

# DISTRICT COURT CRIMINAL PRACTICE NOTE 16

## WORK HEALTH AND SAFETY ACT PROSECUTIONS

### Name and commencement of Practice Note

- 1 This practice note is to be known as Practice Note 16 - Work Health and Safety Prosecutions (WHS prosecutions). It replaces Practice Note 16 -Work Health and Safety Act Prosecutions issued 5 November 2018.
- 2 This practice note commences on 28 June 2021 and applies to all WHS prosecutions before the Court at that date, except those already listed for trial or sentence hearing. The extent to which the practice note is applicable to existing matters is to be approached, by the parties and the Court, on a case by case basis.

### Application of the Practice Note

- 3 This practice note applies to all criminal proceedings commenced in the Court pursuant to s 229B(1)(b) *Work Health and Safety Act 2011* (the WHSA) (WHS prosecutions).

### Purposes of the Practice Note

- 4 The purpose of this practice note is to:
  - (a) reduce delays in summary WHS prosecutions before the Court by implementing the preliminary disclosure and case management provisions in Chapter 4, Part 5, Division 2A (Division 2A) of the *Criminal Procedure Act 1986* (CPA);
  - (b) set out the case management procedures and the process for the preparation for and conduct of trials and sentence hearings to ensure that criminal proceedings are dealt with in a just and timely way; and

- (c) to assist defendants to take advantage of the legal principles that provide for a discount on sentence for an early guilty plea.

### **Statutory context**

- 5 Case management provisions and other provisions to reduce delays in summary WHS prosecutions are set out in Division 2A (ss 247A-247Y) CPA.
- 6 Part 53 of the District Court Rules (DCR) applies generally to WHS prosecutions.
- 7 Case management measures available to the Court include the ordering of preliminary hearings, preliminary conferences and further preliminary disclosure. The Court has a discretion to determine which (if any) of those measures are suitable in the criminal proceedings concerned.

### **Responsibility of the parties, legal practitioners and agents**

- 8 It is the responsibility of each party, its legal representatives and agents to consider the directions appropriate to be made in the particular case to ensure that criminal proceedings are dealt with in a timely way and as efficiently as possible.
- 9 If a party reasonably considers that compliance with this practice note will not be possible, or will not be conducive to the efficient resolution of the proceedings, the party must:
  - (a) apply to the Court to be relieved from compliance with this practice note;
  - (b) propose an alternate regime that will provide for a more efficient resolution of the proceedings; and
  - (c) notify the other parties of the proposed alternate regime at least 3 working days before making the application referred to in (a) above, or less if urgency requires it.

### **Legal practitioners and agents of parties to be prepared**

- 10 Each party, not appearing in person, must be represented by a legal practitioner or an agent familiar with the subject matter of the proceedings and with sufficient instructions to enable all appropriate directions and orders to be made.
- 11 Parties are to endeavour to confer prior to any attendance before the Court and provide to the Court, where necessary, directions agreed upon or competing short minutes of order that are to be proposed.

### **Commencement of summary proceedings**

- 12 Summary proceedings are to be commenced pursuant to s 246 CPA and in accordance with rule 53.26 DCR.
- 13 The Summons will be made returnable on the first Monday 8 weeks following the date of issue.
- 14 The Summons, Statement of Facts and a copy of this practice note is to be served in accordance with rule 53.27 DCR within 7 days of the date of issue of the Summons.
- 15 The defendant or the defendant's legal representative is to file with the Court and serve on the prosecutor a Notice of Appearance (in the approved form published with this practice note) within 7 days of the service of the Summons.

### **Service of the brief of evidence**

- 16 The prosecutor is to serve the brief of evidence on the defendant or the defendant's legal representative within 28 days of service of the Notice of Appearance.

