



BEST PRACTICE GUIDE - *EX PARTE* APPLICATIONS

Peter Dunning KC¹

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Warrants 9

Reviewed by:

Ian Robertson SC

Member of the South Australian Bar
Chair, Advocacy Training Council

Kanaga Dharmananda SC

Member of the Western Australian Bar

Claire Harris KC

Member of the Victorian Bar

Introduction

1. This publication is intended to provide to barristers a practical guide to best practice for the bringing of *ex parte* applications.
2. The authorities are legion² as to the stringency of the obligation that falls upon a party and its legal representatives when moving a court *ex parte*. Utmost good faith - *Uberrima Fides* - is required.³
3. The obligation of the barrister is to the Court.⁴ In addition to that common law⁵ obligation, the various professional conduct rules regulating barristers throughout Australia (collectively (the Conduct Rules)) contain complementary rules.⁶ There are practice directions in relation to *ex parte* applications, including in respect of particular kinds of applications which may by their nature call for an *ex parte* application at least in some circumstances.⁷
4. Each occasion will, to an extent, be reflective of its own facts and circumstances,⁸ but at a minimum the following standards ought to be adhered to.

The threshold requirement of actual urgency or necessity to proceed in the absence of the party whose rights are to be affected

5. Other than in those applications that proceed without another party having to attend,

² E.g. *Edison* at 681.9; *Lane* at [8]; *Fletcher* at [103]; *Southern Equities* at 422.8. Full citations and the judge or judges whose reasons are referenced are set out in the table of cases and statutory provisions at the end of this document.

³ *Edison* at 682.1; *Lane* at [10]; *Savcor* at [24]; *Papas* at [71].

⁴ *Lane* [8]; *Savcor* at [24]; *Papas* at [72].

⁵ In the sense explained in *PGA* at [22].

⁶ *ACT Conduct Rules and NT Conduct Rules* rr 24 and 24A, see also 1 – 5, 21 and 22; *Qld Conduct Rules* rr 29 and 30, see also 2, 4(a) – (c), 5(a) – (e) and 25 – 27; *SA Conduct Rules* rr 19.4 and 19.5, see also 2.1, 3.1, 19.1 and 19.2; *Tas Conduct Rules* by r 5 adopting the *Uniform Conduct Rules*; *Uniform Conduct Rules* rr 27 and 28, see also 3(a) – (c), 4(a) – (e) and 23 – 25; Western Australia has adopted the Legal Profession Uniform Conduct Rules from 1 July 2022. Full citation of the relevant rules are set out in the table of cases and statutory provisions at the end of this document.

⁷ E.g. Federal Court of Australia Practice Notes CPN-1 (Pt 5), the relevant National Practice Area practice note relating to “Urgent Applications”, GPN-FREZ, GPN-SRCH; Supreme Court of New South Wales ‘Practice and Procedure before Duty Judge in Equity’ (being an address by Brereton J to the New South Wales Bar Association on 14 August 2008); Supreme Court of New South Wales Practice Notes SC Gen 13 and 14; Supreme Court of the Northern Territory Practice Directions 5 and 6 of 2006; Supreme Court of Queensland Practice Directions 1 and 2 of 2007; Supreme Court of Tasmania Practice Direction No. 4 of 2006 and No. 3 of 2012; Supreme Court of Victoria Practice Note No. 4 of 1993; Supreme Court of Western Australia Consolidated Practice Directions 4.3. and 9.6. Schemes of arrangement may be considered as raising the same duties as *ex parte* applications. At the time of writing the Federal Court was inviting comment on matters pertaining to the nature of evidence to be adduced at scheme court hearings.

