



ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS PRACTICE NOTE (ACLHR-1)

National Practice Area Practice Note

1. INTRODUCTION

1.1 This practice note sets out arrangements for the management of administrative law, constitutional law and human rights (“**ACLHR**”) 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) 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 issuing;
- (c) is intended to set out guiding principles for the conduct of these proceedings but is not intended to be inflexibly applied; and
- (d) applies to all ACLHR matters. However, practitioners should also familiarise themselves with general practice notes that operate across National Practice Areas (“**NPA**s”) and may apply to this NPA. See the further practice information listed at paragraph 13.1 of this practice note.

2. OVERVIEW AND DEFINITION

2.1 The ACLHR NPA does not cover appeals in ACLHR cases from a single judge of this Court, or a single judge of the Federal Circuit and Family Court of Australia (Division 2). Such appeals, including migration appeals, will be separately managed by the Court nationally through the National Operations Registrar. However, jurisprudence and legal development in the ACLHR area arising from migration appeals will be a direct concern of the National and Registry Coordinating Judges of the ACLHR NPA.

2.2 The ACLHR NPA covers the following subject matter:

Administrative Law

- Judicial review applications pursuant to s 39B of the *Judiciary Act 1903* (Cth) (“**Judiciary Act**”), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (“**ADJR Act**”), and ss 476A and 476B(3) of the *Migration Act 1958* (Cth) (being matters in this Court’s original jurisdiction and not appeals from the Federal Circuit and Family Court of Australia (Division 2)).
- Appeals on questions of law, under provisions such as s 172 of the *Administrative Review Tribunal Act 2024* (Cth), s 46 of the *Superannuation (Resolution of Complaints) Act 1993* (Cth) and s 169 of the *Native Title Act 1993* (Cth) (see also Part 33 of the Federal Court Rules).
- Matters remitted from the High Court to this Court which were commenced in the High Court under s 75 of the Constitution (generally, s 75(v), see also Part 32 of the Federal Court Rules).
- Referrals of petitions under the *Commonwealth Electoral Act 1918* (Cth).

Note: not all appeals from the Administrative Review Tribunal (“**ART**”) or judicial review applications will be allocated to this NPA. A proceeding may be more appropriately allocated to another NPA (such as the Taxation or Employment and Industrial Relations NPAs) because of the substantive issues in the proceeding.

Constitutional Law

- Proceedings where a notice under s 78B of the Judiciary Act is required, because the proceeding involves a matter arising under the Constitution or involving its interpretation.

Note: not all proceedings in which s 78B notices are issued will be allocated to this NPA. A proceeding may be more appropriately allocated to another NPA (such as the Taxation or Intellectual Property NPAs) because of the substantive issues in the proceeding.

Human Rights

- Proceedings issued under s 46PO of the *Australian Human Rights Commission Act 1986* (Cth), on termination of a complaint by the Human Rights Commission.

Note: matters involving allegations of discrimination under the *Fair Work Act 2009* (Cth) will generally be allocated to the Employment and Industrial Relations NPA.

3. OPERATION OF NPA

3.1 The operation of the ACLHR NPA will be consistent across the Court nationally. This includes the following key features:

- A national allocations system, with a dedicated group of judges with special expertise in the NPA who will be allocated ACLHR matters. A comprehensive list of all ACLHR NPA Judges nationally, and in each Registry, is available on the Court's website.
- A case management hearing, which may be expedited, will take place in the case management of all ACLHR matters to ensure that the matter is case managed efficiently and is ready for trial at the earliest appropriate time.

4. COMMENCING PROCEEDINGS

4.1 The Federal Court Rules and forms apply to the commencement of proceedings in this NPA.

4.2 When commencing a proceeding in this NPA, save where a rule in Chapter 3 of the Federal Court Rules permits that no supporting material be filed with an application, any application should be accompanied by appropriate supporting material.¹

Title of Proceedings and Naming Parties

4.3 In respect of proceedings involving the ART, the National Native Title Tribunal and the Native Title Registrar:

- (a) each party bringing the application should be named as the First Applicant, Second Applicant and so on respectively;
- (b) each of the other parties to the proceeding before the relevant Tribunal or Registrar should be named as the First Respondent, Second Respondent and so on respectively;
- (c) in applications for judicial review (under s 39B of the Judiciary Act or the ADJR Act) the relevant Tribunal or Registrar should be named as the last respondent;
- (d) the individual names of the President, Deputy Presidents, Senior Members, Members or Registrars of the relevant Tribunal should not appear in the title of the proceeding; and
- (e) in appeals directly from the ART to the Federal Court, the relevant Tribunal or Registrar is not a party and should not be named as a respondent.

¹ See r 8.05 of the Federal Court Rules requiring a statement of claim or affidavit in support or, the Central Practice Note, which permits the use of a concise statement, where appropriate (see also paragraphs 6.5 – 6.7 of this practice note).

