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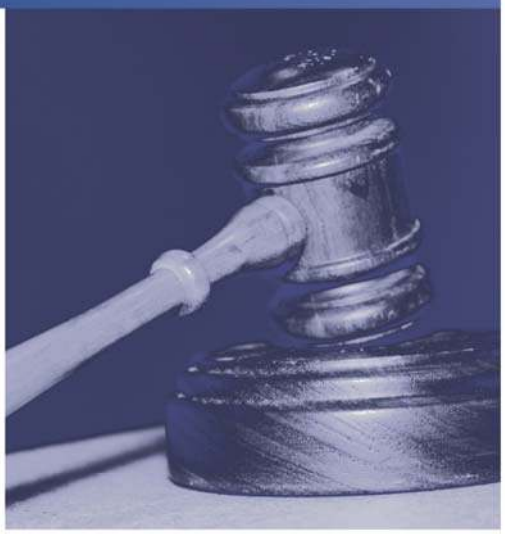
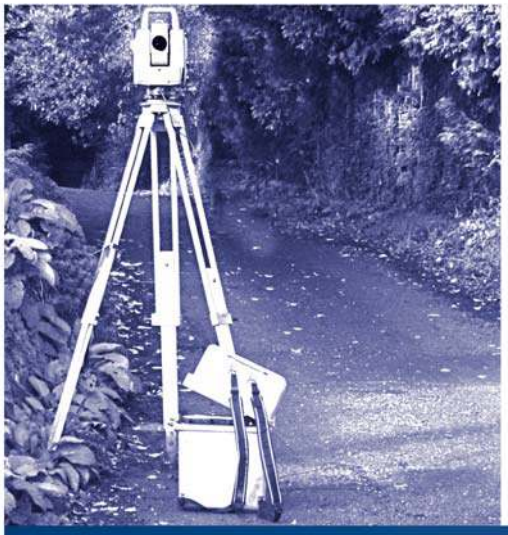
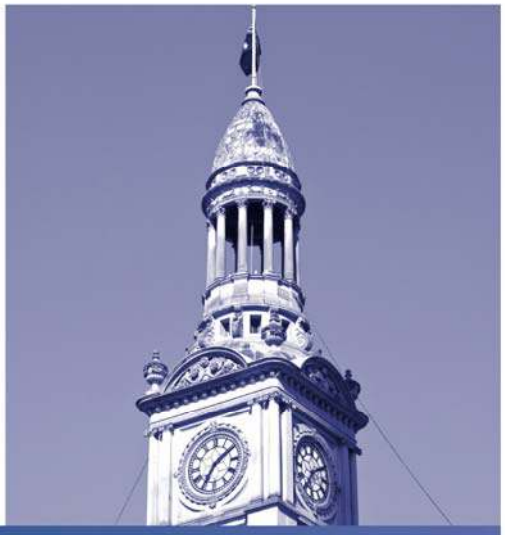


Prosecution Manual for Local Government Planners and Building Surveyors





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PROSECUTION MANUAL

CHAPTER ONE
INVESTIGATION

- INVESTIGATION CHECKLIST
- INTERVIEW TECHNIQUES
- RIGHTS OF ENTRY

INVESTIGATION

Rules to remember

1. **Any action regarding an alleged breach of the P.E.A or Regulations may end in a prosecution.**
2. **If an officer is of the opinion that it is appropriate to undertake a prosecution, the building surveyor has the responsibility of:**

(a) **providing sufficient evidence to support a prosecution; and**

(b) **ensuring that this evidence is collected and maintained in a manner which the court can accept.**

When municipal officers receive a report that a breach of the planning legislation is occurring, there are a number of actions they are trained to take. Primary among these are what could be called `front end' actions, involving inspecting the site of the alleged breach, assessing the level of compliance, and taking whatever action is specifically required or permitted under the Regulations.

Generally, an officer's training pays less attention to what could be called `follow up' actions, which are required if the front end actions either do not achieve a suitable result, or the legislative breach is of such seriousness that further action is necessary.

The first of these follow up actions involves the actual process of investigation. Many officers are trained to assess levels of regulatory compliance, they are not usually trained as `police-style' investigators. But if the investigation is not carried out correctly, any follow up could be jeopardised before it even starts. And if the follow up leads to a prosecution, and there have been faults in the investigation, the prosecuting officer will almost inevitably be open to attack in court by an opposing lawyer.

It is not adequate for one to simply inspect a site or building, determine that in her or his own opinion there has been a breach, then phone the council's lawyers asking for a prosecution to be undertaken, and expect the case to be successful. If the right steps have not been taken, the case will almost certainly be lost.

What can you do to help avoid being attacked in court because of faults in the investigation process? Learn and abide by the following steps to carrying out a successful investigation, techniques for interviewing potential defendants, and information on rights of entry. They will not guarantee a successful prosecution, but they should increase the chances of winning.

STEPS TO CARRYING OUT A SUCCESSFUL INVESTIGATION

1. Obtain any current building details

Unless there is an emergency, before you rush out to inspect you should carry out a search of the council's records for any current building details - eg permit applications, notification of appointment of a private building surveyor, and so on.

2. Prepare for on-site action

It would be sensible to as far as possible prepare any documentation you may require for this prior to leaving the office - and, in general terms, you should have a system established to enable you to do so.

See also Lovegrove on Building Control, Part 8.

3. Take a witness

When carrying out a site inspection which may result in a prosecution, you should always take a colleague or other credible witness with them. It is essential that any eye witness accounts of the circumstances of the inspection, and any actions taken or statements made should be corroborated. This will significantly enhance your case in court.

4. Take a camera

Photographs of the site, any building works, any possibly illegal activities, machinery on site, workers in action and the like will be of great evidential value.

When doing this, you should:

- Take sufficient shots to put together a panoramic view of the site and any illegal building works.
- Ensure that every picture tells a story - and that story should be the one you will be putting to the court
- Use a camera which produces a date and time on the photographs.
- Use a conventional camera, rather than a polaroid-style camera, because-
- The resolution of polaroid-style photographs tends to fade over time (a trial may not take place for 6-12 months after the inspection, and any appeals may take even longer); and
- It is extremely difficult to reproduce copies of polaroid shots as needed (copies will be required for various documents which form an essential part of the pre-trial and trial processes).
- Ensure that when you have the film developed, you get large glossy prints, and have them laminated.

5. Get the details of the person in charge'

When speaking to the `person in charge' of the building works obtain their:

- Name.
- Contact number.
- Position in regard to the building works - eg contractor, site supervisor, owner, and so on.
- If they are an employee or contractor, the name and contact details of their employer or person in charge of the contract.
- Where possible, details of their Building Practitioners Registration.

6. Get the details of the owner

Ask the ‘person in charge' for details of the building owner. Later confirm these details by conducting a title search at the Land Titles Office.

7. Take any on-site action

Take any on-site action necessary regarding the breaches of Regulations - such as issuing a Notice or Order.

8. Make notes

Make notes during your inspection, and during or immediately after any conversations. It does not matter if these notes are abbreviated, so long as you can accurately interpret them later.

It is also critical that, immediately on returning to the council, the officer and the person who acted as witness must make detailed notes of the site inspection, and any matters which led up to the inspection.

For example, such notes should include at least:

- Why an inspection was carried out - eg if the inspection resulted from a phone call, you should note the caller's name, the date, the time, the details of the call, any property details given, and details of any people mentioned.
- Where the inspection was carried out.
- When the inspection was carried out.
- Who the inspection was carried out with.
- What you saw.
- Who you spoke to, what they said, what they did, and who they mentioned. Note that when reporting conversations, you should avoid using the phrase `words to that effect' - rather, paraphrase the conversation.
- What documents you sighted or which were provided for you at the inspection.

These notes, called `contemporaneous' notes, will form the basis of your witness statements for the prosecution. If the notes are taken immediately, it reduces the possibility that the evidence will be challenged at trial due to memory failure of the witnesses. These notes are crucial to your case, and the longer after the event they are made, the weaker they stand in court.

9. Check your files

Check the council's files for any information regarding planning or building permits related to the subject site

10. Contact police, if necessary

If you suspect criminal damage to property, or any other criminal action, contact the police - for example, during a demolition a concrete block may have fallen and damaged a parked car. In such cases, the police will, if they consider such action necessary, have to be the informant for any prosecutions under the Crimes Act 1958.

11. Get witness statements

You should immediately contact the person who alerted the council to the legislative breach, and any other witnesses, and obtain a statement from each of them. Such statements should include at least:

- Who they are and their address and other contact details.
- When did they first observe the matter that gave rise to them contacting the council? Also, any subsequent relevant times and dates.
- What did they see?
- When did they see it - time and date?
- What work was being carried out, and by whom?
- Do they know the identity (name and role) of the people they observed on the site or in the building who were responsible for or carrying out the legislative breach?
- Was there a person directing or overseeing any work or workers on site or in the building?
- Would they be able to make a physical identification of the people they observed on the site or in the building?
- Did they have any conversations with people on site or in the building and if so, with whom, when, and what was the content of these conversations?
- Did they take any photographs or videos of the matter which gave rise to the complaint? If so, obtain copies and the time and date of them being taken.
- Are there any other witnesses?

These statements are crucial to your case, and the longer after the event they are made, the weaker they stand in court.

Make sure that the witness statements corroborate and link together with your statement.

12. Interview the owner and builder

Contact the building owner, and, if the legislative breach involves building works, the builder. This interview should ascertain the reasons why the legislative breach occurred, and any other relevant details. Refer to the section below on techniques for interviewing potential defendants.

TECHNIQUES FOR INTERVIEWING POTENTIAL DEFENDANTS

Failure to follow the correct interview process could make all the evidence you collect as part of the interview inadmissible at the trial.

The process is not difficult, and if you stick to the following points there is a very high chance that the evidence you collect could form a high point in your case.

1. Tape the interview

You should always try to tape the interview. Note that it is the interviewee's prerogative to refuse to allow the interview to be taped.

Note that even if it is taped, you should take notes of important issues raised during the interview in case the tape recording is not clear, or in some other way fails to be suitable for use in court.

These notes should be made at the time - but, if you have used abbreviations and the like, you may wish to write the notes up after the interview. However, the longer after the interview the notes are made, the less useful they are as evidence.

2. Give a warning

You must give the interviewee a warning. The warning should:

- alert the interviewee that the interview is being taped;
- alert the interviewee that she or he is not obliged to say anything, but that anything she or he does say may be used in evidence at a later stage; and
- advise the interviewee that she or he is allowed to seek legal advice.

While there is no legal rule that such warnings are required, failure to provide one could cause a court to decide that such failure is evidence that the contents of the interview were not made voluntarily, particularly if they contain any admissions or confession.

3. Information to be sought

The information you obtain at an interview could form the basis of charges and a prosecution at a later stage. It is important that you collect as much relevant material as possible. You should make notes before the interview of the questions you want to ask, and note during the interview any additional lines of enquiry the interview may open up.

At the beginning of the interview, you should seek information along the following lines (you will need to tailor your interview to the precise circumstances of the situation):

- The interviewee's full name and address.
- The interviewee's relationship with the building work on the site (eg. owner, site supervisor, designer etc).
- The name, address and other contact details of the relevant building surveyor, if any.
- Whether or not there is a planning or building permit in force.
- When building work started on the site, and how long the work has continued.
- Who was responsible for or authorised the commencement of building work on the site (particularly any work you think may be illegal).
- What building work has been carried out on the site (eg. demolition, excavation, construction etc - particularly any work you think may be illegal).
- Whether or not any protection measures have been implemented on the site.
- Other details of what happened on the site.

The further information you need to seek includes such information as the date of and place where any building work took place, and a sufficient description of the type of building work that was carried out on the site.

Ideally, the interview should provide sufficient information to form the basis of any case against the defendant. Being realistic, however, it often will fall short of this target. Nonetheless, you must try - that is your job.

