



EMPLOYMENT AND INDUSTRIAL RELATIONS PRACTICE NOTE (E&IR-1)

National Practice Area Practice Note

1. INTRODUCTION

1.1 This Practice Note sets out arrangements for the management of employment and industrial relations cases within the National Court Framework (“NCF”). It:

(a) is to be read together with the:

- Central Practice Note (CPN-1), which sets out the fundamental principles concerning the NCF of the Federal Court and key principles of case management procedure. The Central Practice Note is an essential guide to practice in this Court in all proceedings; and
- *Federal Court of Australia Act 1976 (Cth)* (“**Federal Court Act**”) and the *Federal Court Rules 2011 (Cth)* (“**Federal Court Rules**”);

(b) takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of its issue;

(c) sets out the arrangements for the management of employment and industrial relations proceedings. It is intended to set out guiding principles for the conduct of these proceedings and is not intended to be inflexibly applied.

1.2 Nothing in the Central Practice Note or this Practice Note is to be taken as preventing parties from making applications under the Federal Court Act or Federal Court Rules or otherwise as the parties consider appropriate. What is essential, however, is that parties consider carefully the necessity for, and cost of, every step in proceedings in order to ensure the achievement of the overarching purpose of civil practice and procedure in Part VB of the Federal Court Act - to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

2. OVERVIEW AND DEFINITION

2.1 The Employment and Industrial Relations National Practice Area (“NPA”) incorporates proceedings that are substantially of a character of employment and/or industrial relations. As indicated in paragraph 4.2 of the Central Practice Note, the identification of the appropriate NPA for a proceeding may involve a question of judgment. Generally, the following matters will fall within this NPA:

- (a) matters involving the exercise of jurisdiction under the *Fair Work Act 2009* (Cth) (“**Fair Work Act**”), the *Fair Work (Registered Organisations) Act 2009* (Cth) (“**Registered Organisations Act**”) and the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (“**Building Industry Act**”) and related regulations;
- (b) matters arising under the *Competition and Consumer Act 2010* (Cth) (“**Competition and Consumer Act**”) relevant to boycotts, conduct of employee organisations, prohibited arrangements for goods and services or misleading conduct, when the issues relate to:
- the conduct of any employer or employee; or
 - the conduct of any association of employers or employees or their officers or members in that capacity;
- (see ss 45D, 45DA, 45DC, 45DD, 45E, 45EA and 45EB, and s 31 of Schedule 2 of the *Competition and Consumer Act*)
- (c) matters arising under any anti-discrimination legislation or regulation of the Commonwealth or State, when the issues relate to:
- the conduct of any employer or employee; or
 - the conduct of any association of employers or employees or their officers or members;
- (d) matters arising under the *Public Service Act 1999* (Cth) or related regulations;
- (e) matters arising under the *Independent Contractors Act 2006* (Cth);
- (f) matters arising under the *Safety, Rehabilitation and Compensation Act 1988* (Cth), including appeals under section 172 of the *Administrative Review Tribunal Act 2024* (Cth);
- (g) matters within the Court’s jurisdiction under s 273A of the *Work Health and Safety Act 2011* (Cth), whether or not the matter is brought in the Fair Work Division;
- (h) employment-related matters involving an administrative decision of a person holding office under a Commonwealth Act;
- (i) matters in which relief in the nature of a constitutional writ under s 39B of the *Judiciary Act 1903* (Cth) (“**Judiciary Act**”) is claimed against the Fair Work Commission;
- (j) matters remitted from the High Court of Australia in which relief is sought against, or in relation to any act or omission of, the Fair Work Commission or any member thereof;
- (k) employment-related matters involving appeals or referrals from the *Administrative Review Tribunal*;

- (l) matters arising under a contract of employment or involving rights, entitlements or obligations of any employer or employee;
- (m) any other proceeding the character of which is substantially employment or industrial relations.

