

District Court Criminal Practice Note 16

WORK HEALTH AND SAFETY ACT PROSECUTIONS

COMMENCEMENT

1. This Practice Note is to commence on 5 November 2018 and applies to all prosecutions commenced on or after that date.

APPLICATION

2. This Practice Note applies to prosecutions under the *Work Health and Safety Act 2011* (WHS Act), and replaces District Court Practice Note 10 dated 6 December 2011 save for the *Notice of Appearance* form published in that Practice Note.

COMMENCEMENT OF PROCEEDINGS

3. A Summons issued pursuant to Part 53 rule 26 *District Court Rules 1973*, will be made returnable on the first Monday, 8 weeks following the date of issue.
4. The Summons and the documents referred to in Part 53 rule 26 *District Court Rules 1973* are to be served within 7 days of the issue of the Summons together with a copy of this Practice Note.
5. 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 service of the Summons.
6. The prosecutor is to serve the brief of evidence on the defendant or the defendant's legal representative within 28 days of the service of the *Notice of Appearance*.

CONTENT OF THE BRIEF OF EVIDENCE

7. The prosecution brief of evidence is to include:

- a. Written statements taken from any person the prosecutor intends to call to give evidence at the hearing;
- b. Copies of any document that the prosecutor will seek to tender as an exhibit at the hearing;
- c. Photographs of any physical exhibit or information as to how an inspection of a physical exhibit is to occur;
- d. A copy of any notice issued pursuant to section 155(2)(a) WHSA and the signed information provided in response to that notice;
- e. A transcript of any electronically recorded interview with a witness conducted pursuant to section 155(2)(c), section 171(1)(c) WHSA or consented to by the witness;
- f. A copy of any recording made pursuant to section 185A WHSA;
- g. Any expert reports to be relied on by the prosecutor at the hearing;
- h. A list identifying:
 - (i) any information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as relevant to the case or the subject of the prosecutor's duty of disclosure that is not in the prosecutor's possession; and
 - (ii) the place at which the prosecutor believes the information, document or other thing is situated;

- i. A copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness; and
 - j. A copy of any information, document or other thing in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the defendant
- 8. Written statements referred to in 7a, are to comply with section 283B(2) - (5) *Criminal Procedure Act 1986* and clauses 9I and 9K *Criminal Procedure Regulation 2017*. A written statement is not required if the evidence of the witness to be adduced at the hearing by the prosecutor is disclosed in a document referred to in 7d-f of this Practice Note.
- 9. A written statement should be prepared and served if the prosecutor wishes to lead any additional or new evidence or where the person interviewed informs the prosecutor that they do not agree with, or stand by the content of any of the answers contained in a section 155(2)(a) notice or a record of interview. An outline of the evidence should be prepared and served, if the witness does not consent to providing a statement.

LISTING MATTERS FOR HEARING FOLLOWING A PLEA OF NOT GUILTY

- 10. Where a defendant enters a plea of not guilty the matter will be adjourned to a Case Readiness Hearing (CRH) within 8 weeks of the entry of the plea of not guilty. The date for hearing will be fixed at the CRH.
- 11. The prosecutor is to serve the following, no later than 4 weeks before the date of the CRH:
 - a. Any statement, document or thing omitted from the brief of evidence served;

- b. If the prosecutor proposes to tender evidence at the hearing in the form of a summary, a copy of the summary or, where the summary has not yet been prepared, an outline of the summary;
- c. A copy of any chart or explanatory material that the prosecutor proposes to tender at the hearing;
- d. If any expert witness is proposed to be called at the hearing by the prosecutor, a copy of each report (including any draft report, unless it is the subject of a claim for legal professional privilege) of the expert witness;
- e. If a record of interview or information received pursuant to section 155(2)(a) WHSA is to be tendered by the prosecutor, the prosecutor must serve a Schedule identifying each question and answer to be relied on and to which of the pleaded particulars in the Summons the question and answer is relevant or an outline of the evidence that the prosecutor expects the witness to give;
- f. A copy of any information, document or other thing provided by an investigator appointed under the *WHSA* to the prosecutor, or otherwise in the possession of the prosecutor, that may reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the defendant;
- g. A certificate signed on behalf of the prosecutor that it has made enquiries and complied with its duty of disclosure;
- h. A list identifying the affidavits or statements of those witnesses who are proposed to be called at the hearing of the proceedings by the prosecutor.

Note: The prosecutor is not required to include in a notice anything that has already been included in a brief of evidence in relation to the matter served on the defendant or that has otherwise been provided or disclosed to the defendant.

