

Practice Note SC CA 01 Court of Appeal

Commencement

1. This Practice Note was issued and commenced on 27 March 2009.

Application

2. This Practice Note applies to any step taken in proceedings in the Court of Appeal after the commencement of this Practice Note: see r 51.1(2).

Definitions

3. In this Practice Note:
rules means the Uniform Civil Procedure Rules 2005.
old rules means Part 51, of the Supreme Court Rules 1970 as in force immediately before their repeal.
Other words and phrases have the meanings assigned by r 51.2.

Commencement – reference to decision below

4. Where proceedings are commenced in relation to a decision of a Court or Tribunal which has a media neutral citation, that citation should be included in the identification of the decision from which the appeal or other challenge is brought.

Commencement of appeals

5. All rights to appeal arise under statute. Before commencing proceedings, the moving party should identify the provision under which the right of appeal arises. It is necessary to identify the provision in the Notice of Appeal, if an appeal is as of right, and in the Summons for leave if leave is sought.
6. Even where an appeal may be brought as of right under a particular provision, attention should be paid to any qualification requiring leave in particular circumstances. Where leave is required it must be sought by way of summons.
7. In relation to appeals from Tribunals or other bodies, the matters assigned to the Court of Appeal are identified in s 48 of the *Supreme Court Act 1970*.
8. The scope of appellate jurisdiction may be limited, for example as to questions of law, or subject in certain cases to the grant of leave to appeal. The main provisions creating appellate jurisdiction in the Court of Appeal and stating when leave to appeal is required are:
Appeals from Supreme Court
Supreme Court Act 1970, ss 101 (general provision, including matters requiring leave in s 101(2)), 101A (question of law concerning criminal contempt), 102 (appeal after Supreme Court jury trial), 103 (appeal from separate decision in Supreme Court).
Appeals from Land and Environment Court
Land and Environment Court Act 1979, ss 57, 58. See also *Supreme Court Act 1970*, s 48(1)(a)(i).
Appeals from Dust Diseases Tribunal
Dust Diseases Tribunal Act 1989, s 32. See also *Supreme Court Act 1970*, s 48(1)(a)(ia).
Appeals from District Court
District Court Act 1973, ss 127, 142N. See also *Supreme Court Act 1970*, s 48(1)(a)(iv).
Appeals from GREAT Tribunal
Government and Related Employees Appeal Tribunal Act 1980, s 54. See also *Supreme Court Act 1970*, s 48(1)(a)(iii).
Appeals from Workers Compensation Commission constituted by Presidential Member
Workplace Injury Management and Workers Compensation Act 1998, s 53.
Appeals from other Tribunals
If the relevant statute confers a right of appeal to the Supreme Court and if s 48(1)(a)(vii) of the *Supreme Court Act* applies, the appeal is assigned to the Court of Appeal. As to s 48(1)(a)(vii), see *Daykin v SAS Trustee Corporation* (2001) 51 NSWLR 328, [2001] NSWSC 58.
9. In cases where the right of appeal is limited, for example to errors of law, the statement of grounds to be included in the Notice of Appeal must be appropriately formulated.
10. A notice of appeal (including a draft notice of appeal supporting a leave application contained in the White Folder) must state the matters required by r 51.18. It is not enough merely to allege that the primary court erred in law or fact or that its decision is against the evidence or the weight of the evidence. The grounds of appeal

must identify the respects in which error in law or (if applicable) fact occurred as well as any material findings that it is said that the primary court should or should not have made, and any material facts that it is said that the primary court should or should not have found.

