



New South Wales

SUPREME COURT RULES (AMENDMENT No. 316) 1997

1. These rules are made by the Rule Committee on 28 November 1997.
2. The Supreme Court Rules 1970 are amended as follows—
 - (a) Part 51 rule 2 (1)
Insert, in alphabetical order—
“**interested party**” means a non-submitting party who has an address for service in the proceedings;
“**necessary party**”, in relation to service in proceedings in the Court of Appeal, means a person (other than the party effecting service) who is a party to, or who is required by rule 9 to be joined as a party to, the proceedings.
 - (b) Part 51 Division 2
Omit rule 4 and insert instead—
Institution of application for leave
 4. (1) An application for leave to appeal to the Court of Appeal shall be made by filing and serving on each necessary party within 28 days after the material date:
 - (a) an ordinary summons in Form 59; or
 - (b) a holding summons in Form 59A.
 - (2) An application for leave to cross-appeal to the Court of Appeal shall be made:
 - (a) if an ordinary summons for leave to appeal or a notice of appeal with appointment has been filed in the proceedings—by filing an ordinary summons in Form 59 in the proceedings and serving it on each necessary party within 28 days of the date of:
 - (i) service of the ordinary summons for leave to appeal; or
 - (ii) service of the notice of appeal with appointment, on the applicant, whichever is the earlier; or
 - (b) otherwise—by filing a holding summons in Form 59A in the proceedings and serving it on each necessary party within 28 days of the date of:
 - (i) service of the holding summons for leave to appeal; or
 - (ii) service of the notice of appeal without appointment, on the applicant, whichever is the earlier.

(3) A claimant who files a holding summons for leave to appeal shall within:

- (a) 3 months after serving the summons on all necessary parties; or
- (b) such shorter period as the Court of Appeal may in special circumstances order,

file and serve on each necessary party an ordinary summons in Form 59. Part 2 rule 5 shall not apply to the calculation of the period of 3 months under paragraph (a).

(4) A claimant who files a holding summons for leave to cross-appeal shall within:

- (a) 28 days after service on the claimant of an ordinary summons for leave to appeal or a notice of appeal with appointment, whichever is the earlier; or
- (b) such shorter period as the Court of Appeal may in special circumstances order,

file and serve on each necessary party an ordinary summons in Form 59.

(5) The court below may extend time under subrule (1) only within 28 days after the material date or on a notice of motion or other application filed and served on each necessary party within 28 days after the material date.

(6) The Court of Appeal may extend time under subrule (1), (2), (3) or (4) at any time.

(7) A party applying for an extension of time under subrule (6) may include that application in an ordinary summons for leave to appeal or cross-appeal.

Discontinuance of application for leave

4A. (1) The claimant for leave to appeal or to cross-appeal may discontinue the application by filing a notice of discontinuance in Form 60C and serving it on each opponent who has been served with the summons.

(2) If the claimant fails to comply with rule 4 (3) or (4), the application shall thereupon be taken to be discontinued.

(3) If:

- (a) an application for leave to appeal is discontinued; and

(b) an opponent who has applied for leave to cross-appeal has been served with neither an ordinary summons nor a notice of appeal with appointment in the proceedings,

the application for leave to cross-appeal shall thereupon be taken to be discontinued.

(4) The discontinuance of an application for leave to appeal in proceedings in which an ordinary summons or a notice of appeal with appointment has been filed shall not affect any application for leave to cross-appeal by an opponent on whom the summons or notice has been served.

Claimant's summary of argument etc

4B. (1) A claimant for:

(a) leave to appeal; or
(b) leave to cross-appeal in proceedings in which no application for leave to appeal (other than a discontinued application) has been served on the claimant,

shall file, in triplicate, with an ordinary summons a folder (the "white folder") containing:

(c) a copy of the summons;
(d) a summary of the claimant's argument in accordance with subrule (2);
(e) the reasons for judgment (if any) or the summing up (if any) in the court below, certified by the proper officer of the court below;
(f) a draft notice of appeal or cross-appeal;
(g) if the summary contains a statement under subrule (3) (g)—the necessary documents for the appeal or cross-appeal, unless the registrar gives leave to defer filing them; and
(h) any other documents other than documents to be filed by the opponent, that are necessary for disposal of the application, and serve the white folder with the summons.

