



FOLEY'S | LIST

The practicalities of raising constitutional points in the context of criminal proceedings

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Foley's List

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Outline

- **Part 1:** s 78B of the *Judiciary Act*
- **Part 2:** Procedural requirements
- **Part 3:** When does s 78B apply

Part 1

s 78B of the *Judiciary Act 1903* (Cth)

Section 78B(1): Giving notice

Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

Section 78B(2): What the Court may do

For the purposes of subsection (1), a court in which a cause referred to in that subsection is pending:

- (a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;
- (b) may direct a party to give notice in accordance with that subsection; and
- (c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.

Section 78B(3): giving the Notice

For the purposes of subsection (1), a notice in respect of a cause:

(a) shall be taken to have been given to an Attorney-General if steps have been taken that, in the opinion of the court, could reasonably be expected to cause the matters to be notified to be brought to the attention of that Attorney-General; and

(b) is not required to be given to the Attorney-General of the Commonwealth if he or she or the Commonwealth is a party to the cause and is not required to be given to the Attorney-General of a State if he or she or the State is a party to the cause.

Section 78B(4) and (5): costs and urgent relief

(4) The Attorney-General may authorize the payment by the Commonwealth to a party of an amount in respect of costs arising out of the adjournment of a cause by reason of this section.

(5) Nothing in subsection (1) prevents a court from proceeding without delay to hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary in the interests of justice to do so.

Point 1: a notice
must be sent to all
nine Attorneys-
General

- Don't forget the territories!
- Make sure the correct party is named
 - (for constitutional cases in Victoria, for example, the correct Victorian party is generally the State of Victoria except in some circumstances where case involves a statutory corporation)

Point 2: the court 'cannot proceed' ...

- However:
 - s 78B(2)(c) enables a court to continue to hear evidence and argument on matters that are severable from the constitutional question.
 - s 78B(5) provides that a court may proceed immediately to hear urgent interlocutory proceedings where the court thinks it necessary to do so.

Point 3: the
court does not
need to wait for
a response

If steps have been take that could reasonably be expected to cause the matters to be notified to be brought to the attention of that Attorney-General, then notice is taken to have been given:
s78B(3)(a)

Part 2

Procedural requirements

The Supreme, County and Magistrates' Court

Order 19 of the:

Supreme Court (General Civil Procedure) Rules 2015

County Court Civil Procedure Rules 2018

Magistrates' Court General Civil Procedure Rules 2020

- The notice should state (r 19.02(2)):
 - specifically the nature of the matter; and
 - the facts showing that the matter involves the Constitution or its interpretation
- The Notice should be filed in Form 19A (r 19.02(3))
- Must be served on every other party (r 19.03(1)) and the party serving the notice must also file an affidavit of service (r 19.03(4)).

The Federal Court

Division 8.2 of the *Federal Court Rules 2011*

- The notice should state (r 8.11(2)):
 - briefly but specifically the nature of the constitutional matter; and
 - the facts showing that the matter involves the Constitution or its interpretation
- The Notice should be filed in accordance with Form 18
- Must be served on every other party (r 8.12(1)(a)) and the party serving the notice must also file an affidavit of service (r 8.12(1)(b))
- Time limits (r 8.12(2))
 - If the matter arises in any originating application or pleading: within 7 days after the filing of the application or pleading
 - If the matter arises before the date fixed for a hearing of a proceeding (assuming the matter does not arise in an originating application or pleading: not later than 14 days before the date fixed for the hearing

The High Court

Part 5 of the *High Court Rules 2004*

- The notice should state (r 5.01.2):
 - specifically the nature of the constitutional matter; and
 - the facts showing that the matter involves the Constitution or its interpretation
- The Notice should be filed in accordance with Form 1 (r 5.01.3)
- Must be served on every other party (r 5.02.1) and the party serving the notice must also file an affidavit of service within 2 days of service (r 5.03)
- Time limits for service (r 5.02.1)
 - If the matter arises in any originating application or pleading: notice must be served within 7 days after the filing of the application or pleading
 - If the matter arises before the date fixed for a hearing of a proceeding (assuming the matter does not arise in an originating application or pleading: notice must be served not later than 14 days before the date fixed for the hearing