2.2 For the purposes of s 13(5) of the Federal Court Act (see also r 2.13(1)(b) of the Federal Court Rules), a proceeding commenced in this NPA that is in relation to a matter or matters arising solely under the Fair Work Act; the Registered Organisations Act; the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (“**Transitional Act**”); the *Workplace Relations Act 1996* (Cth) as it may continue to apply because of the Transitional Act; or the *Building Industry Act*, is to be instituted, heard and determined in the Fair Work Division of the Court. Otherwise the proceeding is to be instituted, heard and determined in the General Division of the Court.

3. URGENT MATTERS

3.1 Parties and their representatives should familiarise themselves with the information dealing with urgent originating and interlocutory applications in Part 5 of the Central Practice Note.

4. COMMENCING PROCEEDINGS

4.1 Subject to the matters clarified below, the Federal Court Rules and Forms apply to the commencement of proceedings in this NPA.

4.2 An originating application must be accompanied by a statement of claim, affidavit or, in appropriate cases, a concise statement (under the arrangements in Part 6 of the Central Practice Note).

4.3 It is important that the nature of the proceeding and the likely issues for resolution are made clear as early as possible. This will be aided by the applicant making clear in the originating application and accompanying material what the case is about.

4.4 When the proceeding has been commenced using a concise statement, the respondent should file a concise response in advance of the first case management hearing, which will take place with the specific aims described in Part 8 of the Central Practice Note (including sub-paragraph 8.5(d), ie. the most appropriate form of pleading in a particular case). Whether a matter will continue under the concise statement method will be at the discretion of the Court.

4.5 When the proceeding has been commenced on a statement of claim, the defence must be filed within 28 days (see r 16.32 of the Federal Court Rules) and any reply is to be filed within a further 14 days (see r 16.33).

- 4.6 In those cases in which a proceeding is commenced on affidavit, the docket judge will consider at the first case management hearing whether the proceeding should continue on affidavit. If so, the affidavit accompanying the originating application will be treated as a statement of the party's factual case in the proceeding, whether or not it contains evidence that would be admissible at trial. The Court will assume that the applicant is content to have the strength of the case at trial measured against the facts set out in the applicant's affidavit.
- 4.7 When, in such a case, the respondent files an affidavit in reply to the applicant's affidavit, the respondent's affidavit will be treated as a statement of the respondent's factual case in the proceeding, whether or not it contains evidence that will be admissible at trial. The Court will assume that the respondent is content to have the strength of the respondent's defence at trial measured against the responses and facts set out in the respondent's affidavit. When a respondent does not file an affidavit, the Court will assume that the respondent is content to have the strength of the respondent's defence at trial measured against the facts set out in the applicant's affidavit.
- 4.8 In the normal course, the Court requires the filing of an affidavit by the respondent within 28 days after the date of service of the originating application. The exchange of any evidence beyond that contained in the affidavits referred to at paragraphs 4.6 and 4.7 (above) should be addressed at the first case management hearing.
- 4.9 When relief is claimed in the nature of a constitutional writ under s 39B of the *Judiciary Act* against the *Fair Work Commission*, each party bringing the application shall be named as the First Applicant, Second Applicant, and so on. Each of the other parties to the proceeding before the *Fair Work Commission* shall be named as the First Respondent, Second Respondent, and so on. The *Fair Work Commission* shall be named as the last respondent. The names of the President, Vice Presidents, Deputy Presidents, Commissioners, Members or persons holding delegations should not appear in the title of the proceeding.
- 4.10 The Court has a naming convention for cases which commonly appear with the same title, usually involving regular litigants such as a regulator and a registered organisation. In such cases, prior to the delivery of judgment, the Court may assign an identifying title to the proceeding (eg. *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Cardigan St Case)* [2018] FCA 957).

5. CASE MANAGEMENT

Approach to Case Management

- 5.1 Parties and their representatives should familiarise themselves with the guiding case management information set out in Part 8 of the *Central Practice Note*. This *Practice Note* should always be read with the *Central Practice Note*.