⁸ *Williams* at [47]; *Argyle* at [160].

such as orders for a scheme of arrangement, the threshold requirement which must be met to justify seeking and obtaining an *ex parte* order is that the party moving *ex parte* is doing so either because:

- a) of such urgency due to irredeemable or serious damage which is imminent, preventing notice, including informal notice,⁹ being given;¹⁰ or
 - b) there is a real danger that if the notice is given, the other party will act in the meantime to destroy or remove the subject matter of the suit.¹¹
6. The rationale for the threshold requirement is that a person should not be subject to an order prejudicing that person unless the person has had the opportunity of being heard in opposition to such order.¹² That concept lies at the heart of securing procedural fairness in the adversarial system of justice.
7. Various court rules across Australian jurisdictions now contemplate *ex parte* applications, adopting in substance the above formulation at least in part and the provision of abridged or informal notice including in circumstances such as these.¹³
8. The existence of an apparently strong case – and much less the moving party and its lawyers’ perception that is so – is not alone sufficient to justify an order made departing from this basal rationale and key tenet of the adversarial system of justice.¹⁴

Content of the duty of candour

9. In the event that the threshold is met, the significant obligations that fall upon the party, and its legal representatives, in seeking an *ex parte* order engage the duty of candour.
10. The duty of candour will interact with other obligations set out below.
11. At a minimum the duty of candour requires the following.

⁹ *Bond Brewing (VCA)* at 459 ls 15-30.

¹⁰ *Edison* at 681.6; *Bond Brewing (VCA)* at 454 ls 10-15, 455 ls 30-40, 457 ls 20-25, 35-40; *South Downs Packers (McPherson J)* at 570 ls 35-40; *Fletcher* at [105]-[106]; *Williams* at [47]; *Griffiths* 34 ls 30-45.

¹¹ *Edison* at 681.6; *Argyle* at [159].

¹² *Edison* at 681.5; *International Finance* at [133]; *Aristocrat* at [15]; *South Downs Packers (McPherson J)* at 570 ls 25-45; *Lane* at [8]; *Fitz Jersey* at [66]; *Fletcher* at [106].

¹³ *ACT Court Rules* r 6(1), *FCA Court Rules* r 7.01 and Division 7.4 and 7.5; *NSW Court Rules* r 18.4, *NT Court Rules* r 46.05 (4), *Qld Court Rules* rr 27(3) (a) and (b), *SA Court Rules* rr 102.1(2), (6) and (7), *Tas Court Rules* r 529(1), *Vic Court Rules* r 2.04(1), and *WA Court Rules* r O54 r4.

¹⁴ *International Finance* at [133].

Full and frank disclosure of all material facts

12. An incident of moving *ex parte* is the requirement to present all those facts that are material¹⁵ to the orders being sought and the circumstances in which they are sought.¹⁶
13. Consequently, the task is not one of persuasively illuminating the favourable facts and circumstances for the moving party. Rather, in a sense atypically – and calibrated to the immediate situation¹⁷ – it calls for explicating the facts and circumstances for and against¹⁸ making the order.
14. That implication means that it is not satisfactory to state “...matters obliquely, including documents in voluminous exhibits ...” and the duty thus goes beyond “... merely not mis-stating the position. It means squarely putting the other side’s case, if there is one, by coherently expressing the known facts in a way such that the Court can understand, in the urgent context in which the application is brought forward, what might be said against the making of the orders. It is not for the Court to search out, organise and bring together what can be said on the respondents’ behalf. That is the responsibility of the applicants, through its representatives.”¹⁹

It is for the Court and not the applicant to decide what is a material fact

15. The moving party’s subjective sense of what is material (or not) is not to the point. Materiality is to be determined by the Court objectively as to what is material to whether the *ex parte* order should or should not be made.²⁰ Thus, the moving party’s counsel should consider the matter through the lens of how the matter may be determined objectively with the benefit of hindsight and the material that may ultimately be put forward by the opposing party.

All material facts include those that would be known upon proper enquiries being made before making the application

16. The duty of candour requires making whatever inquiries are relevant to ensure a full and fair disclosure of the facts and circumstances.²¹

¹⁵ *South Downs Packers* (Connolly J) at 566 ls 20-30 and (McPherson J) at 571 ls 10-20.

¹⁶ *Edison* at 681.9; *International Finance* at [131]; *Savcor* at [25]-[27]; *Williams* at [47]; *Argyle* at [160].

¹⁷ *Williams* at [47].

