

Criminal Procedure Amendment (Case Management) Act 2009 No 112

[2009-112]



New South Wales

Status Information

Currency of version

Repealed version for 14 December 2009 to 1 February 2010 (accessed 11 July 2024 at 22:20)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Repeal**

The Act was repealed by sec 30C of the [Interpretation Act 1987 No 15](#) with effect from 2.2.2010.

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 2 February 2010

Criminal Procedure Amendment (Case Management) Act 2009 No 112



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Criminal Procedure Amendment (Case Management) Act 2009 No 112



New South Wales

An Act to amend the *Criminal Procedure Act 1986* in relation to case management of criminal trials; and for other purposes.

1 Name of Act

This Act is the *Criminal Procedure Amendment (Case Management) Act 2009*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of *Criminal Procedure Act 1986* No 209

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

trial Judge means the Judge before whom trial proceedings, following empanelment of a jury in proceedings on indictment, are heard.

[2] Section 3 (4)

Insert after section 3 (3):

(4) In this Act, a reference to the **empanelment of a jury** is, in the case of a trial by a Judge alone, taken to be a reference to the point in time when the Judge first assumes the role of the tribunal of fact.

[3] Section 130A

Omit the section. Insert instead:

130A Pre-trial orders and orders made during trial bind trial Judge

- (1) A pre-trial order made by a Judge in proceedings on indictment is binding on the trial Judge in those proceedings unless, in the opinion of the trial Judge, it would not be in the interests of justice for the order to be binding.
- (2) If, on an appeal against a conviction for an offence in proceedings on indictment, a new trial is ordered, a pre-trial order made by a Judge, or an order made by the trial Judge, in relation to the proceedings from which the conviction arose is binding on the trial Judge hearing the fresh trial proceedings unless:
 - (a) in the opinion of the trial Judge hearing the fresh trial proceedings, it would not be in the interests of justice for that order to be binding, or
 - (b) that order is inconsistent with an order made on appeal.
- (3) If proceedings on indictment before a trial Judge are discontinued for any reason, a pre-trial order made by a Judge, or an order made by the trial Judge, in relation to those proceedings is binding on a trial Judge hearing any subsequent trial proceedings relating to the same offence as the discontinued proceedings unless, in the opinion of the trial Judge hearing the subsequent trial proceedings, it would not be in the interests of justice for the order to be binding.
- (4) In this section, ***pre-trial order*** means any order made after the indictment is first presented but before the empanelment of a jury for a trial.

[4] Chapter 3, Part 3, Division 3

Omit the Division. Insert instead:

Division 3 Case management provisions and other provisions to reduce delays in proceedings

134 Purpose

- (1) The purpose of this Division is to reduce delays in proceedings on indictment by:
 - (a) requiring certain pre-trial disclosure by the prosecution and the defence, and
 - (b) enabling the court to undertake case management where suitable in those proceedings, whether on its own motion or on application by a party to the proceedings.
- (2) Case management measures that are available to the court under this Division include the ordering of pre-trial hearings, pre-trial conferences and further pre-trial disclosure. The court has a discretion in determining which (if any) of those measures are suitable in the proceedings concerned.

135 Definitions

(1) In this Division:

court means the Supreme Court or District Court.

pre-trial conference means a conference held under section 140.

pre-trial hearing means a hearing held under section 139.

(2) In this Division, a reference to the ***accused person*** is to be read as including a reference to the Australian legal practitioner representing the accused person.

136 Directions for conduct of proceedings

At the first mention of proceedings in the court before which the trial is proposed to be heard, the presiding Judge is to give directions with respect to the future conduct of the trial, including a direction as to the time by which notice of the prosecution case is to be given under section 137 and notice of the defence response is to be given under section 138.