Note

- In the federal courts, the party that raises the argument must prepare the notice, whereas the State Rules permit a court to order a different party prepare the notice.
- *eg 19.02(1) of Supreme Court (General Civil Procedure) Rules 2015:*
*Where a proceeding involves a matter arising under the Constitution or involving its interpretation within the meaning of section 78B of the Act, the party whose case raises the matter shall, **unless the Court directs another party to do so**, forthwith file a notice of a constitutional matter.*
- *FYI:* VCAT does not have the power to determine constitutional questions: *Guss v Aldy Corporation Pty Ltd & Anor (Civil Claims)* [2008] VCAT 912

Part 3

When does s 78B apply?

What is a "matter"?

When does that matter "arise under" or "involve the interpretation of" the Constitution?

Is there a
matter?

Primary requirement is for a “matter”: s 78B does not apply to hypothetical questions.

Is there a matter?

- A declaration sought upon the basis of a hypothetical situation or facts which are contingent or may never occur has the character of an advisory opinion which does not relate to a real question. Therefore it does not relate to a matter and is outside the jurisdiction of the Court

- *IMF (Aust) Ltd v Sons of Gwalia Ltd* [2004] FCA 1390

Is there a matter?

- "It is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties."
- "That is so even where the validity of the provision is challenged by a party sufficiently affected by the provision to have standing: a party will not be permitted to 'roam at large' but will be confined to advancing those grounds of challenge which bear on the validity of the provision in its application to that party."

- *Knight v Victoria* (2017) 261 CLR 306

Is there an issue?

- If the constitutional point is frivolous or unarguable, the Court can determine that s 78B does not apply: *Australian Competition & Consumer Commission v C G Berbatis Holdings Pty Ltd* [1999] FCA 1151
 - The matter must 'really and substantially' involve a matter arising under the Constitution to invoke s 78B, meaning the argument has to relate to a live issue in the proceeding and has to have some merit

Cases involving Notices

Benbrika & Ors v The Queen [2010] VSCA 281

117 In yet another departure from the written submissions filed on behalf of his client, senior counsel for Benbrika put forward, in oral argument, a new point. He submitted that the width accorded to the term 'fostering' by the trial judge meant that the scope of the various 'terrorist organisation' offences, as left to the jury, was in breach of the implied freedom of political communication, as found in the Commonwealth Constitution. When this new argument emerged, s 78B notices were issued to enable this point to be developed.

118 In the end, however, the constitutional argument was only faintly pressed. That was a sensible decision. The premise upon which the argument rested was that the failure to direct the jury to disregard the extended definition of 'fostering', as set out in the dictionary, meant that the judge had tacitly given that broader definition his judicial imprimatur.

119 There is no warrant for that premise. The jury were told, in the clearest of terms, that the term 'fostering' meant nothing more than 'encouraging'. It is not suggested that a direction in those terms was in any way deficient. ... It follows that the constitutional issue, if it otherwise had any merit, simply does not arise in this case.

Cases involving Notices

CDPP v Galea – sentence [2020] VSC 750

During the course of the pre-trial argument (and only two weeks before the trial date) s 78B Notices (in the form of letters) were served asserting invalidity of the offence *as pleaded* (not the offence provision itself) as breaching the implied freedom of political communication.

Ultimately the notices were withdrawn.

Hollingworth J noted that there were some issues with the content of the notices, but was taking steps to facilitate appearance by any interested Attorney-General during the remaining pre-trial period.

Cases involving Notices

Cases in which notices were issued and the constitutional point was removed to the High Court:

- *Clubb v Edwards* (2019) 366 ALR 1
- *Brown v Tasmania* (2017) 261 CLR 328
- *Minister For Home Affairs v Benbrika* [2021] HCA 4

Other examples ...

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