## Content of the brief of evidence

- 17 The prosecution brief of evidence is to include:
- (a) written statements taken from any person the prosecutor intends to call to give evidence at the hearing;
  - (b) copies of any document that the prosecutor will seek to tender as an exhibit at the hearing;
  - (c) photographs of any physical exhibit or information as to how an inspection of a physical exhibit is to occur;
  - (d) any document or thing referred to in s 247E(2A) CPA;
  - (e) any expert reports to be relied on by the prosecutor at the hearing.
- 18 Written statements referred to in paragraph 17(a) are to comply with s 283B(2) - (5) CPA and clauses 9I and 9K *Criminal Procedure Regulation 2017*. A written statement is not required if the evidence of the witness to be adduced at the hearing by the prosecutor is disclosed in a document or thing referred to in s 247E(2A) CPA.
- 19 A written statement must be prepared and served if the prosecutor intends to lead any additional, new or clarifying evidence or where the person interviewed informs the prosecutor that they do not agree with, or stand by the content of any of the answers contained in a s 155(2)(a) notice or a record of interview. An outline of the evidence should be prepared and served if the witness does not consent to providing a statement.

## **Number of pre-trial or pre-sentencing hearing attendances**

20 The parties are expected to minimise the number of appearances in Court prior to the trial or sentence hearing.

## **Before the first mention**

21 In preparation for the first mention and to enable the Court to make appropriate directions, the parties are to take the following steps before the first mention:

- (a) retain solicitors and/or counsel who will be appearing for them in order to allow for meaningful and binding forensic decisions to be made about evidence and other matters;
- (b) the defendant is to consider the plea the defendant intends to enter to the offence charged. The defendant is entitled to a discount on penalty for the utilitarian value of a plea of guilty which is maximised by the early entry of a plea of guilty;
- (c) the defendant is to consider any representations the defendant wants to make to the prosecutor regarding the particulars of the charge and the facts alleged that will facilitate a plea of guilty. The defendant should be in a position on the first mention date to commit to a timetable for the submission of representations;
- (d) the defendant is to consider if the defendant intends to make an application to the regulator for an Enforceable Undertaking (see paragraphs 49-51 below);
- (e) the prosecutor is to consider the time by which a notice of the prosecution case could be given by the prosecutor under s 247E CPA;

- (f) the defendant is to consider the time by which notice of the defence response could be given by the defendant under s 247F CPA;
- (g) the prosecutor and the defendant are to confer and consider whether one or more preliminary hearings before the Court under s 247G CPA are necessary. At preliminary hearings, the Court may make directions for the efficient management and conduct of the proceedings, hear and determine interlocutory applications and make rulings or findings on objections, submissions and questions of law (see s 247G(3) CPA);
- (h) the prosecutor and the defendant are to confer and consider whether the Court should order a preliminary conference under s 247H CPA. The purpose of the preliminary conference is to determine whether the prosecutor and the defendant can agree on the evidence to be admitted at the trial and/or sentence hearing (see s 247H(4) CPA);
- (i) the prosecutor and the defendant are to consider whether the Court should order preliminary disclosure by the prosecutor under s 247J CPA, by the defendant under s 247K CPA and by the prosecutor in response under s 247L CPA; and
- (j) the prosecutor and the defendant are to discuss and agree, where possible, on the directions that the Court should make at the first mention;
- (k) where there are co-offenders or different charges arising from the same set of facts, every effort should be taken to ensure that the proceedings travel together in the pre-trial stage and are heard by the same Judge, unless there are reasons for not doing so.

## **At the first mention**

- 22 The prosecutor is to advise whether the service of the brief of evidence has been effected in accordance with paragraph 16 of this practice note.
- 23 The defendant should advise the Court if the defendant is in a position to enter a plea of guilty or not guilty to the charge, or if the defendant needs further time to consider the brief of evidence.
- 24 At the first mention, the matter will be listed for a preliminary hearing.
- 25 If a plea of guilty is likely to be entered subject to an agreement on the particulars of the charge and the facts alleged, the following procedure is to be followed:
- (a) a direction will be made for the defendant to make representations to the prosecutor relating to the particulars of the charge and the facts alleged;
  - (b) a direction will be made for the prosecutor to respond to the defendant's representations;
  - (c) in the absence of agreement as to the particulars of the charge and the facts, within 14 days of the prosecutor's response to the defendant's representations, the parties will be ordered to participate in a preliminary conference under s 247H CPA with a view to agreeing on the particulars of the charge and the facts. Parties must ensure that persons with the authority to give instructions are present at or available to be contacted at the time that the preliminary conference is held;
  - (d) the matter will be listed for a preliminary hearing at which time the defendant is to enter a plea of guilty or not guilty to the charge;

