HIGH COURT RULES 2004

INTRODUCTORY REMARKS AT SEMINARS FOR THE LEGAL PROFESSION OCTOBER/NOVEMBER 2004

My objectives tonight are very limited. I want to draw attention to the fact that the Rules of Court have been completely revised and I want to point to some, but not all, of the principal changes that have been made. Much of what I want to say is recorded in the Explanatory Statement which the Court has issued with the 2004 Rules.

The fact that you have attended this session means that my first objective has been achieved. You are aware of the fact that there are to be new High Court Rules. Achieving that objective does not mean, however, that we should at once adjourn to other more enjoyable, or even, dare I say in your case, more profitable, pursuits. Rather, I must detain you a little longer on this most exciting of topics.

The present High Court Rules were made in 1952. They were based on the old English pattern found originally in the First Schedule to the *Judicature Act* 1875 (UK) and later remade as the Rules of the Supreme Court 1883. These Rules also provided the pattern for

the Rules of many, but not all, of the State Supreme Courts. Some of us grew up on those Rules.

The High Court Rules 1952 were drawn at a time when a very substantial amount of work was done in the original jurisdiction of the Court. They were drawn at a time when the Court could and did try witness actions. They were drawn at a time when appeals to the Court lay as of right. Since then, of course, there have been many significant changes in the Court's work. Giving the Court power in 1976 (by the *Judiciary Amendment Act* 1976 (Cth)) to remit proceedings to other courts has meant that the trial of witness actions no longer takes place in the Court. Since that same set of amendments to the *Judiciary Act*, in 1976, appeals no longer lie as of right. Appeals lie only by special leave.

Now the work which the Court does in its original jurisdiction is largely confined to constitutional work and, often enough, that work proceeds by way of stated case pursuant to s 18 of the *Judiciary Act* 1903 (Cth) or by demurrer.

Some, but by no means all, of these changes found some reflection in amendments to the Rules. But, with their heavy emphasis on trial of actions, many of the provisions of the 1952 Rules no longer find ready application to the work of the Court.

Rather than amend the 1952 Rules, the decision was taken to start again, with a clean sheet of paper. The Court has now made the High Court Rules 2004 which repeal the former Rules with effect from 1 January 2005. The new Rules are intended to reflect more accurately the nature of the work which the Court now undertakes. They are intended to follow more modern styles of drafting. They do not, however, contain diagrams, or notes, or flow charts.

There is no doubt that a lot of attention has been, and will be, given to the provisions made by the new Rules which will allow some applications for special leave, and some applications pursuant to s 40 of the *Judiciary Act* 1903 (Cth), for removal of a cause or part of a cause into the Court, to be dealt with on the papers. But these are not the only changes made by the Rules and it would be wrong to focus attention on those changes to the exclusion of other modifications that the Rules make. I do not propose to give a list of those changes. But I do want to make reference to some of the more important of them.

The new Rules are organised in five Chapters. Chapter 1 contains general rules applicable to all proceedings in the Court. It is here that you will find many of the provisions that those familiar with Court work take for granted. Here, for example, you find the rule that regulates the size of type to be used in documents filed in the Court – 12 point not 10 or 8 point as some counsel, no doubt oppressed by page limits, seem to think. Chapter 2 deals with

proceedings in the original jurisdiction. Chapter 3 deals with election petitions. Chapter 4 deals with proceedings in the appellate jurisdiction. Chapter 5 deals with costs.

We have tried, as far as possible, to arrange the Rules in a logical order that will enable the intelligent lay reader to follow the procedures that will apply in proceedings in the Court. In general, therefore, the rules are arranged in an order that follows the progression of a matter from start to end.

You will notice that I have referred to the "intelligent lay reader". Many of the decisions that have been made about the way the Rules are cast have been formed against a background in which so much of the work now coming to the Court is work in which one or other of the parties prepares their documents and ultimately will present any oral argument in the Court without legal representation. It is considerations of that kind which underpin such matters as the Court's decision not to permit filing or service of documents by e-mail. Much time is spent by Registry staff assisting litigants in person by pointing out difficulties and deficiencies in documents that are proffered for filing in the Court. That cannot be done if electronic filing is permitted.