(2) The summary of argument shall not exceed 10 pages in length, shall be signed by the barrister or solicitor who prepares it or, where it is not prepared by a barrister or solicitor, by or on behalf of the party on whose behalf it is signed, and:

(a) the name of the signatory;

- (b) a telephone number at which the signatory can be contacted; and
- (c) if available, the signatory's facsimile number,

shall be typed or printed in a neat and legible manner under his or her signature.

(3) The summary of argument shall state:

- (a) the nature of the claimant's case;
- (b) the questions involved;
- (c) briefly, the claimant's argument;
- (d) the reasons why leave should be granted;
- (e) any reasons why an order for costs should not be made in favour of the opponent if the application is refused;
- (f) whether the claimant consents to the application for leave being determined or dealt with in the absence of the public and without any attendance by or on behalf of any person;
- (g) where applicable—that, and the reasons why, it is suitable for oral argument of the appeal or cross-appeal to proceed concurrently with the leave application (the appeal or cross-appeal being subject to the granting of the application); and
- (h) in tabular form, a list of relevant authorities and legislation.

(4) Each folder shall:

- (a) be white in colour;
- (b) be approximately A4 in size;
- (c) be covered with a clearview PVC (or similar) binder capable of holding an A4 insert;
- (d) be 38 mm wide and contain 2 D rings, to hold documents; and
- (e) contain labelled dividers separating the contents in a convenient way, including dividers to receive the opponent's documents and the claimant's reply.

Opponent's response

4C. (1) Subject to subrule (3), an opponent (which expression in this rule includes an opponent to an application for leave to cross-appeal), shall, within 28 days after service of the white folder or the documents referred to in subrule (3) on him or her, file and serve the opponent's response on each interested party.

(2) A response shall:

- (a) state that the opponent:
 - (i) consents to the leave sought;
 - (ii) submits to the orders of the Court of Appeal; or
 - (iii) submits to the orders of the Court of Appeal save as to costs; or
- (b) state:
 - (i) briefly, the opponent's argument;
 - (ii) the reasons why leave should or should not be granted;
 - (iii) whether the opponent consents to the application for leave being determined or dealt with in the absence of the public and without any attendance by or on behalf of any person;
 - (iv) any other relevant matters, including terms to which leave should be subject and contentions concerning costs; and
 - (v) in tabular form, a list of relevant authorities and legislation.

(3) If the opponent applies for leave to cross-appeal, the opponent shall file and serve with the response:

- (a) a copy of the summons for leave to cross-appeal;
- (b) a summary of the opponent's argument in favour of leave to cross-appeal;
- (c) a draft notice of cross-appeal;
- (d) if the summary of the opponent's argument contains a statement under subrule (5) (g)—the necessary documents for the cross-appeal, unless the registrar gives leave to defer filing them; and
- (e) any other documents, not already filed, other than documents to be filed by the other party, that are necessary for disposal of the application for leave to cross-appeal.

(4) The response, and the summary referred to in subrule (3) (if any), shall each:

- (a) not exceed 10 pages in length;
- (b) be signed by the barrister or solicitor who prepares it or, where it is not prepared by a barrister or solicitor, by or on behalf of the party on whose behalf it is signed, and:

- (i) the name of the signatory;
- (ii) a telephone number at which the signatory can be contacted; and
- (iii) if available, the signatory's facsimile number, shall be typed or printed in a neat and legible manner under his or her signature; and
- (c) be hole punched for insertion in the white folder.

(5) The summary referred to in subrule (3) shall state:

- (a) the nature of the opponent's case;
- (b) the questions involved;
- (c) briefly, the opponent's argument;
- (d) the reasons why leave to cross-appeal should be granted;
- (e) any reasons why an order for costs should not be made in favour of the claimant for leave to appeal if the application for leave to cross-appeal is refused;
- (f) whether the opponent consents to the application for leave to cross-appeal being determined or dealt with in the absence of the public and without any attendance by or on behalf of any person;
- (g) where applicable—that, and the reasons why, it is suitable for oral argument of the cross-appeal to proceed concurrently with the leave application (the cross-appeal being subject to the granting of the application); and
- (h) in tabular form, a list of relevant authorities and legislation, and shall contain labelled dividers separating the contents in a convenient way including, if application is made for leave to cross-appeal, a divider to receive the claimant's response and the opponent's reply.