137 Notice of prosecution case to be given to accused person

(1) The prosecutor is to give to the accused person notice of the prosecution case that includes the following:

- (a) a copy of the indictment,
- (b) a statement of facts,
- (c) a copy of a statement of each witness whose evidence the prosecutor proposes to adduce at the trial,
- (d) a copy of each document, evidence of the contents of which the prosecutor proposes to adduce at the trial,
- (e) if the prosecutor proposes to adduce evidence at the trial 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,
- (f) a copy of any exhibit that the prosecutor proposes to adduce at the trial,
- (g) a copy of any chart or explanatory material that the prosecutor proposes to adduce at the trial,
- (h) if any expert witness is proposed to be called at the trial by the prosecutor, a copy of each report by the witness that is relevant to the case,
- (i) a copy of any information, document or other thing provided by police

officers 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 accused person,

- (j) a list identifying:
 - (i) any information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as being of relevance to the case but that is not in the prosecutor's possession and is not in the accused person's possession, and
 - (ii) the place at which the prosecutor believes the information, document or other thing is situated,
 - (k) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness.
- (2) The regulations may make provision for or with respect to the form and content of a statement of facts for the purposes of subsection (1) (b).

138 Notice of defence response to be given to prosecutor

The accused person is to give the prosecutor notice of the defence response that includes the following:

- (a) the name of any Australian legal practitioner proposed to appear on behalf of the accused person at the trial,
- (b) notice of any consent that the accused person proposes to give at the trial under section 190 of the *Evidence Act 1995* in relation to each of the following:
 - (i) a statement of a witness that the prosecutor proposes to adduce at the trial,
 - (ii) a summary of evidence that the prosecutor proposes to adduce at the trial,
- (c) a statement as to whether or not the accused person intends to give any notice under section 150 (Notice of alibi),
- (d) a statement as to whether or not the accused person intends to give any notice under section 151 (Notice of intention to adduce evidence of substantial mental impairment).

139 Pre-trial hearings

- (1) At the first mention of proceedings in the court before which the trial is proposed to be heard or at any other time, the court may order the prosecutor and the accused person to attend one or more pre-trial hearings before the court so long as the time appointed for any such hearing occurs after the indictment has been

presented or filed.

- (2) During a pre-trial hearing, the court may make such orders, determinations or findings, or give such directions or rulings, as it thinks appropriate for the efficient management and conduct of the trial.
- (3) Without limiting subsection (2), the court may take any or all of the following action under that subsection:
 - (a) hear and determine an objection to the indictment,
 - (b) order the holding of a pre-trial conference under section 140,
 - (c) order pre-trial disclosure by the prosecutor or the accused person under section 141,
 - (d) give a direction under section 145 (3),
 - (e) give a ruling or make a finding under section 192A of the *Evidence Act 1995* as if the trial had commenced,
 - (f) hear and determine a submission that the case should not proceed to trial,
 - (g) give a ruling on any question of law that might arise at the trial.
- (4) Despite any other provision of this Act, the court may make any order, determination or finding, or give any ruling, under this section on application by a party to the proceedings or on the court's own initiative.
- (5) Any order, determination or finding made, or ruling given, by the court under this section is binding on the trial Judge in the proceedings unless, in the opinion of the trial Judge, it would not be in the interests of justice for the order, determination, finding or ruling to be binding.
- (6) Except with the leave of the court, a party to proceedings may not raise a matter referred to in subsection (3) (a) or (e) at trial if a pre-trial hearing was held in the proceedings and the matter was not raised at the pre-trial hearing.
- (7) Leave is not to be granted under subsection (6) unless the court is of the opinion that it would be contrary to the interests of justice to refuse leave to raise the matter concerned.

140 Pre-trial conferences

- (1) At the first mention of proceedings in the court before which the trial is proposed to be heard or at any other time, the court may order that a pre-trial conference is to be held so long as the time appointed for any such conference occurs after the indictment has been presented or filed.