If other facts become available later, and you missed them at the interview simply because you asked the wrong questions, or more specifically didn't ask the right questions, your case could fall down.

4. Translations

There may be times when it is necessary, or you believe it may be necessary, or you are advised it will be necessary to provide translation services during an interview. You need to make sure that your evidence is not thrown out of court because it is argued that:

- the defendant did not properly understand what she or he was hearing or saying; or
- the translator you used was deficient.

You should only use a translator who is accredited in the correct language with NAATI (the National Accreditation Authority for Translators and Interpreters - see the handy address list). There are a number of these listed in the Yellow Pages under translators, many specialising in specific languages. Contact NAATI if you are in any doubt.

If there is limited time, or you only become aware of a language problem at short notice and you do not want to adjourn the interview, there are a number of services you can contact which will provide telephone translating assistance (see the handy address list for one such contact which provides a 24 hour service - which could be helpful during an inspection, especially an emergency).

This kind of service is not cheap (perhaps ranging between $35 and $50 or so per hour), but it may make the difference between a successful prosecution, and having your case thrown out of court.

5. Transcriptions

Ensure that the taped interview is transcribed. The court is unlikely to hear lengthy tapes of interviews - your transcription will form the basis of your case. Nonetheless, the tapes of any interviews must be kept safe in case they are needed in evidence upon the transcriptions being challenged. The handy address list includes the contact details of a transcription service.

RIGHTS OF ENTRY & INVESTIGATORY AUTHORITY

For an investigation and any ensuing prosecution to be valid, the investigating officer must be properly authorised, and must carry out the investigation within the limits imposed by the law. Failure to closely abide by these requirements will leave you wide open to attack by an opposing lawyer at any trial which may result from your investigation.

ENTRY CAN ONLY BE BY AN AUTHORISED INVESTIGATING OFFICER

An investigating officer must be properly authorised. In essence, the legislation requires that such an authorisation must be made in writing by the relevant Council.

For an investigation to be legally valid:

- the authorisation MUST be in existence prior to investigating any contravention under the Act or Regulations;

2. POWERS OF ENTRY

Reasonable belief that there may be an offence

An investigating officer may apply to a Magistrates' Court for a search warrant (see Section 231 B of the Building Act 1993) if she or he is confronted with a situation where:

- there is not a danger to public safety, the occupants or otherwise; but
- there are reasonable grounds to believe that there is (or may be within the next 72 hours) a particular thing which may be evidence of a legislative breach.

The aim of a search warrant is to collect evidence to support a prosecution for a legislative breach. It involves a process which could take some time to complete, and will require you to convince a magistrate that there are sufficient grounds for a search warrant to be issued.

Because of the time involved in gaining a warrant, there are two matters you should consider. First is whether or not the risks to the community or people using the building are such that a delay could result in a dangerous outcome. If there is such a risk, you will need to consider whether or not you would be more justified in taking the entry action appropriate to an emergency (see Option 1 above).

The second matter you need to consider is the risk that the people involved in the breach may dispose of evidence if they become aware that an investigating officer intends to collect it. If you suspect that evidence or material will be disposed of while a search warrant is being obtained, another investigating officer (ie)an `authorised officer') should remain at the site.

This officer should be prepared to record evidence of any acts of disposal or destruction of evidence by means of video, photographs and tape recordings, as may be appropriate. Refer also to the material above regarding contemporaneous notes in the section on steps to a successful investigation.

Once you have determined to proceed with the search warrant process, you need to make sure that you have sufficient evidence to persuade a magistrate that a search warrant should be issued.

The `fair minded person' rule applies to whether or not this is the case. That is, the decision should be on the objective basis that a `fair minded person' would agree that a warrant is required on the basis of the circumstances of the case.

For example, it may be reasonable to suspect that illegal building works are being carried out when:

- a search has been done of the relevant municipal records, and nothing is found in relation to building works being authorised at the subject site;
- building trades people have been observed working on the site; and
- building materials, and equipment have been observed at the site.

However, the circumstances of each case will differ, and it is your role to piece together all available facts to support a reasonable belief that there is evidence of a breach of the Act or Regulations at a particular site. These facts will be considered by the Magistrate when determining the application for a search warrant.

With regard to search warrants, it may be prudent:

- to engage legal assistance, as it will require an appearance before a Magistrate, presentation of the facts so far collected, and argument regarding whether or not a warrant should be issued on the basis of those facts; and
- once the warrant is obtained, to be in the company of other `authorised officers' when it is being executed - they will be witnesses of any occurrences for later reference in court (note also the discussion regarding use of Police assistance above).

PROSECUTION MANUAL

CHAPTER TWO
PLEADINGS PREPARATION

- WHAT ARE PLEADINGS?
- DO YOU HAVE THE AUTHORITY TO LAUNCH PROSECUTION?
- HOW MUCH DETAIL SHOULD BE IN PLEADINGS?
- DUPLICITY
- PLANNING OFFENCES
- CHARGE AND SUMMONS SHEETS
- DESCRIPTION OF CHARGE IN THE PLEADINGS
- IDENTIFICATION OF LEGISLATION, PROPERTY
- OWNER, DEFENDANT AND DOCUMENTS
- How MANY OFFENCES SHOULD BE LISTED?
- ADVICE OF VENUE AND MENTION DATE
- EXTENSION OF MENTION DATE
- TYPING OF CHARGE AND SUMMONS SHEETS
- AMENDMENTS TO PLEADINGS
- FILING PROCESS
- SERVICE OF CHARGE AND SUMMONS SHEETS
- SUBSTITUTED SERVICE
- PROOF OF SERVICE

PLEADINGS PREPARATION

Rules to remember

1. Make sure you have the authority to initiate a prosecution.

2. Purchase copies of blank charge and summon sheets and draft your pleadings (ie the charges, and information regarding them). In doing this, you should:

(c) provide sufficient information - but don't put in too much information;

(d) avoid duplicity;

(e) properly identify the property, the defendant, the property owner and any relevant documents;

(f) advise as to the mention date; and

(g) have the document typed.

3. Properly serve the charge and summon sheet - be aware of the process, the timelines, and the need for proof of service.

WHAT ARE PLEADINGS?

Where a prosecution is being launched, pleadings are written statements setting out the nature of the charges being brought against the person named as a defendant.

The pleadings are in summary form, and must state the basic facts, and the legislative provisions which you are claiming have been breached (see the discussion below on detail in the pleadings).

DO YOU HAVE AUTHORITY TO LAUNCH A PROSECUTION?

Before drafting pleadings, you must ensure that you, as the informant (ie the person who is bringing the charge), have the authority to bring the prosecution.

This entails two basic things:

1. ensuring that you have an instrument of delegation from the council, endorsed with the Council's Seal, stating that you are authorised to bring a prosecution. This instrument of delegation must indicate the scope of authority in terms of the relevant Acts under which you are authorised to prosecute.

2. Have a copy of the relevant instrument of delegation prepared to present as evidence to the court. See the chapter on admissibility for further discussion of this matter.

How MUCH DETAIL SHOULD BE IN PLEADINGS?

The pleadings must provide an adequate description of the charge, so that the defendant can reasonably determine what offence she or he is charged with the extent of detail required in the pleadings is a fine line between unreasonable brevity and a degree of `overkill' which reveals all the key details of your prosecution strategy. However, while the defendant is not entitled to receive the `kitchen sink', and you do not need to give your entire case away, she or he has a right to be given sufficient information to know the basis of the charges.

It is unfortunately common for this issue of details in pleadings to become a field of argument between the defence and the prosecution taking up much time and money. These antics benefits no-one but those who are paid for their time, and can deflect you from the focus of the case.

It is your responsibility, in consultation with your lawyers, if you have any, to determine what is reasonable and save yourself and everyone else time and money by putting that detail in the original pleadings. However, having made that decision, do not allow yourself to become an easy target for a defence playing these kinds of games.

DUPLICITY

In legal terms, duplicity is where one charge attempts to cover more than one offence. There are numerous instances where a provision of the failure to do this can be an embarrassing breach of protocol, and can lead to the charges being struck out by the court. The consequences for you of this occurring because you have failed to correctly prepare your pleadings are obvious.

On the other hand, you should beware of minimising all reasonable charges - if you believe a charge fits, make it (without, of course, overdoing it to a ridiculous extent, which may cause a court to feel sympathy for the defendant). It is far better for you to make several charges, than to:

- make the serious error of using one charge for several offences (duplicity);
- fail to make charges which might stick better than the ones you actually make; or

- failing to leave room for strategic plea bargaining at a later stage.
  SUMMARY OFFENCES

See Section 112 of the Sentencing Act 1991. In effect, this means that it will, in the first instance, be heard in the Magistrates' Court, without the defendant having a right to have the matter heard before a judge and jury.

PLANNING OFFENCES

When preparing your pleadings you should carefully consider provisions of the Planning and Environment Act 1987. The defendant may have breached a planning permit or other planning and environment provisions. Note that if such matters are to be entered in your pleadings your instrument of delegation must allow you to prosecute for breaches under this Act. Otherwise, you should advise the council's planning officers of the apparent breach.

CHARGE AND SUMMONS SHEETS

Criminal proceedings are initiated in the Magistrates' Court by filing a `Charge and Summons' sheet with the Registrar of the Magistrates' Court - see Section 26(1) Magistrates' Court Act 1989. These sheets are effectively what is known as the `pleadings', and are often simply referred to as the `Charge and Summons'. See the discussion below on filing Charge and Summons sheets

The Charge and Summons sheet must be signed by the informant - see Section 26(2) of the Magistrates' Court Act 1989.

DESCRIPTION OF THE CHARGE IN THE PLEADINGS

A charge must describe the offence the defendant has allegedly committed. It is sufficient to use either the precise words of the relevant section of the - see Section 27(1) of the Magistrates' Court Act 1989.

IDENTIFICATION OF BREACHED LEGISLATION

A charge must identify the section or regulation which creates the offence the defendant is alleged to have committed - see 27(2) of the Magistrates' Court Act 1989.

This may be a simple listing of the breached legislative provision. However, not all legislative provisions which can be breached carry a specific penalty for that breach.

Care must be taken when drafting a charge to ensure that the breach of a particular provision creates an offence. A means of identifying whether a breach of a provision is an offence is the presence of a specific reference to a punishment or penalty in the provision (see the Table included in Chapter 1 of this manual). If the provision does not contain such a penalty, consider recourse to Section 16(1).

IDENTIFICATION OF THE SUBJECT PROPERTY

It is common for prosecutions under the Building Act to refer to a specific property which is subject to the prosecution. Such a property must be described in language which clearly explains which property is involved. For example, a clear residential address, or a Certificate of Title Volume and Folio number - see Section 27(3) of the Magistrates' Court Act 1989.

IDENTIFICATION OF THE PROPERTY'S OWNER

If the charge describes the property and does not require any reference to the owner (for example, the owner is not involved in the offence), then there is no need to name the property's owner - see Section 27(4) of the Magistrates' Court Act 1989.

Note that if you plead the defendant as the owner of the property, you should have a certified extract of the Certificate of Title from the Land Titles Office proving that the defendant was the owner at the time the offence was committed.

If the property involved in the charge belongs to more than one person, and, for example, only one of the owners is charged as a defendant, the charge should describe the property as owned by the defendant 'and other persons'.

If the property is owned by a collection of persons (eg a corporation) it is sufficient to describe the property as belonging to the corporation, and not to name each individual - see Section 27(5) of the Magistrates' Court Act 1989.

IDENTIFICATION OF THE DEFENDANT

The description of the defendant or any other person who is referred to in the charge must be reasonably sufficient to identify the person - see Section 27(6) of the Magistrates' Court Act 1989. For example, the full name of the defendant should be used, and in the case of a corporation, reference should be made to the corporation's ACN.

If the charge refers to a person whose name is not known, or it is impractical to describe the person with reasonable sufficiency, the phrase 'a person

unknown' should be used - see Section 27(7) of the Magistrates' Court Act 1989.

