



New South Wales

## **SUPREME COURT RULES (AMENDMENT No. 326) 1999**

1. These rules are made by the Rule Committee on 15 February 1999.
2. The Criminal Appeal Rules are amended as follows—
  - (a) After Rule 85, insert—

### **86 Application for guideline judgment**

(1) Application may be made for a guideline judgment under section 26 of the Criminal Procedure Act 1986 by sending to the Registrar an application in Form XXIV.

(2) The Attorney General shall, unless the Court or a Judge of the Court otherwise orders, send to the Senior Public Defender:

- (a) a copy of the application—on the day the application is sent to the Registrar;
- (b) a statement or summary of any submissions that the Attorney General proposes to make on the hearing of the application—within a reasonable time before the hearing; and
- (c) a copy of any written submissions sent by the Attorney General to the Registrar and not previously sent to the Senior Public Defender—on the day the submissions are sent to the Registrar.

(3) The Senior Public Defender shall, unless the Court or a Judge of the Court otherwise orders, send to the Attorney General:

- (a) a statement or summary of any submissions that the Senior Public Defender proposes to make on the hearing of the application—within a reasonable time before the hearing; and
- (b) a copy of any written submissions sent by the Senior Public Defender to the Registrar and not previously sent to the Attorney General—on the day the submissions are sent to the Registrar.

### **87 Discontinuance of application**

(1) The Attorney General may discontinue an application under section 26 of the Criminal Procedure Act 1986 by sending written notice of discontinuance to the Registrar.

(2) Discontinuance under this rule shall not prevent the Attorney General from bringing a fresh application seeking the same guideline judgment.

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(b) **Forms**

After Form XXIII insert:

XXIV

Criminal Procedure Act 1986

Application for Guideline Judgment

Application is hereby made by the Attorney General to the Court of Criminal Appeal under section 26 of the Criminal Procedure Act 1986 for a guideline judgment concerning (*set out the offence or category of offences to which the application relates*).

(*Submissions with respect to the framing of the guidelines may be set out here.*)

Dated (*date*)

Attorney General

3. The Supreme Court Rules 1970 are amended as follows:

(a) Part 9 rule 7A (1) (b)

Omit “1902” and insert instead “1902, as in force prior to the commencement of the Justices Legislation Amendment (Appeals) Act 1998,”

(b) Part 32 rule 9

Omit the rule and insert instead—

**Application**

9. This Division applies to proceedings to which Division 1 of Part 5 of the Justices Act 1902 (the “**Justices Act**”), as in force prior to the commencement of the Justices Legislation Amendment (Appeals) Act 1998, applies.

(c) Part 51A rule 1 (c)

Omit “(which Divisions relate to stated cases by and orders restraining proceedings before Justices)”.

(d) After Part 51A insert:

**PART 51B—APPEALS TO THE COURT UNDER PART 5  
OF THE JUSTICES ACT 1902**

**Application**

1 This Part applies to an appeal to the Court to which Part 5 of the Justices Act 1902 (as amended by the Justices Legislation Amendment (Appeals) Act 1998) applies.

### **Assignment of business**

2 Proceedings to which this Division applies shall be commenced in the Common Law Division.

### **Interpretation**

3 In this Part, unless the context or subject matter otherwise indicates or requires:

**“tribunal below”** means, in relation to an appeal to the Court, the court or the person whose decision is under appeal;

**“decision”** includes a conviction, order or sentence, judgment, opinion, direction or determination;

**“informant”** includes a complainant, the Director of Public Prosecutions and any other person responsible for the conduct of a prosecution;

**“material date”** in relation to an appeal means:

- (a) where the appeal is from the decision of a court, the date on which the decision is pronounced or given; and
- (b) where the appeal is from any other person, the date on which notice of the decision was given to the person who wishes to appeal by or on behalf of the person who made the decision.

### **Extension of time, and orders as to service, by magistrate**

4 (1) This rule applies where the decision appealed from is that of a magistrate.

(2) Prior to the commencement of proceedings in the Court, the court below, on such terms and conditions (if any) as it thinks fit, may extend any time fixed by this Part, as well after as before the time expires, whether or not an application for the extension is made before the time expires.

(3) Subrule (1) does not affect Part 2 rule 3 (which relates to an extension of time).

(4) For the purposes of Part 9, the powers of the Court making an order under Part 9 rules 10 and 11 (which relate to substituted service and confirmation of informal service) may be exercised by a magistrate making an order in the proceedings.

