceedings.

Rule 7.11 applies in precedent appeal proceedings under section 30CB of the Federal Court Act if the acquitted person provided an address for service in the primary proceedings and that address has not been withdrawn. If the acquitted person has not yet provided an address for service in the precedent appeal proceedings, a document in the precedent appeal proceedings can be served at the address for service provided for the primary proceedings.

Division 7.4 — Other rules about service

Rule 7.12 deals with the service of documents by the Court. Unless the rules provide otherwise, a document that is to be given to, or served on, a person by the Court may be given or served in any way permitted for service under Rule 7.3. That means the relevant document can be given or served in a way that amounts either to ordinary service or to personal service.

Rule 7.13 provides that, for the purpose of proving service, a statement by a person of the person's identity, or that the person holds a particular office or position, is evidence of the person's identity or that the person holds the office or position.

Rule 7.14 deals with proof of service. Unless the Court otherwise orders, a party to criminal proceedings may give evidence that a document has been served by filing an affidavit of service. The affidavit need not be served on any other party to the proceedings.

Rule 7.15 sets out rules for when a document served by post, fax or email is taken to have been served.

Division 7.5 — Service outside Australia

Rule 7.16 provides that a party to criminal proceedings does not require leave of the Court to serve a document on a person in a foreign country. Subrule (2) provides that a document can be served in a foreign country in accordance with an applicable convention, the law of the foreign country, or an order of the Court under Division 7.5.

Rule 7.17 provides that the other provisions of Part 7 apply to service of a document on a person in a foreign country in the same way as they apply to service on a person in Australia,

unless they are inconsistent with Division 7.5, an applicable convention, or the law of the foreign country.

Rule 7.18 provides that a document in criminal proceedings that is served on a person in a foreign country need not be served personally if it is served according to the law of the foreign country.

Rule 7.19 deals with proof of service in a foreign country. An official certificate or declaration stating that a document has been served on a person in a foreign country is proof that the document has been served.

Rule 7.20 deals with deemed service of a document in a foreign country. A party to criminal proceedings can apply to the Court, without notice, for an order that a document is taken to have been served on a person in a foreign country if it is not practicable to serve the document in a way required by the Rules and the party provides evidence that the document has been brought to the attention of the person to be served.

Rule 7.21 deals with substituted service of a document in a foreign country. A party can apply for an order for substituted service in a foreign country if it is not practicable to serve a document on a person in a way required by the Rules

Division 7.6 — Service through diplomatic channel or by transmission to foreign government

Rules 7.22 and 7.23 deal with service through the diplomatic channel or by transmission to a foreign government in accordance with a convention. Rule 7.22 sets out what documents must be filed with the Court. Rule 7.23 deals with the payment of expenses incurred by the Court.

Part 8 - Subpoenas

The Rules in Part 8 are similar to the rules for civil cases in Part 24 of the *Federal Court Rules 2011*. The rules have been harmonised in accordance with the advice of the Council of Chief Justices' Rules Harmonisation Committee.

Division 8.1 — Leave to issue subpoena

Rule 8.01 provides that a subpoena can only be issued with leave of the Court. A party to criminal proceedings can apply for leave to issue a subpoena without notice. Power to give leave has been delegated to a Registrar under Rule 1.10.

Division 8.2 — Subpoenas to give evidence and to produce documents

Rule 8.02 contains definitions for the purpose of Division 8.2.

Rule 8.03 provides that the Court can issue a subpoena requiring a person to give evidence or produce documents, or to do both.

Subrule (2) specifies circumstances in which an issuing officer must not issue a subpoena.

Subrule (3) provides that the issuing officer must seal or otherwise authenticate a sufficient number of copies of the subpoena for service and proof of service. Subrule (4) provides that a subpoena is taken to have been issued when it is sealed or otherwise authenticated.

Rule 8.04 deals with the form and contents of a subpoena.

A subpoena must not be addressed to more than one person. A subpoena must identify the addressee by name or by description of office or position.

A subpoena to produce must identify the document or thing to be produced and specify the date, time and place for production. A subpoena to attend to give evidence must specify the date, time and place for attendance.

