



# Express law

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## High Court Rules 2004

**The High Court has adopted new rules governing the procedure of cases heard in the High Court. The High Court Rules 2004 will come into effect on 1 January 2005. This Express Law aims to highlight the main changes.**

### *Outline of the High Court Rules 2004*

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The High Court Rules 2004 (SR No 304 of 2004) were notified in a Special Gazette on 14 October 2004 ('the Rules'). The Rules comprise five chapters, which are organised according to subject matter. Chapter 1 contains general rules applicable to all proceedings in the Court. Chapter 2 deals with proceedings in the original jurisdiction of the Court. Chapter 3 deals with election petitions. Chapter 4 deals with proceedings in the appellate jurisdiction of the Court. Chapter 5 deals with costs. All forms are found in Schedule 1 to the Rules.

It is intended that the rule number will identify the chapter and part to which the rule belongs. For example, rule 25.03 is found in Chapter 2, Part 25. The end of each chapter is clearly denoted and includes a note advising with which Part the next Chapter commences.

### *Commencement*

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The Rules are effective on 1 January 2005, at which time the High Court Rules 1952 will be repealed. For proceedings commenced before 1 January 2005, the Rules will govern all steps taken on or after 1 January 2005, unless the Court orders otherwise.

### *Changes to note*

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Most of the changes to the Rules may merely be noted. Some changes of note include the abolition of the distinction between a Justice sitting in Court and sitting in Chambers (see rule 6.04.3) and the rule that amendment will now always require the leave of the Court or a Justice (rule 3.01). Under rule 5.03(b), parties raising a constitutional matter within the meaning of section 78B of the *Judiciary Act 1903* are now required to provide relevant documents to interveners. Practitioners should also be aware of rule 1.08, which prescribes the requirements for all documents filed with the Court, and rule 1.05, which deals with the procedure after remittal. It should also be noted that the Rules do not permit electronic filing of documents.

Chapter 3 contains the rules regarding election petitions. They are largely unchanged from the rules provided by the High Court Rules 1952.

Practice Directions No 3 of 1996, No 1 of 2000 and No 2 of 2001, which deal with written submissions and lists of authorities, will continue to apply.

## ***Part 25 – Mandamus, prohibition, certiorari, habeas corpus and quo warranto***

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Part 25 governs applications for writs of mandamus, prohibition, certiorari, habeas corpus and quo warranto. In accordance with the principles of plain English, the Rules no longer refer to an 'order nisi'. Instead, the term 'order to show cause' is used.

All applications for an order to show cause relating to these writs must now be made on notice (rule 25.03.1). Therefore, all hearings will be held *inter partes* and the parties will be referred to as plaintiff and defendant (rule 25.02.1).

If an order to show cause is granted, the Rules provide that the plaintiff is confined to the relief sought and grounds stated in that order (rule 25.04). Therefore, applicants may not raise new grounds during the application for final relief.

The time limits for applications for writs of mandamus and certiorari under the High Court Rules 1952 are retained. That is, applications for a writ of mandamus must be filed within 2 months of the refusal to determine a matter and applications for a writ of certiorari must be filed within 6 months of the judgment or decision (rules 25.06.1, 25.07.2).

### ***Outline of submissions***

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When an application for a writ under Part 25 is served, a summons and an outline of submissions must be filed and served with it. This outline must state why the matter should not be remitted to another court, or, if the plaintiff submits that it should be remitted, identifying the court to which it should be remitted. The outline should also indicate what the future conduct of the case should be. That is, the plaintiff is required to make submissions on what, if any, further steps should be taken in the Court and the times by which, and the manner in which, such further steps are to be taken (see rule 25.03.2). The summons, returnable before a Justice, is to specify the orders sought by the plaintiff on the future conduct of the case (to which the outline of submissions will relate).

In the case of applications for a writ under Part 25, these documents must be served with the application, which may not be served more than 90 days after the date on which it was issued unless an order of the Court or a Justice allows further time (rules 25.01(g), 25.03.1, 25.03.2).

When a plaintiff serves a writ of summons under Part 27, a similar outline of submissions must be filed and served together with a summons for directions returnable before a Justice concerning the future conduct of the case (see rule 27.06). The time for filing the summons for directions is no later than 14 days after the time prescribed for an appearance (see rules 27.01(d), 27.06). The writ may not be served more than 12 months after the date on which it was issued unless an order of the Court or a Justice allows further time (see rule 27.01(f)).