¹⁸ *Edison* at 682; *Lane* at [5] and [12]; *Papas* at [71].

¹⁹ *Walter Rau*, referred to with approval in *Borg* at [42]; *Fitz Jersey* at [72].

²⁰ *International Finance* at [131]; *Lane* at [9]; *Savcor* at [35]-[36]; *Williams* at [47]; *Argyle* at [160].

²¹ *Papas* at [71]; *Williams* at [47]; *Argyle* at [160].

17. That involves the barrister critically engaging with (a) what other facts might likely exist which would be relevant to whether the order should be made; and (b) deploying attempts to ascertain the situation in relation to those facts.²²

Identification of any defence or response that might be anticipated

18. An incident of moving *ex parte* is assuming the obligation to alert the Court to all those defences or responses that it might be expected the other party could raise if it had been present.²³
19. Consequently, the Court should not be invited to make an order contrary to principle;²⁴ must be informed of circumstances which would disentitle the moving party to the relief sought;²⁵ and should be informed of the authorities, favourable or unfavourable, which bear relevantly on the matters under consideration.²⁶
20. This includes identification of the potential of irreparable damage to the party against whom the order is sought by the making of the order.²⁷
21. That identification process should be meaningful and neutrally expressed.²⁸ The order sought must be known to the law.

The course the barrister must adopt where legal professional privilege would, if relied upon, impact on the obligation

22. The Conduct Rules oblige a barrister aware of a matter against the making of an order, or for limiting it, which is the subject of legal professional privilege, to seek the client's instructions to waive the privilege, and if the client refuses, to refuse to appear on the application: *ACT Conduct Rules and NT Conduct Rules* rr 24(c) and 24A, *Qld Conduct Rules* rr 29(c) and 30, *SA Conduct Rules* rr 19.4(c) and 19.5, *Tas Conduct Rules* r 5, *Uniform Conduct Rules* rr 27(c) and 28, noting that Western Australia has adopted the Legal Profession Uniform Conduct Rules from 1 July 2022 .

A worthwhile undertaking as to damages should either be offered or an explanation provided as to why the order is sought without one

²² *Williams* at [48]-[49].

²³ *Edison* at 682.2; *International Finance* at [131]; *Papas* at [71]; *Argyle* at [160].

²⁴ *Bond Brewing (VCA)* at 476 ls 20-25.

²⁵ *Fitz Jersey* at [55].

²⁶ *Papas* at [72].

²⁷ *Bond Brewing (VCA)* at 455 ls 35-40; *Williams* at [47].

²⁸ *Papas* at [71]; *Williams* at [48].

23. A worthwhile undertaking as to damages will be required in all but exceptional circumstances. If it is not offered then it is necessary to explain to the Court with care why it is contended that no such undertaking should be given.²⁹ It would be a relevant consideration against making the *ex parte* order.
24. Candour calls for identification of the lack of worth of the undertaking where that situation arises, including where the lack of worth arises not absolutely, but because of the magnitude of the other party's potential losses.

The reach of the *ex parte* order should be no greater than is strictly necessary

25. There should be no overreach in the order. The order should be only that which is strictly necessary to guard against the matters that were the threshold basis for moving *ex parte*, and only until the time at which the other party can be heard on notice.³⁰
26. It follows that the barrister moving *ex parte* must be in a position to explain to the Court why each particular order is necessary.

The *ex parte* order should be returnable at a fixed date in the near future

27. The *ex parte* order should be expressed to be operative until a fixed date in the relatively near future.³¹ Provision should also be made for the proceedings to be returnable to the Court before that date.

Costs or other inessential orders to the benefit of the moving party should not be made *ex parte*

28. It is inappropriate to seek an order for costs or other inessential orders to the benefit of the moving party on such an occasion.³² There is no requirement for that to be determined on an *ex parte* basis.
29. Rather, the orders should be limited to those necessary to guard against the action or inaction of the other party identified as the threshold basis for the *ex parte* application.

