

WESTERN AUSTRALIAN BAR ASSOCIATION

BAR READERS COURSE

**THE FEDERAL MAGISTRATES COURT:
JURISDICTION, PRACTICE AND
PROCEDURE AND CROSS-VESTING
APPLICATIONS**

Federal Magistrate Toni Lucev*

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**(*The views expressed in this paper are the views of Federal Magistrate Lucev.
They are not, and do not purport to be, the views of the Federal Magistrate's Court
or any other Federal Magistrate.)**

Introduction

1. This paper provides an overview of the jurisdiction, practice and procedure of the Federal Magistrates Court¹ and a comment on cross-vesting.

Establishment & Federal Magistrates

2. The FM Court is a Chapter III court under the Constitution, established by s.8 of the *Federal Magistrates Act, 1999* (Cth).²
3. The FM Court commenced sitting on 3 July 2000. There were originally twelve Federal Magistrates appointed.
4. Chief Justice Gleeson speaking at the 13th Commonwealth Law Conference in Melbourne in 2003 at a time when there were 19 Federal Magistrates said:

*“The [FM Court] deals with shorter and simpler matters in federal jurisdictions, and, in the short time since it was created, it has become even more apparent that there is a great deal of work suitable for its attention...I expect that, in time, it will become one of Australia’s largest courts.”*³

5. Today there are 53 Federal Magistrates sitting in every State and mainland Territory of the Commonwealth, 49 Federal Court justices and 40 Family Court justices.

Hierarchy

6. The FM Court is the lowest level Australian federal court, sitting beneath the High Court at the apex, and the Federal Court and Family Court at the level immediately above the FM Court. The FM Court is a court of record and a court of law and equity,⁴ but unlike the Federal Court and the Family Court is not expressly said to be a

¹ “FM Court”.

² “FM Act”.

³ Chief Justice Gleeson “The State of the Judicature” (13th Commonwealth Law Conference, 17 April 2003).

⁴ *FM Act*, s.8(3).

superior court of record. That distinction was recently addressed by the FM Court as follows:

“Like the Federal Court and Family Court, this Court is:

- a) a court of record;⁵*
- b) a court with such original jurisdiction as is vested in it by laws made by the Federal Parliament,⁶*

and this Court like the Federal Court is a court of law and equity.⁷

Unlike the Federal Court and the Family Court this Court is not expressly said to be a “superior” court of record. Nor, however, is it said expressly to be an inferior court of record.

It may therefore be arguable that this Court’s implied incidental powers are less than those of the Federal Court and Family Court, and, by analogy, less than the inherent jurisdiction of the courts of common law of unlimited jurisdiction. At the very least, the failure to create this Court as a “superior” court of record under the FM Act may be taken as an indication that the Federal Parliament did not intend to create this Court as a superior court of record. Put another way it is arguable that this Court’s implied incidental power to make orders necessarily incidental to its express powers is not as broad as that of the Federal Court because the Federal Court is expressed by statute to be a superior court of record. If that argument is correct it may seem anomalous to some given that this Court and the Federal Court, and this Court and the Family Court, have concurrent jurisdiction in many areas, and concurrent, but sometimes limited, jurisdiction in other areas.⁸ For similar reasons it may also seem anomalous given that this Court, like the Federal Court and the Family Court, has associated jurisdiction to deal with common law claims which,

⁵ *Federal Magistrates Act, 1999*, s.8(3) (“FM Act”); *Federal Court of Australia Act, 1976* (Cth), s.5(2) (“FC Act”); *Family Law Act, 1975* (Cth) s.21(2) (“FL Act”).

⁶ *Federal Magistrates Act, 1999*, s.10(1) & (2); *Federal Court of Australia Act, 1976* (Cth), s.19; *Family Law Act, 1975* (Cth) s.31.

⁷ *Federal Magistrates Act, 1999*, s.8(3); *Federal Court of Australia Act, 1976* (Cth), s.5(2).

⁸ Those areas of concurrent (including concurrent but limited) jurisdiction include various aspects of: (a) administrative law, admiralty, bankruptcy, consumer protection (trade practices), copyright, human rights and equal opportunity, migration, privacy and workplace relations (with the Federal Court); and (b) family law and child support (with the Family Court).

were it not for the primary federal matter, would, in many cases, be within the jurisdiction (including any inherent jurisdiction) of the state common law superior courts of record.⁹

Ultimately, the superior – inferior distinction may matter little at a federal level. First, the declaration of a court as a “superior” court of record may not be intended to confer jurisdiction, but be merely titular.¹⁰ Second, there may be a distinction between an “inferior” court at common law, and an “inferior” court in the Australian federal system, with the Federal Court and Family Court being inferior to the High Court, and this Court being inferior to each of those courts.¹¹ Ultimately however the exercise of the implied incidental power of a federal statutory court is always subject to relevant statutory provisions.¹² The High Court expressed it this way in *DJL*:

“In the case of each such court, State or federal, attention must be given to the text of the governing statutes and any express or implied powers to be seen therein.”¹³ ¹⁴

Purpose

7. The FM Court was established with the purpose of hearing the simpler, less complex, smaller and high volume cases, thus leaving the Federal Court and Family Court to hear more complex and longer cases.

⁹ *FM Act*, s.18; *FC Act*, s.32; *FL Act*, s.33.

¹⁰ J. Quick and L.Groom, *The Judicial Power of the Commonwealth (1904)* p.76; discussing “superior court of record” in s.4 of the *Judiciary Act, 1903* (Cth).

