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Update Summary

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FEDERAL COURT PRACTICE

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The authors have updated commentary and caselaw in this update with the most significant matters referred to below.

Judiciary Act 1903

Exclusive and invested jurisdiction (s 39B)

The authors note that, although there will not be a “matter” if a party seeks a ruling on a question that is purely hypothetical, in some circumstances there may be a “matter” where a person with a sufficient interest seeks a declaration that their conduct complies with the law. See [JUD39B.40].

Federal Court Rules 2011

Jurisdiction Anti-Suit Injunctions and Forum Non Conveniens

The court’s discretionary power to stay a proceeding if Australia is a “clearly inappropriate forum” is discussed in new commentary. The party seeking the stay bears the onus of establishing that Australia is a “clearly inappropriate forum”. Further, in determining whether Australia is a “clearly inappropriate forum”, the focus is “upon the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum”.

Finally, the author notes that alternative to a permanent stay, the court can grant a temporary stay until the determination of the foreign proceeding. See [FCR13.01.160].

Pleadings Necessary particulars

It is not necessary for a party to plead matters which are merely relied upon in support of an attack on a witness’ credit.

Although not pleadable, there is an obligation where an allegation of dishonesty or collusion regarding a witness will be made, “to make clear at an appropriate time that the honesty of the witness’s testimony is a real issue in the trial and the witness should be fairly confronted with the allegations in question”: *3WJ Pty Ltd v Kanj* [2008] NSWCA 321. See [FCR16.41.70].

Notice to produce document in pleading or affidavit

Various recent judicial comments addressing the purpose of r 20.31 have been referred to including those in *Saffari v Amazon Commercial Services Pty Ltd* [2024] FCA 436 where it was held that “[t]he purpose of r 20.31 is to provide procedural fairness to the recipient of a pleading or affidavit served by another party which pleading or affidavit refers directly to a document”. See [FCR20.31.20].

Further, in relation to an affidavit, the document referred to for the purposes of r 20.31 needs to be in the body of the affidavit itself. A reference to another document in the exhibits to an affidavit does not enliven the rule and a notice to produce cannot be issued for those documents: *Saffari v Amazon Commercial Services Pty Ltd* [2024] FCA 436. See [FCR20.31.60].

Evidence Act 1995

Effect of Act on other laws – s 9(1)

The authors have extracted comments from *McNamara v The King* (2023) 98 ALJR 1; [2023] HCA 36, where Gageler CJ, Gleeson and Jagot JJ explained the operation of s 9(1). See [EA9.20].

Hearsay rule Exception: criminal proceedings if maker not available – s 65(2)(b)

In *Moore v R* [2023] VSCA 236, the Court of Appeal confirmed that the “circumstances” to be considered in the application of s 65(2) can include previous, or subsequent, statements or conduct of the person who made the representation. However, the other representations must “form part of the context in which the representation in question was made”. The Court of Appeal also stated that the better view therefore appears to be that the qualification requires that the other representations have a degree of contemporaneity with the representation in question; it would not permit consideration of later representations made weeks or months after the representation in issue. See [EA65.30].

Evidence of an admission – s 81(1)

In *Millsave Holdings Pty Ltd v Connective Group Pty Ltd* [2023] VSCA 326, the Court of Appeal considered whether the commencement and prosecution of a confidentiality proceeding was consistent only with the truth of passages in a witness statement sought to be protected as confidential. The Court of Appeal held that the bringing of the confidentiality proceeding, taken with the silence of the parties in that context as to whether they denied, or did not admit, the truth of the contents of the witness statement, amounted to a clear representation as to the truth of those contents. See [EA81.40].

Section 92(2) exception

The “exception” in s 92(2) enables that which s 91 would otherwise forbid: evidence of a prior conviction within s 92(2) is admissible to prove the existence of a fact that was in issue in the criminal proceeding: *Osborne v Butler* [2024] VSCA 6. The Evidence Act also makes provision for the calling of further evidence in cases where a prior conviction has been admitted under s 92(2). Section 167, read with the definition of “request” in s 166(g), permits a party to make a reasonable request, in relation to evidence of a person’s conviction to which s 92(2) applies, that another party call as a witness a person who gave evidence in the proceeding in which the person was convicted. See [EA92.10].

The tendency rule

In *Director of Public Prosecutions v Roder* (2024) 98 ALJR 644; [2024] HCA 15, Gageler CJ and Gordon, Edelman, Steward, Gleeson, Jagot and Beech-jones JJ affirmed the correct process of reasoning under s 97(1). See [EA97.20].

Exclusion of evidence of settlement negotiations

A binding contract brought into existence because of without prejudice negotiations is not protected by the privilege against non-disclosure and is not confidential absent an agreement as to confidentiality: *Beecham Motors Pty Ltd v General Motors Holden Australia NSC Pty Ltd (No 2)* [2023] VSC 640. See [EA131.60].