## ***Part 41 – Applications for leave or special leave to appeal***

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Among the significant changes are the changes to the procedure governing applications for leave or special leave to appeal.

### **Procedures for unrepresented applicants**

To relieve respondents of the time and expense involved in responding to unmeritorious applications, applications by unrepresented applicants will now first be considered on the papers filed by the applicant. Unrepresented applicants will be required to present their argument to the Court by filing a draft notice of appeal and written case. These documents are filed in place of the applicant's summary of argument under rule 41.05 and are not to be served on a respondent unless directed by the Court or a Justice (rule 41.10.1). If the written

case is not filed within 28 days of filing the application, the application shall be deemed to be abandoned unless the Court or a Justice has otherwise ordered (rule 41.10.4).

Once a written case has been filed by an unrepresented applicant, two Justices may determine to dismiss the application on the papers (rule 41.10.5). If the Justices do not make a direction to dismiss the application, then a direction will be given to the applicant to serve a copy of the written case on the respondent. This written case will operate as the applicant's summary of argument. The procedure of Part 41 in relation to the respondent's summary of argument, reply, application book, etc, will be followed from this point, as though the applicant was represented (rule 41.10.6).

It should be noted that the rules regarding the application for leave or special leave to appeal (rules 41.01 – 41.03) and notices of appearance (rule 41.04) do not distinguish between represented and unrepresented applicants. Therefore, unrepresented applicants will still be required to file an application within 28 days of judgment, and serve the application, with the documents prescribed in rule 41.01.2, within 7 days of filing the application. Within this time, a copy of the application must also be lodged with the Prothonotary, Registrar or other proper officer of the court below (rule 41.03.2). Notices of appearance (Form 7) must be filed and served within 14 days of service of the application (rule 41.04).

### **Determining applications on the papers**

Rule 41.11.1 provides that any application for leave or special leave to appeal may be determined by any two Justices on the papers. This applies to represented and unrepresented parties. The rule is stated in permissive, not mandatory, terms. Hayne J has indicated that the Court has not yet decided when, or the circumstances in which, this procedure will be used.

### **Deemed abandonment of applications**

Applications can be deemed to have been abandoned (unless the Court or a Justice has otherwise ordered) in the following circumstances:

- Failure to serve on the respondent a copy of the application and documents filed under rule 41.01.2, or failure to lodge with the court below a copy of the application, within 3 months of filing the application; or
- Failure to file and serve a summary of argument and draft notice of appeal under rule 41.05.1 or failure to file and supply the required copies of the application book under rule 41.09.11 within 6 months of filing the application (see rule 41.13.1).

### **Costs consequences of deemed abandonment**

If an application is deemed to be abandoned under rule 41.13.1, the Registrar shall provide a certificate of deemed abandonment, if requested to do so by the respondent. Once this certificate is issued, rules 41.12.2, 41.12.3 and 41.12.4 apply. Therefore, unless the Court or a Justice has otherwise ordered the applicant shall pay the respondent's costs in respect of the application and such costs shall be taxed, unless agreed (rule 41.12.2).

Rule 41.12.2 is not applied to applications by unrepresented applicants which are deemed to be abandoned under rule 41.10.4. Presumably this is because the respondent is unlikely to have incurred costs beyond those associated with filing a notice of appearance.

## **Costs**

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Parties may now request that a Taxing Officer make an estimate of the bill of costs, if it were taxed. In response to such a request, the Taxing Officer will make such an estimate and

notify each party in writing of the estimate. A party has 14 days in which to file and serve a notice of objection to the estimate under rule 57.02. If no such notice is filed and served, the bill will not be taxed and a Certificate of Taxation shall be issued for the amount of the estimate. If a notice of objection is filed, the filing party is first required to pay \$1,250 into Court as security for the costs of the taxation (see generally rule 57.01).

Costs of, and incidental to, the taxation shall be ordered against the party filing a notice of objection if that party fails to reduce the estimate by 1/6 or more (rule 58.02.1). If on taxation the amount of the bill of costs is reduced by 1/6 or more, the party entitled to the costs will not be allowed costs for drawing or copying the bill or for attending the taxation (rule 58.03(a)).

*Text of the new rules is available at:*

[http://www.austlii.edu.au/au/legis/cth/consol\\_reg/hcr2004170/](http://www.austlii.edu.au/au/legis/cth/consol_reg/hcr2004170/)

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