- (2) The court may order the holding of a pre-trial conference under this section on application of any party or on the court's own initiative.
- (3) The court may make such an order only if the accused person will be represented by an Australian legal practitioner at the pre-trial conference.
- (4) The purpose of the pre-trial conference is to determine whether the accused person and the prosecutor are able to reach agreement regarding the evidence to be admitted at the trial.
- (5) The following persons must be present during the pre-trial conference:
 - (a) the prosecutor,
 - (b) the Australian legal practitioner representing the accused person.
- (6) If the accused person has been charged jointly with any other person with the offence concerned, a joint pre-trial conference may be held in respect of two or more co-accused, but only with the consent of the prosecution and each of the co-accused concerned.
- (7) A requirement under this section that a person be present for the purposes of a pre-trial conference is taken to be satisfied if the person is present or available by way of an audio visual link or telephone.
- (8) Within 7 days after the holding of a pre-trial conference:
 - (a) the prosecutor and the Australian legal practitioner who represented the accused person at the pre-trial conference must complete a pre-trial conference form, and
 - (b) the prosecutor must file the pre-trial conference form with the court.
- (9) The pre-trial conference form:
 - (a) is to indicate the areas of agreement and disagreement between the accused person and the prosecutor regarding the evidence to be admitted at the trial, and
 - (b) is to be signed by the prosecutor and the Australian legal practitioner representing the accused person.
- (10) Except with the leave of the court, a party to proceedings may not object to the admission of any evidence at trial if the pre-trial conference form indicates that the parties have agreed that the evidence is not in dispute.
- (11) Leave is not to be granted under subsection (10) unless the court is of the opinion that it would be contrary to the interests of justice to refuse leave.

141 Court may order pre-trial disclosure in particular case

- (1) After the indictment is presented or filed in proceedings, the court may make any or all of the following orders, but only if the court is of the opinion that it would be in the interests of the administration of justice to do so:
 - (a) order that the prosecutor is to give notice in accordance with section 142,
 - (b) order that the accused person is to give notice of the defence response to the prosecution's notice in accordance with section 143,
 - (c) order that the prosecution is to give notice of the prosecution response to the defence response in accordance with section 144.
- (2) The court may order pre-trial disclosure under this section on application of any party or on the court's own initiative.
- (3) The court may order pre-trial disclosure only if the court is satisfied that the accused person will be represented by an Australian legal practitioner.
- (4) The court may limit pre-trial disclosure to any specified aspect of the proceedings.
- (5) Pre-trial disclosure required by an order under this section is to be made in accordance with a timetable determined by the court.

142 Prosecution notice—court-ordered pre-trial disclosure

For the purposes of section 141 (1) (a), the prosecution's notice is to contain the following:

- (a) the matters required to be included in the notice of the prosecution case under section 137,
- (b) 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 accused person,
- (c) a list identifying the statements of those witnesses who are proposed to be called at the trial by the prosecutor.

143 Defence response—court-ordered pre-trial disclosure

For the purposes of section 141 (1) (b), the notice of the defence response is to contain the following:

- (a) the matters required to be included in a notice under section 138,
- (b) a statement, in relation to each fact set out in the statement of facts provided

by the prosecutor, as to whether the accused person considers the fact is an agreed fact (within the meaning of section 191 of the *Evidence Act 1995*) or the accused person disputes the fact,

- (c) a statement, in relation to each matter and circumstance set out in the statement of facts provided by the prosecutor, as to whether the accused person takes issue with the matter or circumstance as set out,
- (d) notice as to whether the accused person proposes to dispute the admissibility of any proposed evidence disclosed by the prosecutor and the basis for the objection,
- (e) if the prosecutor disclosed an intention to adduce expert evidence at the trial, notice as to whether the accused person disputes any of the expert evidence and which evidence is disputed,
- (f) a copy of any report, relevant to the trial, that has been prepared by a person whom the accused person intends to call as an expert witness at the trial,
- (g) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,
- (h) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,
- (i) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,
- (j) notice as to whether the accused person proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor,
- (k) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges,
- (l) notice of any consent the accused person proposes to give under section 184 of the *Evidence Act 1995*.

