

Federal Court—Pre-trial steps and considerations

From Practical Guidance
Dispute Resolution

Authored by Jodi Walkom, Partner, Thomson Geer



Pre-trial considerations

When proceedings in the Federal Court are allocated a trial date, parties must take a number of steps to ensure that their case is ready for trial.

When considering pre-trial directions contained in a practice note for a given *National Practice Area* (NPA), parties should give consideration to whether there is cause to deviate from or alter the standard directions having regard to the particular case.

The court will ordinarily make directions in relation to pre-trial steps when the case is allocated a hearing date.

This Guidance Note considers some of the prudent and necessary preparations and steps that a party should take in anticipation of a hearing.

Particular pre-trial requirements in each National Practice Area

Parties must have regard to the applicable practice note for the relevant NPA to ensure they comply with any pretrial steps. Each NPA has particular requirements that must be observed and complied with, as do some sub-areas.

See the following practice notes for each NPA and/or sub-area:

- *Administrative and Constitutional Law and Human Rights* (ACLHR-1) ;
- *Admiralty and Maritime* (A&M-1) ;
- *Commercial and Corporations* (C&C-1) ;
- *Federal Crime and Related Proceedings* (CRIME1) ;
- *Employment and Industrial Relations* (E&IR-1) ;
- *Intellectual Property* (IP-1) ;
- *Native Title* (NT-1) ;
- *Taxation* (TAX-1) ; and
- *Defamation* (DEF-1) .

Cross-examination of witnesses

Where a party requires a witness who has given affidavit evidence in a proceeding to be available for cross-examination, they must give notice to the party for whom that witness gave evidence: *r 29.09* of the Federal Court Rules 2011 (Cth) (FCR).

Practice Tip 1: The rules do not specify a time by which the notice must be given, however, it is prudent to send any notices to attend for cross-examination as soon as possible after a hearing date is allocated. This avoids any debate as to whether reasonable notice was provided. If, closer to the hearing date, it becomes apparent that the witness is no longer required, a further notice should be sent to the party for whom the witness is giving evidence to inform them of that fact.

If a witness in respect of whom notice was served does not attend the hearing, their affidavit evidence cannot be used unless the court orders otherwise: *rr 29.09(3)* and *1.34* of the FCR regarding the court's power to dispense with this rule.

The Federal Court publishes a helpful [guide to preparing witnesses for cross-examination](#).

Practice Tip 2: When acting for a witness who is going to be cross-examined at trial, it is prudent to arrange to take that witness to court prior to trial, particularly if that witness has little experience with litigation. This enables the witness to familiarise themselves with the courtroom and the way in which proceedings are conducted.

Once a witness has been called to give evidence, until they have been released by the court, a legal practitioner is not permitted to converse with that witness, other than in relation to logistical matters (such as when they should return to a courtroom). If the witness is a client and instructions are required during the period in which the evidence is given, leave of the court will be required to seek instructions. It is prudent to inform a witness of this issue beforehand.

Subpoenas to attend to give evidence

Where a witness may not voluntarily agree to attend to give evidence or be cross-examined parties should consider whether it is necessary to compel that witness' attendance at trial by issuing a subpoena.

The required form of subpoena is the approved *FCR Form 43A – Subpoena to give evidence* or *FCR Form 43C – Subpoena to give evidence and produce documents*.

Rule 24.13 of the FCR requires that:

- the subpoena specifies the date, time and place for attendance (*r 24.13(5)*);
- the date specified in the subpoena must be the date of trial or any other date permitted by the court (*r 24.13(6)*); and
- the subpoena be served on the person no later than 5 days before the date when the person is required to attend, or any other date fixed by the court, and the last date for service must be specified in the subpoena: *r 24.13(8)*.

Practice Tip 3: A subpoena to attend to give evidence usually records the first day of the trial as the date when the party must attend. However, a party can and should liaise with a witness to discuss the timing of their evidence and the day when their attendance is required.

The person on whom the subpoena is issued is not required to comply with the subpoena unless conduct money has been provided or tendered at a reasonable time before the date on which attendance is required: *r 24.17(1)* of the FCR.

Conduct money is a sum of money or equivalent (such as pre-paid travel) sufficient to meet the reasonable expenses associated with the person's attendance at court as required by the subpoena (and their return travel). Conduct money can include a sum necessary to compensate a subpoena recipient for:

- travel costs – eg: plane tickets, train tickets or parking costs;
- accommodation costs – if the witness is required to travel a distance to attend court and is required to attend over multiple days; and
- meal expenses.

See [Federal Court – Issuing subpoenas and orders for production](#) for further guidance regarding subpoenas.

Practice Tip 4: The court expects parties to adopt a “common sense” approach regarding the amount of conduct money given to a subpoena recipient. In doing so, parties should have regard to the requirements of the subpoena recipient, on a case by case basis, including by discussing the likely costs of attendance with the recipient.

Preparation of the Court Book

A Court Book is a bundle of documents containing the documents that the parties intend to rely upon at trial.

Ordinarily, it is the responsibility of the applicant to prepare a court book that contains all of the documents upon which the parties intend to rely. Some NPAs have particular requirements for Court Books, which means that it is important to review any applicable practice notes for that NPA in the lead up to trial.

