

# ADVOCACY

## Exhibits

“Exhibits have the aura of “real” evidence. It is often said of them in court that they never lie or exaggerate.”

J H Phillips CJ

**As part of your pre-case preparation and the development of your case strategy you will have to consider what exhibits are to be introduced into evidence and the effective use of those exhibits. At that time you should also consider the related topic of the use of visual aids. I will discuss visual aids next month.**

In relation to exhibits it will be necessary for you to identify those exhibits that you must introduce into evidence and those in relation to which you have a choice. In relation to some exhibits there will be no choice, they will be essential to the proper presentation of your case. In other instances the position will not be so clear. In those cases the degree of relevance and the likely nature of the impact of the exhibit will usually be the determining factors.

Most relevant exhibits will have some impact upon the tribunal. They are items that can be expected to become a focus of attention. They will give meaning to the oral evidence and, generally speaking, will enliven that evidence. Some exhibits will have an enormous impact upon the tribunal because of what they are. It is not hard to appreciate that the production of a dangerous looking knife, or a gun or some other weapon will have a significant impact in a criminal or civil assault trial. Such an exhibit can be used to great effect. On the other hand the introduction of exhibits that are of marginal relevance or of limited impact may be counterproductive because they unnecessarily increase the clutter of materials available to the tribunal. In some cases the introduction of unnecessary exhibits may serve to distract the tribunal from focusing upon

the issues that you have identified in your preparation as essential to your case. Such exhibits may provide your opponent with an opportunity that would not otherwise be available.

Having identified an exhibit you propose to introduce into evidence you should next consider through whom the exhibit is to be introduced and at what point in the case that is to occur. In determining through whom the exhibit is to be introduced you will need to consider the nature of the exhibit and the characteristics of your witnesses. In many instances the exhibit will only be able to be introduced through one witness. However an exhibit that speaks for itself often may be introduced through any witness and therefore at any time in the course of the proceedings. An exhibit that requires explanation may have to be introduced through the witness who is best able to carry out that task and the time at which you introduce the exhibit will therefore be governed by the time at which that witness is to be called. The desirable timing for the introduction of an important exhibit may impact upon the order in which you decide to present your case. The desire to introduce an exhibit at a certain point in the case may lead to you re-assessing and altering the order in which witnesses are to be called.

As to the timing of the introduction of the exhibit to the tribunal it should be remembered that you are not restricted to production during evidence in chief. You may wish to first produce the exhibit to the tribunal in the course of your opening on the basis that a subsequent witness will introduce it into evidence. As an alternative you may wish to save the production of the exhibit for the cross-examination of a witness who you know must be called.

Heightened interest in the exhibit may be achieved by allowing it to be referred to on a number of occasions before it is finally produced. You may wish to leave it casually lying on the Bar table. You



*Hon Justice Riley*

may wish to inspect it whilst your opponent is addressing some other issue. You may wish to produce it from an opaque bag or from below the bar table for maximum effect. On the other hand you may wish to have the exhibit in evidence from an early time in the trial to enable the tribunal to fully appreciate the evidence to which it is relevant. Your approach will vary depending upon the nature of the exhibit and the manner in which you wish to introduce the exhibit into evidence.

Once the exhibit has been admitted into evidence you will need to consider whether it should then be shown to the jury. If it is a high impact exhibit you may wish to ask the trial Judge to have it shown to, or circulated amongst, the members of the jury immediately. Proceedings will then stop whilst that occurs, serving the purpose of focusing attention on the exhibit and adding to the importance of the moment.

If the exhibit is a document you may wish to emphasize the importance of the relevant passages by having the witness read them to the tribunal. You will only do this if the passage to be read is short. The reading of a lengthy passage is likely to mean that you lose the interest of the tribunal. If it is absolutely necessary for a lengthy passage to be read you should provide copies to members of the jury or to the tribunal so that others may follow the text for themselves.