4.4 For proceedings against the Superannuation Complaints Tribunal:

- (a) each party bringing the application should be named as the First Applicant, Second Applicant and so on respectively;
- (b) each of the other parties to the proceeding before the Superannuation Complaints Tribunal (including a trustee, insurer, retirement savings account provider, superannuation provider or other decision-maker) should be named as the Second Respondent, Third Respondent and so on respectively;
- (c) the Superannuation Complaints Tribunal should be named as the last respondent; and
- (d) the individual names of the Chairperson, Deputy Chairperson or member of the staff of that Tribunal authorised under s 59 of the *Superannuation (Resolution of Complaints) Act 1993* to exercise the relevant powers should not appear in the title of the proceeding.

5. URGENT APPLICATIONS

5.1 Parties, their representatives and litigants in person should familiarise themselves with the information regarding urgent originating and interlocutory applications in the Duty (Urgent) Interim Practice Note during 3 Region Trial (GPN-DUTY).

Duty Judge Contact Information

5.2 Contact information for applications to the General Duty Judge is available on the Court's website from the Daily Court List webpage and the Duty Judge Contact webpage.

6. CASE MANAGEMENT

Approach to Case Management

6.1 Parties and their representatives should familiarise themselves with the information on case management in Part 8 of the Central Practice Note.

6.2 The following should be noted in relation to the ACLHR NPA.

First Case Management Hearing

6.3 Unless dispensed with in a particular case, all proceedings will be listed for a case management hearing as soon as reasonably practicable after the proceedings have been issued.

6.4 Matters with which the parties or their legal representatives must come ready and able to deal with at the first management hearing are:

- (a) The judge may ask for a concise statement from the applicant and a concise statement in response from the respondent (see paragraphs 6.5 – 6.7 below).

- (b) The judge may fix a date for the final hearing of the proceeding and the parties should therefore come prepared with appropriate hearing dates from their perspective and an estimate of the length of the hearing.
- (c) The Court will expect parties subject to the Commonwealth or State model litigant policies to consider how best to conduct the proceeding so as to comply with those obligations. For example, if an applicant is unrepresented, consideration should be given to whether the respondent should prepare the court book, or take other such steps as are necessary to resolve the proceedings justly and efficiently.
- (d) Where appropriate, parties in proceedings in this NPA, including on judicial review applications, may be expected by the Court to attend mediation.
- (e) Where appropriate, the Court will consider whether costs-capping orders, or any other form of costs orders the parties wish to raise, should be made in the proceeding.
- (f) Whether the matter should, or is required to be, heard by a Full Court, and why.
- (g) Whether the matter can and, if so, should be remitted to the Federal Circuit and Family Court of Australia (Division 2).
- (h) Parties are to include in case planning the preparation of a statement of agreed facts, to be tendered pursuant to s 191 of the *Evidence Act 1995* (Cth). This should occur before filing of evidence so that oral or affidavit evidence need only deal with contested matters.
- (i) Whether evidence is to be adduced orally or by affidavit.
- (j) Whether discovery is sought and, if so, why and for what documents.
- (k) Whether reasons for the decision under review have been provided or are available.
- (l) Parties should be able to inform the Court about any proposed interlocutory applications, including summary dismissal, objection to competency and how these can be programmed into trial preparation.
- (m) Neither interlocutory applications, nor mediations should be considered by parties to affect their obligations to prepare for trial.
- (n) Use of electronic authorities and copies of relevant enactments.
- (o) Use of electronic court books.
- (p) If a party is self-represented, parties should be prepared to discuss what (if any) modifications or accommodations should be made to the way the case is prepared for trial, and dealt with at trial.

Concise Statement

- 6.5 If the judge considers it appropriate, at the first case management hearing or at any time prior to trial, each party may be directed by the judge to file and serve a short document entitled “concise statement” limited to 5 pages, outlining and summarising the party’s case in the proceeding.
- 6.6 The direction may or may not include particular topics which the party must address in the concise statement, such as what legal issues are common ground, what factual matters are controversial, a concise description of the applicant’s complaint or the respondent’s response. The concise statement is not intended to supplant pleadings if these exist, but to focus attention on the essential issues.
- 6.7 If the parties are ordered to file and serve a concise statement it shall include:
- (a) a concise description of the applicant’s complaint or the respondent’s response;
 - (b) for each party, a list of the particular constitutional provisions, statutes and regulations as in force at the relevant time and applicable to the questions the subject of the application; and
 - (c) any additional topics that the Court may require, such as what legal issues are common ground, what factual matters are controversial (for example in a matter remitted by the High Court or in human rights proceedings).

Pre-Trial Case Management Hearing

- 6.8 The parties should expect a pre-trial case management hearing to be programmed to occur approximately 2 or 3 weeks prior to trial. In straightforward matters the parties may seek, and the Court will consider, addressing pre-trial matters by consent, on the papers or by other efficient means. The purpose of this hearing is to ensure that all necessary steps have been taken or are underway, that the hearing estimate is accurate, that all opportunities for mediation have been fully explored and that the parties will be ready for trial.