IDENTIFICATION OF ANY RELEVANT DOCUMENTS

If the charge refers to any documents, each document should be clearly described to enable reasonable identification - see Section 27(8) of the Magistrates' Court Act 1989.

Note that any documents referred to in the charge will have to be an exhibit for the trial, and be available for inspection by the defendant. So make sure you have copies. See the chapter on admissibility for a discussion of this matter.

HOW MANY OFFENCES SHOULD BE LISTED?

Each Charge and Summons sheet can contain more than one offence if:

- the offences relate to the same facts, or
- the offences form part of a series of offences of a similar fact or character.

If there is more than one charge on the Charge and Summons sheet, the particulars of each offence must be in a separate numbered paragraph - see Section 31(2) of the Magistrates' Court Act 1989.

All offences listed on the same Charge and Summons sheet must be heard together (see Section 31(1) of the Magistrates' Court Act 1989), unless either the informant or defendant receives the court's permission to have the charges heard separately (see Section 31(3) of the Magistrates' Court Act 1989).

If the charges are listed on separate Charge and Summons sheets, each charge will be heard separately, unless either the informant or defendant receive the court's permission to have the charges heard together - see Section 31(4) of the Magistrates' Court Act 1989.

ADVICE OF THE VENUE AND MENTION DATE

The Charge and Summons sheet must direct the defendant to attend a specified venue on a specified date at a specified time to answer the charge or charges - see Section 33(1) of the Magistrates' Court Act 1989.

This information will be sorted out between you and the Registrar of the relevant Magistrates' Court at the time the Registrar 'issues' the Charge and Summons (see below).

The date on the Charge and Summons sheet is called the 'mention' date, and is the first date that the matter is brought before a Magistrate (see the chapter on trial preparation for more detail on mentions). -Try to get a mention date listed for midweek, when the list of cases is not so long. The mention date is ordinarily entered on the Charge and Summons sheet by hand.

The mention date should generally be at least 4 weeks in the future. This will allow reasonable time to serve the documents, and for the defence to respond by, if it chooses, lodging a request for pre-hearing disclosure (see the chapter on trial preparation). Failure to allow a reasonable time could lead the court to simply adjourn the matter to safeguard the defendant's rights to natural justice.

Note that when filing the Charge and Summons sheets, and choosing the mention date, you should have a list of suitable (or, as the case may be, unsuitable) dates. It is essential that both yourself and your prosecution team be available for the hearing.

EXTENSION OF THE MENTION DATE

Under Section 33(2) of the Magistrates' Court Act 1989, the informant is entitled to apply to the Registrar for one extension of the mention date, without cause:

- prior to serving the Charge and Summons sheet; and
- before the mention date has expired, or within one month after the mention date (eg if the re has been trouble serving the Charge and Summons sheet).

After the first extension of the mention date, a further extension may be granted by the Registrar, if she or he is satisfied by evidence on oath or affidavit that the informant has made reasonable attempts to serve the Charge and Summons sheet on the defendant - see Section 33(2) of the Magistrates' Court Act 1989.

TYPING OF THE CHARGE AND SUMMONS SHEETS

The Charge and Summons sheets come in sets of 4, each colour coded depending on who gets the relevant copy (and each is marked with an indication of who gets that copy). These sheets can be obtained from specialist printers (see the handy address list elsewhere in this manual).

It is effectively impossible for the Charge and Summons sheets to be printed on a computerised system, so they will need to be typed on a manual typewriter. It is recommended that the sheets be sent to a typing service (see the handy address list elsewhere in this manual). As yet there is not a version of this document in computerised or template form.

AMENDMENTS TO PLEADINGS

If there are any errors in the pleadings on the Charge and Summons sheet, the informant can apply to the court for an amendment - see Section 50 of the Magistrates' Court Act 1989.

FILING PROCESS

The filing process starts with the typed Charge and Summons sheet being taken to the Registrar of the relevant Magistrates' Court for 'issuing' - this is the process by which the sheets are stamped and signed by the Registrar, and a copy is retained by the court.

There will now be 3 copies remaining:

- One copy is served on the defendant (by the prosecution, which usually retains a specialist 'process server' for the job - see the handy address list elsewhere in this manual).
- One copy is retained by the prosecution.
- The final copy is 'filed' back at the Magistrates' Court, with the service details completed, as proof of service.

With regards to filing fees for Charge and Summons sheets, you should check these fees with the Magistrates' Court, as they are subject to change.

SERVICE OF CHARGE AND SUMMONS SHEETS

The Charge and Summons sheet must be served at least 14 days before the mention date, and must be served on the defendant by:

- delivering a true copy of the Charge and Summons sheet to the defendant personally; or
- leaving a true copy of the Charge and Summons sheet for the defendant at her or his last or most usual place of residence or business, with a person who apparently resides or works there, and who is apparently over the age of 16 - see Section 34(1) of the Magistrates' Court Act 1989.

It is most common for Charge and Summons sheets to be served by a specialist in this work, ordinarily known as a 'process server'. See the handy address list elsewhere in this manual.

See the chapter on admissibility for further discussion regarding service.

SUBSTITUTED SERVICE

If the court is satisfied by evidence on oath or affidavit that service cannot be effected on the defendant, the court may make an order for `substituted service' - see Section 34(2) of the Magistrates' Court Act 1989.

`Substituted service' means that the court will accept the means and methods employed by the informant as reasonable attempts to serve the Charge and Summons sheet on the defendant.

PROOF OF SERVICE

Once the Charge and Summons sheet has been successfully served on the defendant, the informant has to prove to the Court that service has been effected. This can be done by evidence on oath, affidavit, or declaration - see Section 35(1) of the Magistrates' Court Act 1989.

The proof of service must identify the Charge and Summons served, including the time, date, and manner of service - see Section 35(2) of the Magistrates' Court Act 1989. The manner of service must comply with the discussion above on service of the Charge and Summons.

The informant must file the affidavit or declaration of service with the Registrar at least 7 days before the mention date - see Section 35(4) of the Magistrates' Court Act 1989.

It is most common for the proof of service .to be in the form of a final copy of the Charge and Summons sheet, with some special elements completed by the person who served the document.

PROSECUTION MANUAL

CHAPTER THREE
TRIAL PREPARATION

- MENTION SYSTEM
- FIRST MENTION
- CONTEST MENTION
- PLEA BARGAINING
- PRE-HEARING DISCLOSURES
- How TO SUMMONS A WITNESS
- BRIEF OF EVIDENCE

Rules to remember

1. Mentions are a form of pre-trial hearing, to sort out timing issues, and give the parties time to discuss the case. There are usually two mentions - the `first' mention, and the `contest' mention. The case could proceed directly to a hearing of the charges at either of these - it is your responsibility to be ready if they do.

See the chapter on the trial for more information on preparing for mentions. It is generally not expected that your witnesses be ready for a mention. At least 2 weeks prior you must make

2. your prosecution team and any barrister is properly briefed, and you have a run through of your evidence and likely questions;

(b) you have a summary of the facts and evidence ready to read to the court, and your documentary evidence is ready to run including your photos, your certified instrument of delegation

(c) you have a tally of your costs, and you have a list of dates which are acceptable/unacceptable to yourself, your prosecution team, and your key witnesses - this list should stretch some 4 months into the future.

Once you have your evidence together, and you have laid your charges, there is much more work to do to shore up your prosecution case before it is actually heard in court, including such things as `mentions', pre-hearing disclosures, and the like.

Lack of attention to these details will almost certainly lead to your case running off the rails - and, if it reaches court, in you being savaged by the opposing lawyers.

MENTION SYSTEM

`Mentions' are perhaps most easily described as pre-trial hearings - although they can extend into a hearing of the charges. They will almost certainly be part of the process of effecting a prosecution.

(1). FIRST MENTION

The `first mention' date is the date specified on the Charge and Summons sheet, and is obtained in discussion with the Registrar of the relevant Magistrates' Court (usually being the court closest to the site of the alleged offence). See the chapter on trial preparation for further discussion of the mention date.

Check the material in the chapter on the trial for information regarding your preparation for a mention. Under certain circumstances a mention can extend into a hearing of the charges, but if you need witnesses the hearing will be adjourned.

The following material regards the operation of the first mention, and looks at the various likely alternatives for how the mention may proceed:

1. Non-appearance by defendant

It is expected that the defendant or her or his representative will appear at the first mention. However, if the defendant or a representative does not appear, you will have to provide the court with proof that the Charge and Summons sheet was correctly served.

In such a case, the court may decide to allow the case to proceed 'ex parte' (ie in the absence of the defendant).

Regarding proper service, see the discussion on service in the chapters on pleadings and admissibility.

2. If case proceeds 'ex parte'

If the court allows the mention to proceed ex parte (ie in the absence of the defendant), the prosecution must be in a position to call evidence, or give evidence that will prove elements of the offences for which the defendant has been charged.

If witnesses are crucial to this process, the case should be adjourned to a further date. You should be prepared to negotiate a suitable date.

If the case is adjourned, the defendant need not be advised of the new date. The assumption is that the effective outcome would be the same as if the case had proceeded at the first mention - and the defendant has been given an opportunity to appear at the mention.

Nonetheless, if a conviction is entered on the charges, the defendant has the right under the Magistrates' Court Act to have the conviction overturned on a rehearing.

3. If the defendant appears and pleads `guilty'

If the defendant appears and/or is represented, and pleads guilty to the charge or charges, it is ordinarily acceptable for a summary of the facts and the law to be read to the court by the prosecutor.

To enable this, the prosecution should have prepared an outline which clearly summarises the factual circumstances which constitute the offences. This may include photographic evidence to help `paint the picture'.

The Magistrate will ask the defendant whether or not that outline is a fair summary. If there is any significant disagreement on the summary, the hearing may require that sworn evidence be given.

This may, in turn, require an adjournment of the hearing of the guilty plea.

4. If the defendant agrees with the prosecution's summary

Where the defence agrees with the summary, the Magistrate will ask whether `anything is known' - ie if the defendant has any prior convictions or previous criminal history.

The Magistrate will exercise discretion over whether or not this information is relevant to the offences committed in this case, and whether or not they should form part of a decision regarding a penalty. It is also open to the prosecution to edit its listing of prior convictions if they clearly have nothing to do with the case at hand.

The defence will then be asked to make submissions in relation to sentencing, and they may produce character references or other material relating to the defendant and the circumstances in which the offence was committed. The defence may submit what it considers to be a reasonable penalty.

If, during this process, the defence raises matters with which the prosecution wants to take issue, they should be raised immediately with the court.

When this process is complete, the Magistrate will then pass sentence. At this stage, the prosecution may apply for an order that the defendant pay the costs of the prosecution. The prosecution should make sure it is in a position to justify its claims for costs - a listing of the costs should be at hand, and a justification of the level of the cost elements.

5. If the defendant pleads `not guilty'

If the defendant pleads not guilty, the defence may or may not enter an actual plea (ie the plea may be held in reserve).

Generally, if the hearing is likely to take less than a time specified by each Magistrates' court (eg it is 3 hours at the Melbourne Magistrates' Court), and the parties consent, the case may go straight to the hearing of evidence. If this is likely to involve witnesses, the hearing may need to be adjourned. It would be worthwhile checking this time with the Criminal Co-ordinator of the court your case will be heard at.

Note that if the parties are in agreement on this matter prior to the mention, they should advise the relevant Criminal Co-ordinator in writing prior to the mention date.

If the hearing is likely to take longer than this time, it will go to what is called a `contest mention'. The date for this will be fixed at the first mention, and the prosecution should be prepared by having a list of dates which are either appropriate or inappropriate (as suitable) for the prosecuting officer, key witnesses, and any lawyers (including the barrister, if there is one).