¹¹ Quick and Garran, *Annotated Constitution of the Australian Commonwealth (1901)*, p. 726; *Constitution*, s.71. See also the discussion in L. Zines, *Federal Jurisdiction in Australia* (3rd Ed), (Sydney: Federation Press, 2002) pp 106-115. In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 41 O’Connor J. spoke of the High Court being vested by s.71 of the Constitution with the “supreme judicial power of the Commonwealth, and it must necessarily include the power to keep inferior Courts of the federal judicial system from exceeding their jurisdiction.”

¹² *VTAG FCR* at 294 per Heerey, Finkelstein and Lander JJ; *FCA* at paras. 19-20 per Heerey, Finkelstein and Lander JJ; *VTAG v Minister for Immigration and Multicultural Affairs* (2005) 141 FCR 291; [2005] FCAFC 91.

¹³ *DJL CLR* at 247 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *HCA* at para. 43 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *DJL v The Central Authority* (2000) 201 CLR 226; [2000] HCA 17.

¹⁴ *Skipworth v State of Western Australia & Ors (No. 2)* [2008] FMCA 544 at paras. 35-38 per Lucev FM (“*Skipworth (No. 2)*”) (the footnotes to the above quote are the footnotes from the original quote).

8. Complexity is however a comparative thing and not necessarily determined by length or size of case. The FM Court now exercises the bankruptcy jurisdiction, previously exercised by the Federal Court, and before it the Federal Bankruptcy Court (with very minor exceptions). The FM Court's migration jurisdiction is the same as the original jurisdiction of the High Court and the jurisdiction (again with minor exceptions) is now the same jurisdiction previously exercised by the Federal Court, and before it the High Court. In other areas the FM Court, where it has jurisdiction, often has concurrent jurisdiction with the Federal Court.¹⁵ Many of the cases now heard by the FM Court, particularly in its trade practices and human rights jurisdictions, may take a week to hear, and sometimes two weeks, although if a matter were sought to be listed for more than a week, consideration ought to be given to transferring the proceedings to the Federal Court.¹⁶

Object

9. The object of proceedings in the FM Court is to achieve a just, efficient and economical resolution of proceedings, without undue formality, but consistent with the proper exercise of the judicial power of the Commonwealth by a Chapter III court.¹⁷

Jurisdiction

Areas

10. The FM Court has two broad areas of jurisdiction:
- a) family law (in all states except Western Australia), in which it deals with approximately 80 per cent of first instance family law applications;

¹⁵ See footnote 8 above.

¹⁶ See the discussion at paras. 15-24 below concerning transfer of proceedings from the FM Court to the Federal Court.

¹⁷ *FM Act*, s.42; *FMC Rules*, r.1.03; *Goodall v Nationwide News Pty Ltd* [2007] FMCA 218 at para 21 per Lucev FM ("*Goodall (No.1)*").

- b) general federal law, including bankruptcy, where it deals with more than 95 per cent of first instance bankruptcy applications; and migration, where it deals with more than 99 per cent of first instance migration applications.¹⁸

Jurisdiction – statutory not inherent

- 11. The FM Court is, like the Federal Court and the Family Court, a court of statutory and not inherent jurisdiction.¹⁹ In *Skipworth (No. 2)* the Court said:

*“The true position is therefore that this Court, like the Federal Court and the Family Court, has no inherent jurisdiction. There is an implied incidental power to make orders necessarily incidental to express powers. As with the Federal Court and the Family Court, this Court has implied incidental powers shaped by the relevant statutory provisions.”*²⁰

Jurisdiction – general federal law

- 12. The remainder of this paper deals with the FM Court’s general federal law jurisdiction as that is the jurisdiction in which barristers practising in Western Australia will encounter the Court. There is also a focus, deliberately, on cases decided in the Perth Registry of the FM Court.
- 13. The FM Court has jurisdiction in a number of areas of general federal law, including:
 - a) administrative law;
 - b) admiralty law;
 - c) bankruptcy law;
 - d) consumer protection and trade practices law;

¹⁸ The “first instance migration applications” referred to are applications for judicial review of the decisions of the Migration Review Tribunal and Refugee Review Tribunal.

¹⁹ *Skipworth (No. 2)* at paras. 28-34 per Lucev FM.

²⁰ *Skipworth (No. 2)* at para. 34 per Lucev FM. In *Skipworth (No. 2)* the FM Court found that it had no inherent jurisdiction to re-open a matter to vary a costs order already entered: at para. 50 per Lucev FM.

- e) human rights law;
 - f) intellectual property law;
 - g) industrial law;
 - h) migration;
 - i) national security law; and
 - j) privacy law.
14. The FM Court also has jurisdiction in:
- a) all matters transferred to it by the Federal Court; and
 - b) associated matters.

Jurisdiction – transfer from Federal Court and to Federal Court

15. Sections 39-41 of the *FM Act* deal with the transfer of matters from the FM Court to the Federal Court.
16. In determining whether to transfer a matter to the Federal Court the FM Court has regard to the factors set out in the *FM Act*. In *Genovese v BGC Construction Pty Ltd*²¹ the FM Court set out the various factors that the FM Court must consider when exercising its discretion as to whether to transfer proceedings to the Federal Court, as follows:

“The making of an order to transfer proceedings from this Court to the Federal Court is discretionary: s.39(1) and (2) Federal Magistrates Act 1999 (Cth). The order is not able to be appealed: s.39(6) Federal Magistrates Act. There are, however, factors which it is mandatory for the Court to take into account under s.39(3)(a)-(d) of the Federal Magistrates Act, which provide as follows:

- (a) any Rules of Court made for the purposes of subsection 40(2); and*

²¹ [2006] FMCA 1507 (“*Genovese*”).