Time for commencement

11. Subject to the rules permitting the filing of a Notice of Intention to Appeal (see paras 12-14), a Summons seeking leave to appeal and a Notice of Appeal generally must be filed within 28 days after the “material date” as defined in r 51.2: see r 51.8. If the Court grants leave to appeal, a Notice of Appeal must be filed within 7 days of leave being granted unless the Court orders otherwise.
12. The Rules permit an applicant to file a Notice of Intention to Appeal, whether the appeal is as of right or by leave. The notice must be filed within 28 days after the “material date”, as defined in r 51.2: see r 51.8.
13. The filing and service of a Notice of Intention to Appeal does not have the effect of commencing proceedings in the Court: r 51.9(3). Its effect is limited to extending the time otherwise allowed for filing and serving a Notice of Appeal or a Summons seeking leave in cases where there is no period specified otherwise than under the Rules: see rr 51.7(b), 51.16(1). Note that the time for bringing appeals from GREAT is fixed at 21 days by s 55 of the *Government and Related Employees Appeal Tribunal Act* and cannot be extended by filing a Notice of Intention to Appeal (see *Commissioner of Corrective Services v Walker* [2007] NSWCA 213).
14. Where a Notice of Intention to Appeal is filed and served, the Rules provide that the Notice of Appeal or summons seeking leave to appeal must be filed and served within three months after the material date as defined in r 51.2, and not, as under the old rules, from the date of filing a holding summons or a notice of appeal without appointment: see UCPR r 51.6.
15. The Rules permit a prospective respondent to file a notice of intention to appeal: See UCPR r51.9A.

Applications for leave

16. An application for leave to appeal is commenced by Summons. It must be filed and served within 28 days after the material date, or, in the case of an application for leave to cross-appeal, 28 days after the application for leave to appeal unless the time has been extended by the filing of a Notice of Intention to Appeal: see r 51.10.
17. Supporting documentation must be included in the White Folder containing the summary of argument and other documents referred to in r 51.12. Thereafter the opponent must file a response and additional documents in accordance with r 51.13.

Separate or concurrent hearings

18. Where leave to appeal is required, each party should indicate in the summary of argument whether (and if so why) the matter is thought appropriate for a concurrent hearing of the leave application and the appeal: r 51.12(4)(g).
19. Where application is made for a concurrent hearing, the summary of argument should address the following matters:
 - (a) the extent to which the argument on the application for leave is expected to canvas the merits of the appeal;
 - (b) the extent to which the application for leave will require reference to materials which would be relevant to the appeal;
 - (c) whether the appeal will involve an issue of public importance;
 - (d) any prejudice which may be suffered as a result of delay flowing from a separate leave application;and
 - (e) any matter relevant to the reason why leave is required in the circumstances of the case.
20. Applications for concurrent hearings will be determined by a judge on the papers (r 51.14) and a decision will be conveyed to the parties on the first mention date thereafter by the Registrar.
21. If a direction is given for a concurrent hearing, the Registrar will give such of the following directions as may be necessary in the circumstances of the case:
 - (a) if additional papers are required, whether the White Folder can be supplemented or whether it is necessary to prepare appeal books;
 - (b) whether the summaries of argument sufficiently address the merits of the appeal or should be replaced by written submissions as on an appeal;
 - (c) such other directions as might be necessary for the hearing of the appeal.

Proceedings other than appeal proceedings

22. Where it is sought to bring proceedings by way of judicial review, pursuant for example to ss 65 or 69 of the *Supreme Court Act*, such proceedings may be brought in the Court of Appeal if they relate to a specified Tribunal as defined in s 48 of the *Supreme Court Act*.
23. Proceedings by way of judicial review should be commenced by way of Summons: r 51.45. The Rules now require an applicant to file written submissions not exceeding 20 pages to address the matters set out in r 51.45(3).

Related Appeals or Applications

24. Parties are obliged to inform the Registrar at the earliest opportunity of any related appeal or application which should reasonably be taken into account in the listing of any appeal or application. For instance, separate appeals from the same or related first instance matters should be brought to the attention of the Registrar so that appeals can be listed together if that is more appropriate

Expedition

25. A party may apply for the hearing of an appeal or application for leave to be expedited: r 51.60. If each interested party files a Notice of Non-objection the application may be decided on the papers. Expedition may also be sought at a directions hearing or an application for a stay or when leave to appeal is granted.