12. The defendant is to serve the following no later than 2 weeks before the date of the CRH:

- a. Notice of any consent that the defendant proposes to give at the hearing of the proceedings under section 190 *Evidence Act 1995* in relation to each of the following:
 - (i) a statement of a witness that the prosecutor proposes to adduce at the hearing of the proceedings,
 - (ii) a summary of evidence that the prosecutor proposes to adduce at the hearing of the proceedings;
- b. A statement, in relation to each paragraph in the statement of facts provided by the prosecutor, as to whether the defendant considers the paragraph or any part of it is an agreed fact (within the meaning of section 191 *Evidence Act 1995*) or the defendant disputes the whole or any part of the paragraph;
- c. Notice as to whether the defendant proposes to dispute the admissibility of any proposed evidence disclosed by the prosecutor and the basis for the objection;
- d. If the prosecutor disclosed an intention to adduce expert evidence at the hearing, notice as to whether the defendant disputes any of the expert evidence, which part(s) of the evidence is disputed and the basis on which it is disputed;
- e. A copy of any report, relevant to the proceedings, that has been prepared by a person whom the defendant intends to call as an expert witness at the hearing;

- f. Notice as to whether the defendant proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor;
- g. If the prosecutor disclosed an intention to tender at the hearing of the proceedings any transcript, notice as to whether the defendant accepts the transcript as accurate and, if not, in what respect the transcript is disputed;
- h. Notice as to whether the defendant proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor;
- i. Notice of any consent the defendant proposes to give under section 184 *Evidence Act 1995*.

Note: The defendant is not required to include in a notice anything that has already been provided or disclosed to the prosecutor.

13. At the CRH the matter will be listed for hearing and any further orders or directions will be made for the just and efficient disposal of the proceedings pursuant to Part 53 rule 28 *District Court Rules 1973*.

14. A failure to comply with the disclosure requirements set out in paragraphs 11 and 12 above may be taken into account in the admission or rejection of evidence at the hearing, an application to adjourn the hearing and/or in determining an appropriate costs order for an adjournment and/or the proceedings.

SENTENCE MATTERS

15. District Court Practice Note 15 does not apply to prosecutions under *Work Health and Safety Act 2011*.

16. 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.
17. The defendant is to file and serve any affidavit and supporting documentation relevant to the issue of capacity to pay a fine (section 6 *Fines Act 1996*) no later than 4 weeks before the date on which the matter is listed for sentence.
18. 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.

EXPERT EVIDENCE

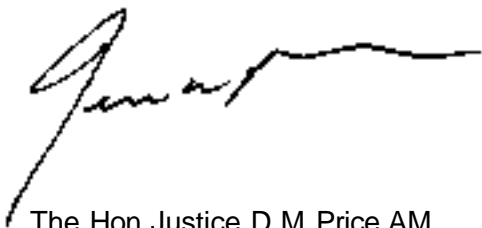
19. Unless the Court otherwise orders in summary prosecutions, an expert witness's evidence in chief must be given by the tender of one or more reports.
20. The provisions of Part 31 rules 23 and 27 *Uniform Civil Procedure Rules 2005* apply to the evidence of expert witnesses and any report of an expert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

COURT TECHNOLOGY AND EVIDENCE

21. If a party intends to adduce electronic evidence, for example CCTV footage, via CDs, DVDs or data files, the party must consult the "Technology in courts" page located on the District Court website at:
http://www.districtcourt.justice.nsw.gov.au/Pages/facilities_support/technology.aspx 28 days prior to the hearing to confirm that the Court's technology resources are capable of playing the evidence. Arrangements for testing any equipment may be made on enquiry with the Court Registry or contacting multimedia@justice.nsw.gov.au.
22. If 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

23. Applications to the regulator for an Enforceable Undertaking (EU) pursuant to Part 11 WHSA must be made by a defendant promptly after service of the Summons and no later than 12 weeks after the service of the brief of evidence.
24. In the event that an application for an EU is made later than 12 weeks after the service of the brief of evidence and the application for an EU is unsuccessful, the Court will take that into account in assessing the utilitarian value of any plea of guilty entered at a later time. It will be sufficient for compliance with this paragraph if the prosecutor informs the court that an application for an EU has been made or that the application is expected to be made within a reasonable time.
25. Matters in which an application for an EU is made will be adjourned for directions to a date no later than 14 days after the next meeting of the Enforceable Undertaking Panel or other convenient date in the EU process. The parties must relist a matter for directions within 7 days of a decision by the regulator to reject an application for an EU.



The Hon Justice D M Price AM

Chief Judge of the District Court

19 October 2018