Subrule (6) provides that the date specified in a subpoena must be the date of trial or any other date as permitted by the Court. If a subpoena is issued after a trial has commenced the Court will direct what date must be specified in the subpoena.

Subrule (8) provides, in effect, that a subpoena must be served at least 5 days before the earliest date the addressee is required to comply with the subpoena unless the Court fixes another date.

Subrule (9) provides that if the addressee of a subpoena is a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Rule 8.05 provides that the issuing party can give notice to the addressee changing the date or time on which the addressee must attend court or produce documents.

Rule 8.06 provides that an addressee, or another person with a sufficient interest, can apply for an order setting aside a subpoena in whole or in part.

An application under Rule 8.06 must be made on notice to the issuing party and the Court may order the applicant to give notice of the application to any other party or to any other person having a sufficient interest.

Rule 8.07 deals with serving a subpoena. A subpoena must be served personally on the addressee. Rules about service are in Part 7.

Subrule (2) provides that the issuing party must serve a copy of a subpoena to produce on each other party as soon as practicable after the subpoena has been served on the addressee.

Rule 8.08 deals with compliance with a subpoena.

Subrule (1) provides that an addressee need not comply with a subpoena to attend to give evidence unless conduct money has not been handed or tendered a reasonable time before the date attendance is required. However, that is subject to subrule (3) which provides that an addressee must comply with the requirements of a subpoena even if it has not been served personally if the addressee has, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Subrule (2) provides that an addressee need not comply with the requirements of a subpoena if it is not served on or before the date specified in the subpoena as the last date for service.

Subrule (4) provides that an addressee can comply with a subpoena to produce by attending at the date, time and place specified for production or by delivering the document or thing to the Registrar at the address specified for the purpose in the subpoena.

Subrule (6) provides that, unless a subpoena specifically requires the production of the original document, the addressee may produce a copy of any document required to be produced by the subpoena.

Rule 8.09 deals with production otherwise than on attendance.

If the addressee requests, a Registrar must provide a receipt for anything produced by the addressee. The issuing party can give consent for the addressee to produce copy documents instead of the original documents.

Subrule (5) provides that the addressee may, at the time of production, tell the Registrar in writing that any document or copy document need not be returned and can be destroyed.

Rule 8.10 deals with the removal, return, inspection, copying and access to documents or other things that have been produced to the Court. The Court can make orders in relation to the documents or things.

Rule 8.11 deals with the inspection of, and dealing with, a document or other thing that has been produced otherwise than on attendance.

Subrule (2) provides that, if requested in writing by a party, a Registrar must tell the party whether production in response to a subpoena has occurred and, if so, include a description of the documents and things produced.

Subrule (3) provides that a person may inspect a document or thing only if the Court has granted leave and the inspection is in accordance with the leave. Power to give leave to inspect has been delegated to a Registrar under Rule 1.10.

Subrule (4) gives the addressee, and any other person having sufficient interest, to object to the inspection of a document or thing. A person objecting to inspection must notify the Registrar in writing of the objection and the grounds of the objection.

If there is an objection to inspection, the Registrar must refer the objection to the Court for hearing and determination.

Under subrule (10) a Registrar may permit a document or thing to be removed from the Registry if there is an application in writing signed by the lawyer for a party. Subrule (11) provides that a lawyer who signs an application under subrule (10) and removes a document or thing is taken to undertake to the Court that the document or thing will be kept in the personal custody of the lawyer or a barrister briefed by the lawyer and the document or thing will be returned to the Registry in the same condition, order and packaging in which it was removed, as and when directed by a Registrar.

Rule 8.12 sets rules for the return of a thing which has been produced under a subpoena. The return of exhibits is dealt with in Rule 9.11.

A Registrar may return to the addressee any document or thing produced under a subpoena if the Registrar has given at least 14 days' notice to the issuing party and that period has expired.

The Registrar can also destroy a document four months after the end of the relevant criminal proceedings if the document is a copy.