(2). CONTEST MENTION

At the contest mention, at which the informant (most likely you) should be present, the parties to the case will define:

- the issues in dispute;
- how many witnesses will be involved; and
- how long the case is likely to run.
- The purpose of the contest mention is to:
- facilitate a forum by which the parties can assess their own positions, and to some extent the position of their opponents; and
- provide for the most effective use of court time, particularly where the case may be particularly long.

Check the material in the chapter on the trial for information regarding your preparation for a mention. Under certain circumstances a mention can extend into a hearing of the charges, but if you need witnesses the hearing will be adjourned. The following material regards the operation of the contest mention, and looks at the various likely alternatives for how the mention will proceed.

1. Description of the case

At the start of the contest mention, the Magistrate will usually ask the prosecution to describe the case, and what it is about.

The prosecution should be prepared with the summary or outline of the case used at the first mention - unless there have been any significant changes, or rethinks in how the case is presented. In which case, a new summary of the facts should be prepared.

2. `Guilty' or `not guilty'?

The Magistrate will next ask the defendant how she or he pleads. The Magistrate may ask the defence to outline the basis on which the charge is contended (ie why they are fighting the case).

The defence is not required to go into detail, and may simply say that the defendant did not do what the prosecution alleges (eg they may not want to reveal details of their case to the prosecution at too early a stage).

3. Discussion among the parties

The Magistrate may then allow the parties to discuss the case among themselves, if that has not already occurred. For example, this may be an opportunity to undertake the plea bargaining process (see below).

4. Agreement between the parties

If an agreement is reached (perhaps in the form of a plea bargain), the Magistrate may be in a position to proceed immediately to determining the case in the same manner outlined previously in relation to a plea of guilty at the first mention date.

5. No agreement between the parties

If an agreement is not reached, the Magistrate will fix a date for the final hearing of the charges on the basis of the `not guilty' plea. As before, you should make sure that yourself, any key witnesses and your prosecution team are available. In these circumstances, your list of appropriate or inappropriate dates should stretch out to around 4 months in the future.

PLEA BARGAINING

Plea bargaining can take place at almost any stage of the pre-trial process - and indeed can, in some cases, take place during the actual hearing. It usually takes the form of the two parties agreeing to alter the nature of the charges in return for an alteration in the `not guilty' plea.

For example, depending on the circumstances, a plea of guilty may be offered by the defence in return for the withdrawal of other charges, or a substitution of a lesser charge.

These negotiations are conducted `without prejudice' - ie neither party is entitled to disclose the substance of the negotiations to the court at any later stage. This means, for example, that any apparent admissions made during the negotiations cannot be raised later in evidence.

The extent of the negotiations, and the preparedness of the parties to withdraw or substitute charges, will depend on the circumstances of each case. The discretion to act is wide, so long as the prosecution exercises it in good faith and the best interests of the community.

If you take part in this process of withdrawing or altering the charges, you should make sure of several things:

- you must have the delegated authority of the council for your actions;
- you must have regard to the public policy considerations of your actions;
- you must have regard to the interests of the council; and
- you would be wise to make sure the council will agree with your actions (this may involve a discussion of the likely options beforehand).

Your reasons for agreeing to a plea change will usually be strategic. For example, you may believe that some of your charges may be difficult to prove, and/or you may be unsure of your evidence or your witnesses.

Accordingly, part of a win may be better than a total loss. In this context, you should have regard to the totality of the likely penalty, and whether or not you believe it will achieve an adequate punishment for the totality of the defendant's conduct.

PRE-HEARING DISCLOSURE

A pre-hearing disclosure is the disclosure to the defence of certain elements of the prosecution's evidence. The process and requirements regarding this matter are set out below.

Note the discussion in the chapter on pleadings regarding the amount of detail to be included in a Charge and Summons - as at that stage, playing games at this point can lead to expensive amounts of correspondence between the defence and the prosecution. While you are not expected to reveal important details of your strategy, it ill behoves one to try and hide or disguise material which should be included.

1. Defendant can ask for pre-hearing disclosure

The defendant may at any time lodge a request for pre-hearing disclosure with the informant - see Schedule 2 of Item IA of the Magistrates' Court Act 1989. However, if such a request is to be lodged within 14 days before the mention date, the defence must receive the court's permission.

2. Timeframe for providing pre-hearing disclosure material

The informant must provide these documents at least 7 days before the mention date, unless the court has permitted the defendant to make a request for pre-hearing disclosure less than 14 days before the mention date. In the latter case, the court will nominate a period by which the informant is to provide the pre-hearing disclosure.

3. Informant can ignore request if brief of evidence served

The informant does not need to respond to such a request if she or he has served a brief of evidence on the defendant in accordance with Section 37 of the Magistrates' Court Act 1989 (see below for a discussion of briefs of evidence).

4. What is the informant required to disclose?

If a pre-hearing request has been received, and a brief of evidence has not been served, the informant must provide (see below for exceptions):

(1) witness statements;
(2) written summaries of the evidence of people who provided information to the informant and have not made a witness statement;
(3) a list of the names and address of witnesses;
(4) copies of exhibits and photographs; and
(5) documentary evidence of prior convictions or findings of guilt made against the defendant.

5. Exception - prior convictions The informant:

- is not required to disclose particulars of any prior conviction, if she or he is of the opinion that the conviction is not relevant to the proceedings before the court; but
- is required to advise the defendant of undisclosed prior convictions or findings of guilt.

6. Exceptions - prejudice and endangerment

The informant may refuse to comply with any or all of the elements of the request for pre-hearing disclosure if she or he is of the opinion that providing the information would be likely to cause:

prejudice to the investigation of the legislative breach, or the enforcement or administration of the law;

prejudice to the fair trial of a person, or the impartial adjudication of the case;

the disclosure of the identity of confidential sources of information; prejudice to the effectiveness of detection and investigative methods;

endangerment to the lives or physical safety of the people involved in the enforcement of the law or people who provide confidential information; or

endangerment to the lives or physical safety of the witnesses.

7. Reasons for refusal to provide pre-hearing disclosure material

If the informant refuses to comply with a request for pre-hearing disclosure, she or he must serve a written statement on the defendant setting out the grounds for refusing to comply with the request.

8. Court may order compliance

The court may, on the application of the defendant, order the informant to comply with the defendant's request for pre-hearing disclosure.

9. Material which comes into existence after request is made

The defendant's request for pre-hearing disclosure applies to documents or 'other things' which come into existence or take place after the request is made, if that item would have come within the scope of the request.

The informant must provide the defendant with the additional documents or other things within a reasonable time after they come into existence or take place.

10. Expert witnesses

At least 7 days prior to the mention date, the defendant must serve the informant with a copy of the statement of any expert witness the defendant intends to call to give evidence at the hearing. If such a statement does not already exist, it must be served as soon as practicable.

HOW TO SUMMONS A WITNESS

If you have key people whose evidence is necessary to prove your case, it is usual to summons (or 'subpoena') them to appear in court.

You should remember that if your key witnesses do not appear, your whole case could collapse around your ears. If your witnesses have been summonsed, and they change their minds about appearing, you have some means of requiring their presence, if you feel that such an appearance would still be strategically wise.

Note that under certain circumstances it is possible to enter documentary statements from such witnesses rather than have them appear personally.

The process for summonsing witnesses is as follows:

1. What can a witness be summonsed to do?

The informant can summons or subpoena a witness (see Section 43(2) of the Magistrates Court Act 1989) to:

- give evidence; and/or
- produce a document or `thing' (being a form of evidence other than a document).

2. Issuing' a summons

The witness summons may be `issued' by the Registrar of a Magistrates' Court ( see Section 43(1) of the Magistrates Court Act 1989) - `issued' means that the Registrar endorses the summons with the Court stamp, NOT that the Registrar has any responsibility for serving the summons.

The cost of a witness summons is a $5.00 filing fee per summons, plus `conduct money' (see below).

The Court or Registrar will issue the witness summons (see Section 43(3) of the Magistrates Court Act 1989), if it appears that the witness is likely to:

- be able to give material evidence for any party to the proceeding; and/or
- have in their possession or control any document or `thing' which may be relevant for the hearing of the matter.

3. What form does a witness summons take?

A witness summons must (see Section 43(4) of the Magistrates Court Act 1989) require a person to attend a specified Magistrates' Court on a specified date and time to:

- give evidence at the hearing; and/or
- produce for examination at the hearing any documents or `thing' described in the summons which is in their possession or control.

4. Service of a witness summons

A witness summons must be served in accordance with the rules set out for service of a Charge and Summons (see the chapters on pleadings and admissibility), except for the service timeframe. A Charge and Summons must be served at least 14 days before the mention date. A witness summons, however, must be served a `reasonable time' before the relevant hearing (see Section 43(5) of the Magistrates Court Act 1989).

The term `reasonable time' does not provide a definite deadline, however it would usually be good and wise practice for the witness summons to be served as soon as the date of the hearing at which they are to appear is known.

Such action will provide the witness with ample time to locate the relevant documentation, and make arrangements to be available to attend the Court as directed. Failure to be seen to provide a reasonable time could result in the adjournment of the case, with consequent cost and `impression' outcomes.

5. Conduct money and loss of wages

'Conduct money' is defined to mean a sum of money or its equivalent sufficient to meet the reasonable expenses of a person to whom a witness summons is directed when complying with the summons (see Section 3 of the Magistrates' Court Act 1989).

A witness is excused from complying with the requirements of the summons unless `conduct money' is provided at either the time of serving the summons or a reasonable time before the mention date (see Section 43(6) of the Magistrates Court Act 1989).

Note that you do not need to provide `conduct money' if the witness will not reasonably incur any expenses in complying with the summons (see Section 43(6) of the Magistrates Court Act 1989).

The Court may direct that a witness who attends the Court as required is entitled to receive from the party who sought the issuing of the summons further conduct money (including money for loss of wages) for each day of attendance (see Section 43(8) of the Magistrates' Court Act 1989).

6. Witness timeframes regarding documents or `things'

A witness who, as part of a witness summons, is required to produce a `thing' or document, must produce the `thing' or document (with a copy of the summons) to the Registrar of the relevant Magistrates' Court at least 2 days before the date specified on the summons for its production in court (see Section 44(1) of the Magistrates' Court Act 1989). Note that:

- the Court or Registrar may make a direction other than this 2 day requirement; and
- the production of the `thing' or document does not excuse the witness from attending the Court to give evidence if requested to do so in the summons (see Section 44(2) of the Magistrates' Court Act 1989).

BRIEF OF EVIDENCE

A `brief of evidence' is an option open to the prosecution. It is an approach ordinarily taken only where it is believed that the defendant will not appear at the hearing, and in practice is more often used by the police than other prosecution teams. Nonetheless, this discussion is provided for your information.

1. What is a brief of evidence?

An informant can serve a brief of evidence on the defendant - see Section 37 of the Magistrates' Court Act 1989.

The brief of evidence must contain:

(1) a notice in the prescribed form explaining-
- the service of the statements on the defendant under Section 37 of the Magistrates' Court Act 1989, and
- the procedure if the defendant does not appear in court, under clause 5 of Schedule 2 of the Magistrates' Court Act 1989;

(2) a list of the people who have made statements which the informant intends to rely on if the defendant does not appear in court;
(3) copies of the witness statements;
(4) a copy of the Charge and Summons sheet relating to the offence;
(5) copies of any documents which the informant intends to rely on as evidence to prove the charge;
(6) a list of the exhibits; and
(7) copies of any photographs that cannot be described in detail.

2. Witness statements in a brief of evidence

The witness statements included as part of the brief of evidence must be in the form of an affidavit, or must contain an acknowledgment signed in the presence of a member of the State police force or the Australian Federal Police - see Section 37(2)(a) & (b) of the Magistrates' Court Act 1989.

This acknowledgment should state that `the statement is true and correct and is made in the belief that a person making a false statement in the circumstances is liable to penalties of perjury' - see Section 37(2)(a) & (b) of the Magistrates' Court Act 1989.

3. If a witness is under 18 years of age

If a witness is under 18 years of age, the statement must include the age of the witness - see Section 37(3) of the Magistrates' Court Act 1989.