144 Prosecution response to defence response—court-ordered pre-trial disclosure

For the purposes of section 141 (1) (c), the notice of the prosecution response to the

defence response is to contain the following:

- (a) if the accused person has disclosed an intention to adduce expert evidence at the trial, notice as to whether the prosecutor disputes any of the expert evidence and, if so, in what respect,
- (b) if the accused person has disclosed an intention to tender any exhibit at the trial, notice as to whether the prosecutor proposes to raise any issue with respect to the continuity of custody of the exhibit,
- (c) if the accused person has disclosed an intention to tender any documentary evidence or other exhibit at the trial, notice as to whether the prosecutor proposes to dispute the accuracy or admissibility of the documentary evidence or other exhibit,
- (d) notice as to whether the prosecutor proposes to dispute the admissibility of any other proposed evidence disclosed by the accused person, and the basis for the objection,
- (e) a copy of any information, document or other thing in the possession of the prosecutor, not already disclosed to the accused person, that might reasonably be expected to assist the case for the defence,
- (f) a copy of any information, document or other thing that has not already been disclosed to the accused person and that is required to be contained in the notice of the case for the prosecution.

145 Dispensing with formal proof

- (1) If a fact, matter or circumstance was alleged in a notice required to be given to the accused person by the prosecutor in accordance with this Division and the accused person was required to give a defence response under section 143 but did not disclose in the response an intention to dispute or require proof of the fact, matter or circumstance, the court may order that:
 - (a) a document asserting the alleged fact, matter or circumstance may be admitted at the trial as evidence of the fact, matter or circumstance, and
 - (b) evidence may not, without the leave of the court, be adduced to contradict or qualify the alleged fact, matter or circumstance.
- (2) If evidence was disclosed by the prosecution to the accused person in accordance with this Division and the accused person was required to give a defence response under section 143 but did not include notice in that response under section 143 (d) in relation to that evidence, the court may, by order, dispense with the application of any one or more of the following provisions of the [Evidence Act 1995](#) in relation to the adducing of the evidence at trial:

- (a) Division 3, 4 or 5 of Part 2.1,
 - (b) Part 2.2 or 2.3,
 - (c) Parts 3.2–3.8.
- (3) The court may, on the application of a party, direct that the party may adduce evidence of 2 or more witnesses in the form of a summary if the court is satisfied that:
- (a) the summary is not misleading or confusing, and
 - (b) admission of the summary instead of evidence from the witnesses will not result in unfair prejudice to any party to the proceedings.
- (4) The court may, in a direction under subsection (3), require that one or more of the witnesses whose evidence is to be adduced in the form of a summary are to be available for cross-examination.
- (5) The opinion rule (within the meaning of the *Evidence Act 1995*) does not apply to evidence adduced in accordance with a direction under subsection (3).
- (6) The provisions of this section are in addition to the provisions of the *Evidence Act 1995*, in particular, section 190.

146 Sanctions for non-compliance with pre-trial disclosure requirements

- (1) **Exclusion of evidence not disclosed** The court may refuse to admit evidence in proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with requirements for pre-trial disclosure imposed by or under this Division.
- (2) **Exclusion of expert evidence where report not provided** The court may refuse to admit evidence from an expert witness in proceedings that is sought to be adduced by a party if the party failed to give the other party a copy of a report by the expert witness in accordance with requirements for pre-trial disclosure imposed by or under this Division.
- (3) **Adjournment** The court may grant an adjournment to a party if the other party seeks to adduce evidence in the proceedings that the other party failed to disclose in accordance with requirements for pre-trial disclosure imposed by or under this Division and that would prejudice the case of the party seeking the adjournment.
- (4) **Application of sanctions** Without limiting the regulations that may be made under subsection (5), the powers of the court may not be exercised under this section to prevent an accused person adducing evidence unless the prosecutor has complied with the requirements for pre-trial disclosure imposed on the

prosecution by or under this Division.

- (5) **Regulations** The regulations may make provision for or with respect to the exercise of the powers of a court under this section (including the circumstances in which the powers may not be exercised).