Special care needs to be taken in tendering a bundle of documents or a file of documents to ensure that the

*Continued page 18*

information contained in any peripheral document is not adverse to your client. You should carefully read the whole of the information contained in all of the documents to be included in the tender before completing the tender. An example of a situation where special care needs to be taken is in the tendering of a hospital file which is likely to include a substantial amount of information regarding your client and much of that information is likely to be in handwriting that is only decipherable with assistance.

The introduction of an exhibit need not be a simple mechanical process devoid of impact. Whilst there will be some exhibits that must be introduced in that way it is necessary to consider each exhibit to ascertain the potential it may have to further enhance your case by the manner and timing of it being introduced into evidence.

# NOTICEBOARD

## Relationships Australia

Relationships Australia has recently been accepted as a provider of post-separation parenting programs under the new parenting compliance regime of the Family Law Act 1975.

The Relationships Australia education program from June — December 2001 includes sessions titled *Building Better Relationships*, *Fathers After Separation*, *Rebuilding After Separation*.

Relationships Australia has offices in Darwin and Alice Springs which operate during normal business hours with evening sessions offered on Monday and Tuesday of each week.

All enquiries about Relationships Australia, its programs and course timetable should be directed to the Director, Bill Medley in Darwin on 08 8981 6676.

## Practice Note 16 - Affirmation and Oaths

The Practice Note No 16 issued by the Federal Court of Australia on 21 January 2000 has been revoked and the following Practice Note is substituted:

1. In nearly all circumstances a person giving evidence in a proceeding before the Federal Court of Australia, whether orally or by affidavit, is required by law to make an affirmation or take an oath. The purpose of this requirement is to compel people to tell the truth.
2. It is a criminal offence for a person deliberately to give false evidence after making an affirmation or taking an oath.
3. A card will be handed to each witness upon entering the witness box setting out the form of oath or affirmation that they will be requested to read, or to have read on their behalf, before giving evidence to the Court.
4. The Court expects practitioners to ensure that witnesses are properly informed, in advance of giving evidence, of the purpose of an procedure for making an affirmation or taking an oath. It also expects practitioners:
  - to ensure that court officers are informed before court commences of any witnesses who would prefer to have the oath or affirmation read on their behalf (e.g., because of poor sight or limited literacy); and
  - to give the Court (via the judge's associate) at least 24 hours' notice of any other special arrangements that may need to be made by the Court to facilitate the taking of an oath or making of an affirmation by a witness. (For example, the Court must be notified if a witness has other requirements to facilitate the taking of an oath in accordance with his or her beliefs.)

A copy of the Practice Note is available on the Federal Court's website at:

<http://www.fedcourt.gov.au>

## RELIEF FOR HIH POLICY HOLDERS

The Commonwealth Government has announced a relief package for policy holders suffering financial hardship as a result of the HIH collapse.

The package is only available for 'small businesses' — ones that employ less than 50 employees. Details on the package can be obtained from the Minister for Financial Services and Regulation's website: [www.minfsr.treasury.gov.au/p/2001/041.asp](http://www.minfsr.treasury.gov.au/p/2001/041.asp)

The Government will also provide a hot-line for HIH policy holders to apply for assistance. Details of this will be advertised shortly.

The rescue package excludes a number of categories from the scheme, including professional indemnity for legal practitioners (to the extent that it is compulsory). It is unclear whether 'non-compulsory' or 'top up' insurance for lawyers is included in the package.

The package also excludes:

- claims where the insured is not an Australian citizen or permanent resident;

- claims for reinsurance contracts or in the nature of a reinsurance contract issued by HIH;
- insurance mandated by State and Territory Governments including compulsory third party motor vehicle insurance (CTP) workers' compensation and builders' warranty
- claims where the insured was a director or officer or an associate of a director or office (as defined under the Corporations Law) of any company within HIH three years before its failure; and
- claims where the insured was a director or officer or an associate of an individual, who was in a position to influence or advise the directors or officer of any companies within HIH three years before its failure.

The Law Council of Australia is currently seeking further information in relation to the fund and is examining what steps can be taken to ensure legal practitioners are not left out of the rescue deal.