**Leave to appeal or cross-appeal**

5 (1) An application for leave to appeal and, subject to subrule (2), to cross-appeal shall be made by summons that states an appointment for hearing in accordance with Part 5 rule 4A.

(2) A party served with a summons for leave to appeal who wishes to apply for leave to cross-appeal may do so by motion on the hearing of the summons, supported by an affidavit stating the matters set out in subrule (7), without filing or serving a summons or notice of the motion.

(3) The summons for leave to appeal shall be filed within 28 days after the material date or within such extended time as the Court may fix.

(4) A summons for leave to cross-appeal shall be filed within 28 days after service of the summons instituting the appeal, or the summons for leave to appeal, or within such further time as the Court may fix.

(5) The Court may extend time under subrule (3) or (4) at any time.

(6) The summons for leave to appeal or to cross-appeal shall include a claim for the decision which the party instituting the appeal seeks in place of the decision of the tribunal below.

(7) The applicant shall file and serve with or subscribe to the summons a brief but specific statement of:

- (a) the grounds relied upon in support of the appeal and, in particular, the grounds upon which it is contended that there is any error of law;
- (b) as to whether the appeal is from the whole or part only and what part of the decision in the tribunal below;
- (c) the nature of the case;
- (d) the questions involved; and
- (e) the reasons why leave should be given.

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(8) The applicant for leave to appeal shall, unless the Court otherwise directs, not later than 3 days before the date fixed for the hearing of the application for leave to appeal, file an affidavit exhibiting:

- (a) a copy of the transcript of the proceedings in the tribunal below, unless a transcript cannot be obtained in respect of proceedings of that type; and
- (b) a copy of the reasons for decision in the tribunal below, unless the tribunal below has not given, and does not intend to give, written reasons.

(9) Where an application for leave to appeal or to cross-appeal has been granted:

- (a) the summons for leave to appeal shall be deemed a summons instituting an appeal in respect of the grounds upon which the Court has granted such leave; and
- (b) the summons, or the affidavit under subrule (2), for leave shall be deemed a notice of cross-appeal instituting a cross-appeal in respect of the grounds upon which the Court has granted such leave.

(10) A party applying for an extension of time under subrule (3) or (4) shall:

- (a) include that application in the summons for leave to appeal or cross-appeal; or
- (b) lodge with his or her notice of motion or summons a draft, completed as far as possible, of the summons under subrule (1) and the statement under subrule (7), to be filed if an extended time is fixed.

### **Time for appeal**

6 (1) Subject to any provisions made by or under any Act, an appeal must be instituted within 28 days after the material date or within such extended time as the Court may fix.

(2) The Court may extend time under subrule (1) at any time.

(3) A party applying for an extension of time under subrule (2) shall:

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- (a) include that application in the summons instituting the appeal; or
  - (b) lodge with his or her notice of motion or summons a draft, completed as far as possible, of the summons under rule 7 and the statement under rule 8, to be filed if an extended time is fixed.

### **Institution of appeal**

7 Subject to rule 5, an appeal to the Court shall be instituted by filing a summons that:

- (a) states an appointment for hearing in accordance with Part 5 rule 4A; and
- (b) claims the decision which the party instituting the appeal seeks in place of the decision of the tribunal below.

### **Statement of ground**

8 The plaintiff shall file and serve with or subscribe to the summons instituting the appeal a brief but specific statement:

- (a) of the grounds relied upon in support of the appeal and, in particular, the grounds upon which it is contended that there is any error of law; and
- (b) as to whether the appeal is from the whole or part only and what part of the decision in the tribunal below.

### **Transcript and reasons for decision**

9 The plaintiff shall, unless the Court otherwise directs, not later than 3 days before the date fixed for the hearing of the summons, file an affidavit exhibiting:

- (a) a copy of the transcript of the proceedings in the tribunal below, unless a transcript cannot be obtained in respect of proceedings of that type; and
- (b) a copy of the reasons for decision in the tribunal below, unless the tribunal below has not given, and does not intend to give, written reasons.

### **Parties**

10 (1) Any informant and each person who is directly affected by the relief sought in the appeal or is interested in maintaining the decision under appeal shall be joined as a defendant to the appeal.

(2) Subject to subrule (3), the tribunal below shall be joined as a defendant.