- (b) *whether proceedings in respect of an associated matter are pending in the Federal Court; and*
- (c) *whether the resources of the Federal Magistrates Court are sufficient to hear and determine the proceeding; and*
- (d) *the interests of the administration of justice.*

Rule 8.02(4)(a)-(e) of the Federal Magistrates Court Rules, 2001 (Cth) provides for other factors to be considered as follows:

- (a) *whether the proceeding is likely to involve questions of general importance, such that it would be desirable for there to be a decision of the Federal Court or the Family Court on one or more of the points in issue;*
- (b) *whether, if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceeding is not transferred;*
- (c) *whether the proceeding will be heard earlier in the Federal Magistrates Court;*
- (d) *the availability of particular procedures appropriate for the class of proceeding;*
- (e) *the wishes of the parties.”²²*

17. In *Genovese* the FM Court examined what constituted a question of general importance, and said:

“A question of general importance might arise where:

- (a) *the issue to be determined is of general importance to the public at large or a significant class of persons or type or series of cases: MZXJR v The Minister for Immigration [2006] FMCA 652 at par [38] per McInnis FM;*
- (b) *the case relates to the revenues of a Commonwealth or State: Noble v Cotton in Dowling, Proceedings of the*

²² *Genovese* at paras. 8-9 per Lucev FM. For other decisions concerning transfer of proceedings see *Kurniadi v Loh* [2004] FMCA 5; *Ogawa v University of Melbourne* [2004] FMCA 712; *Omiros Pty Ltd v PM Developments (No.3)* [2006] FMCA 58; *Rilstone v BP Australia Pty Ltd & Anor* [2007] FMCA 330 and the cases noted at para. 1 per Raphael FM.

Supreme Court, Vol 34 1 at p.10 per Dowling and Stephen JJ (and in that case relating to revenues of the then colony of New South Wales);

- (c) *significant human rights issues are at stake such as in Karner v Austria (2003) ECHR 395, where the European Court of Human Rights had to deal with differential treatment of homosexuals in succession to tenants under Austrian law as involving a question of general importance not just for Austria but for other state parties to the relevant convention;*
- (d) *an issue as to the proper construction of legislation arises: Baumer v R (1988) 166 CLR 51;*
- (e) *some important or exceptional point of principle arises: Veen v R (1979) 143 CLR 458 at p.461 per Stephen J, p.468 per Mason J and pp.497-498 per Aickin J;*
- (f) *the particular area of law or the case law concerning that area is, "an area of some complexity": Spencer & Rutherford v Horizon Holidays & Ors [2006] FMCA 386 at par [7] per Connolly FM, or is a "substantial commercial dispute which involves a number of complex issues": Spencer & Rutherford at par [10] per Connolly FM.*²³

18. The FM Court also considered what was meant by the interests of the administration of justice, and in that regard the FM Court said as follows:

"In BHP Billiton Ltd v Schultz (2004) 221 CLR 400, [2004] HCA 61, ("Schultz") the High Court considered the nature of the "interests of justice": Gleeson CJ, McHugh and Heydon JJ CLR at p.421, HCA at par [15] said:

The interests of justice are not the same as the interests of one party, and there may be interests wider than those of either party to be considered. Even so, the interests of the respective parties, which might in some respects be common (as, for example, cost and efficiency), and in other respects conflicting,

²³ *Genovese* at para. 13 per Lucev FM.

will arise for consideration. The justice referred to in s.5 is not disembodied, or divorced from practical reality.

Gummow J observed that the interests of justice “are even-handed”; CLR at p.445, HCA at par [100] while Callinan J referred to the requirement to “do equal justice”: CLR at p.492, HCA at par [258].

Some of the factors ordinarily considered when assessing the interests of justice are factors which it is mandatory for this Court to take into account under the Federal Magistrates Act and Federal Magistrates Court Rules: for example, costs and convenience of hearing and determination, earlier hearing of proceedings, availability of particular proceedings and pending proceedings in another court (in this case the Federal Court).

....

In assessing the “interests of the administration of justice” similar considerations to those in Schultz apply, with the qualification related to “administration of justice”. Administration means “management”: Concise Oxford Dictionary, 7th Edition (Oxford: Oxford University Press, 1984) at p.13. Thus, s.39(3)(d) of the Federal Magistrates Act is directed to a consideration of the interests of the management of justice, which must mean management by the Court of the proceedings pending before the Court.

Pursuant to the Federal Magistrates Court Rules, specifically r.1.03(1), proceedings are to be resolved as efficiently and economically as possible.

Applications should in the interests of the administration of justice be heard as soon as possible....

I also note that the matter has been listed for some time and that save some exigent circumstance there appears to be no good reason for it otherwise to be transferred in the interests of the administration of justice. No such circumstance has been identified by the applicant in these proceedings.

It is also appropriate in the interests of the administration of justice that an application such as this be heard by a Court appropriate to the nature of the application. The vast majority

of bankruptcy cases are dealt with by this Court. In 2004/2005 92 per cent of the bankruptcy cases in Australia at first instance were heard by this Court: Federal Magistrates Court of Australia, Annual Report 2004-2005, p.22. This is therefore an appropriate Court for the application given the other factors that I have outlined which in my view do not distinguish this application from many others which come to this Court.

Finally, in respect of the interests of the administration of justice I note r.8.02(2) of the Federal Magistrates Court Rules which provides that unless the Court otherwise orders, a request for transfer must be made on or before the first court date for the proceedings. The current application, that is, the application lately made on 14 September 2006, is not an application which conforms with that Rule. Ordinarily that might not be a factor to which I would attribute much weight, but in the circumstances of this case it is simply another indicator that it is not appropriate to grant the application for transfer to the Federal Court and that the application for transfer would not be in the interests of the administration of justice.”²⁴

19. As to whether proceedings are “pending” in the Federal Court, the meaning of “pending” was discussed by the FM Court in *Genovese v BGC Construction Pty Ltd*²⁵ where the FM Court said:

*“The etymology of “pending” is discussed in *Franklins v Richards*²⁶, and traced to its origin “as a technical legal word”. Reference is made to *Stroud’s Judicial Dictionary of Words and Phrases* (6th Edition), where the primary meaning of “pending” is given as:*

A legal proceeding is ‘pending’ as soon as commenced (on which see 5 Rep. 47, 48; 7 Rep. 30), and until it is concluded, ie. so long as the court and (sic) [having]

²⁴ *Genovese* at paras. 24-26 and 28-33 per Lucev FM.