Subrule (3) provides that the issuing party must attach, to the front of a subpoena to produce, a notice and declaration, in accordance with the approved form. The addressee must complete the notice and declaration and attach it to the subpoena or copy of the subpoena that is returned to the Court together with the documents produced under the subpoena. The notice and declaration will say whether the documents are originals or copies and whether the addressee wants them back.

Rule 8.13 deals with the expenses of complying with a subpoena. The Court can order the issuing party to pay the amount of any reasonable loss or expense incurred by the addressee. This is in addition to any conduct money paid to the addressee and any witness expenses payable to the addressee.

Rule 8.14 notes that it is a contempt of court for a person to fail to comply with a subpoena without reasonable excuse. The Court also has power to issue a warrant for arrest to enforce compliance with a subpoena. Warrants for arrest are dealt with in Rule 9.06.

Rule 8.15 applies if a document or other thing is in the custody of the Court or of another court. If the thing is in the custody of the Federal Court, a party can ask a Registrar to produce it. If the thing is in the custody of another court, a party can ask a Registrar to request the other court to send the thing to the Registrar.

Part 9 - Other matters

Rule 9.01 deals with interlocutory applications in criminal proceedings.

If no other procedure is prescribed, a party can apply for an interlocutory order orally at a hearing of the Court or by writing in the approved form.

A written application must be accompanied by an affidavit and must be served at least 3 days before the date fixed for the hearing of the application.

Rule 9.02 deals with the procedure to bring an accused person before the Court. The Court can issue a summons or an arrest warrant, as appropriate. If an accused is in custody, the Court can make an order directing that the accused be brought before the Court, and can make an order concerning the continuing custody of the accused.

Summonses are dealt with in Rule 9.04. Warrants for arrest are dealt with in Rule 9.06.

Rule 9.03 applies if a witness is in custody. The Court can make an order directing that the witness be brought before the Court, and can make an order concerning the continuing custody of the witness. Rule 9.05 deals with the form of an order that a person in custody be brought before the Court.

Rule 9.04 deals with summonses to appear before the Court. Where no other form of summons is prescribed, a summons can be issued under this Rule.

A summons under Rule 9.04 must be in the approved form and must give the person 5 days' notice of the need to attend court.

Rule 9.04 does not apply to a summons attached to an information in summary criminal proceedings or to a summons for jury service.

Rule 9.05 deals with the form of an order that a person in custody be brought before the Court.

Rule 9.06 deals with the form of a warrant for arrest.

Rule 9.07 deals with the form of a warrant for imprisonment.

Rule 9.08 deals with the form of a notice of intention to adduce evidence of a previous representation.

Rule 9.09 deals with the form of a notice of intention to adduce tendency evidence.

Rule 9.10 deals with the form of a notice of intention to adduce coincidence evidence.

Rule 9.11 deals with the return of exhibits.

At the end of a trial, any exhibit tendered by the prosecutor will be returned to the prosecutor to be held pending a possible appeal. If there is an appeal a Registrar may direct the prosecutor to produce the exhibit to the Court.

Any exhibit tendered by the accused will be retained by the Court for such period as the Court considers appropriate pending a possible appeal, and then returned to the accused. If there is an appeal the exhibit will be dealt with in accordance with subrule (4).

Subrule (4) applies to any exhibit held by the Court in relation to criminal appeal proceedings. Subject to subrule (5), the exhibit will be retained by the Court for such period as the Court considers appropriate pending a possible further appeal and then returned to the person who tendered the exhibit.

Subrule (5) applies if appeal proceedings are commenced in the High Court. The Court will retain any exhibit until the appeal proceedings have concluded, or until the High Court otherwise orders or directs. The Court will then return the exhibit to the person who tendered it unless there is an order or direction of the High Court to the contrary.

Those rules are subject to the operation of subrule (6) which gives a Registrar power to return a documents or thing that was produced under a subpoena to the person who produced rather than to the party who tendered it as an exhibit.

That may apply if the thing in question is an original document or a valuable item. It may be more appropriate to return it to the person who owns it rather than the party who tendered it as an exhibit.

Schedule 1 - Dictionary

The Dictionary defines a number of words and phrases that appear in the Rules. Other definitions appear in section 4 of the Federal Court Act.