For example, in the Administrative and Constitutional Law and Human Rights NPA, each party will be expected to file and serve electronically a bundle of the particular constitutional provisions, statutes and regulations as in force at the relevant time and applicable to the questions the subject of the application including any transitional or savings provisions, as well as a list of cases and other materials to be relied upon. The trial bundle may be required to be filed with any outline of submissions ordered to be filed, see *Administrative and Constitutional Law and Human Rights Practice Note (ACLHR-1)* at [12.2].

Generally, the Court Book is divided into sections, including sections for:

- pleadings;
- any affidavit or expert reports; and
- a bundle of all of the exhibits and annexures that are in evidence in the proceedings, arranged chronologically.

Because affidavits will refer to documents by their exhibit or annexure number, the affidavits in the Court Book should be cross referenced to refer to where that document is located within the Court Book. This will assist the court and the parties in navigating the Court Book efficiently during the trial.

The typical process for preparing a Court Book contemplates the applicant preparing a proposed index and providing that document to the other parties with reasonable time for them to review the draft and propose any changes. If material to be placed before the court is voluminous (eg, where it includes multiple copies of the same document), it may be possible to agree to only include one copy of that document within the bundle (unless the document bears markings or is somehow different). Care should be taken to reduce the volume of material wherever possible.

The standard directions for trial generally impose a date by which the Court Book must be provided to the court. Unless orders have been made for an electronic Court Book, a hard copy must be given to the court (they are usually delivered to the judge's chambers, but this should be confirmed with the judge's associate). The applicant should offer to provide two copies of the Court Book to the court, so that the judge can freely mark up her or his copy. A further clean copy of the Court Book must be provided to the court for use by witnesses during the trial.

Practice Tip 5: The spines of the Court Book should clearly indicate a volume number and either the date or page number range contained within that volume. This makes the volume easy to identify quickly in court. Page numbers are ordinarily placed on the outside corner of each page and be as large as possible without obstructing the document.

Cross-examination bundles

It may be the case that a witness must be cross-examined on material that does not form part of the Court Book, for whatever reason.

When this occurs, parties must ensure that there are sufficient copies of that material to be provided to the court, the witness and the opposing party.

This material should be provided to the other party as early as is possible, and preferably not immediately prior to the witness being cross-examined on the material.

Trial schedules

For certain cases with a significant number of witnesses, it may be useful to prepare a trial schedule that provides an estimate of when and how long a witness will be required to give evidence.

This allows for the parties to plan when witnesses may be required in order to ensure the efficient use of the court's time (and that of witnesses). It may be sensible to discuss this schedule with the opposing party and reach an agreement.

Transcripts

To obtain a daily, running transcript of the trial, parties must prepare and submit the relevant form prior to the hearing and pay any necessary fees.

The [relevant transcript order forms and details of the process for ordering transcript](#) are published on the Federal Court website.

Transcripts are subject to copyright and cannot be shared between parties or used for any purpose other than the proceedings to which they relate.

Objections to evidence

Pre-trial orders generally require parties to exchange any objections to the affidavit evidence that will be tendered at trial.

These objections may raise issues with the form and substance of the affidavit evidence and may be made on the bases that the evidence is, eg, irrelevant, opinion evidence, hearsay, or tendency or coincidence evidence.

Prior to each witness being called, the court will ordinarily rule on objections. It can be helpful to mark up a copy of the Court Book to record the rulings on evidence so that there is an easy reference as to what evidence has been ruled inadmissible when cross-examining witnesses or preparing submissions.

Vacating a hearing date

Circumstances may arise that necessitate a party seeking leave to vacate a hearing date.

These circumstances may include:

- the unexpected unavailability of a critical witness;
- late service of evidence that is permitted to be received; or
- the late discovery of documents.

Generally, the party seeking leave to vacate the hearing is required to pay the other parties' costs occasioned by the vacation.

The application should be made as soon as a party forms the view that it cannot proceed to hearing on the date fixed.

An application for leave to vacate the hearing date is made using the approved [FCR Form 35 – Interlocutory Application](#) together with a supporting affidavit in the approved [FCR Form 59 – Affidavit](#) that sets out the facts that justify the vacation.

If the court grants the vacation, the usual order is that the party seeking the vacation must pay any other parties costs thrown away by reason of the vacation.

Forms

Federal Court of Australia – FCR Form 35: Interlocutory application ([Word](#))

Federal Court of Australia – FCR Form 43A: Subpoena to give evidence ([Word](#))

Federal Court of Australia – FCR Form 43C: Subpoena to give and produce documents ([Word](#))

Federal Court of Australia – FCR Form 59: Affidavit ([Word](#))

Other Resources

[Federal Court of Australia – Administrative and Constitutional Law and Human Rights \(ACLHR-1\)](#)

[Federal Court of Australia – Admiralty and Maritime \(A&M-1\)](#)

[Federal Court of Australia – Administrative forms](#)

[Federal Court of Australia – Commercial and Corporations \(C&C-1\)](#)

[Federal Court of Australia – Defamation \(DEF-1\)](#)

[Federal Court of Australia – Employment and Industrial Relations \(E&IR-1\)](#)

[Federal Court of Australia – Federal Crime and Related Proceedings \(CRIME1\)](#)

[Federal Court of Australia – Guide to preparing witnesses for cross-examination](#)

[Federal Court of Australia – Intellectual Property \(IP-1\)](#)

[Federal Court of Australia – Native Title \(NT-1\)](#)

[Federal Court of Australia – Taxation \(TAX-1\)](#)

[Litigation in the Federal Court 2015 \(book\) > Chapter 9 – Hearings](#)