²⁵ (2007) 207 FLR 141; [2007] FMCA 71 (“*Genovese 2007*”).

²⁶ [2002] NSWCC 2 at paras.[4]-[5] per Neilson J. Note also *Norcal Pty Ltd v D’Amato* (1988); (1988) 15 NSWLR 376, where the meaning of “pending” is also discussed, but where the outcome was determined by the very particular statutory provisions there in issue. (This footnote is from the original quote.)

*original cognisance of it can make an order on the matters in issue or to be dealt with, therein.”*²⁷

and agreed with the judgment of the District Court of Western Australia in *Proposch v Anne French Investments Pty Ltd*²⁸ where the District Court said:

*“the word ‘pending’ in s.7 should be given its widest possible meaning so as to ensure that all or any extant matters that were before, or which could have come before, the Local Court for any reason but for the repeal of the Local Courts Act is to be taken to be a case in the Magistrates Court and is to be heard and determined under the Civil Proceedings Act.”*²⁹

20. On appeal the Federal Court agreed with the reasoning of the FM Court that the relevant case was still a case pending³⁰ and added that:

*“The power resident in the Local Court to reconsider and review the judgment and orders made, they being inchoate and incomplete, further supports the conclusion that immediately prior to the transition date the respondent’s action or matter against the appellant in the Local Court was within the meaning of Section 7 of the Courts Repeal Act, “pending” action or matter and in certain respects therefore one which was still available to be heard and determined within the meaning of Section 7(b).”*³¹

21. In *Deputy Commissioner of Taxation v Cumins*³² the FM Court held that a Federal Court appeal was not the “same matter” as that then before the FM Court, namely a creditors petition for issuance of sequestration order, even though there was no issue that the proceedings and the Federal Court appeal were “in respect of an

²⁷ *Genovese 2007 FLR* at 148 per Lucev FM; FMCA at para. 39 per Lucev FM.

²⁸ [2006] WADC 47 (“*Proposch*”).

²⁹ *Genovese 2007 FLR* at 149 per Lucev FM; FMCA at para. 47(c) per Lucev FM, quoting from *Proposch* at para. 20 per McCann DCJ.

³⁰ *Genovese v BGC Construction Pty Ltd* [2007] FCA 923 at para. 37 per Gilmour J (“*Genovese 2007 Appeal*”).

³¹ *Genovese 2007 Appeal* at para. 45 per Gilmour J. As to when proceedings are “pending” see also *Fisher v Minister for Immigration and Citizenship* [2007] FCA 591.

³² [2007] FMCA 1841 (“*Cumins*”).

associated matter” for the purposes of s.19(1) of the *FM Act*, and that the Federal Court appeal was pending.³³

22. In *Cumins*, the FM Court transferred the proceedings to the Federal Court on the basis that it was in the interests of the administration of justice to do so (because the proceedings would have had to be dismissed by the FM Court on very slim and technical grounds if not transferred to the Federal Court) and because of the “important issue of the extraordinary amount of money owing to the Commonwealth by an individual non corporate taxpayer”.³⁴ The creditor’s petition related to a judgment debt obtained by the Deputy Commissioner of Taxation against Cumins in an amount of \$38,051,066.24.³⁵
23. Section 32AB of the *Federal Court of Australia Act, 1976 (Cth)*³⁶ provides for the Federal Court to transfer matters to the FM Court with similar provisions to those in s.39(3) of the *FM Act*.
24. Section 32AA of the *FC Act* prohibits the institution of proceedings in the Federal Court if proceedings in an associated matter are before the FM Court, and s.19(1) of the *FM Act* contains a reciprocal provision prohibiting the institution of proceedings in the FM Court if proceedings in an associated matter are before the Federal Court.³⁷

Jurisdiction – associated

25. As a court of record and a court of law and equity, the FM Court has a full suite of available remedies including injunctions, orders for restitution, awards of equitable damages and declarations. Section 14 of the *FM Act* requires the FM Court to resolve all matters within jurisdiction in proceedings before the FM Court. Section 18 of the *FM Act* provides that the FM Court has associated jurisdiction. Thus, provided that the FM Court has federal jurisdiction in a matter, it can deal with and make orders with respect to all matters

³³ *Cumins* at paras. 15 and 24 per Lucev FM.

³⁴ *Cumins* at para. 47, see also para. 46, per Lucev FM.

³⁵ *Cumins* at para. 4 per Lucev FM.

³⁶ “*FC Act*”.

³⁷ See *Cumins* at paras. 16-17 and 23-30 per Lucev FM.

associated with the matter within federal jurisdiction.³⁸ If there is no matter within the primary jurisdiction associated jurisdiction under s.18 of the *FM Act* cannot be invoked.³⁹

26. Barristers giving advice need to give proper consideration to whether applications made to the FM Court might have matters associated with the federal jurisdiction also made the subject of the application. Some simple examples will suffice:
- a) in claims under the *Workplace Relations Act, 1996* (Cth)⁴⁰ for under-payment under an Award, Industrial Agreement or AWA, there may also be an associated breach of contract claim;⁴¹
 - b) in a claim for unlawful termination under the *WR Act* there may also be associated claims for defamation and negligence (and also further federal claims for misleading and deceptive conduct in employment under the *TP Act*, and discrimination on bases set out in federal anti-discrimination and human rights and equal opportunity legislation);⁴²
 - c) in a claim for breach of the civil penalty provisions with respect to industrial action under the *WR Act* there may also be a claim in relation to various of the so called “industrial” torts;⁴³

³⁸ For cases concerning s.18 of the *FM Act* see: *Crowe v Comcare Australia (No. 1)* [2002] FMCA 146; *Windros v Transact Communications Pty Ltd* [2002] FMCA 145; *W & W* [2003] FMCAfam 150. Generally, see Justice Allsop, “Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002” (2002) 23 *Aust Bar Review* 25, and Justice Allsop “An Introduction to the Jurisdiction of the Federal Court of Australia”, www.fedcourt.gov.au/aboutci/judges_papers/speeches_allsop.html (October 2007).