Case management

26. Parties seeking case management, including the making of orders for filing of electronic appeal books, should file a motion for directions accordingly if the Court has not already set matters in train for case management.

Parties

27. In preparing a Summons or Notice of Appeal, the applicant or appellant should identify and join any person who is interested in the outcome of the appeal: r 51.4. This may require the joinder of a party not joined by the applicant or appellant in the court below. Where the status of a party has changed since the commencement of the proceedings in the court below, for example a corporation entering liquidation, procedural steps should be taken to permit it to be joined to proceedings and the Registrar advised of the steps which are required or have been taken.
28. The Tribunal below is not a party to proceedings by way of appeal, but must be joined if the proceedings are by way of judicial review.

Orders relevant to appeal

29. A Notice of Appeal (or draft Notice of Appeal in the case of an application for leave to appeal) should identify the orders made by the court below which are the subject of challenge. Where there is provision for the formal entry of orders, a copy of the orders as entered should be included with the reasons for judgment in the White Folder or the Red Book.
30. Appeals are brought from orders, not from the reasons of the court below. Accordingly it is necessary for the applicant or appellant to identify those orders which are sought to be set aside or varied and the orders sought in their place.
31. The applicant or appellant should also include in the summary of argument or the written submissions (as relevant) any relevant information as to the status of the orders made by the court below. If a stay is in place, the terms of the stay must be identified. If part or all of the judgment has been paid, that fact, together with any consequential order sought with respect to repayment (including any claim for interest) if the appeal succeeds, must be included in the notice of appeal (see r 51.19).

Objections as to competency

32. A respondent who objects to the competency of an appeal (including the competency of an appeal brought as of right where leave is required) must apply by motion for an order dismissing the appeal as incompetent. The notice of motion must be filed and served on all other parties to the appeal within 28 days after service on the respondent of the notice of appeal: r 51.41. Failure to comply may have adverse costs consequences: r 51.41(2).
33. If an appellant is faced with a formal objection to the competency of its appeal and intends to seek leave to appeal, the application for leave should be filed before the hearing of the contested competency application so that the two matters can be heard concurrently: *Council of the Municipality of Woollahra v Sved* (unreported, Mason P and Sheller JA, 18 May 1998, 24 July 1998).

Summaries of argument, written submissions and chronologies

34. The Rules contain detailed requirements in relation to summaries of argument and written submissions, including limitations on length: see rr 51.12, 51.13 (leave applications), 51.36 (appeals), 51.45 (proceedings other than appeal proceedings).
35. Chronologies prepared in accordance with r 51.35 must be filed in an appeal by the appellant (r 51.34(1)(b)) and may be filed by the respondent (r 51.34(2)). It must contain cross-references to the Appeal Book. The chronology should be an objectively correct statement of “the principal events leading up to the litigation” and should not be a chronology merely of those matters of assistance to one party or the other: *Woods v Harwin* (CA(NSW), Mahoney AP, Clarke and Meagher JJA, 5 November 1993, unreported). The chronology should include key events in the litigation, such as the commencement of the proceedings in the court below. Failure to file a proper chronology may have adverse costs consequences.
36. The following is the suggested form for chronologies:

DATE	EVENT	APPEAL BOOK & PAGE No.
22.09.2001	Arrangements in Wagga between Smith and Co for financing of wheat purchases	Black 62
23.11.2001	First request by Brown to Smith and Co for drawdown to pay for wheat purchases	Black 71
30.11.2001 0930 hrs	at Fax Smith and Co to Brown re above	Blue 15 (Exhibit 5)
30.11.2001 1145 hrs	at Telex Brown to Smith and Co requesting drawdown to pay for further wheat	Blue at 20 (Exhibit 6)
01.12.2001	“Warehouse receipt” from Jones to Smith and Co	Blue 18 (Exhibit D)
06.01.2002	Letter Jones to Smith and Co concerning method of carrying out financial arrangements for barley	Blue at 12 (Exhibit 7)
07.01.2002	Internal memorandum of Smith and Co re meeting Allen in Wagga	Blue at 22 (Exhibit 8)