4. If a witness cannot read

If the witness cannot read, the statement must be read to them before they sign the statement, and the statement must acknowledge that it was read to them before they signed it - see Section 37(4) of the Magistrates' Court Act 1989.

5. Consequences of making a false statement

A person who makes a false statement is liable to be charged with perjury - see Section 37(5) of the Magistrates' Court Act 1989.

6. Timeframe for service of brief of evidence

The brief of evidence must be served on the defendant at least 14 days before the mention date, and the methods of service are identical to those used for the Charge and Summons sheets (refer to the discussion on service in the chapters on pleadings and admissibility).

7. Proof of service

The service of the brief of evidence must be proved in the same manner as service of the Charge and Summons sheets (refer to the discussion on service in the chapters on pleadings and admissibility).

8. List of witnesses

A list of people who have made statements which the informant intends to rely on, if the defendant does not appear in court, need not comply with Section 37(2)(a) & (b) of the Magistrates' Court Act 1989 (ie the requirement that the statements be sworn - see above) if:

(1) the informant files a copy of a witness statement which complies with Section 37(2)(a) & (b) of the Magistrates' Court Act 1989 with the Registrar of the relevant Magistrates' Court at least 7 days before the mention date; and

(2) the statement contains an acknowledgment signed before a member of the State police force or Australian Federal Police that the content of the statement is an identical copy of the statement served on the defendant.

PROSECUTION MANUAL

CHAPTER FOUR
ADMISSIBILITY OF EVIDENCE

- RELEVANCE & WEIGHT
- BUSINESS RECORDS
- PROOF OF STANDING
- CONTEMPORANEOUS NOTES & MEMORY REFRESHING
- RECORDS OF INTERVIEW
- CONFESSIONS & ADMISSIONS
- OPINIONATIVE & EXPERT EVIDENCE
- CHARACTER EVIDENCE & PRIOR CONVICTIONS
- VIDEO, AUDIO & PHOTOGRAPHIC EVIDENCE

ADMISSIBILITY OF EVIDENCE

When you are preparing for trial, and on the day itself, there are a number of issues you need to deal with regarding the evidence you require to persuade the court your version of the facts is correct. The first issue is that the defendant will be attempting to either disprove your facts, disallow your evidence, or put a different slant on the facts to paint an alternative picture of events.

Knowing this, it is your responsibility to know what evidence to put to the court, and, very importantly, how to put it. There are two things to be particularly wary of - wasting the court's time with inadmissible evidence, and giving the defendant's lawyers an opportunity to disallow or downgrade your evidence.

The following points raise a number of essential matters you must keep in mind, both when preparing your case, and on the big day itself. Failure to remember any one of these could result in the loss of your case.

Note that this is an extremely complex area of the law, with many lengthy and learned texts discussing and debating the subject, and extensive case law. It is not possible to paraphrase all of this material. What follows is a discussion of the key points relevant to the kind of cases covered by this manual, and should not be regarded as absolute. As is the case with any complex area, if you are in any doubt you should consult a professional expert.

ADMISSIBILITY, RELEVANCE AND WEIGHT

Rules to remember

- Any relevant material is admissible as evidence - with some important exceptions (see below).
- It is acceptable for several facts to be used to prove a point.
- There are many exceptions to the admissibility rule, but the
- following four are particularly important- Hearsay
- Opinion
- Character
- Similar conduct
- Admissible evidence may be weighted by the court in terms of its ability to establish a fact.

1. Admissibility of relevant material

Any material relevant to either proving or disproving a fact can be admitted to a court as evidence (ie it is 'admissible') - subject to a number of important exclusions (see below).

`Relevant' means that the material must, either by itself or together with other material, be able to:

- prove or disprove (as the case may be) the fact being considered by the court; or
- demonstrate the probability of the fact being proved or disproved.

2. Multiple facts

There may be occasions when it is necessary to tender evidence which, together with several facts, proves a particular point.

For example, a person observed on a building site during an inspection may dispute carrying out building works on the site. Evidence may be available which indicates that:

- at the time of the inspection a vehicle was seen parked near the site;
- the vehicle contained building tools and equipment; and
- the vehicle belonged to the person observed on the site during the inspection.

This evidence can be tendered to the Court as proof that the person seen on the site was carrying out building works on that site.

3. Exceptions to the rule of admissibility

While there are many exceptions to the general rule of admissibility, the following four are particularly important. As a general rule, the following kinds of evidence are not admissible:

(1) Hearsay evidence

This is where a witness seeks to give evidence of what she or he has been told by a third party to the case, and that third party is not a witness in the case.

Hearsay evidence is discussed in more detail below.

(2) Opinion evidence

This is where a person other than an expert seeks to inform the court of her or his personal view of the nature of certain facts.

For example, in a case where the structural stability of a building's walls is of importance, a person with little or no experience of structural engineering may assert that `the walls were negligently constructed'. Such evidence would be inadmissible, as it would be an issue for determination by the court or for evidence by an expert.

Expert evidence opinions are discussed in more detail below.

(3) Character evidence

This is where a person is said to be more likely to have committed an offence because of her or his reputation.

There are circumstances, however, when a person's character will be called into question, and can be admissible prior to a finding of guilt or innocence.

Character evidence is discussed in more detail below.

(4) Similar conduct on other occasions

This is where it is claimed that because a person has acted in a particular manner on a previous occasion, that person is likely to have also acted that way on the occasion in issue before the court.

4. Weight of evidence

While evidence may be admissible, it can be weighted in terms of its ability to prove or disprove (ie establish) a fact - ie a court will regard certain evidence more highly than other evidence.

There are three basic weight levels - the higher the weight, the more important the evidence is in proving a fact.

The basic test applied by the court to determine the weight of evidence is the `reasonable person' test. That is, would a reasonable person agree that the evidence establishes the fact?

The High Court in Jones v. Dunkel (1959) 101 CLR 298 at 304 and 305 considered the sufficiency of evidence required to satisfy findings as to the probability of a fact being established.

In deciding what weight to attach to evidence Courts generally form an opinion on the basis of:

- the actual evidence;
- the arguments made by both sides; and
- in some cases, the demeanour of the witnesses. This last point should not be underestimated. Answers given by a witness under cross-examination can affect the weight a court attaches to other aspects of her or his evidence.

For example-

- A witness who gives evidence in a forthright way, and is unperturbed during cross-examination, may lead a court to be more likely to believe her or his evidence than that presented by a stumbling, prevaricating witness.

- A witness who exhibits some conduct which the court may regard as contemptible will be liable to have her or his other evidence coloured unfavourably.

1. The lowest weight

The lowest weight is attached to evidence which is so weak that no reasonable person could properly agree that it establishes the fact.

For example:

(a) A fire occurs in a townhouse and evidence is given that a separate townhouse which is part of the same development is constructed of fire rated material which does not comply with the Building Code of Australia's requirements.

(b) This evidence on its own may be said to be insufficient to support the conclusion that the burnt premises were also constructed of non-complying fire rated materials.

(c) In this case, it would be argued that the simple fact of non-compliance in one part of the overall development does not prove that it is probable that the burnt unit was also constructed of non-complying materials.

(d) The court would not accept such evidence as proof of the fact being contended if there is no other supporting evidence.

2. The middle weight

A higher weight is attached to evidence which is sufficient to entitle a reasonable person to agree that it establishes the fact, although it is still possible to decide either way. That is, the evidence is not weak enough to dismiss as not establishing the fact, nor is it strong enough to agree that it absolutely establishes the fact.

Using the previous example of the townhouse fire:

Evidence might be put that a different section of the burnt townhouse other than the section that was burnt was constructed of non-complying fire rated materials.

(2) A court may reasonably decide that such evidence provides an inference that the construction of the burnt section was also illegal. However, the court could just as easily decide the other way.

3. The highest weight

The highest weight is attached to evidence which, in the absence of any contradictory evidence, would cause any reasonable person to agree that the fact is established.

Again, using the townhouse fire example:

(1) If it could be shown that the materials actually used in the construction of the burnt section of the townhouse were non-complying fire rated materials, it would be reasonably presumed that the burnt section was illegally constructed.

(2) In such a case a court would regard the evidence as being conclusive, and would have no alternative but to accept it as establishing the fact being contended.

ADMISSIBILITY OF BUSINESS RECORDS

Rules to remember

- For a business record to be admissible:
- The record must be based on material from a person who both has knowledge of the matters it covers, and is called as a witness (with some exceptions).
- The statements in the record must be admissible if they were given as oral evidence.
- The statements in the record must not have been made as part of the investigation, or by a person involved in a dispute over any facts covered by the statements.
- There are certain circumstances in which the statements can be made by a person who is not called as a witness.
- The court can reject a statement if it does not appear to serve the cause of justice.

Section 55 of the Evidence Act 1958 specifies the conditions for admissibility of certain documents. These are as follows:

1. A business record is admissible if it is based on information supplied by a person who both has personal knowledge of the matters it covers, and is called as a witness. The statements in such documents-
   (1) must be admissible if they were to be given as oral evidence;
   (2) must not have been made as part of the investigation of the matters being considered by the court, or as part of either the defence or prosecution case; and
   (3) must not have been made by a person involved in a dispute over and facts which may be established by the statements.

2. The requirement that the person who made the statement must be called as a witness does not apply if:

(1) the person is dead, unfit, or absent;

(2) the person is not required to appear by either the defence or prosecution;

(3) the defence and the prosecution agree that she or he does not need to appear; or

(4) considering the time that has lapsed and any other relevant circumstances, the person can reasonably be- supposed not to recollect the matters dealt with in the statements.

3. The court may either:

(1) admit a business record even if the person who made the statements it contains is available but is not called as a witness; or

(2) reject any statement if its acceptance would not serve the interests of justice.

PROOF OF STANDING TO INVESTIGATE AND BRING PROCEEDINGS

Rules to remember

- You must be able to prove that you are authorised to investigate and initiate court proceedings.
- Such proof must be in writing, endorsed with the Council's Seal.
- You will not be required to offer such proof to the court, unless the matter is queried by the opposing party.
- It is possible to avoid bringing an entire delegation document to the court by providing a certificate from the council's Chief Executive Officer that the delegation contains the required authorisation - however, it is possible for a defending lawyer to question such a certificate.

The prosecuting officer, if asked in court, must be able to prove that prior to initiating the proceedings:

- she or he had the written authority of the Council to investigate and bring proceedings.

Under Section 242 of the Local Government Act 1989, the court must take `judicial notice' of (ie it must accept without question) a certificate stating that a council document contains certain facts, if the certificate is signed by the council's Chief Executive Officer. Again, it is possible for a defending lawyer to argue with the contents of such a certificate, in which case further proof of the contents of the certified document may be required.

Finally, this matter is of such importance that you should also make sure that the delegations which exist to cover your absence are also clear, in case a person acting in your absence has to initiate proceedings.

1. Section 242 of the *Local Government Act 1989 (LGA)*

You do not need prove that the Council exists. Nor do you need to prove, without being asked, that you have the council's authority to act.

242. Evidentiary provisions

Until evidence is given to the contrary proof is not required as to any of the following-

(a) the constitution of a Council;

(b) the size, location or boundaries of a municipal district;

(c) (e) the fact that a place is located within a municipal district;

(d) the appointment of a member of Council staff to do an act or for a particular purpose;

(e) the authority to bring any proceedings;

(f) that a document purporting to be issued by a Council was issued by the Council;

Section 242 also specifies the method of proving Council documents:

A certificate certifying any matter relating to the contents of any document kept by a Council and purporting to be signed by the Chief Executive Officer is admissible in any proceedings as evidence of the matters appearing in the certificate.

All courts, judges and people acting judicially must take judicial notice of such a signature and must presume that the certificate was properly signed until the contrary is proved.

3. Section 5(4) of the LGA

The court must accept the authority as genuinely representing the wishes of the council if the Council's Seal is imprinted on it.