The provisions made in Ch 2 of the Rules for proceedings in the original jurisdiction of the Court have a number of features to which attention should be drawn. First, if you go to Pt 20 you will

see that every proceeding in the original jurisdiction of the Court is commenced by filing the appropriate form of initiating process. Part 20 tells you where then to go in the Rules: Pt 25 for constitutional writs and associated relief, Pt 26 for s 40 removals, Ch 3 for Election Petitions, Pt 27 for actions by writ of summons. The former practice of applying for constitutional writs and associated relief by filing an affidavit and draft order nisi will go. Instead, there is a form of application (Form 12) which will usually be served upon the opposite parties. The application will therefore ordinarily proceed on notice. In this respect, the procedures prescribed by the 2004 Rules reflect the current practice in the Court in which most applications for order nisi are made on notice. The parties to an application for constitutional writs are called the plaintiff and defendant. Once instituted, an application for relief of that kind must be served on the opposite party within 90 days. The former time limits for instituting such proceedings (6 months for certiorari, 2 months for mandamus) are preserved.

Applications for orders for removal under s 40 of the *Judiciary Act* are also to be instituted by a form of application (Form 17). All applications for removal will now be dealt with by a Full Court but, because the same procedures are to be followed as in the case of an application for special leave, applications for orders for removal may be dealt with on the papers.

Finally, there is the residual category of cases brought in the original jurisdiction of the Court which are to be commenced by writ. There is a new form of writ of summons (Form 20). This category of cases includes, of course, matters arising under the Constitution or involving its interpretation and in particular actions seeking declarations of invalidity. Many of the provisions found in the former Rules regulating pleadings find equivalent provisions in the new Rules. As under the former Rules, the new Rules require the plaintiff to plead facts demonstrating that the matter falls within the original jurisdiction of the Court.

Very soon after the commencement of an application for constitutional writs, or similar relief, or commencement of an action by filing a writ of summons, the plaintiff will have to take out a summons for directions, returnable before a Single Justice. The Rules provide that the plaintiff must file an outline of submissions dealing with a number of matters. In particular, the plaintiff must show why the case should not be remitted to another court and, if it is submitted that it should not be remitted, the submissions must make proposals for the future conduct of the matter in the Court. This is an evidently important step to which both the plaintiff and the opposing parties will be expected to pay close attention.

We have not made some changes that current procedural fashions might suggest could have been made. Pleadings have been retained in actions commenced by writ. We have retained the old

procedure by way of demurrer to pleadings (see rule 27.07). Although I think demurrer is less frequently employed now than once it was, it remains a useful procedure for determining some questions of constitutional validity. That was reason enough to retain the procedure and there seemed to be no advantage to be gained by renaming it.

The provisions made in Ch 3 for dealing with election petitions are not very different from the provisions made in the current Rules. I therefore say no more about them.

On the appellate side of the Court's work, we have not changed the Court's practice notes about the provision of lists of authorities. These practice notes serve important purposes in the orderly disposition of the Court's work. They are there to be followed.

Then there are the changes made which will permit the Court to deal with some applications for special leave to appeal on the papers. This procedure will be available not only for any application for special leave instituted after 1 January 2005 but also to applications now pending in the Court.

What I am saying should not be misunderstood as some indication that the Court proposes to deal on the papers with all, or even a majority, of applications for special leave whether now

pending or later issued. The Court has made no decision about which, if any, applications will be dealt with in that way. In that regard, it is important to notice that the calendar which the Court has published for its sittings in 2005 includes more, not fewer, motion days. But it is important for legal practitioners and their clients to recognise the effect of rule 1.03: that the new Rules will apply not only to proceedings commenced after 1 January 2005 but to any step in a proceeding that is taken after that date. That includes the step of dealing with the application for special leave.