37. As to the time for filing written submission and chronologies in an appeal see r 51.37. These and other documents must be included in the Orange Book (see r 51.30).
38. A party who proposes to seek leave to challenge the correctness of a decision of the Court of Appeal or of another Australian intermediate appellate court should notify the Registrar at the earliest opportunity. The letter should indicate the decision(s) likely to be challenged and their materiality to the instant proceedings.
39. If substantial grounds of appeal are abandoned prior to the hearing then the other parties and the Court should be informed immediately. Substantial amendments should similarly be notified together with a Notice of Motion seeking leave to rely upon the varied grounds.

Motions

40. An interlocutory application by Summons, Notice of Motion or otherwise, will be listed at 9.45am in the motion list before the Registrar on a Monday unless otherwise ordered. The parties should expect that it will proceed on the return date.
41. At 9.45am the Registrar will commence to call over all matters in the list.
42. Applications for the following may be dealt with by the Registrar:–
consent orders;
extensions of time;
competency of appeals;
security for costs; and
non-compliance with directions.
43. The following applications will be assigned to the Referrals Judge for hearing:
expedition of the hearing of proceedings, where there is no consent;
contested applications for stay or injunction; and

other matters as determined by the Registrar.

Settlement of pending proceedings

44. Where a motion has settled or is not to proceed on the motion day, the Registrar must be informed forthwith. If the Registrar cannot be contacted, the President's Associate should be contacted.
45. Any settlement touching a substantive matter should be notified to the Registrar as soon as it has occurred or becomes imminent.

List of authorities

46. Each party must, no later than 24 hours before the hearing of an appeal or other proceeding, lodge in the box provided on level 12, Supreme Court building, four copies of a list including:
- (a) reference to any Commonwealth or New South Wales statutes, identifying the relevant reprint or date;
 - (b) in relation to other jurisdictions, annexing copies of the relevant legislation;
 - (c) cases from which passages will be read in the course of argument being:–
 - (i) cases reported in the CLR and NSWLRs (maximum 10 without leave);
 - (ii) up to five cases from other reports;
 - (iii) other cases, whether reported or unreported, with copies of the relevant parts annexed.
 - (d) cases to be cited but not read, and
 - (e) The provider of the list of authorities must place his or her name and contact details including email and telephone number at the foot of the list of authorities.

The intent of (c) is to include a requirement for the provision by annexure to the list of authorities of the relevant parts of **any** unreported authority from which passages will be read.

47. No further list need be filed in relation to a leave application where the party concerned has included a list of relevant authorities and legislation complying with para 46 in the summary of argument.
48. If a party decides to read from a case not included in para 46(c), copies are to be provided to the Court at the hearing. For reported cases, only the headnote and relevant passage are to be copied.

Court attire

49. Barristers are to robe (without wigs) if appearing before the Court on the hearing of an appeal, an application for leave or a substantive matter other than an appeal. Robing is not required for directions hearings or Monday referrals before a single Judge or before the Registrar.

J J Spigelman AC
Chief Justice of New South Wales
Date: 27 March 2009

Related information

Practice Note SC Gen1 Supreme Court – Application of Practice Notes

Amendment history:

27 March 2009: This Practice Note replaced the previous version of SC CA 1 issued on 7 April 2008.
7 April 2008: This Practice Note replaces the previous version of SC CA 1 issued on 17 August 2005.
17 August 2005: Practice Note SC CA 1 replaced Former Practice Note Nos. 22, 42, 65, 74 and 77 on 17 August 2005