



Précis Paper

Bail Application

A discussion about the current climate in Australia in relation to bail, the requirements that need to be satisfied in an application to bail and the circumstances in which bail may be granted.

Discussion Includes

- Bail Act 2013 (NSW)
- Considerations when applying for bail
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Bail Application

1. In this edition of BenchTV, Michael Finnane QC (Barrister, 2 Wentworth Chambers, Sydney) and Parisa Hart (Barrister, 2 Selborne Chambers, Sydney) discuss the current climate in Australia in relation to bail, the requirements that need to be satisfied in an application to bail and the circumstances in which bail may be granted.

Bail Act 2013 (NSW)

2. The main purpose, as set out in the preamble, is the need to ensure the safety of victims of crime, individuals and the community, the need to ensure the integrity of the justice system, the common law presumption of innocence and the general right to be at liberty.

Considerations when applying for bail

3. In every case, regardless of the offence charged, an applicant must satisfy an unacceptable risk test. This test applied under previous legislation. However, under the current legislation, for certain serious offences, an applicant must also show cause as to why they should get bail. This means that if a person is charged with one of the serious offences, they must show cause, as well as pass the unacceptable risk test, for bail to be granted.
4. There are some offences in which there is a right to bail. These include offences where people face only a fine or their charges are under the *Summary Offences Act 1988* (NSW).

How to apply

5. In an application for bail, what the court will look at is the seriousness of the charges, the strength of the Crown case, the previous criminal record of the accused person, whether the offences were committed on bail, whether the applicant has a fixed place of abode, what their state of health, whether they have a job or dependents and particularly in serious cases, whether there are any sureties to ensure that he will turn up to court. Community ties is also an important factor.
6. To order to ascertain whether an offence is a show cause offence, one must look at section 16B of the *Bail Act 2013* (NSW). A show cause offence includes any offence where a sentence of life imprisonment could be imposed, any serious violence offence, any offence involving a serious sexual assault or the use of firearms, any offence committed on bail and

serious drug charges both under the *Drug Misuse and Trafficking Act 1985* (NSW) and *Criminal Code Act 1995* (NSW).

Sureties

7. The extent of a surety is an important matter for a solicitor to raise with their client. The surety will depend on the circumstances. For example, if the person accused is charged with the serious offence of importing drugs or dealing in drugs in large quantities but has no previous convictions the surety required may be around \$1 million or more.

Special rules for certain offences

8. If a client has been convicted and is appealing to the court of criminal appeal they will only be able to get bail in special or exceptional circumstances. For example, Justice Murphy when he was convicted of an offence of perversion of course of justice, he was granted bail as he was still sitting as a High Court judge.
9. If a trial judge does grant bail and the Court of Appeal does not deem it special or exceptional, the accused will be put back into custody.
10. Further, if someone is charged with terrorism offences they will not be given bail unless there are exceptional circumstances. What constitutes an exceptional circumstance will be for the Judge to determine.

Multiple bail applications

11. A person cannot make any more than one bail application in any given court unless that person can show a change in circumstances.

Unacceptable risk test

12. In order to be granted bail, the applicant must show that if they are granted bail, they will not be an unacceptable risk. To assess this, the court will look at the seriousness of the charges, how strong the crown case is, any previous criminal record and risk to the victim.
13. It is important that a good written submission be prepared and submitted which covers the principles that have been laid down by the Supreme Court and Court of Criminal Appeal and sets out why it is that cause has been shown and/or the unacceptable risk test has been met. The rules of evidence do not apply to bail applications and as a result hearsay evidence can be submitted.

Show cause for serious offences

14. An example of a show cause for a serious offence, is health. To establish this, the applicant must be able to establish that there is a very real situation of bad health for some family member that requires the accused person to be present.

The show cause requirement and appeal matter

15. If an applicant is seeking an appeal to the Supreme Court of Criminal Appeal, they must show special exceptional circumstances.

Takeaways for practitioners

16. There is a need for counsel to put together a good, solid, written submission and it must be with the judge at least 3 days before the hearing.
17. On the day, counsel must enquire whether the judge, in addition requires a special set of conditions to be filled out in a format provided by the judge.
18. The bail list is now running every day in the Supreme Court due to the amount of applications are caused largely by the show cause requirement.

BIOGRAPHY

Michael Finnane QC

Barrister, 2 Wentworth Chambers, Sydney

A former judge of the District Court of New South Wales and Colonel of the Australian Army Legal Corps, Michael has a practice which includes Criminal Law, Commissions of Inquiry, Common Law, mediations and arbitrations. Prior to his judicial appointment in the year 2000, Michael maintained a broad practice, regularly representing clients in long and complex matters, such matters including Royal Commissions and Inquiries undertaken on behalf of the New South Wales Government. He has appeared in the High Court of Australia, Federal Court of Australia and in every Court in New South Wales. Michael has also appeared in the Supreme Court of South Australia and on numerous occasions in the Supreme Court of Victoria. Michael is accredited as a Mediator by the Bar Association and by the Australian Mediation Association. He has acted as Mediator in numerous commercial mediations and has appeared as Counsel on behalf of clients, including the New South Wales Government. Michael also holds qualifications as an Arbitrator. The Bar Association recognises him as a mediator. Michael has been admitted as a lawyers in Papua New Guinea and is available to take instructions in any matter that concerns Papua New Guinea.

Parisa Hart

Barrister, 2 Selborne Chambers, Sydney

Parisa was called to the Bar in 2016 and conducts and advises cases in the areas of Commercial, Communications/Media, Defamation/Criminal and Family provision. She has a diverse practice in a range of Courts and Tribunals, including the Federal Court, the NSW Court of Criminal Appeal, the NSW Supreme Court and the NSW District and Local Courts.

BIBLIOGRAPHY

Legislation

Bail Act 2013 (NSW)

Summary Offences Act 1988 (NSW)

Drug Misuse and Trafficking Act 1985 (NSW)

Criminal Code Act 1995 (NSW)