The number of special leave applications filed in the Court has risen markedly over recent years. In my time on the Court, the number of applications for special leave has doubled. For the year ended 30 June last, more than 700 applications were filed. Many applications for special leave are made by litigants in person. Not all of those applications by litigants in person are arguable. One of the changes made by the new Rules concerns applications for special leave where the applicant is unrepresented. The applicant must file a written case and draft notice of appeal within 28 days or the application is deemed abandoned (rule 41.10). Only if an arguable question is raised in that written case will a respondent be called on to make answer to it.

In those matters where the application for special leave is argued orally, the time limits for oral argument remain unchanged.

What may be apparent to you from the changes that I have mentioned is that oral advocacy in the Court remains of central importance. It is important to recognise, however, that in the High Court, as in other courts, written advocacy is now and will continue to be very important. I suspect that legal practitioners may have to give closer attention to the development of the skills necessary for presenting written argument than they may have in the past. In this respect, Australian lawyers may benefit from considering the best American practice. To take only one example of what I mean, the present Practice Directions in the Court require parties to identify the issue or issues that arise on an appeal. That will continue to be the case. Often enough, however, little attention appears to have been given in written submissions to the way in which the issue is framed. It emerges as some variation on the theme of "The issue is whether the court below was wrong". Quite a lot has been written in the United States about framing issues. One place to begin considering how better to frame the issue may be Bryan A Garner's book *A Dictionary of Modern Legal Usage*, in its 2nd ed, under the title "issue framing". But this is to divert from my immediate concern which is to draw attention to some aspects of the new Rules.

Chapter 5 of the Rules deals with costs. Simplifying the complicated provisions made in the existing Rules regulating this subject was not easy. Experience will reveal whether the attempt has been successful. One of the changes that has been made is to

make provision for a Registrar to give an estimate of the amount which he or she considers would be allowed on taxation. If the opposite party insists upon taxation, that party will pay the costs of the taxation unless the bill is taxed out in an amount which gives that party a better result by at least one-sixth of the amount of the original estimate.

Finally, of course, the First Schedule prescribes the Forms to be used in the Court. The Forms have been changed. Although you will not notice much difference in the Forms prescribed for outlines of argument, in this, as in all other aspects of the work in the Court next year, it will pay to look at the relevant Rules.

The Rules of Court are intended to assist the orderly, efficient and just disposition of the Court's work. They work at their best when reference to them during the course of a hearing is unnecessary. That can happen only where practitioners have read and observed the requirements of the Rules.

In a project as large as this has been, it is inevitable that something will have slipped through the net. That is why we have provisions like rules 2.02 and 2.03 concerning dispensing with compliance and the consequences for failure to comply, Part 3 dealing with amendment and, most importantly, rule 6.01 dealing with cases not provided for by the Rules.

The present form of the Rules has been adopted by the Court after extensive submissions were made on an earlier draft by the Australian Bar Association and the Law Council of Australia and by the Solicitors-General. We have not adopted all of the suggestions that were made, but we have considered all of them. We are very grateful for the time and effort that was put in to the preparation of those commentaries.

None of us is so foolish as to think that the High Court Rules 2004 constitute the last possible word on the Rules to govern proceedings in the Court. If it is suggested that there are improvements that can be made to the Rules, we will consider them. But like so many drafting problems, it is never enough to say that "the drafting of rule such and such is unsatisfactory". The relevant question is, "what form of the rule would be better?". Nor is it enough to say that lawyers could work more efficiently if a particular procedure was adopted. Account must be taken of the fact that not all parties who litigate in the High Court are represented by lawyers.

The line we have had to discern in drawing the Rules has not always been brightly lit. We have had to make choices at just about every step along the path. Nonetheless, we trust that the end product of our labours does provide sufficient, and sufficiently clear, guidance to those who litigate in the Court, and to those who advise them about what is to be done in conducting a matter in the Court, after 1 January 2005.