³⁹ *Taylor v CGU Insurance Limited* [2005] FMCA 1073; followed in *Fernando v Minister for Immigration* [2007] FMCA 724 at para. 41 per Lucev FM.

⁴⁰ “*WR Act*”.

⁴¹ See I Taylor, “Workplace Relations and the Federal Magistrates Court and An Overview of the Workplace Relations Case”, New South Wales State Legal Conference Paper, 28 August 2006 (“Taylor, “Workplace Relations””) at para. 7: “employees will be able to bring breach of contract claims (eg, claiming payment in lieu of notice on termination) that are associated with claims of payment under industrial instruments or arising from termination of their employment.”

⁴² See T Lucev, “The Axe unto the Root? Unfair Dismissals and Unlawful Terminations Post Work Choices”, The Law Society of Western Australia Seminar: Work Choices or Worst of Choices? The New World of Workplace Relations, 27 September 2006, at page 14 (“Lucev, Unfair Dismissals and Unlawful Terminations”).

⁴³ Taylor “Workplace Relations” at para. 7: “Employers seeking to enforce orders of the Australian Industrial Relations Commission to prevent industrial action could also claim tortious damages.” See also: Macken, et al, *Law of Employment* (5th Ed) (Sydney: Lawbook Co, 2002), Ch.12 “Industrial Torts”.

- d) negligence claims might be brought in association with discrimination claims under federal discrimination law;
 - e) misleading and deceptive conduct under s.52 of the *TP Act* might also have associated breach of commercial contract claims;
 - f) in *Goodall v Nationwide News Pty Ltd (No. 2)*⁴⁴ an application with respect to a breach of copyright (of the applicant's photos of his five murdered children) was brought in conjunction with an application for misleading and deceptive conduct under s.52 of the *TP Act* (which was dismissed under the prescribed information provider provisions of s.65A of the *TP Act*)⁴⁵ and defamation (which was also dismissed).⁴⁶
27. The combination of statutory jurisdiction and associated jurisdiction provides barristers giving advice on initiating applications an interesting box of toys with which much litigious mischief might be made.⁴⁷

Jurisdiction – Perth – types of matters

28. Presently in Perth about 80% of cases heard by the FM Court are, in very broad terms, evenly split between three main areas:
- a) bankruptcy – which tend to be shorter half day to day matters with a larger volume of applications;
 - b) workplace relations – which vary between shorter half day to day matters, but generally two to three days, (but in one case presently before the FM Court, 10 days);
 - c) trade practices matters – with a lesser volume of matters, but hearings generally between two to four days, and occasionally

⁴⁴ (2007) AIPC 92-249; [2007] FMCA 1427 (“*Goodall (No.2)*”).

⁴⁵ *Goodall (No. 2)* FMCA at paras. 39-42 per Lucev FM.

⁴⁶ *Goodall (No. 2)* FMCA at paras. 69-75 per Lucev FM.

⁴⁷ In 1908 the *Dublin Review* published posthumously a piece by the English poet Francis Thompson on Shelley, in which Thompson wrote of Shelley “The universe is his box of toys...He makes bright mischief with the moon”.

more (one case presently before the FM Court may require seven days).

29. Most of the remaining 20% is evenly split between administrative, human rights, intellectual property and migration matters. Most administrative and migration matters are dealt with on the papers, and tend to be short half day to day matters. Human rights and intellectual property matters tend to be longer one to three day matters.
30. In the last 20 months there has only been one matter involving admiralty law, one matter involving privacy law and no national security law matters in the Perth Registry.

Administrative law

31. The FM Court has jurisdiction to hear applications under the *Administrative Decisions (Judicial Review) Act 1977*.⁴⁸
32. Under the *ADJR Act* the FM Court can review a decision on any one or more of the following grounds:
 - a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
 - b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
 - c) that the person who purported to make the decision did not have jurisdiction to make the decision;
 - d) that the decision was not authorised by the enactment in pursuance of which it was purported to be made;
 - e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

⁴⁸ “*ADJR Act*”.

- f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
 - g) that the decision was induced or affected by fraud;
 - h) that there was no evidence or other material to justify the making of the decision;
 - i) that the decision was otherwise contrary to law.⁴⁹
33. In *Ivanovic v Chief Executive Officer of the Australian Customs Service*⁵⁰ an applicant contended that procedures required by law to be observed in connection with the making of a decision, to terminate the applicant's probationary employment, were not observed. The FM Court held that the documents referred to, being the Conditions of Engagement and Probationary Policy and the Assessment of Probationary Employees – Managers Toolkit, were not documents that the respondent was required by law to observe under s.5(1)(b) of the *ADJR Act*, nor under the relevant certified Industrial Agreement.⁵¹
34. *Broadley v Inspector-General in Bankruptcy*⁵² related to an appeal filed with the Federal Court and transferred to the FM Court against a decision of the Administrative Appeals Tribunal⁵³ upholding the Inspector-General's objection to Broadley's discharge from bankruptcy.⁵⁴ The Trustee in Bankruptcy had objected to Broadley's automatic discharge from bankruptcy on the basis that he had failed under s.149D of the *Bankruptcy Act, 1966 (Cth)*⁵⁵ to provide the Trustee with complete information on certain matters relating to his financial affairs. Whilst upholding the Trustee's objection, which had been reviewed by the Inspector-General, the AAT found that the

⁴⁹ *ADJR Act*, ss.5-6.