A transcript or other record of the *ex parte* hearing should be made and provided to the party affected by the order

²⁹ *Bond Brewing (VCA)* at 455 ls 10-15, 477 ls 15-35; *Bond Brewing (HCT)* at 277.3.

³⁰ *Bond Brewing (VCA)* at 455 ls 30-40, 457 ls 25-30, 476 ls 15-25.

³¹ *Bond Brewing (VCA)* at 455 ls 5-10, 472 ls 30-40.

³² *Bond Brewing (VCA)* at 455 ls 10-15.

30. A transcript ideally, or at least some other reliable record, should be maintained of what occurred leading up to the making of the *ex parte* order and at the hearing.
31. Ideally, correspondence with the Court, via the associate, should be largely or entirely in writing so there is a permanent record. Similarly, the hearing of the application should be recorded by the relevant court reporting service. In the event that, for whatever reason, court recording is not possible, whatever other realistic means of keeping a record should be explored.
32. On those extremely rare occasions when it is necessary to have the order sought and obtained in circumstances that do not permit any sort of recording to be made, a detailed note should be made by at least one of the legal practitioners during the hearing and reviewed and formalised as soon after the events as possible.
33. The correspondence leading up to obtaining the order, any written submissions, all affidavit material, and the record of the hearing should in all but exceptional circumstances be provided promptly to the other party, usually, as far as possible, at the same time as serving the order.

Service or other means of notifying the persons affected by the *ex parte* order should be specific and ordinarily urgently attended to

34. The order should specifically contemplate how notice is to be given and service is to be effected on any person affected by the *ex parte* order, and especially the party against whom the order was made. The order should provide for any such person being able to return to the Court earlier than the contemplated return date in the orders, if necessary.
35. Ordinarily that notice and service should be attended to urgently.³³ The order should specify what is to be served.

At the first hearing at which the application the subject of the order made *ex parte* can be fairly resisted, the party having obtained that order *ex parte* will bear the onus of justifying its continuance

36. At the first occasion that the party the subject of the *ex parte* order can meaningfully deal with the application for such order, the onus will be upon the party which has obtained that *ex parte* order to justify its continuation.³⁴

³³ *Michael Wilson & Partners* at [40]; *Bond Brewing (VCA)* at 455 ls 40-45.

³⁴ *Qantas* at [8]; *Savcor* at [20] – [22]; *Argyle* at [116].

The *ex parte* order is voidable, not void, but ordinarily a material breach of the duty of candour or other requirements for obtaining an *ex parte* order would justify the discharge of the *ex parte* order

37. An *ex parte* order made in breach of any of the above considerations is voidable not void.³⁵ Whilst there is a discretion to continue the order in the face of a non-material breach, ordinarily such an order would be set aside.³⁶
38. Considerations of fairness, efficiency and whether in any event a fresh order could and would be made bear on that consideration.³⁷

Cases where a statute authorises the making of the application *ex parte*

39. Where a statute contemplates the bringing of an *ex parte* application, special considerations arise as to the proper construction of that statute, and the extent to which that statute has, if at all, modified the above obligations.³⁸
40. By way of illustration, an order for an examination in the area of company liquidation has traditionally been provided for in the applicable rules to be made *ex parte*.³⁹
41. Similarly, court rules which provide for an *ex parte* application to seek to suppress until trial material that would otherwise be disclosable.⁴⁰
42. Where the obtaining of the order is provided to be made *ex parte*, but there has been no other modification to the law pertaining to obtaining an *ex parte* order, the applicant for such order comes under the same obligations of candour as any other party applying *ex parte*, albeit considerations as to what is necessary to constitute full disclosure, or materiality, may differ from other cases.⁴¹

Warrants

43. Search warrants are in a special category because they are an administrative not judicial

³⁵ *Savcor* at [32].

³⁶ *Edison* at 682.3; *International Finance* at [133]; *Aristocrat* at [15]; *Borg* at [36]-[38]; *Williams* at [53]; *Argyle* at [160].

³⁷ *Savcor* at [28]-[34].

³⁸ See generally *Griffiths* at 32-34.