Determination of application for leave without attendance

4D. (1) An application for leave to appeal or to cross-appeal that is not opposed in accordance with the rules may be determined or dealt with by the Court of Appeal in the absence of the public and without any attendance by or on behalf of any person.

(2) An application for leave to appeal or to cross-appeal to which subrule (1) does not apply may, with the consent of each party who has an address for service in the proceedings and has not:

- (a) filed a submitting appearance; or

(b) consented or submitted to the application under rule 4C (2) (a), be determined or dealt with by the Court of Appeal in the absence of the public and without any attendance by or on behalf of any person.

(c) Part 51 rule 5

(i) In subrule (3), after “filed” insert “and served on each necessary party”.

(ii) In subrule (9, after “lodge” insert “and serve”.

(d) Part 51 rule 6 (1)

After “registry of the Court of Appeal”, insert “and serving on each necessary party”.

(e) Part 51 rule 6 (2)

Omit the subrule and insert instead—

(2) An appellant who files a notice of appeal without appointment shall within:

(a) 3 months after filing the notice of appeal; or

(b) such shorter period as the Court of Appeal may in special circumstances order,

file and serve on each necessary party a notice of appeal with appointment in Form 60. Part 2 rule 5 shall not apply to the calculation of the period of 3 months under paragraph (a).

(f) Part 51 rule 8

After “file” insert “and serve on each necessary party”.

(g) Part 51 rule 9 (7)

Omit the subrule and insert instead—

(7) This rule applies, making such changes as are necessary, to an application for leave to appeal or to cross-appeal.

(h) Part 51 rule 10

Omit subrule (1) and renumber subrules (2) and (3) as (1) and (2) respectively.

(i) Part 51 rule 11 (2)

Omit the subrule and insert instead—

(2) Unless the respondent has filed a summons in the proceedings, the notice of appeal shall bear a note that before taking any step in the proceedings the respondent must enter an appearance, or file a summons, in the proceedings in the registry.

(j) Part 51 rule 14

Omit the rule and insert instead—

Notice of appeal or summons for leave to appeal or cross-appeal: filing or lodgment with court below

14. An appellant who files:

- (a) a notice of appeal with or without appointment; or
- (b) an ordinary or a holding summons for leave to appeal or to cross-appeal,
("the initiating document") in the registry of the Court of Appeal shall:
- (c) in the case of an appeal from a decision in proceedings in a Division—on the day of filing the initiating document, file a copy thereof in the registry of the Division; or
- (d) in any other case:
 - (i) file a copy of the initiating document in the registry or office of the court below; or
 - (ii) if compliance with subparagraph (i) is not in accordance with the practice or organisation of the court below, lodge a copy of the initiating document with an officer of the court below concerned with its records or process.

(k) Part 51 rule I7

Omit the rule and insert instead—

Amendment of notice of appeal

17. A notice of appeal may, before the date of call-over, be amended without leave by filing, and serving on all necessary parties, a supplementary notice.

(1) Part 51 rule 18

- (i) In subrule (1) after "file" insert "and serve on each necessary party".
- (ii) Omit subrule (2) and insert instead—

(2) A notice of cross-appeal must be filed and served by a respondent within the earlier of:

- (a) 14 days after service on the respondent of a notice of appeal with or without appointment;
- (b) 14 days after leave to cross-appeal is given; or

(c) such extended or abridged time as the Court of Appeal may fix.

(m) Part 51 rule 19 (8) (b)
Omit “party to the appeal” and insert instead “interested party”.

(n) Part 51 rule 20
Omit “summons” and insert instead “summons, other than under rule 4.”.

(o) Part 51 rule 21 (1)
Omit the subrule and insert instead—

Notice of contention

21. (1) Where a respondent to an appeal wishes to contend that the decision of the court below should be affirmed on grounds other than those relied upon by the court below, but does not seek a discharge or variation of any part of the decision of the court below, the respondent need not file a notice of cross-appeal but he or she must, within 14 days after service on him or her of the notice of appeal with or without appointment, file and serve on each other interested party notice of that contention stating briefly but specifically, the grounds relied upon in support of the contention.