- (e) in the event that there is still a dispute between the parties as to the facts alleged by the prosecutor, the defendant can enter a plea of guilty and the matter will be listed for a sentence hearing on the basis that the disputed facts will be determined at the sentence hearing.

26 If a defendant is undecided about its plea, it may seek an order at the first directions hearing that the prosecutor serve a notice of the prosecution case under s 247E CPA and/or a notice of disclosure by the prosecutor under s 247J CPA.

### **Preliminary hearings**

27 The parties are required to minimise the number of preliminary hearings prior to the entry of a plea by the defendant.

28 Any notice of motion relating to an interlocutory application should be listed on the date of a preliminary hearing, unless there is some reason for urgency. Parties and legal practitioners are to file motions together with any supporting affidavit evidence, where possible, with adequate notice so that the motion can be heard on the return date.

29 If a defendant enters a plea of not guilty, the parties will enter a timetable for the following steps, if they are appropriate in the proceedings:

- (a) the service of a notice of the prosecution case under s 247E CPA and/or a notice of disclosure by the prosecutor under s 247J CPA;

- (b) the service of a notice of the defence case under s 247F CPA and/or a notice of disclosure by the defendant under s 247K CPA;



- (c) the service of a notice of disclosure in response by the prosecutor under s 247L CPA;
- (d) an order for a preliminary conference under s 247H CPA with a view to the parties agreeing on the evidence to be adduced at trial and/or identifying the evidence that will be objected to at trial. Parties must ensure that persons with the authority to give instructions are present at or available to be contacted at the time that the preliminary conference is held. Counsel briefed in the trial should be present, if possible;
- (e) the listing of a preliminary hearing to set a trial date.

30 The notice of the prosecution case under s 247E CPA is to be accompanied by:

- (a) a certificate signed on behalf of the prosecutor that the prosecutor has made enquiries and complied with the prosecutor's duty of disclosure;
- (b) if a record of interview or information received under s 155(2)(a) WHSA is to be tendered by the prosecutor at trial, a schedule identifying each question and answer to be relied on by the prosecutor and identifying to which of the pleaded particulars in the Summons the question and answer is relevant. If the person interviewed or providing responses under s 155(2)(a) WHSA is to be called as a witness, the prosecutor must consider if it is necessary to provide a written statement of the witness relating to changes to or clarification of their evidence, as contemplated in [19] above.

31 In the event that the defendant does not enter a plea to the charge at the first or a later preliminary hearing, the Court may, if appropriate, require the parties

to enter a timetable on the basis that the defendant has entered a plea of not guilty.

- 32 Prior to the preliminary hearing to fix a date for trial, the parties must:
- (a) consider the need for any further preliminary hearing to deal with the matters referred to in ss 247G and 247M CPA;
  - (b) consider what other directions may be necessary for the efficient management and conduct of the trial;
  - (c) confer and endeavour to agree on the appropriate directions to be made, the estimated length of the trial and available dates for the trial.

### **Breach of the Court's directions**

- 33 If there is a breach of the Court's directions sufficient to cause slippage in the timetable, the parties must, in accordance with [35] below, relist the matter in the next Monday list. The party in breach or a legal practitioner with knowledge of the reasons for the breach, must file and serve a letter by no later than 4.00pm on the preceding Friday, identifying the breach, explaining the reasons for the breach and outlining the proposed directions to be made in consequence of the breach.

### **Variation of timetables**

- 34 If proposed directions vary an existing timetable, they must include a direction to vacate any previous directions that can no longer be maintained, including dates for directions hearing or the hearing of motions.