³⁹ *Federal Court (Corporations) Rules* (2000) rr 11.2 (2) and 11.3 (2) – see the analogues under the State and Territory *Corporations Act* court rules; see also *Federal Court (Bankruptcy) Rules* (2016) rr 6.02, 6.07 and 6.13.

⁴⁰ E.g. *Qld Court Rules* rr 224 and 393 (3), *Coster* at [1] and [12] – [15].

⁴¹ *Sutherland* at [50] (citing with approval *Walter Rau* at [38] and *South Equities* at 422 – 423), see also [49] and [51] – [54].

act.⁴² Thus, the special rules in relation to *ex parte* applications discussed above are not engaged.

44. However, the rules against making a misleading statement to the Court, and taking all necessary steps to correct any misleading statement made to the Court as soon as practical after the barrister becomes aware the statement was misleading, do apply to such application.⁴³
45. Further, as with all administrative decisions, such a warrant can be set aside on the basis of, *inter alia*, a misrepresentation, including a statement which is a half-truth.⁴⁴

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⁴² *Lego Australia* at 555; *Caratti* at [32] – [33].

⁴³ *ACT Conduct Rules* and *NT Conduct Rules* rr 21 and 22, *Qld Conduct Rules* rr 26 and 27, *SA Conduct Rules* rr 19.1 and 19.2, *Tas Conduct Rules* r 5, *Uniform Conduct Rules* r 24 and 25.

⁴⁴ *Lego Australia* at 555 ls f – g; *Caratti* at [33], *Lord* at 88 ls C – E, 89 ls D – E, *Kylsant* at 446.8 and 448.8 – 449.4. See also in relation to arrest warrants. *Francis* (Muir JA) at [56]-[64] and (Mackenzie AJA) at [98]-[100].

Table of cases and statutory provisions

Cases

1. **Argyle** – *Argyle Building Services Pty Ltd v Franek* [2020] VSC 166 per Digby J.
2. **Aristocrat** - *Aristocrat Technologies Australia Pty Ltd v Allam* [2016] HCA 3; (2016) 90 ALJR 370 per Gageler J (a case in the original jurisdiction of the High Court).
3. **Bond Brewing (HCA)** – *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1990] HCA 10; (1990) 169 CLR 271 per Mason CJ, Brennan and Deane JJ (a special leave disposition, note *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104 at [111] – [113] per Kiefel (as her Honour then was) and Keane JJ and French CJ, Nettle and Gordon JJ agreeing at [52]).
4. **Bond Brewing (VCA)** – *Bond Brewing Holdings Ltd v National Australia Bank Ltd* (1990) 1 ACSR 445; 8 ACLC 330 per Kaye, Murphy and Brooking JJ.
5. **Borg** – *Borg Engineering Pty Ltd v Tivity Solutions Pty Ltd* [2019] QCA 305 per Flanagan J (as his Honour then was), Gotterson and McMurdo JJA agreeing.
6. **Caratti** – *Caritti v Commissioner of the Australian Federal Police* [2017] FCAFC 177; (2017) 257 FCR 166 per Logan, Rangiah and Bromwich JJ.
7. **Coster** – *Coster v Bathgate* [2005] QCA 210; [2005] 2 Qd R 496 per McMurdo P, Muir and Philippedes JJ (as their Honours then were).
8. **Edison** – *Thomas A Edison Ltd v Bullock* [1912] HCA 72; (1912) 15 CLR 679 per Issacs J (as his Honour then was) (a decision in the original jurisdiction of the High Court).
9. **Fletcher** – *Fletcher v Anderson* [2014] NSWCA 450; (2014) 292 FLR 269 per Barrett JA, Beazley P and McColl JA agreeing.
10. **Fitz Jersey** – *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd* [2017] NSWCA 53; (2017) 94 NSWLR 606 per Basten JA, Beazley ACJ agreeing.
11. **Francis** – *A-G (Qld) v Francis* [2008] QCA 243; (2008) 250 ALR 555 per Muir JA, and Mackenzie AJA, Fryberg J agreeing.
12. **Griffiths** – *Re Griffiths* [1991] 2 Qd R 29 per Byrne J (as his Honour then was).
13. **International Finance** – *International Finance Trust Company Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 per Hayne, Crennan and Kiefel (as her Honour then was) JJ.
14. **Kylsant** – *R v Kylsant (Lord)* [1932] 1 KB 442 per Avory, Branson and Humphreys JJ.
15. **Lane** - *Lane v Channel 7 Adelaide Pty Ltd* (2004) SASC 47 per Delbell, Bleby and Besanko JJ.
16. **Leung** – *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 per Finklestein J, Beaumont J agreeing at 402 ls c – d.