(p) Part 51 rule 27 (1)
(i) After “under”, insert “rule 4”.
(ii) From paragraph (a), omit “non-submitting party to the appeal” and insert instead “interested party”.

(q) Part 51 rule 28
Omit “non-submitting” wherever occurring and insert instead “interested”.

(r) Part 51 rule 29 (1) (b)
Omit the paragraph and insert instead—
(b) if a holding summons for leave to appeal or to cross-appeal, or a notice of appeal without appointment, is filed or lodged under rule 14—three months after the filing of the summons or notice.

(s) Part 51 rule 36
(i) From subrule (l) omit “the appellant and any other party who has not submitted” and insert instead “any other interested party”.

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- (ii) From subrule (3) omit “party who has not submitted” and insert instead “interested party”.
- (t) Part 51 rule 37
Omit “party, other than a submitting respondent” wherever occurring and insert instead “interested party”.
- (u) Part 51 rule 40
After “file” insert “and serve”.
- (v) Part 51 rule 41
After “service” insert “on the respondent” and after “serve” insert “on each other interested party”.
- (w) Part 51 rule 42 (4)
Omit “all parties, other than a submitting respondent” and insert instead “each other interested party”.
- (x) Part 51 rule 42 (5) (a)
Omit “every other party other than a submitting respondent” and insert instead “each other interested party”.
- (y) Part 51 rule 44
Omit the rule and insert instead—

Written submissions and chronology

44. Each non-submitting party, shall, unless otherwise directed, file and serve written submissions on each other interested party, and the appellant shall file and serve a chronology on each other interested party. The respondent may file and serve an amended or supplementary chronology on each other interested party.

- (z) Part 51 rule 46 (1) (d)
Omit “which” and insert instead “whose”.
- (aa) Part 51 rule 48
Omit “party to the appeal other than a submitting respondent” and insert instead “other interested party”.
- (ab) Part 51 rule 50 (1)
After “rules” insert ”and in particular rule 4 (1) (b) and (2) (b)”.
- (ac) Part 51 rule 51 (1)
Omit “Appeal” and insert instead “Appeal, other than proceedings commenced under rule 4.”

- (ad) Part 51 rule 51 (2) (a)
After “ground” insert “in the affidavit or in the summary of argument”.
- (ae) Part 51 rule 51 (2) (b)
After “support” insert “or the white folder”.
- (af) Part 51 rule 57
 - (i) Omit “summons” and insert instead “summons, other than a summons under rule 50 (2),”.
 - (ii) Omit paragraph (b) and insert instead—
(b) unless the grounds of the application are stated in an affidavit or summary of argument—state those grounds.
- (ag) SCHEDELE F Form 59
Omit the form and insert instead

Form 59

(To be set out in accordance with Form 1.)

[Where Part 51, rule 57 (a) applies, add, above the name of the claimant in the title—

In the matter of section _____ of the _____ (name) Act 19 _____.
P 51, rr: 4 (1) (a), (2) (a).

ORDINARY SUMMONS FOR LEAVE TO (APPEAL or CROSS-APPEAL)

The proceedings in respect of which leave to {appeal or cross-appeal} is sought were heard on 7 and 8 May 19 ____ and decided on May 19 ____.

The claimant claims an order granting leave to (appeal or cross-appeal) from the decision of _____ (or as the case may be) (or the following part of the decision of _____ (or as the case may be)—

(state the part)).

[Where there is an opponent. add—

To the opponent (address):

The rules require you to file and serve a response (as to which see Part 51 rule 4C) within 28 days of service of this summons and the documents referred to in Part 51 rule {4B (1) or 4C (3)} upon you, in default of which the summons may be disposed of:

- (a) in your absence; and
- (b) solely on the basis of the claimant's argument.

*[If opponent has not filed a summons in the proceedings add—
Before you file the notice or take any other step in the proceedings, you must enter an appearance in the Registry unless you have by then filed a summons in the proceedings.]*

Place: *(address of Court)*.