(3) Subrule (2) shall not apply where the tribunal below is a court.

(4) The Court may order the addition or removal of any person as a party to an appeal.

(5) A person shall not be made a plaintiff without his consent.

### **Service**

11 (1) Subject to subrule (2), the plaintiff shall, on the day of filing a summons instituting an appeal or for leave to appeal, or as soon as practicable thereafter, subject to Part 9 rule 8, serve the summons on the defendant personally.

(2) When the summons contains an application for extension of time, service shall be effected on the day when the application is granted, or as soon as practicable thereafter.

### **Directions for service**

12 Where the Court makes an order granting:

- (a) leave to appeal or to cross-appeal; or
  - (b) an extension of time for:
    - (i) appealing or cross-appealing; or
    - (ii) applying for leave to appeal or to cross-appeal,
- the Court may, at the same time or afterwards, give directions for service other than personal service of any summons or notice of cross-appeal by which, pursuant to the order, proceedings are commenced for an appeal or for leave to appeal or to cross-appeal, and of any other document in the proceedings so commenced.

### **Filing with tribunal below**

13 (1) Where the tribunal below is a court, the plaintiff shall, on the date of instituting the appeal, file a copy of the summons instituting the appeal in the registry or office of that court.

(2) For the purposes of subrule (1), the date of instituting the appeal shall:

- (a) if the summons instituting the appeal contains an application for extension of time—the day the application is granted; or
- (b) if a summons for leave is deemed by rule 5 (9) to be the summons instituting the appeal—the day when the summons is so deemed.

(3) If compliance with subrule (1) is not in accordance with the practice or organisation of that court, the plaintiff shall lodge a copy of the summons with an officer of that court concerned with its records or process.

#### **Security for costs**

14 (1) The Court may, in special circumstances, order that such security as the Court thinks fit be given of the costs of an appeal to the Court.

(2) Subject to subrule (1), no security for the costs of an appeal to the Court shall be required.

(3) Subrules (1) and (2) do not affect the powers of the Court under Part 53, Division 1 (which relates to security for costs).

#### **Date of hearing of appeal**

15 Unless the Court otherwise orders, the appeal shall not be heard before 21 days after service of the summons by which the appeal is instituted.

#### **Amendment**

16 (1) The summons by which the appeal is instituted and any statement under rule 8 may be amended by the plaintiff without leave by filing a supplementary notice not less than 7 days before the day appointed for hearing.

(2) The plaintiff must, on the day of filing the supplementary notice, serve it on the other parties and must file or lodge a copy of it in accordance with rule 13 as if it were a summons.

(3) Subrule (1) does not affect the powers of the Court under Part 20 (which relates to amendment).



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### **Cross-appeal**

17 (1) Where a defendant wishes to appeal from the whole or part of a decision, the defendant shall file a notice of cross-appeal.

(2) The defendant must file the notice of cross-appeal within the later of:

(a) 28 days after service of the summons instituting the appeal on the defendant; and

(b) 14 days after leave to appeal or to cross-appeal is given.

(3) Subject to subrules (1), (2) and (4), the provisions of this Part relating to an appeal and a summons apply to the cross-appeal and a notice of cross-appeal.

(4) Part 6 and rule 6 (which relates to time for appeal) do not apply to a cross-appeal or notice of cross-appeal.

### **Notice of contention**

18 Where a defendant wishes to contend that the decision of the tribunal below should be affirmed on grounds other than those relied upon by the tribunal below but does not seek a discharge or variation of any part of the decision of the tribunal below, the defendant need not file a notice of cross-appeal but, within the time limited by rule 17 (2), the defendant must:

(a) file notice of that contention stating, briefly but specifically, the grounds relied upon in support of the contention; and

(b) serve the notice of contention on each other party to the appeal.