4. *All courts, judges and persons acting judicially must take judicial notice of the imprint of the seal of a Council on any document and must presume that the document was properly sealed until the contrary is proved.*

CONTEMPORANEOUS NOTES AND MEMORY REFRESHING

Rules to remember

- You may use contemporaneous' notes to refresh your memory when giving evidence.
- Contemporaneous notes must be made as close as possible to the time of the events they record, ie during or immediately after.
- You may be cross-examined on the contemporaneity of the notes, and you should only use notes as a last resort memory refresher.
- While notes are generally not tenderable, they may be called as evidence, particularly as regards those parts of the notes which are not used as memory refreshers.
- You may read notes to refresh your memory outside the court.

During the hearing, witnesses are entitled to refresh their memory from written or typewritten notes provided:

- the notes were made `contemporaneously' with the events regarding which evidence is being given (see below);
- the notes were made or adopted by the witness as a true and correct account of the events;
- the memory of the witness is exhausted insofar as it relates to the events; and
- the court, upon application by the prosecutor, has granted permission to the witness to refer to the notes to refresh her or his memory.

1. Contemporaneous

To be used for memory refreshing in court, notes must be `contemporaneous'. This means that they must have been written reasonably close to the time of the events being noted.

For example, if you observe certain matters during an inspection, notes on those observations will be regarded as `contemporaneous' if they have been made immediately on returning to the office. They would be said to have been made at a time when the matters were fresh in your memory.

Nevertheless, it is still preferable to take some notes during an inspection, or immediately following a relevant conversation. This is so even if the notes are abbreviated, so long as they are accurate and you can later interpret them.

2. Cross examination as to contemporaneity

Prior to the court granting permission for a witness to use notes as a memory refresher, the witness may be cross-examined as to:

- the contemporaneity of the notes;
- the recollection of the witness prior to looking at the notes; and
- the circumstances of the writing of the notes.

3. Using notes should be a last resort

It is likely that a long time will have passed between the events regarding which evidence is being given and the giving of evidence in court. However, while your memory may be tricky:

- it is preferable to give as much evidence as possible before seeking recourse to notes; and
- it is important that the evidence given prior to looking at notes does not conflict with the notes without very good reason.

4. Notes are generally not `tenderable'

Where a witness refreshes her or his memory from contemporaneous notes, such notes are not generally permitted to be tendered in evidence.

However:

- the opposing party is entitled to call for and inspect notes made by a witness, whether or not they have been used for memory refreshing - although this is different from having them actually tendered as evidence before the court; and
- if the witness is cross-examined by the opposing party on any area of the notes which they have not used for memory refreshing, the notes may become tenderable - in such a case, the notes will ordinarily become tenderable by the party for whom the witness is appearing.

5. Notes may be read outside the court

Witnesses may read their notes outside court prior to giving evidence - and in some regards this may be good practice.

For example:

- it may avoid the need to use the notes in court as memory refreshers;
- it may ensure that evidence given prior to any memory refreshing does not conflict with that given subsequently; and
- where a witness refreshes her or his memory outside court and consequently does not need to use the notes in court, the opposing legal representative will be unable to pursue the issue of memory refreshing and contemporaneity during cross-examination.

6. Tendering notes where a witness is cross-examined

Where a witness is cross-examined on a document, the court may require its production for inspection, and may then make such use of it as the court thinks fit (including tendering as evidence) - see Section 36 of the Evidence Act 1958. This includes notes made by a witness - if the court is aware of their existence.

7. Inconsistent written statements

Where a prior written statement is made by a witness which is inconsistent with the evidence given in court, or a statement made at a later time, the prior statement may be admissible as evidence of the witness being unreliable on the particular issue and/or unreliable generally.

8. Right to call for notes to be tendered

The calling of a document in the possession of the other party will, in the absence of a right to inspect, render the document tenderable at the instance of that party. This could be a tactical error if you are not fully aware of the document's contents, as it may contain information which is injurious to your case.

9. Use of a record of interview to refresh memory

Where a record is made of an interview between a prosecution officer and a defendant, and that record of interview is not adopted by the defendant, the document may still be used by the prosecution officer to refresh her or his memory as long as the criteria above are satisfied.

RECORDS OF INTERVIEW AND WITNESS STATEMENTS

Rules to remember

- It is good practice to give a warning regarding the use of any record of an interview, where that interview may be used as evidence in court.
- A record of interview where a person exercises her or his right to silence or simply answers `no comment' is not admissible, unless:
- the answers indicate a consciousness of guilt; or
- later use of a reasonable explanation gives reason to disbelieve the witness.
- A record of interview is otherwise ordinarily admissible, unless:
- it does not contain an admission or confession; or
- it contains material which provides a higher level of risk to the defendant than its value in terms of proving an issue.
- Statements must be made voluntarily, and the failure to give a `warning' may be construed by the court as evidence of the statement being involuntary.

You should exercise considerable care over how you make a record of an interview, and the circumstances in which witness statements are made. Failure to do so could be used as an argument that the rights of the defendant to natural justice have been breached. See also the discussion on techniques for interviewing potential defendants in the chapter on investigation.

1. Warning of the possible use of a record of interview

There is no rule of law that a record of interview be prefaced by a warning that the interviewee is `not obliged to say anything but anything that she or he does say will be recorded and may be used in evidence'.

However, it is prudent for an investigating officer to give such a warning. For example, a court may consider the failure to provide such a warning as evidence that a statement was not made voluntarily (see below).

2. Right to silence, or to say `no comment'

With two exceptions, where the defendant exercises her or his right of silence or gives a 'no comment' record of interview, that record cannot be used as evidence against the defendant - see Driscoll v. R (1977) 137 CLR 517.

The exceptions are as follows:
(1) The selective answering of questions in a record of interview can be used to support a contention that the defendant has indicated a consciousness of guilt - see ***Woon v.* R** (1964) 109 CLR 529.

(2) The failure to provide a reasonable explanation available at the time of being asked, and which the defendant later seeks to use, can be applied to support the argument that the defendant ought not be believed as to the explanation now being offered - see ***R v. Neilan*** (1991) 1 VR 57

3. Admissibility of a record of interview

Ordinarily a record of interview, if accepted by the accused, will be admitted into evidence. However, as a general rule:

- a record of interview is not admissible where the accused has not said anything which could be construed as an admission or a confession; and
- the court has the discretion to refuse to admit statements made in the course of a record of interview where it can be shown that the value of the statement in terms of providing proof of an issue is outweighed by the prejudicial risk to the defendant if the statement is admitted - noting that a court is extremely unlikely to make such a decision in the case of confessions and admissions.

4. 4. Statements must be made voluntarily

The prosecution needs to show that a statement made by the defendant against her or his own interest was made voluntarily, without being threatened or being offered a benefit in procuring the statement.

If a caution as to the rights of the defendant has not been given prior to the statement being made, the court may consider that fact when deciding whether the defendant made a particular statement voluntarily or not.

CONFESSIONS AND ADMISSIONS

Rules to remember

- A confession is a statement made by a defendant which incriminates her or him in all elements of the offence.
- An admission is a statement or conduct by a defendant which incriminates him or her in the commission of an offence or an element of the offence.
- The prosecution must prove that a confession or admission was obtained `voluntarily'.
- If the defendant disputes the fairness of the circumstances in which the confession or admission is made, she or he must prove that the circumstances were unfair.
- Illegally obtained evidence is not automatically inadmissible, but courts generally disallow it if the prosecution could have obtained the evidence legally.
- There is no law in Victoria against entrapment.

(1) What is a confession?

A confession is a statement made by a defendant which incriminates her or him in all elements of the offence.

(2) What is an admission?

What is an admission? An admission is:

- a statement made by a defendant out of court which incriminates her or him in the commission of the offence or an element of the offence; or
- some form of conduct by the defendant, where she or he commits an act or acts which provide evidence in relation to any of the elements of the offence.

(3) The truth of statements

Courts have long held the view that a statement made against the interests of the person making the statement is likely to be true. Such statements are much more readily admissible in court.

On the other hand, a statement made by a person which is in the interests of the person making the statement is less admissible because it may be said to be a 'self serving statement'.

3. The admissibility of confessions and admissions

In relation to the admissibility of admissions and confessions there are two fundamental principles:

(1) The prosecution must establish that, on the balance of probabilities, the defendant's statement or conduct was voluntary. A confessional statement must not have resulted from an inducement, or oppression by a person in authority.

(2) The defence must establish that a confessional statement or conduct ought be rejected by the court because, on the balance of probabilities, it resulted from `unfairness'. The conduct of the prosecution officers in this regard can be considered and assessed as to whether they acted fairly and legally in obtaining the confessional statement or conduct.

The basis of the admissibility of confessions and admissions is whether they have occurred in circumstances where it can be said that the defendant acted `voluntarily' in the sense that she or he was free to exercise a right to speak or act freely, or alternatively remain silent.

Accordingly, where the issue is whether or not the defendant acted voluntarily, the onus is on the prosecution to show that she or he did. On the other hand, where the issue is unfairness or illegality in procuring a confessional statement, the onus is on the defendant.

Examples of situations which may put the voluntary nature of a confession or admission in doubt are:

(1) A statement or promise by an investigating officer to allow stopped building works to continue if answers are given.

(2) A statement or promise by an investigating officer not to prosecute if answers are given.

(3) A statement or promise of granting a period of time to the defendant to rectify illegal building works if answers are given.

On the other hand examples of matters to be considered when determining whether or not a statement was obtained fairly and legally are:

(1) Whether the investigating officer offered the defendant an opportunity to obtain legal advice.

(2) Whether the investigating officer informed the defendant that she or he had a right to remain silent.

(3) Whether the investigating officer asked ambiguous or multi-part questions, or questions involving assumptions which are not proven to be untrue.

The court has an overriding discretion to reject any confessional statement where it ought be rejected as a matter of `public policy'. In that respect the court will weigh the balancing considerations of:

(1) the interests of justice being served and the defendant being accountable; and
(2) the liberty of the individual and her or his basic rights as a citizen.

The assessment as to whether the conduct of the investigating officer was calculated to cause an untrue admission is an assessment which will be made by the court.

Illegally obtained evidence will not automatically be excluded by the court, but there is a growing judicial preparedness to exclude illegally obtained evidence of the grounds of `public policy' where the illegality could have been overcome by the investigating officers availing themselves of a legal method of conducting their investigatory procedure.

Note that there is no law in Victoria which prohibits entrapment of a defendant into committing or attempting to commit an offence.

5. Relevant legislation

Section 149 of the Evidence Act 1958 governs the admissibility of confessional statements in Victoria.

149. *Confession after promise or threat or purporting to be on oath*

s.149 No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made; nor shall any confession which is tendered in evidence be rejected on the ground that it was made or purports to have been made on oath.

OPINIONATIVE AND EXPERT EVIDENCE

Rules to remember

(1) Generally, the opinions of witnesses are not admissible, unless they are general opinions of everyday life, and are couched with such words as `appeared'.
(2) The opinions of experts are an exception to this rule, insofar as they assist the court in determining a fact.
(3) Expert witnesses are subject to cross-examination, and must be able to prove their expertise.

1. Witness opinions

As a general rule, the opinions of a witness are not admissible in evidence as they may usurp the court's role of drawing its own conclusions on the basis of the evidence.

In this context, the court ordinarily receives evidence of things a witness saw or heard her or himself. A witness is not usually entitled to draw conclusions from knowledge or observations, except for some general opinions of matters of everyday life.

For example, it may be said that the ground appeared damp, or that a person appeared surprised. Note the use of the word `appeared'. Courts tend to allow evidence of what appeared to a witness, rather than the fact itself. To say that a person `was surprised' would ordinarily be going too far, but to say that the person `appeared surprised' would be admissible.

