



THOMSON REUTERS

Update Summary

PLEASE CIRCULATE IMMEDIATELY!

UPDATE 232

JANUARY 2025

FEDERAL COURT PRACTICE

Oren Bigos KC, Charles Parkinson KC, Glyn Ayres, Harry Hill-Smith and Leo Freckleton

Material Code 42475015

Print Post Approved PP255003/00337

© Thomson Reuters (Professional) Australia Limited 2025

Looseleaf Support Service

You can now access the current list of page numbers at:

<http://www.thomsonreuters.com.au/support/product-support.aspx?id=/mediaTree/58599>. If you have any questions or comments, or to order missing pages, please contact Customer Care LTA ANZ on 1300 304 195 Fax: 1300 304 196 Email: Care.ANZ@thomsonreuters.com

UPDATE SUMMARY

The author team has updated commentary and case law throughout the work. Matters of note include the following.

Proceedings not to continue

In *Cody Gemtec Retail Pty Ltd v Underwriting Members of Syndicate 2003 at Lloyd's (Declassing Applications)* [2024] FCA 1098, Lee J held that the analysis under s 33N of the *Federal Court of Australia Act 1976* involved a degree of subjectivity and is in a "broad sense" a discretionary decision. See [FCA33N.20].

Discontinuance

In *Fisher v BT Funds Management Ltd* [2024] FCA 1166, the court considered when notice under s 33X should be given to group members of a proposed discontinuance. The court held that each case turns on its own facts and listed factors relevant to the court's consideration. See [FCA33V.40].

Application to review – s 35A(5)

Whether an application is one for review is a question of fact informed by the intention of the applicant: *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2024] FCAFC 113. See [FCA35A.40].

Review of exercise of power by Registrar – s 35A(6)

In *Swancom Pty Ltd v Jazz Corner Hotel Pty Ltd (No 4)* [2024] FCA 1006, a review of a registrar's decision as to the quantum of costs payable pursuant to a lump sum award, O'Bryan J decided to refer the question to an experienced costs lawyer for inquiry and report as a referee. His Honour noted that, in a busy court, it is unrealistic for the parties to expect that judges will set aside a one day hearing to assess, on a *de novo* basis, the quantum of lump sum costs to be paid between the parties. See [FCA35A.50].

Power to make orders – s 37AF

In *Youssef v Federal Commissioner of Taxation* [2024] FCA 1033, Perram J highlighted the obvious tension between the court's legal obligation to anonymise all protection visa applications and its non-obligation in that regard in tax cases. See [FCA37AF.20].

Service

In *Mensink v Registrar of the Federal Court of Australia* (2024) 304 FCR 471; [2024] FCAFC 124 the alleged contemnor lived outside Australia and disputed whether he could be properly served, whether he had submitted to the jurisdiction of the court, and whether the proceeding could be heard in his absence. See [FCR42.13.10].

Practice Notes

Updated Practice Notes have replaced older ones, being:

- Admiralty and Maritime Practice Note (A&M-1) – see [AM-1];
- Commercial and Corporations Practice Note (C&C-1) – see [CC1];

- Employment and Industrial Relations Practice Note (E&IR-1) – see [EIR-1];
- Taxation Practice Note (TAX-1) – see [TAX-1];
- Overseas Service and Evidence Practice Note (GPN-OSE) – see [GPN-O SE];
- Foreign Judgments Practice Note (GPN-FRGN) – see [GPN-FRGN];
- Lists of Authorities and Citations Practice Note (GPN-AUTH) – see [GPN-AUTH]; and
- Consent Orders Involving Federal Tribunal Practice Note (GPN-TRIB) – see [GPN-TRIB].

Jurisdiction of Courts (Cross-Vesting) Act 1987

Proceeding by way of an appeal – from a single judge – s 7(5)

The operation of s 7(5) was considered in detail by the High Court in *HBSY Pty Ltd v Lewis* (2024) 98 ALJR 1211; [2024] HCA 35. The majority overturned a decision of the Full Federal Court that interpreted s 7(5) as only applying to an appeal from a decision of a single judge of a Supreme Court of a State or Territory made in the exercise of cross-vested jurisdiction. See [JCA7.120].

Proceeding by way of an appeal – A matter arising under an Act – s 7(5)

In *HBSY Pty Ltd v Lewis* (2024) 98 ALJR 1211; [2024] HCA 35 at [106], the majority held that:

a matter for determination in a proceeding by way of appeal, posited by s 7(5), must be a "matter arising under an Act specified in the Schedule". The language of "matter arising under" an Act adopts the language of s 76(ii) of the Constitution, which was adopted in s 39B(1A)(c) of the Judiciary Act. See [JCA7.140].