(e) Part 54 rule 6 (1)

Omit “1902” and insert instead “1902, as in force prior to the commencement of the Justices Legislation Amendment (Appeals) Act 1998,”

(f) SCHEDULE E Part 1

After the matter relating to Part 49, in the appropriate columns insert—

Part 51B

Rule 5 (8) Direction concerning filing of affidavit —

Rule 9 Direction concerning filing of affidavit —

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Supreme Court Rules (Amendment No 326) 1999

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4. The Supreme Court Rules 1970 are further amended as follows—
- (a) Part 1 rule 10 (1)
    - (i) Omit paragraph (b) and insert instead—
      - (b) subject to subrule (4), in respect of proceedings in a Division (except where paragraph (b1) applies)—a number preceded by the letter “S”;
    - (ii) From paragraph (b1) omit “in the Probate Division”.
    - (iii) After subrule (3) insert—
      - (4) Subrule (1) (b) shall not apply to proceedings:
        - (a) in the Common Law Division where the document is for use in proceedings for trial or hearing at a place outside Sydney at which there is a registry and is not received in the Sydney registry; or
        - (b) specified in the Third Schedule to the Act or assigned by Part 75.
  - (b) Part 12 rule 4
    - (i) Renumber the rule as 4 (1)
    - (ii) After subrule (1) (as renumbered) insert—
      - (2) There shall be assigned to the Common Law Division proceedings in the Court:
        - (a) under the provisions of the Acts and Commonwealth Acts mentioned in column 1 of Part 1 of Schedule H; and
        - (b) mentioned in Part 2 of Schedule H.
      - (3) The matter in column 2 of Part 1 of Schedule H is inserted for convenience of reference only and does not affect the operation of the rules.
  - (c) Part 12 rule 6
    - Omit the rule.
  - (d) Part 12 rule 7 (a)
    - Omit the paragraph and insert instead:
      - (a) the Fair Trading Act 1987 (except proceedings specified in the Third Schedule to the Act or assigned by Part 75);

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- (e) Part 14 rule 1 (2)  
Omit the subrule and insert instead—  
(2) Subrule (1) does not apply to:
    - (a) any proceedings assigned by the Act or by or in accordance with the rules or by or under any other Act to the Court of Appeal or the Equity Division (other than proceedings assigned by this Part or with a view to entry in the List);
    - (b) proceedings to which Part 76 or Part 78 applies;
    - (c) proceedings assigned by Part 12 rule 4 (2) or Part 77 rule 84 (3) or rule 92 or rule 96 or rule 99 or rule 100 or rule 104 or rule 114 or rule 116 or rule 118; or
    - (d) proceedings:
      - (i) for commanding or otherwise requiring a public body or a public officer to perform a public duty;
      - (ii) for prohibiting or otherwise restraining a public body or a public officer from performing or purporting to perform any act;
      - (iii) for determining by declaration or otherwise any matter concerning the powers of a public body or a public officer; and
      - (iv) in appeals or applications to the Court in respect of decisions of a public body or a public officer under any enactment specified in the rules for the purposes of this subsection.
    - (e) proceedings specified in the Third Schedule to the Act or assigned by Part 75.
  - (f) Part 27 rule 1B (2) (a)  
Omit “Criminal” and insert instead “Common Law”.
  - (g) Part 32 rule 33 (3)  
Omit “Registrar of the Administrative Law Division” and insert instead “Prothonotary”.
  - (h) Part 49 rule 1 (1)  
After “List” insert “or to which Part 76 or Part 78 applies”.
  - (i) Part 63 rule 6 (2)  
After “List” insert “or to which Part 76 or Part 78 applies”.
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- (j) Part 75 rule 3  
Omit “Criminal” and insert instead “Common Law”.
- (k) Part 75 rule 3A (1)  
Omit the subrule and insert instead—  
(1) Proceedings in the Court under the Children (Criminal Proceedings) Act 1987 (“the subject Act”), are assigned to the Common Law Division.
- (l) Part 75 rule 3I  
Omit “In the Criminal Division” and insert instead “specified in the Third Schedule to the Act or assigned by Part 27 rule 1B (2) or by Part 75”.
- (m) Part 75 rule 5A  
Omit “Criminal” and insert instead “Common Law”.
- (n) Part 76 rule 2  
Omit “Protective” and insert instead “Equity”.
- (o) Part 76 rule 3  
Omit the rule and insert instead—  
3. Notwithstanding Part 65 rule 1 (2) and (3) (which relate to the heading and title), the word “Protective” and (on the next line) the words “In the matter of” together with the name of the subject person, protected person or patient shall appear on any document in any proceedings referred to in rule 2 above the serial number, in addition to the matter required under Part 65 rule 1.
- (p) Part 76 rule 7  
Omit “in the Protective Division” and insert instead “referred to in rule 2”.
- (q) Part 77 rule 32  
Omit “the Protective Division” and insert instead “Equity”.
- (r) Part 77 rule 54  
(i) From subrule (1) omit “Subject to subrule (2), proceedings” and insert instead “Proceedings”.  
(ii) Omit subrule (2).