2. Expert witnesses

It is generally accepted that experts form a distinct exception to the usual rule that the evidence of a witness is not to draw conclusions. In Runjanjic (1991) 53 ACR 362 the court was prepared to allow expert evidence where such evidence was of a technical nature and would assist the court in making a determination.

This is the key - expert witnesses have knowledge or skills which enable the court to form a conclusion on the evidence. That is:

(1) they are able to assist the court in areas where it may have difficulty understanding the issues and facts; and
(2) they are expected to answer questions which will assist the court, even if the answers do not assist the party calling them.

In the Magistrates Court Act 1989 there is provision for the service of expert witness statements by both the prosecution and the defendant - see Schedule 2, sub-clause 1(A)(2) & (8). Such expert witness statements are not admissible in evidence of themselves, and the usual rules apply in relation to the tendering of statements.

Experts will be required to give sworn evidence and will be liable to cross-examination.

The first thing which must be established of experts is their expertise. This can be done by them giving evidence of such matters as their:

(1) formal training and qualifications;
(2) practical experience;
(3) trade or professional memberships;
(4) publications in the area of their expertise;
(5) previous occasions where their expertise has been given; and
(6) any other matters which would show they have a specialised knowledge of the area in issue.
(7) Note that the absence of formal qualifications does not mean that a witness cannot be classified as an expert, and it is quite frequent that considerable practical experience will be sufficient.

CHARACTER EVIDENCE & PRIOR CONVICTIONS

Rule to remember

- Character evidence is not generally permitted prior to a court making a `guilty' decision, unless the defendant raises the issue.

(8) In criminal cases, the prosecution is not permitted to simply lead evidence of the bad character or prior convictions of the defendant before a determination of `guilt' has been made by the court. Such evidence can be heard after a `guilty' determination is made, to assist the court decide on punishment.

(9) However, if the defendant (and only the defendant) makes an issue of her or his character during the hearing, the prosecutor may ask the court to call evidence and cross-examine witnesses on the defendant's character.
(10) In such circumstances, the prosecutor may:
(11) lead evidence of previous convictions, past court appearances which did not result in a finding of `not guilty', and any conduct or reputation evidence regarding the defendant; and
(12) raise issues regarding the defendant's good character and prior
(13) convictions if the defendant has given evidence against a person charged
(14) with the same offence, or the evidence is necessary to prove that the
(15) person has committed the offence being considered by the court.
(16) Section 399(5) of the Crimes Act 1958, covers this matter (note the 'spouse' exception in sub-section (a)):

(a) where a defendant has personally or by her or his advocate asked questions of the witnesses for the prosecution (other than his wife or former wife or her husband or former husband as the case may be) with a view to establishing her or his own good character, or has given evidence of her or his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution (other than his wife or former wife or her husband or former husband as the case may be); or

(b) where a defendant has given evidence against any other person charged with the same offence; or

(c) the proof that she or he has committed or been convicted of such other offence is admissible evidence to show that she or he is guilty of the offence wherewith she or he is then charged

-then the defendant (if she or he gives evidence) may be asked any question showing that she or he has been convicted of or committed a crime or is of bad character.

Under the *Evidence Act 1958,* proof of prior convictions can take the form of a certificate from the relevant person. See below for Sections 87 (regarding an indictable offence), 88 (regarding an offence in another country), and 89 (regarding a summary offence):

87. Proof of trial or conviction or acquittal for an indictable offence by certified copy

S. 87(1) In any legal proceeding whatsoever in order to prove the trial or conviction or acquittal in Victoria of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person or a copy thereof; but a certificate purporting to contain the substance and effect only (omitting the formal part) of the presentment indictment or charge or of the conviction or of the acquittal (as the case may be) of or for such offence purporting to be signed by the officer having the custody of the records of the court where such first-mentioned person was tried convicted or acquitted or by the deputy of such officer or by the officer for the time being acting in such first-mentioned capacity (for which certificate a fee of Fifty cents ($0.50) and no more shall be demanded or taken) shall be sufficient evidence of the said trial or conviction or acquittal without proof of the signature or official character of the person appearing to have signed the same or of the fact that he has the custody of such records; and the conviction shall be deemed to be unappealed against and otherwise unaffected unless the contrary is proved.

88. Mode of proving previous convictions in other countries

s. 88 In any legal proceeding whatsoever in order to prove a conviction out of Victoria (whether in or out of Australia) of any person a certificate purporting to contain the substance and effect only (omitting the formal part) of the conviction purporting to be signed by the officer having the custody of the records of the court where the offender was convicted or by the deputy of such officer or by the officer for the time being acting in

such first-mentioned capacity shall be sufficient - evidence of such conviction without proof of the signature or official character of the persons signing such certificate and without any further proof as to the custody of such records; and the conviction shall be deemed to be unappealed against and otherwise unaffected unless the contrary is proved.

89.

S. 89 ***Evidence of previous summary conviction***

In any legal proceeding whatsoever in order to prove a previous summary conviction before the Magistrates' Court-

(a) a document purporting to be a copy of any such conviction purporting to be certified by the proper officer of the court to which such conviction has been returned;

(b) a document proved to be a true copy of such conviction;

(c) the register kept under the Magistrates' Court Act 1989 *or any corresponding previous enactment or a certificate purporting to contain an extract from such register of such conviction purporting to be signed by a registrar or deputy registrar-*

shall notwithstanding anything in any Act of Parliament contained be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed any such document or certificate or of the statement that the register is so kept; and the conviction shall be deemed to be unappealed against and otherwise unaffected unless the contrary is proved.

VIDEO, AUDIO AND PHOTOGRAPHIC EVIDENCE

Rules to remember

(1) Video, audio and photographic evidence is admissible - if it is relevant, and has been legally obtained.

(2) Charts and diagrams can be used as an evidentiary aid.

Video, audio and photographic evidence is admissible. Photographs are specifically included in the definition of `document' in the *Evidence Act* 1958. Audio tapes and the like are covered in (d) of the definition. Video could arguably also be included in (e) of the definition, but there are also other means for obtaining the admissibility of videos (see further below).

"document" includes, in addition to a document in writing-

(a) any book map plan graph or drawing;any photograph;

(b) any label marking or other writing which identifies or describes any thing of which it forms part, or to which it is attached by any means whatsoever;

(c) any disc tape sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;

(d) any film negative tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom; and

(e) anything whatsoever on which is marked any words figures letters or symbols which are capable of carrying a definite meaning to persons conversant with them;

Charts and diagrams may be permitted by the court, where they are used as an aid to evidence given to the court - see **R. v. *Mitchell*** [1971] *VR 36.* This is supported by Section 42A of the ***Evidence Act* 1958,** which makes provision for different forms of evidence to be admissible as follows:

42A. Form of evidence

s. 42A

(1) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

(2) Nothing in this section affects the operation of section 42B.
Section 42B of the ***Evidence Act 1958*** provides a basis upon which a court would be entitled to receive evidence in the form of a video. For example, for a court to obtain a proper perspective of the nature of defective building works it may be proper for a video of the site to be produced and shown to aid the court in its assessment of the existence and extent of defects. Using a video in this way may significantly reduce the time spent `painting the picture'.

42B. Manner of giving voluminous or complex evidence

s.42B

(1) If the court is satisfied that particular evidence that is to be given in a proceeding by a party is so voluminous or complex that it would not be possible conveniently to assess the evidence if it were given in narrative form, the court may direct the party to give the evidence in a form, specified in the direction, that would aid its assessment by the court.

(2) The direction may also require the party to provide to the other parties copies of the evidence in the form in which the court has directed that it be given.

(3) A direction that includes such a requirement must specify a time within which the copies must be so provided.

Video tapes are similar to audio tapes, in that they provide real evidence of what it was that was recorded. The admissibility of such material does not depend on the medium in which it is presented, but on such factors as:

(1) the relevance of the contents;
(2) the legality of the means used to obtain the recording; and
(3) whether or not the recording was taken in breach of public policy or bad faith.

Note that in the conducting of an investigation with video or audio assistance, it is prudent to:

at the commencement of the recording-

- specify the date and time of commencement of the recording,

(1) specify the location of the recording,
(2) specify the names of the people present, and
(3) give a caution of rights if the circumstances are appropriate; and
(4) at the end of the recording-
(5) specify the date and time of completion,
(6) authenticate the tape, by signature or other identifying mark placed on the tape,
(7) remove the tabs to prevent interference with the taped recording, and
(8) place the tape in a safe place pending the final hearing so it is preserved from loss, damage, or other interference.

PROSECUTION MANUAL

CHAPTER FIVE
THE TRIAL

- TWO WEEKS BEFORE THE TRIAL
- BEFORE THE TRIAL - ON THE DAY
- THE TRIAL - PAINTING THE PICTURE
- PRESENTING YOUR EVIDENCE
- PRESENTING YOUR SELF
- HOW WILL THE TRIAL PROCEED?

Rules to remember

1. Follow the checklist for actions two weeks prior to the trial:

(a) properly brief your barrister or other advocate;
(b) complete your evidence;
(c) prepare your witnesses;
(d) double check your trial date; and
(e) try a practice run through of your presentation and style.

2. Follow the checklist for actions prior to the trial, on the day:

(a) punctuality;
(b) Criminal Division Co-ordinator;
(c) witnesses; and
(d) on-call witnesses.

3. Thoroughly work through the points on painting the picture at the trial:

(a) presenting your evidence; and
(b) presenting your self.

4. Note the trial process, and make sure you are familiar with it.

If you have carried out the various suggestions made elsewhere in this manual, you will be half way to maximising your chances of success at the trial. But there is much more work to be done, both before the trial, and on the day.

TWO WEEKS BEFORE THE TRIAL

At least two weeks prior to the trial date, work through the following checklist:

1. Barrister or other advocate

In the past, it was common for councils to be represented by council officers at building control trials, usually the council building surveyor. While this is still permitted, it is more common these days for councils to be represented at trial by either a barrister (often called `counsel') or the advising solicitor.

If a barrister is representing, you will need to brief her or him thoroughly. This may also be necessary if a solicitor is representing you, and for whatever reason she or he has not been thoroughly involved in the case.

As part of the briefing, you must give the barrister all relevant material, including-

(1) A copy of the charges.
(2) All witness statements.
(3) Any contemporaneous notes made by yourself and the witnessing colleague made at the time of the inspection and, if you have followed our advice, immediately after the inspection.

(4) Any exhibits.
(5) Transcripts of any recorded interviews.
(6) Copies of photographs.
(7) Any expert opinions.
(8) Any certified extracts and the like of relevant documentation (eg Certificate of Title, company searches etc.).
(9) A copy of your instrument of delegation from the council for you as municipal building surveyor to initiate a prosecution - make sure the copy is certified by the council's chief executive officer (or a suitably delegated person) as being a true copy.

The briefing process will possibly entail a number of meetings with the barrister. As part of the process, it is your responsibility to make sure that the barrister is completely on top of the case, and is given all relevant information and material.

This may include a clear indication of some of the issues it may be necessary for the barrister to concentrate on as part of her or his cross examination of witnesses and the defendant at the trial.

It is crucial to the success of the trial that there are no surprises on the day. It would be extremely risky to simply assume that the barrister will have done her or his homework. If the barrister is, for any reason whatsoever, caught on the hop during the trial, your case could fall in a heap.

2. Evidence Make sure that:
(1) All photos have been developed, and are presented in a clear way - it is usually good practice to have large glossy prints, laminated for ease of handling, and clearly labelled.
(2) Transcripts of recordings are completed.
(3) Any other evidence is prepared in a manner which will maximise the court's ability to understand it.

3. Witnesses

It is absolutely forbidden to undertake what is called `coaching' of witnesses - i.e. advising them what to say in response to any questions.

However, it is both legitimate and extremely sensible to make sure of the following:

Witnesses are co-ordinated, which includes telling them-
(1) the trial date;
(2) the time to arrive at the court;
(3) where to go; and
(4) who to meet.