### **Liberty to restore**

- 35 Parties have general liberty to restore to the Monday list on three working days' notice, or less if urgency requires it. A party seeking to do so is to make

prior arrangement with, or give appropriate notice to, any other party, and notify the List Judge or the Judge case managing the proceedings.

### **Applications to vacate hearings**

36 Dates for trials and sentence hearings will not be vacated merely because the parties consent. Applications to vacate hearing dates are to be by notice of motion with an affidavit in support explaining the circumstances of the application and the reasons the hearing date should be vacated. A formal application is not required where a trial date is to be vacated as a result of a change in plea by a defendant.

### **Co-operation**

37 The Court expects parties, legal practitioners and experts to work together to implement this practice note in a practical and sensible way that ensures it achieves its intended purpose.

### **Compliance**

38 Parties and legal practitioners should note s 247N CPA provides for procedural sanctions against parties for non-compliance with the requirements of Division 2A.

39 Any failure by one party to comply with the Court's directions will not normally be considered as an adequate excuse for a failure to comply by the other party. Both parties are responsible for ensuring they comply with directions.

### **Expert evidence**

40 Unless the Court otherwise orders in summary prosecutions, an expert witness's evidence in chief must be given by the tender of one or more reports.

41 The provisions of Part 31 rules 23 and 27 *Uniform Civil Procedure Rules 2005* apply to the evidence of expert witnesses and any report of an expert witness.

## **Preparation for sentence hearings**


- 42 District Court Practice Note 15 does not apply to prosecutions under the WHSA.
- 43 Where a plea of guilty is entered, the prosecutor is to file and serve any sentence bundle on the defendant no later than 4 weeks before the date on which the matter is listed for sentence.
- 44 In the event that either the prosecutor or the defendant seeks an order referred to in ss 236-241 WHSA, the prosecutor or the defendant is to notify the other party in writing of the terms of the order sought and is to file and serve any affidavit evidence in support of the order, by no later than 4 weeks before the date on which the matter is listed for sentence.
- 45 The defendant is to file and serve any affidavit and supporting documentation relevant to the issue of capacity to pay a fine (s 6 *Fines Act 1996*) no later than 4 weeks before the date on which the matter is listed for sentence.
- 46 The defendant is to file and serve any other affidavit and supporting documentation no later than 2 weeks before the date on which the matter is listed for sentence.

## **Court technology and evidence**

- 47 If a party intends to adduce electronic evidence, for example CCTV footage, via CDs, DVDs or data files, the party must consult the Associate to the Judge hearing the matter no later than 7 days before the sentence hearing or trial to confirm that the Court's technology resources are capable of playing the evidence. Arrangements for testing of equipment may be made by enquiry with the Judge's Associate.
- 48 If the electronic evidence is not in a form that is compatible with the Court's technology resources the evidence must either be converted to formats used by the Court or the party must bring their own devices to play the evidence.

## Applications for Enforceable Undertakings

- 49 Applications to the regulator for an Enforceable Undertaking (EU) pursuant to Part 11 WHSA must be made by a defendant promptly after service of the Summons and no later than 12 weeks after the service of the brief of evidence.
- 50 In the event that an application for an EU is made later than 12 weeks after the service of the brief of evidence and the application for an EU is unsuccessful, the Court will take that into account in assessing the utilitarian value of any plea of guilty entered at a later time. It will be sufficient for compliance with this paragraph if the prosecutor informs the Court that an application for an EU has been made or that the application is expected to be made within a reasonable time.
- 51 Matters in which an application for an EU is made will be adjourned for a preliminary hearing on a date no later than 14 days after the next meeting of the Enforceable Undertaking Panel or other convenient date in the EU process. The parties must relist a matter for preliminary hearing within 14 days of a decision by the regulator to reject an application for an EU.



The Honourable Justice D Price AO  
Chief Judge of the District Court  
4 June 2021

\*\*\*\*\*