Additional Requirements for Administrative Law Cases

- 6.9 Where the Federal Court Rules do not already provide, any reasons given for the decision under review are to be filed with the originating application if the applicant has them, otherwise by the respondent within 10 business days of the date of service of the application.

Note: these requirements do not create an obligation on a respondent to provide reasons where there is no legal obligation to do so.

- 6.10 Where the Federal Court Rules do not already provide, a respondent may be directed to file promptly the material before the decision-maker at the time of making the decision.

Additional Requirements for Constitutional Cases

- 6.11 Notices under s 78B of the Judiciary Act are to be lodged and served promptly. Parties’ attention is drawn to the terms of s 78B(1), which provides that:

Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

Additional Requirements for Human Rights Cases

- 6.12 Special requirements exist for filing of matters in human rights proceedings (see Division 34.8 of the Federal Court Rules – rr 34.161 - 34.167).

7. ALTERNATIVE DISPUTE RESOLUTION

- 7.1 Parties and their representatives should familiarise themselves with the information regarding alternative dispute resolution, including mediation, in Part 9 of the Central Practice Note.

8. DISCOVERY

- 8.1 Unless a party provides an acceptable justification, no discovery or interrogatories will be ordered in proceedings for administrative law cases and constitutional law cases. For human rights cases, parties will be expected to be co-operative and proactive in ensuring any discovery process is managed efficiently and in a timely way.
- 8.2 Where a discovery process is necessary the parties and their representatives should familiarise themselves with the information on discovery in Part 10 of the Central Practice Note.

9. EVIDENCE AND WITNESSES

- 9.1 In most administrative law and constitutional law cases, the convenient mechanism for the presentation of evidence is likely to be by affidavit, or by other convenient presentation of the material before the decision-maker or Tribunal under review.
- 9.2 To the extent that there is contested evidence that will require cross-examination, the parties and their representatives should give consideration to the most effective, including cost effective, means of leading the evidence. In this regard, parties and their representatives should familiarise themselves with the information in Part 11 of the Central Practice Note about witnesses and evidence, in particular the agreement of facts which are not in contest.

10. FURTHER INTERLOCUTORY STEPS

- 10.1 In many, if not most, administrative law and constitutional law cases, there will not be any need for interlocutory hearings after the initial case management hearing.
- 10.2 To the extent that interlocutory proceedings are required, parties and their representatives should familiarise themselves with the relevant information in Part 12 of the Central Practice Note.

11. CONSENT ORDERS IN PROCEEDINGS INVOLVING A FEDERAL TRIBUNAL

- 11.1 If the parties propose that an order be made with their consent, the effect of which is to set aside or vary an order of a federal Tribunal (“**proposed consent order**”), then they must:
- (a) prepare a proposed consent order that contains, within a “notes” section at the foot of the document, a succinct statement of the matters said to justify the making of the proposed consent order and giving reference to any authorities or statutory provisions relied upon;
 - (b) each sign the proposed consent order; and
 - (c) provide the proposed consent order to the Court, preferably by eLodgment.
- 11.2 If the proposed consent order relates only to costs, the succinct statement and related references referred to in 11.1(a) above need not be inserted in the proposed consent order.
- 11.3 If the Court makes such a consent order, the parties must, within 7 days of the order being made, serve a copy of the order on the Tribunal.

12. PRE-TRIAL STEPS

Concise Statement

- 12.1 As noted in Part 6 of this practice note, if not previously directed to be filed, prior to trial and at a time to be fixed by the judge, each party may be directed to file and serve a concise statement.
- 12.2 Prior to trial and at a time to be fixed by the judge, each party will be expected to file and serve electronically a bundle of the particular constitutional provisions, statutes and regulations as in force at the relevant time and applicable to the questions the subject of the application including any transitional or savings provisions (“**trial bundle**”), as well as a list of cases and other materials to be relied upon. The trial bundle may be required to be filed with any outline of submissions ordered to be filed.

13. FURTHER PRACTICE INFORMATION AND RESOURCES

- 13.1 This practice note relates to all ACLHR matters. However, additional requirements of particular relevance to this NPA exist in other practice notes and practice information. This includes the following documents and information available on the Court’s website:

- Practice and procedure information and resources for this NPA on the Court’s ACLHR NPA “homepage”;
- Guide to Human Rights Cases;
- Guide to Administrative Law and Constitutional Law Cases;
- Appeals practice information and resources (for instance, in respect of appeals from the ART);
- A number of the Court’s General Practice Notes including the: Expert Evidence Practice Note (GPN-EXPT); List of Authorities and Citations Practice Note (GPN-AUTH); Costs Practice Note (GPN-COSTS); and Consent Orders Involving a Federal Tribunal Practice Note (GPN-TRIB).

13.2 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

13.3 General queries concerning the practice arrangements in the ACLHR 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 your local registry.

D S Mortimer
Chief Justice
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