Witnesses are prepared for the trial, so there are no surprises for them on the day. This may include-

(1) meeting the barrister;
(2) telling them about court procedure;
(3) running through the cross examination process;
(4) advising them of their demeanour when answering what may be extremely hostile questioning; and
(5) advising them how to dress and present themselves.

4. Trial date

Double check the trial date.

It may seem silly, but a simple mistake of this kind can cause all sorts of problems - and it does happen that people get it wrong. Don't let that be you.

5. Run through

Possibly with a colleague, or perhaps your legal team (as seems appropriate), it may be a good idea to run through your evidence at court. Try out your presentation, try answering various relevant questions put in different ways. Try responding to trick or aggressive questioning.

6. Costs

Prepare a listing of your costs, and keep a running tally of any additions to these during the trial. You will probably ask for a court order regarding costs if the defendant is found guilty, and you must be able to come up both with a figure and the justification for it.

These costs will include the cost of expert witnesses, the council's charge-out rate for your services, the cost of legal advice and representation, and other disbursements (eg title and company searches, charge and summons sheet typing, charge and summons service etc.).

7. Dates

Prepare a listing of dates which are suitable and, as the case may be, unsuitable, for any adjournments. Such dates must suit both yourself, your prosecution team, and any key witnesses.

BEFORE THE TRIAL - ON THE DAY

On the day of the trial, work through the following checklist:

1. Punctuality

Punctuality is paramount. Just like it is crucial that you get the day right, it is crucial that you are on time for the trial. In fact, this point is so crucial, we strongly recommend that you:

(1) make every effort to be at the court at least one hour early; and
(2) arrange for witnesses (other than on-call witnesses - see below) to be at the court at least one hour early.

2. Criminal Division Co-ordinator

When you arrive at the court, announce your appearance with the court's Criminal Division Co-ordinator. At this time you may be asked:

(1) how many witnesses will be appearing; and
(2) how long the trial will probably take.

It is essential that you be able to answer these questions as accurately as possible. It is probable that you may have discussed these matters with the court previously, but the Co-ordinator will often want to doublecheck that there have been no changes.

3. Witnesses

Having arranged for your witnesses (other than on-call witnesses - see below) to be at the court at least one hour early, make them comfortable on their arrival, and go through a final run of court procedures, terminology and the like.

4. On-call witnesses

It is possible that some witnesses may not have to be at the court during the whole trial. For example, this may include witnesses whose evidence does not appear crucial, but who may have to appear if required.

These witnesses will usually be on-call at an hour's notice, meaning that if called to appear before the court they must turn up within an hour. It is your responsibility to make sure that this is the case.

Note that it is usually good practice, no matter what level of enthusiasm they show for appearing as required, to have these types of witness subpoenaed. This will enable you to arrange for the court to enforce their appearance in case of unexpected occurrences.

THE TRIAL - PAINTING THE PICTURE

The success of your case on the day of the trial will revolve to a considerable extent around yourself. If you fail at the trial, there is a strong chance that your case will also fail. This means that your ability to `paint the picture' is crucial - ie you must be able to present your evidence in a manner which indicates clearly to the court precisely what happened and why these happenings mean the court should visit a penalty upon the defendant.

There are two basic elements to `painting the picture'. First is the actual presentation - ie the material you want to get across to the court. Second is you - ie why the court should take you and your evidence seriously.

1. Presenting your evidence

(1) Ensure that any evidence tendered to the court is of the highest presentation quality. For example, large photos, and clearly presented and illustrative evidential aids. Don't get carried away with presentation possibilities - for example, it may be suitable to use complex computer generated graphics and overheads at certain types of public presentation, but it may not be suitable in a Magistrates' Court.

(2) Be prepared for battle - your case must be treated as a war, you must be totally prepared. A great case can be defeated by such elements as minor technicalities, over confidence, and underestimating the opposition. Your opposition will be looking for any opportunity to knock you off - don't give it to them.

(3) There is no room for assumptions about the defendant's state of preparedness for trial - apart from an assumption that they are fully prepared and able to beat you if you are not extremely clever and, in turn, better prepared than they are.

(4) Present your evidence clearly and chronologically.

(5) Try not to use too many terms and expressions which are exclusive to your profession - there is every chance the court will not understand them. If you have to use them, try and explain what they mean in clear language.

(6) If you know it, tell the truth. Don't lie, and don't appear to prevaricate.

(7) If you don't understand a question seek clarification. For example, say 'I can't understand the question', or 'can you repeat the question please'. And if you don't know the answer, say so.

(8) Be polite and deferential at all times:

(9) This will often be particularly difficult, but it is a crucial part of convincing the court that you are a professional, and that your evidence should be taken seriously.

(10) Remember, an opposition lawyer will often set out to needle you, to pick at you, to pick at your professional and personal pride, trying to make you snap. This is part of their job - it is your job to avoid the temptation to argue back. Nonetheless, this must be tempered by the need for you to stand your ground, and answer questions firmly, thoroughly and confidently.

(11) Keep your cool, never argue, and don't get smart. The opposition lawyers will be looking for any chink in your armour, and if they find one they will stab you there quickly, expertly, and brutally.
(12) Address your mind to answering all questions precisely - whether they are from your own or the opposition's lawyers. This means:
(13) Answer the question, don't give speeches or tell a story.
(14) Don't say more than you need to answer the question sufficiently - if `yes' or 'no' is sufficient, then just say 'yes' or 'no'.
(15) In this situation, less is more - the more you say, the more material you give the barrister to question you about, and the more opportunities you give them to find that chink in your armour.
(16) Do not be tempted to say more because you do not think they have understood some point you regard as important. Your own lawyer should draw these issues out - if you have prepared them adequately for the trial!

2. Presenting your self

A trial is an extremely serious matter. The court will be treating it seriously, and in all probability the defendant and her or his team will also be treating it seriously. This means you must adopt a serious demeanour, both in the way you present your evidence, and in the way you appear.

This may seem obvious, but we have observed various exceptions to many of the items on the following checklist, some of which have been major exceptions and have resulted in damage to the prosecution case:

(1) Wear conservative, clean clothes. This means, for example:
a conservative suit, usually dark blue or grey or black, although of course there are suitable exceptions;
(2) if you are male (or if you are female and intend to wear a tie), a conservative tie, which is not too flashy, and certainly not jokey;
(3) a plain, matching shirt (or if you are female, a conservative, plain blouse); and
(4) conservative, matching shoes.
(5) Take care with hair grooming, and if you have a beard or moustache make sure it is trimmed neatly.
(6) If you wear one or more earrings, make sure they are not too flashy or intrusive.
(7) Adopt a polite, deferential and helpful demeanour at all times. For example:
(8) Do not tell inappropriate jokes.
(9) Do not use exaggerated slang or profanity.
(10) Do not lose your temper, no matter how much you are goaded. If necessary ask for a glass of water, or take a deep breath, or whatever you need to do to avoid losing your cool.
(11) Do not give smart answers, no matter how obvious the question may be, and no matter how often the question is repeated in different ways.
(12) Call the magistrate 'your worship', 'sir' or `madam'. The magistrate is NOT 'your honour' or any other variation on the theme.
(13) Turn off your mobile phone and pager.

HOW WILL THE TRIAL PROCEED?

This section should be read in conjunction with the discussion of mentions in the chapter on trial preparation. Many of the processes followed on the day of the hearing are similar to those followed at the mentions. The actual hearing could take several courses, what follows is a discussion of the most likely procedure.

1. The prosecution or the clerk of courts will read the charges.
2. The defendant will be asked to enter a plea, which at this stage of the proceedings is most likely to be `not guilty'.
3. The prosecution opens the case. Note that the prosecution is only permitted to make an opening address to the court with the court's permission.
4. The prosecution tenders its exhibits, including any documentary or photographic evidence it intends to rely upon.
5. The prosecution calls its first witness. The prosecution will have previously decided on the best strategic approach to take to presenting its case to the court. This may involve following a chronological approach, in which case the first witness will probably be the person who first observed (and probably reported) the alleged offence. On the other hand, it may be decided that it is best for the building surveyor (ie the informant) to set the groundwork, and call the 'observer' witnesses later.
6. The defence may now cross-examine the witness (this occurs after each witness has finished giving evidence for the prosecution).
7. The prosecution may re-examine the witness to clarify any points raised during the defence's cross examination. Note that unless the court gives its permission (which the prosecution must specifically seek), the prosecution is not allowed to re-examine on any areas which are beyond the scope of the subject matter upon which the witness was cross-examined.
   For example, if no questions were asked during the cross-examination regarding the physical appearance of a worker at the site on a particular day, it would not be allowed (unless specific approval is sought from and given by the court) to ask questions on that matter during a re-examination.
8. Following the giving of all oral evidence, any documents not tendered previously as exhibits must be tendered. This could include copies of the regulations, and Australian Standards, the Building Code of Australia and the like.
9. The defence may then elect to make a `no case' submission, setting out grounds for arguing that the prosecution has not provided sufficient evidence to prove a case which the defence needs to answer. If the court is in agreement, some or all of the charges may be dismissed.
10. The defence may elect not to call any evidence, in which case the Magistrate will immediately proceed to determine guilt or innocence.
11. If the defence elects to call evidence, it may call its own witnesses. The process of examination, cross-examination, and re-examination now occurs again, with the defence and the prosecution swopping positions.

12. Each party to the trial will now be given an opportunity to address the Magistrate on matters of law. Unless the Magistrate gives permission, such an address must not cover issues of fact (ie the evidence, and which aspects of it should be preferred by the court).
13. The Magistrate will now determine the innocence or guilt of the defendant.
14. The Magistrate will ask the prosecution whether `anything is known' - ie if the defendant has any prior convictions or previous criminal history. The Magistrate will exercise discretion over whether or not this information is relevant to the offences committed in this case, and whether or not they should form part of a decision regarding a penalty. It is also open to the prosecution to edit its listing of prior convictions if they clearly have nothing to do with the case at hand.
15. The defence will then be asked to make submissions in relation to sentencing, and they may produce character references or other material relating to the defendant and the circumstances in which the offence was committed. The defence may submit what it considers to be a reasonable penalty. If, during this process, the defence raises matters with which the prosecution wants to take issue, they should be raised immediately with the court.
16. When this process is complete, the Magistrate will then pass sentence.
17. At this stage, the prosecution may apply for an order that the defendant pay the costs of the prosecution. The prosecution should make sure it is in a position to justify its claims for costs - a listing of the costs should be at hand, and a justification of the level of the cost elements.

PROSECUTION MANUAL

CHAPTER SIX
APPENDIX

- **SUMMARY OF THE PROSECUTABLE OFFENCES UNDER THE PLANNING AND ENVIRONMENT ACT 1987**

SUMMARY OF PROSECUTABLE OFFENCES UNDER THE PLANNING AND ENVRIONMENT ACT 1987

The value of a penalty unit is set each year in accordance with section 6 of the *Monetary Units Act 2004*. The current value of a penalty unit is $110.12.

Section	Provision / Offence	Penalty
46AZF	A member of the Growth Areas Authority or a Chief Executive Officer must not release information that the person know is confidential information	100 penalty units
48	Providing misleading information on an application for a permit. Eg signing on behalf of the owner without their knowledge	60 penalty units.
127	General Penalty Provision - Where no penalty has been expressly provided for an offence under the Act	1,200 penalty units. If the contravention or failure is of a continuing nature, a further penalty of 60 penalty units for each day that it continues after conviction
130	Where an infringement notice has been issued for contravening a scheme, permit or agreement	5 penalty units in the case of a natural person. 10 penalty units in the case of a body corporate.
137	Obstructing an authorised officer or member of the police force in taking any action is guilty of an offence.	60 penalty units
169	Any person who insults, assaults or obstructs a member of a panel, or misbehaves at a hearing; repeatedly interrupts a hearing or disobeys a direction of a panel is guilty of an offence	60 penalty units

Please note that under section 128, if you take part in management of a company or body corporate that is charged with an offence, you can also be charged with the same offence.