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Update Summary

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FEDERAL COURT PRACTICE

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The authors have reviewed and amended the commentary throughout the work. Matters of significance are listed below.

Federal Court of Australia Act and Regulations

A final or interlocutory judgment

The weight of authority is that declarations of liability, in a proceeding in which liability and relief are heard separately, are interlocutory. However, the contrary view has been expressed on several occasions including *Damorgold Pty Ltd v JAI Products Pty Ltd* [2014] FCA 448; and *King v Melbourne Vicentre Swimming Club Inc* [2020] FCA 1639. In practice, the court will often avoid this issue by granting leave without expressing a final view as to whether leave is required: eg *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [2024] FCA 928. See [FCA24.260].

Post-settlement – Ongoing court supervision under s 33V

For an example of a subsequent appeal against a decision made by the Independent Counsel under the "Compensation Protocol", see *Casey v DePuy International Ltd (No 4)* [2024] FCA 724. See [FCA33V.120].

Common fund orders

In R*&B Investments Pty Ltd v Blue Sky* [2024] FCAFC 89, the Full Federal Court held that it is a licit exercise of power, pursuant to Pt IVA for the court, upon the settlement or judgment of a representative proceeding, to make a common fund order which would provide for the distribution of funds to a solicitor otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding. See [FCA33ZF.140].

The order is necessary

Where the parties agree to confidentiality orders, the court will be "most vigilant" to ensure that the ground for making them is established: *Patterson v Westpac Banking Corporation (No 2)* [2024] FCA 818. In some cases where a proceeding has settled, the court may order that all of the primary documents in the proceeding are confidential where "the integrity of the settlement will be undermined if third parties, including the media, are allowed access to the documents, contrary to the agreed terms that have been reached by the parties": *Patterson v Westpac Banking Corporation (No 2).* See [FCA37AG.40].

General

The order is "exceptional and serious", but "a judge should shrink away from making a vexatious proceedings order if the preconditions to it being made are established and if it is appropriate to do so": *Storry v Parkyn* [2024] FCAFC 100. The order "reinforces the power of the Court 'to protect its own processes against unwarranted usurpation of its

time and resources and to avoid loss caused to those who have to face proceedings that lack substance"': *Storry v Parkyn.* See [FCA37AO.20]

Public interest litigation

In *McNickle v Huntsman Chemical Company Australia Pty Ltd* [2024] FCA 883 Lee J discussed how the manner in which the public dimension of class actions in facilitating access to justice and their important public dimension may inform the court's discretion as to costs. His Honour decided that the unsuccessful lead applicant should pay the successful respondent's costs but limited the costs liability. See [FCA43.200].

Federal Court Rules 2011

Ancillary orders

The power to make an order under r 7.33 only arises if a freezing order or a prospective freezing order is made, an ancillary order cannot be made independently: *Chen v Insight Investment Management Pty Ltd* [2024] FCA 719; *Gecko Australia Pty Ltd v Montagnese* [2022] FCA 488. See [FCR7.33.40].

Service as soon as practicable

In *Cussen v Sinoace Holdings Ltd* [2024] FCA 716, the court considered r 8.06 and its equivalent rule in r 2.7 of the *Federal Court (Corporations) Rules 2000* (Cth). A liquidator deliberately refrained from serving in accordance with the time-limit in order to obtain funding and conduct public examinations before serving. The court held that the liquidator had contravened rr 8.06 and 2.7, that the liquidator needed an extension of time to serve, and the court then refused to grant the extension of time, and summarily dismissed the proceedings brought by the liquidator. See [FCR8.06.20].

Notice to produce document in pleading or affidavit

By its terms, r 20.31 only permits a notice to produce to be issued by the "first party" to the "second party" in respect of a document mentioned in an affidavit or pleading filed by the second party. The first party may not permissibly issue a notice to produce to the second party in respect of a document mentioned in a pleading or affidavit filed by the first party: *Team Dreegan Pty Ltd v Moss* [2024] FCA 636. See [FCR20.31.20].

As the wording of r 20.31 makes clear, a party cannot issue a notice to produce in relation to a document referred to in their own pleading or affidavits. It only applies to documents referred to by another party: *Team Dreegan Pty Ltd v Moss* [2024] FCA 636. See [FCR20.31.60].

Further, A document mentioned in an exhibit to an affidavit is not thereby a document mentioned in an "affidavit" for the purpose of r 20.31: *Team Dreegan Pty Ltd v Moss* [2024] FCA 636. See [FCR20.31.120].

An abuse of process – relitigation of disputes

In *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd (No 4)* [2024] FCA 538 McElwaine J said that the justice of binding a person by issue estoppel is active participation in the conduct of a proceeding. Where a person is a party or is deemed to have that status, such participation is plainly identifiable. That is not so for an intervener who is not in terms a party nor is granted rights and privileges, including specification of matters that may be raised, when leave is granted to intervene. See [FCR26.01.105].

Evidence Act

Prejudicial effect

In hearing an interlocutory appeal concerning a trial judge's refusal to exclude evidence under s 137, an appellate court is required to apply a standard of "correctness": *Moore (a pseudonym) v The King* [2024] HCA 30. See [EA101.40].