⁵⁰ (2007) 210 FLR 149; (2007) 162 IR 104; [2007] FMCA 503 ("*Ivanovic*").

⁵¹ *Ivanovic* FLR at 157 per Lucev FM; IR at 112 per Lucev FM; FMCA at para. 35 per Lucev FM. See also G. Weeks, "The expanding role of process in judicial review" (2008) 15 AJ Admin L 100 at 102.

⁵² (2007) 97 ALD 797; [2007] FMCA 1714 ("*Broadley*").

⁵³ "AAT".

⁵⁴ *Re Broadley and Inspector General in Bankruptcy* [2006] AATA 914.

⁵⁵ "*Bankruptcy Act*".

failure by Broadley was unintentional. Before the FM Court Broadley referred to the Federal Court judgment in *Wharton v Official Receiver in Bankruptcy*⁵⁶ in which it was held that there was no requirement under s.149D of the *Bankruptcy Act* for a bankrupt to provide information which was complete or accurate. *Wharton* resulted in the making of a regulation under the *Bankruptcy Regulations 1996* (Cth) providing that a bankrupt failed to comply with a Trustee's request under s.149D of the *Bankruptcy Act* if the bankrupt provided information that was incomplete or inaccurate. Because the regulation had come into effect after the Trustee's request for information from Broadley, and because the AAT had found that Broadley's failure was unintentional, the FM Court held that the failure to comply with the Trustee's request was not a breach of his obligations as his actions were not deliberate.

35. Section 44AA of the *Administrative Appeal Tribunal Act, 1975* (Cth) provides that the Federal Court of Australia must not transfer an appeal from the AAT to the FM Court if the appeal relates to a decision given by the Tribunal constituted by a member who was, or by members at least one of whom was, a Presidential Member.
36. This means that decisions in the AAT by Presidential Members (which includes Deputy Presidents) cannot be transferred from the Federal Court of Australia to the Federal Magistrates Court. Decisions of the AAT where the Tribunal is constituted by a Senior Member may be the subject of transfer from the Federal Court of Australia to the FM Court.

Admiralty

37. The FM Court has jurisdiction under sections 9, 27 and 28 of the *Admiralty Act 1988* (Cth) and in any matters referred to it by the Federal Court. The jurisdiction allows the FM Court to hear proceedings commenced as actions *in personam* (an action or right of action against a specific person) on a maritime claim, or a claim for

⁵⁶ (2001) 107 FCR 28; [2001] FCA 96 (“*Wharton*”).

damage done to a ship. The Federal Court or a State Court can remit any *in rem* (a proceeding taken directly against property) matters to the FM Court either on application or on the court's own motion at any stage of proceedings.⁵⁷

Bankruptcy

38. The FM Court has concurrent jurisdiction with the Federal Court under the *Bankruptcy Act* save for the Federal Court's capacity to undertake jury trials under s.30(3) of the *Bankruptcy Act*.
39. Examples of matters regularly dealt with by the FM Court are as follows:
 - a) applications to review bankruptcy decisions of Registrars, particularly in relation to sequestration orders and extension of time for compliance with bankruptcy notices;⁵⁸
 - b) applications to extend time for compliance with bankruptcy notices;⁵⁹
 - c) sequestration order applications;⁶⁰
 - d) applications to set aside bankruptcy notices;⁶¹
 - e) applications to annul bankruptcy;⁶²

⁵⁷ *Admiralty Act, 1988* (Cth), s.28(1)(aa).

⁵⁸ *FM Act*, s.104(2) and (3); *Morien v Johnston* [2007] FMCA 2100; *Deane-Spread v DCOT* [2008] FMCA 8. See *Totev v Sfar* [2008] FCAFC 35 for a recent exposition of the FM Court's powers and duties when reviewing a Registrar's decision in relation to a sequestration order (and particularly the requirement for a hearing de novo and fresh compliance with s.52(1) of the *Bankruptcy Act*).

⁵⁹ *Bankruptcy Act*, s.41(6A) & (6C); *McPhee v Glenthams Pty Ltd* [2006] FMCA 1508; *Richardson v Leonard Cohen & Co* [2007] FMCA 78; *Gullotti v Coad* [2007] FMCA 525; *Tetlow v Department of Planning and Infrastructure* [2008] FMCA 535.

⁶⁰ *Bankruptcy Act*, s. 52(1) and (2); *Ketch Nominees Pty Ltd v Hadden* [2007] FMCA 8 (a case of which it has been said that "the facts of the case, and [the] reasoning, provide useful assistance for litigants and legal advisors trying to apply the classic test as to solvency as laid down in the cases, such as *Sandel v Porter* [1966] 115 CLR 666."; DA Hassall and M Steele (Eds), *Federal Magistrates Court Guide Book* (Sydney: Thompson Legal and Regulatory Limited, 2000) at para. 2.2389) ("Federal Magistrates Court Guide Book"); *Glenthams Pty Ltd v McPhee (No. 3)* [2008] FMCA 284.

⁶¹ *Bankruptcy Act*, s.40(1)(g); *Mahmoud v The Owners Corporation Strata Plan 811 (No. 3)* [2006] FMCA 1742 at paras. 53-55 per Lucev FM (summarising the statutory framework, cases and principles applicable); *La Pegna v DCT* (2006) 204 FLR 364; [2006] FMCA 1643; *Scanlan v Douglas* [2007] FMCA 1265; *Tetlow v Department of Planning and Infrastructure* [2008] FMCA 535.