[Where the time for service under Part 5 rule 4 (3) (b) or (4) (b) has been abridged, add—

The time before which this summons is to be served has been abridged by the Court to 5 p.m. on 5 May 19 *or as the case may require.*

[Where proceedings have been stayed, add—

By order made on *(date)* by *{Justice or as the case may be}* all proceedings under *(describe judgment or order)* were stayed until *{the above date or after the hearing of these proceedings or as the case may be}.*

Claimant: *(name, address)*

Solicitor: *(name, address, telephone and fax numbers and the name of the person in the solicitor's office handling the matter)*

[Tutor: (name, address)]

Claimant's Address for Service: *(Part 9 rule 6)*

Address of Registry:

Form 59A

(To be set out in accordance with Form 1.)

[Where Part 51, rule 57 (a) applies. add, above the name of the claimant in the title—

In the matter of section of the (name) Act 19 .]

P 51, rr. 4 (l) (b), (2) (b).

HOLDING SUMMONS FOR LEAVE TO {APPEAL or CROSS-APPEAL}

The proceedings in respect of which leave to *{appeal or cross-appeal}* is sought were heard on 7 and 8 May 19 and decided on May 19 .

The claimant claims an order granting leave to *{appeal or cross-appeal}* from the decision of *(or as the case may be)*

(or the following part of the decision of *(or as the case may be)*—
(state the part)).

[Where there is an opponent, add—

To the opponent *(address)*:

This summons is filed under Part 51 rule 4 and allows the claimant to proceed with its application for leave, at any time up to 3 months after the date of service of the summons, by filing and serving an ordinary summons.

[If opponent has not filed a summons in the proceedings add—

Before you file the notice or take any other step in the proceedings, you must enter an appearance in the Registry unless you have by then filed a summons in the proceedings.]

[Where proceedings have been stayed, add—

By order made on *(date)* by *{Justice or as the case may be}* all proceedings under *(describe judgment or order)* were stayed until *{ the above date or after the hearing of these proceedings or as the case may be}*.]

Claimant: *(name, address)*

Solicitor: *(name, address, telephone and fax numbers and the name of the person in the solicitor's office handling the matter)*

[Tutor: (name, address)]

Claimant's Address for Service: *(Part 9 rule 6)*

Address of Registry:

(ah) SCHEDULE F Form 60C

Omit the form and insert instead—

Form 60C

P. 51, rr. 4A (1) 6 (5), P. 51AA r. 5 (5).

NOTICE OF DISCONTINUANCE OF {APPEAL or APPLICATION FOR LEAVE})

The appellant hereby discontinues the {appeal or application for leave) the subject of these proceedings.

(ai) SCHEDULE F Index of Forms

(i) Omit the matter relating to Form 59 and insert instead—

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Ordinary summons for leave to appeal or cross-appeal (P. 5 1, rr. 4 (1) (a) (2) (a)).

(ii) After the matter relating to Form 59 insert in the appropriate columns—

59A. Holding summons for leave to appeal or cross-appeal (P. 51 rr. 4 (1) (b), (2) (b)).

(iii) Omit the matter relating to Form 60C and insert instead—

Notice of discontinuance of appeal or application for leave (P. 51, rr. 4A (1), 6 (5), P. 51AA, r. 5 (5)).

3. The amendments contained in paragraph 2 shall apply to proceedings commenced in the Court of Appeal on or after 1 February 1998.

EXPLANATORY NOTE

(This note does not form part of the rules).

The object of the amendments contained in paragraph 2 is to—

- (a) allow applications for leave to appeal to be dealt with on the papers without oral argument where all relevant parties agree to this course being adopted or where the application for leave is not opposed and to facilitate the hearing of contested appeals, in order to reduce costs and time involved in applications for leave (it is anticipated that the number of applications for leave will increase following the recent imposition of a \$100,000 limit below which many District Court appeals will require leave);
- (b) to extend, from 14 to 28 days, the time allowed for taking certain steps in relation to applications for leave to appeal or to cross-appeal;
- (c) allow a holding summons to be used in relation to applications for leave to appeal and to cross-appeal, in order to reduce the cost of applications which do not proceed; and
- (d) clarify the persons upon whom service of various documents under Part 5 1 of the Supreme Court Rules must be effected.

M.A. Blay, the Secretary of the Rule Committee.