147 Disclosure requirements are ongoing

- (1) The obligation to comply with the requirements for pre-trial disclosure imposed by or under this Division continues until any of the following happens:
- (a) the accused person is convicted or acquitted of the charges in the indictment,
 - (b) the prosecution is terminated.
- (2) Accordingly, if any information, document or other thing is obtained or anything else occurs after pre-trial disclosure is made by a party to the proceedings, that would have affected that pre-trial disclosure had the information, document or thing been obtained or the thing occurred before pre-trial disclosure was made, the information, document, thing or occurrence is to be disclosed to the other party to the proceedings as soon as practicable.

148 Court may waive requirements

- (1) A court may, by order, waive any of the pre-trial disclosure requirements that apply under this Division.
- (2) The court may make such an order on its own initiative or on the application of the prosecutor or the accused person.
- (3) An order may be made subject to such conditions (if any) as the court thinks fit.

149 Requirements as to notices

- (1) A notice under this Division is to be in writing.
- (2) Any notice purporting to be given under this Division on behalf of the accused person by his or her Australian legal practitioner is, unless the contrary is proved, taken to have been given with the authority of the accused person.
- (3) A notice under this Division that is required to be given to a prosecutor may be given to the prosecutor in the following manner, or as otherwise directed by the court:
- (a) by delivering it to the prosecutor,
 - (b) by leaving it at the office of the prosecutor,

- (c) by sending it by post or facsimile to the prosecutor at the office of the prosecutor,
 - (d) by sending it by electronic mail to the prosecutor, but only if the prosecutor has agreed to notice being given in that manner.
- (4) A notice under this Division that is required to be given to an accused person may be given to the accused person in the following manner, or as otherwise directed by the court:
- (a) by delivering it to the accused person,
 - (b) by leaving it at the office of the Australian legal practitioner representing the accused person,
 - (c) by sending it by post or facsimile to the Australian legal practitioner representing the accused person at the office of the Australian legal practitioner,
 - (d) by sending it by electronic mail to the Australian legal practitioner, but only if the Australian legal practitioner has agreed to notice being given in that manner.
- (5) A party required to give a notice under this Division must file a copy of the notice with the court as soon as practicable after giving it, or as otherwise required by the court.

149A Copies of exhibits and other things not to be provided if impracticable

- (1) A copy of a proposed exhibit, document or thing is not required to be included in a notice under this Division if it is impossible or impractical to provide a copy.
- (2) However, the party required to give the notice:
 - (a) is to specify in the notice a reasonable time and place at which the proposed exhibit, document or thing may be inspected, and
 - (b) is to allow the other party to the proceedings a reasonable opportunity to inspect the proposed exhibit, document or thing referred to in the notice.

149B Personal details not to be provided

- (1) The prosecutor is not to disclose in any notice under this Division the address or telephone number of any witness proposed to be called by the prosecutor, or of any other living person, unless:
 - (a) the address or telephone number is a materially relevant part of the evidence, or

- (b) the court makes an order permitting the disclosure.
- (2) An application for such an order may be made by the accused person or the prosecutor.
 - (3) The court must not make such an order unless satisfied that the disclosure is not likely to present a reasonably ascertainable risk to the welfare or protection of any person or that the interests of justice (including the accused person's right to prepare properly for the hearing of the evidence for the prosecution) outweigh any such risk.
 - (4) This section does not prevent the disclosure of an address if the disclosure does not identify it as a particular person's address, or it could not reasonably be inferred from the matters disclosed that it is a particular person's address.
 - (5) An address or telephone number that must not be disclosed may, without reference to the person who made the statement being disclosed, be deleted from that statement, or rendered illegible, before the statement is given to the accused person.

149C Requirements as to statements of witnesses

- (1) A statement of a witness that is included in a notice under this Division may be in the form of questions and answers.
- (2) If a notice includes a statement that is, wholly or in part, in a language other than English, there must be annexed to it a document purporting to contain a translation of the statement, or so much of it as is not in the English language, into the English language.