- f) applications for extension of time in which to hold creditors meetings;⁶³
- g) applications for payment of after acquired property;⁶⁴
- h) applications for leave to commence or take fresh steps in proceedings involving the bankrupt in another court;⁶⁵
- i) applications for distribution of a dividend to creditors upon failure to file a statement of financial affairs;⁶⁶
- j) objections to discharge from bankruptcy;⁶⁷
- k) appointment of a Trustee to take control of debtors property;⁶⁸
- l) vesting orders with respect to the bankrupt's property disclaimed by the Trustee;⁶⁹
- m) applications by the Official Receiver for the sale of property and to vacate land;⁷⁰
- n) applications to recover property transferred at an undervalue.⁷¹

Consumer protection (trade practices)

40. The FM Court has jurisdiction under the *TP Act* in relation to claims under:

- a) Part IVA – unconscionable conduct;

⁶² *Bankruptcy Act*, s.153B(1); *Bradley-Meerwald v National Exchange Pty Ltd* [2007] FMCA 1876; *See v Granich & Associates* [2008] FMCA 27.

⁶³ *Bankruptcy Act*, ss.33 and 194(1); *Application of Melvyn Malcolm Posner* [2007] FMCA 610.

⁶⁴ *Bankruptcy Act*, ss.30, 58(1)(b) and 116; *Official Receiver v Prince* [2006] FMCA 1917.

⁶⁵ *Bankruptcy Act*, s.58(3)(b); *Singh v Official Trustee in Bankruptcy & Anor* (2007) 214 FLR 84; [2007] FMCA 1367; *Koblynski v Walker* [2008] FMCA 89.

⁶⁶ *Bankruptcy Act*, s.146; *Official Trustee in Bankruptcy v Thor* [2006] FMCA 1637; *Official Receiver v Howard & Anor* [2007] FMCA 786.

⁶⁷ *Bankruptcy Act*, ss.149C, 149D, 149N and 149Q; *Broadley*.

⁶⁸ *Bankruptcy Act*, s50(1A) and (1B); *Klages (WA) Pty Ltd v Walker* [2008] FMCA 348.

⁶⁹ *Bankruptcy Act*, s.133; *Skipworth v State of WA & Ors (No. 1)* [2007] FMCA 1370.

⁷⁰ *Bankruptcy Act*, ss.19, 30, 77(1)(e) & (g); *Official Receiver v Tregaskis* [2006] FMCA 1915; *Official Receiver v Fall & Anor* [2008] FMCA 489.

⁷¹ *Bankruptcy Act*, ss.120 and 121; *Official Receiver v Huen* [2007] FMCA 304 (under appeal); *Posner v Chen* [2007] FMCA 394.

- b) Part IVB – breach of industry codes;
 - c) Part V – consumer protection, including:
 - i) Division I – unfair practices, including misleading and deceptive conduct;
 - ii) Division IAAA – pyramid selling schemes;
 - iii) Division IA – product safety and product information; and
 - iv) Division IIA – actions against manufacturers and importers of goods; and
 - d) Part VA – liability of manufacturers and importers of defective goods.
41. The FM Court can grant injunctive relief under section 80 of the *TP Act* and award monetary damages under section 82 up to \$750,000.
42. In *Coolstar Holdings Pty Ltd v Cleary & Ors*⁷² the FM Court held that it had power to make Mareva type orders⁷³ and set out the principles for determining whether a Mareva type order ought issue,⁷⁴ before dismissing an application for interim orders for a Mareva type order on the basis that there was not a real risk of asset dissipation.⁷⁵ In relation to the power to make a Mareva type order and the principles for determining whether a Mareva type order ought to issue the FM Court said:

“Power to make Mareva type orders

The power to make Mareva orders in this Court was not disputed. Nor should it have been. Section 15 of the Federal Magistrates Act 1999 (Cth) provides for the Court to make orders, including interlocutory orders of such kinds as the Court thinks fit. Those powers include the making of Mareva type orders: Matther v Luttrell Limited and Others [2003] FMCA 62

⁷² [2006] FMCA 1442 (“*Coolstar*”).

⁷³ *Coolstar* at para. 3 per Lucev FM.

⁷⁴ *Coolstar* at para. 4 per Lucev FM.

⁷⁵ *Coolstar* at paras. 52 and 56 per Lucev FM.

at par 26 per *McInnis FM* (“*Matther*”), *Official Trustee in Bankruptcy v Dunwoody* [2004] FMCA 143 at par [19] per *Rimmer FM* (“*Dunwoody*”).

Mareva type orders – principles

The principles applicable in determining whether a Mareva type order ought issue are:

- (1) *that the applicant show an arguable case that judgment against the other party or parties will be obtained: Clout v Anscore Pty Ltd* [2000] FCA 727 at par [6] per *Drummond J* (“*Clout*”), *Donnelly v Porteous* [2001] FCA 345 at par [9] per *Stone J* (“*Donnelly*”), *Wily v O'Brien* [2006] FMCA 941 at par [9] per *Barnes FM* (“*Wily*”);
- (2) *that the applicant demonstrate by real evidence, and not mere assertion, that a refusal to make the order involves a real risk that judgment in the applicant’s favour would remain unsatisfied because of concealment or dissipation of assets: Donnelly at par [9] per Stone J, Frigo v Culhaci (unreported, NSWCA, CA 4014/98, 17 July 1998) at pp 11 and 16 per Mason P, Sheller JA and Sheppard AJA (“Frigo”), Wily at par [9] per Barnes FM, Matther at par 30 per McInnis FM; and*
- (3) *that the balance of convenience requires the making of an order: Pearce v Waterhouse* [1986] VR 603 at p 605 per *Vincent J, Wily at par [9] per Barnes FM.*”⁷⁶

43. In *Goodall (No. 2)*⁷⁷ the FM Court dismissed an application alleging misleading and deceptive conduct by The Sunday Times in relation to the publication of photos of the applicant’s five murdered children by reason of the exemption under the prescribed information provider provisions of s.65A of the *TP Act*.
44. In *Klages & Ors v Walker & Anor*⁷⁸ the FM Court found that but for the misleading and deceptive conduct the applicants would not have purchased the relevant franchises, and therefore their losses were

⁷⁶ *Coolstar* at paras. 3-4 per Lucev FM

⁷⁷ (2007) AIPC 92-249; [2007] FMCA 1427.