Case Management Hearing

- 5.2 The Court will list the proceeding for the conduct of a first case management hearing, generally, after the close of pleadings or the expiration of the time within which the respondent's affidavit is to be filed, as the case may be.
- 5.3 The parties are expected to give particular attention to the following matters at the first case management hearing:
- (a) whether the proceeding is more appropriately heard in the Federal Circuit and Family Court of Australia (Division 2) (including because it fails to raise a point of principle);
 - (b) whether the proceeding should be heard by a Full Court;
 - (c) the nature of the case and the facts or legal issues that are not in controversy and may be agreed at an early stage of the proceeding;
 - (d) any need for discovery, including limited discovery for the purpose of assisting the resolution of the matter at mediation;
 - (e) whether the proceeding should be sent for mediation, and if so when, and by whom the mediation should be conducted;
 - (f) the means by which evidence is to be adduced at the trial of the proceeding and, in particular, if not to be led orally (see Part 9 of this practice note), whether by witness statement or affidavit;
 - (g) the exchange of outlines of evidence and lists of documents to be tendered at trial;
 - (h) the preparation of a court book, whether electronic or otherwise;
 - (i) the anticipated length of the trial;
 - (j) in a proceeding in which the imposition of a penalty on an individual is claimed:
 - (i) such modifications of normal procedures as will accommodate the making of an election by the individual to file a defence and/or to lead evidence, including any need to split the hearing in order that sufficient notice be given to the applicant of the respondent's case should such an election be made; and
 - (ii) the appropriateness of separating the trial as between issues of liability and penalty;
 - (k) the timing of the trial and of the interlocutory steps required before the trial.
- 5.4 In the normal course, the Court will assume that apart from any necessary pre-trial hearing, after the first case management hearing, further case management hearings will not be required.

6. ALTERNATIVE DISPUTE RESOLUTION

- 6.1 Parties and their representatives should familiarise themselves with the alternative dispute resolution (“ADR”) information set out in Part 9 of the Central Practice Note.

7. DISCOVERY

- 7.1 Parties and their representatives should familiarise themselves with the information in Part 10 of the Central Practice Note.

8. PRE-TRIAL CASE MANAGEMENT HEARING

- 8.1 Parties and their representatives should familiarise themselves with the information in Part 13 of the Central Practice Note.

9. THE TRIAL

- 9.1 Ordinarily evidence-in-chief in relation to controversial facts is led orally. The parties should not assume that the Court will accept an agreement to the contrary reached by the parties under s 47(5) of the Federal Court Act. The parties should raise with the Court any agreement for the giving of evidence by affidavit in a timely way before the trial (and prior to the parties incurring the time and expense of preparing affidavit evidence).
- 9.2 When evidence-in-chief is to be led orally, outlines of evidence will ordinarily be exchanged. The purpose of an outline is to provide notice of the evidence to be given by the witness. An outline of evidence should identify the topics the witness will address, and also outline, in summary form, the evidence that will be given on each topic. It is expected that, ordinarily, no more than 4 pages will be required. Without the leave of the Court, an outline of evidence will not be the subject of cross examination or be tendered as a prior statement of a witness. In considering whether such leave should be given, the limited purpose of an outline may be taken into account.
- 9.3 A record or summary of an interview of a witness may be attached to an outline and serve as notice of the evidence to be led orally from the witness. In such a case, cross-examination on the record / summary or its tender is not conditional on the prior leave of the Court.

10. COSTS

- 10.1 Costs in Fair Work-related matters may only be ordered in certain circumstances (see s 570 of the Fair Work Act). The Court will entertain an application for costs in the event of non-compliance with the Court's directions or orders, or this Practice Note.

11. FURTHER PRACTICE INFORMATION AND RESOURCES

- 11.1 Further information about practice and procedure in this NPA can be found on the Employment and Industrial Relations NPA "homepage" of the Court's website.
- 11.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

Enquiries and Contact Information

- 11.3 General queries concerning the practice arrangements in the Employment and Industrial Relations NPA should be raised, at first instance, with your local registry. If a registry officer is unable to answer your query, please ask to speak to the NCF Coordinator in the local registry. Contact details for your local registry are available on the Court's website.
- 11.4 The Employment and Industrial Relations NPA has a User Group. Further details are contained on the Employment and Industrial Relations NPA "homepage".

D S Mortimer
Chief Justice
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