17. **Lord** – *Lord v Commission of Australia Federal Police* (1997) 74 FCR 61 per Lindgren J.
18. **Michael Wilson & Partners** – *Michael Wilson & Partners v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 per Gummow A-CJ, Hayne, Crennan and Bell JJ.
19. **Pappas** – *Pappas v Grave* [2013] NSWCA 308 per Emmett JA, Basten JA and Sackville AJA agreeing.
20. **PGA** – *PGA v R* [2012] HCA 21; (2012) 245 CLR 355 per French CJ, Gummow, Hayne, Crennan and Kiefel (as her Honour then was) JJ.
21. **Qantas** – *Qantas Airways Ltd v Rohrlach* [2021] NSWCA 48; (2021) 304 IR 218 per Bell P (as his Honour then was), Bathurst CJ and Brereton JA agreeing at [1] and [84].
22. **Savcor** – *Savcor Pty Ltd v Cathodic Protection International APS* [2005] VSCA 213; (2005) 12 VR 639 per Gillard AJA, Ormiston and Buchanan JJA agreeing.
23. **South Downs Packers** – *Re South Downs Packers Pty Ltd* [1984] 2 Qd R 559 per Connolly J, Campbell CJ agreeing, and McPherson J (as his Honour then was).
24. **Southern Equities** - *Re Southern Equities Corporation Ltd (in liq); Bond v England* (1997) 25 ACSR 394 per Lander J, Cox and Bleby JJ agreeing.
25. **Sutherland** – *Sutherland v Pasco* [2013] FCAFC 15; (2013) 297 ALR 44 per Jagot (as her Honour then was), Griffiths and Farrell JJ.
26. **Walter Rau** – *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 955 per Alsop J (as his Honour then was).
27. **Williams** – *Williams (as liquidator of Willahra Pty Ltd (in liq)) v Kim Management Pty Ltd* [2012] QSC 143; [2013] 1 Qd R 387 per Dalton J (as her Honour then was).

Rules

Conduct Rules

28. **ACT Conduct Rules** – *Legal Profession (Barristers) Rules* 2001.
29. **NT Conduct Rules** – *Schedule to the Constitution of the Northern Territory Bar Association Incorporated* – Barristers’ Conduct Rules.
30. **Qld Conduct Rules** – *Bar Association of Queensland Barristers’ Conduct Rules* 23 February 2018.
31. **SA Conduct Rules** – *South Australia Legal Practitioner’s Conduct Rules* 1 January 2022.
32. **Tas Conduct Rules** – *Legal Profession (Barristers) Rules* 2016.
33. **Uniform Conduct Rules** – *Legal Profession Uniform Conduct (Barristers) Rules* 2015 (New South Wales) (Victoria) (Western Australia).

Court Rules

34. **ACT Court Rules** - *Court Procedure Rules (2006)*.
35. **FCA Court Rules** – *Federal Court Rules (2011)*.
36. **NSW Court Rules** – *Uniform Civil Procedure Rules (2005)*.
37. **NT Court Rules** – *Supreme Court Rules (1987)*.
38. **Qld Court Rules** – *Uniform Civil Procedure Rules (1999)*.
39. **SA Court Rules** – *Uniform Civil Rules (2020)*.
40. **Tas Court Rules** – *Supreme Court Rules (2000)*.
41. **Vic Court Rules** - *Supreme Court (General Civil Procedure) Rules (2015)*.
42. **WA Court Rules** – *Rules of the Supreme Court (1971)*.