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- (s) Part 77 rule 77
    - (i) From subrule (1) omit “Subject to subrule (2), proceedings” and insert instead “Proceedings”.
    - (ii) Omit subrule (2).
  - (t) Part 77 rule 84 (1)
 

Omit “registrar of the Administrative Law Division” and insert instead “Prothonotary”.
  - (u) Part 77 rule 84 (2) and (3), 92 (b), 96, 99, 100, 104, 114, 116 and 118
 

Omit “Administrative” wherever appearing and insert instead “Common”.
  - (v) Part 78 rule 1
 

Omit—

“registrar” means the Registrar in Probate.

and insert instead—

“registrar” means the Registrar in Equity or such deputy registrar as may be authorised to exercise the powers of the registrar under this Part.
  - (w) Part 78 rule 3
 

Omit the rule and insert instead—

3. (1) This rule applies to proceedings:

    - (a) to which this Part applies;
    - (b) in the Court under any of the following provisions of the Trustee Companies Act 1964:
      - (i) Section 6 (2) (grant of administration);
      - (ii) Section 15 (appointment of administrator);
      - (iii) Section 18 (3) (review of commission of trustee);
      - (iv) Section 20A (1) (filing accounts relating to an estate);
      - (v) Section 21 (2) (ordering account relating to an estate);
 and
    - (c) on an application under section 19 (3) of the Family Provision Act 1982.

(2) In proceedings to which this rule applies:
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- (a) there shall be added to a document, after the solid line appearing under the name of the filing party, the word “Probate” and (on the next line) the words “The estate of” with a reference to the name, place of residence and occupation of the deceased at the time of the deceased’s death; and
  - (b) if Part 78 Division 3 applies:
    - (i) Part 65 rule 1 (2), (3) and (4) (which relates to heading and title) shall not apply; and
    - (ii) there shall be added to a summons, after the matter referred to in paragraph (a) the words:
      - (A) “Date of death:”, with a reference to the date of the death of the deceased;
      - (B) “Gross value:”, with a reference to the gross value of the estate;
      - (C) “Net value:”, with a reference to the net value of the estate; and
      - (D) “Pages in will:”, with a reference to the number of pages in the will.
  - (x) Part 78 rule 4B  
Omit “Probate” and insert instead “Equity”.
  - (y) SCHEDULE F  
Explanatory Notes 1 and 3
    - (i) Omit “Protective Division” wherever occurring and insert instead “protective proceedings”.
    - (ii) Omit “Probate Division” wherever appearing and insert instead “probate proceedings”.
  - (z) SCHEDULE F Form 87  
Omit “PROTECTIVE DIVISION” wherever appearing and insert instead—  
EQUITY DIVISION  
PROTECTIVE
  - (aa) SCHEDULE F Forms 91, 92 and 93 and 116  
Omit “Probate Division” wherever appearing and insert instead “Equity Division”.

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- (ab) SCHEDULE F Forms 106D, 106E. 108, 109, 111, 114, 115, 115A. 118 and 120

Omit “Probate Division” wherever appearing and insert instead—  
Equity Division  
Probate

- (ac) SCHEDULE H

Omit from the heading to the Schedule “ADMINISTRATIVE” and insert instead “COMMON”.

5. The amendments contained in paragraph 4 shall commence at the same time as Schedule 10 to the Courts Legislation Further Amendment Act 1998 commences.

#### EXPLANATORY NOTE

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

1. The objects of the amendments contained in paragraph 2 are to:

- (a) prescribe the manner of making an application for a guideline judgment under s 26 of Criminal Procedure Act 1986;
- (b) provide for notice of applications and submissions to be given; and
- (c) provide for discontinuance of an application.

2. The objects of the amendments contained in paragraph 3 are to prescribe procedures for appeals to the Supreme Court under Part 5 of the Justices Act 1992, as amended by the Justices Legislation Amendment (Appeals) Act 1998 (which abolishes stated cases and provides for an appeal instead) and to make consequential and ancillary amendments to the rules.

3. The object of the amendments contained in paragraph 4 is to make amendments consequential on the Courts Legislation Further Amendment Act 1998 which abolishes the Administrative Law Division, the Admiralty Division, the Commercial Division, the Criminal Division, the Family Law Division, the Probate and Protective Division.

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