149D Exemption for matters previously disclosed

- (1) The prosecutor is not required to include in a notice under this Division anything that has already been included in a brief of evidence in relation to the matter served on the accused person in accordance with this or any other Act or that has otherwise been provided or disclosed to the accused person.
- (2) The accused person is not required to include in a notice under this Division anything that has already been provided or disclosed to the prosecutor.

149E Court powers to ensure efficient management and conduct of trial

- (1) On or after the commencement of the trial in proceedings, the court may make such orders, determinations or findings, or give such directions or rulings, as it thinks appropriate for the efficient management and conduct of the trial.
- (2) Without limiting subsection (1), the court may order that any of the parties to the proceedings disclose any matter that was, or could have been, required to

be disclosed under this Division before the commencement of the trial.

149F Miscellaneous provisions

- (1) A statement about any matter that is made by or on behalf of the accused person for the purposes of complying with requirements for pre-trial disclosure imposed by or under this Division does not constitute an admission of that matter by the accused person.
- (2) The court may make orders to resolve any dispute between the parties to criminal proceedings about:
 - (a) the requirements for pre-trial disclosure imposed by or under this Division, or
 - (b) the use of anything disclosed under this Division (including restrictions on publication or further disclosure).
- (3) This Division does not affect the obligations or powers under Division 4 (Pre-trial disclosure—general).
- (4) Nothing in this Division prevents any voluntary pre-trial disclosure by the accused person to the prosecutor of any information, document or other thing that the accused person proposes to adduce in evidence in the proceedings.
- (5) This Division does not limit any obligation (arising otherwise than under this Division) for pre-trial disclosure that is capable of being complied with concurrently with requirements imposed by or under this Division, but this Division prevails to the extent of any inconsistency with any such obligation. Any such obligation extends to obligations imposed by the common law, the rules of court, the legal profession rules made under Part 7.5 of the [Legal Profession Act 2004](#) and prosecution guidelines issued by the Director of Public Prosecutions.
- (6) However, this Division does not affect any immunity that applies by law to the disclosure of any information, document or other thing, including, for example, legal professional or client legal privilege, public interest immunity and sexual assault communications privilege under Division 2 of Part 5 of Chapter 6.
- (7) Nothing in this Division limits any powers that a court has apart from this Division in relation to proceedings.
- (8) The provisions of this Division prevail over the provisions of the [Evidence Act 1995](#) to the extent of any inconsistency with those provisions.

[5] Section 314A

Insert after section 314:

314A Review of pre-trial disclosure provisions enacted by Criminal Procedure Amendment (Case Management) Act 2009

- (1) The Attorney General is to review the provisions of Division 3 of Part 3 of Chapter 3 as enacted by the *Criminal Procedure Amendment (Case Management) Act 2009* to determine:
 - (a) whether they have been effective in reducing delays in proceedings on indictment, and
 - (b) the cost impacts of the procedures.
- (2) The review is to be undertaken as soon as possible after the period of 24 months after the commencement of this section.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of that 24-month period.

[6] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Criminal Procedure Amendment (Case Management) Act 2009

[7] Schedule 2

Insert at the end of the Schedule with appropriate Part and clause numbering:

Part Provisions consequent on enactment of Criminal Procedure Amendment (Case Management) Act 2009

Section 130A

The substitution of section 130A by the *Criminal Procedure Amendment (Case Management) Act 2009* applies only in respect of proceedings in which the indictment was presented or filed on or after that substitution.

Case management provisions

- (1) Division 3 of Part 3 of Chapter 3, as substituted by the *Criminal Procedure Amendment (Case Management) Act 2009*, applies only in respect of proceedings in which the indictment was presented or filed on or after that substitution.
- (2) Division 3 of Part 3 of Chapter 3, as in force before its substitution by the *Criminal Procedure Amendment (Case Management) Act 2009*, continues to apply in respect of proceedings in which the indictment was presented or filed

before that substitution.