⁷⁸ [2007] FMCA 2056 (“*Klages (No. 1)*”).

caused by contraventions of ss.51A and 52 of the *TP Act*.⁷⁹ In *Klages (WA) Pty Ltd & Ors v Walker & Anor (No. 2)*⁸⁰ damages of more than \$150,000.00 were awarded to the applicants.

Copyright

45. The copyright jurisdiction of the FM Court is limited to civil actions under Parts V (remedies and offences), VAA (broadcast decoding devices), IX (moral rights) and s 248J (performer's action for unauthorized use) of the *Copyright Act 1968* (Cth).⁸¹ This limited jurisdiction, which is concurrent with the Federal Court was conferred in 2003 by the *Copyright Amendment (Parallel Importation) Act 2003* (Cth).
46. In *MG Distribution Pty Ltd & Ors v Khan & Anor* the FM Court granted Anton Piller orders in relation to breaches of copyright arising from the reproduction, importation and sale of Bollywood films.⁸² The orders were later discharged.⁸³
47. In *Universal Music Australia Pty Ltd v Hendy Petroleum* the FM Court dealt with a claim alleging copyright breach relating to compilation CDs, and awarded additional damages, compensatory damages and injunctive relief, giving effect to the legislative intention to deter others from illegal breaches of copyright.⁸⁴
48. In *Goodall (No. 2)*⁸⁵ the FM Court dealt with an application for a declaration that the respondent had breached copyright and for damages in respect of the publication, and re-publication, of photos of the applicant's five murdered children, the re-publication appearing after the applicant had claimed copyright over the photos following the initial publication. The application was granted as to a declaration of copyright, breach and damages because the respondent

⁷⁹ *Klages (No. 1)* at para. 41 per Lucev FM.

⁸⁰ [2007] FMCA 2138.

⁸¹ "Copyright Act".

⁸² [2005] FMCA 500.

⁸³ *MG Distribution & Ors v Khan & Anor* (2006) 230 ALR 352; [2006] FMCA 666.

⁸⁴ (2003) 59 IPR 204; [2003] FMCA 373.

⁸⁵ (2007) AIPC 92-249; [2007] FMCA 1427.

was, or ought to have been, aware that the re-publication of the photos would constitute an infringement of copyright. Damages were awarded under s.115(2) of the *Copyright Act*, and additional damages under s.115(4) of the *Copyright Act*, in respect of the re-published photos.⁸⁶

49. Recently, in *APRA v Cougars Tavern & Ors*⁸⁷ the FM Court awarded damages of \$27,780.00 for infringement of copyright, and additional damages of \$355,000.00, intended to be “both punitive and a deterrent” where companies and their directors had failed to obtain the APRA licences required to play musical works controlled by APRA at certain venues in Victoria and Queensland.⁸⁸ The judgment contains a useful list of recent awards of additional damages under s.115(4) of the *Copyright Act*.⁸⁹

Industrial relations law

50. The FM Court has jurisdiction to hear applications under the *WR Act*, the *Building and Construction Industry Improvement Act 2005* (Cth)⁹⁰ and the *Independent Contractors Act 2006* (Cth).
51. The jurisdiction conferred on the FM Court by the *WR Act* includes:
- a) applications requiring observance of employee entitlements;⁹¹
 - b) applications for civil penalties, declarations, variation of Workplace Agreements, compensation and injunctions for breach of provisions governing the making of Workplace Agreements;⁹²
 - c) applications for civil penalties for breach of provisions governing industrial action (including power to grant injunctive relief

⁸⁶ *Goodall (No. 2)* at paras. 43-68 per Lucev FM.

⁸⁷ [2008] FMCA 369 (“*Cougars Tavern*”).

⁸⁸ *Cougars Tavern* at para 27 per Raphael FM.

⁸⁹ *Cougars Tavern* at para. 27 per Raphael FM.

⁹⁰ “*BCII Act*”.

⁹¹ *WR Act*, ss.318 and 319.

⁹² *WR Act*, Part 8, Division 11.

enforcing orders to stop industrial action made by the Australian Industrial Relations Commission);⁹³

- d) unlawful termination of employment claims (including injunctive proceedings to enforce unfair dismissal orders made by the Australian Industrial Relations Commission);⁹⁴
- e) underpayment claims in relation to industrial instruments (including AWAs, Awards, Collective Agreements, etc.);⁹⁵
- f) applications for civil penalties arising from breach of union right of entry provisions;⁹⁶
- g) applications for civil penalties and compensation in relation to the freedom of association provisions;⁹⁷
- h) applications for interpretation of an Award or Certified Agreement.⁹⁸

52. In *Balding v Ten Talents Pty Ltd*⁹⁹ proceedings were commenced on behalf of two supermarket employees alleging breaches of s.400(5) of the *WR Act* against the first respondent, the purchaser of the supermarket, and the second respondent, an agent engaged by the first respondent to offer and negotiate new terms of employment to the employees, by applying duress to the employees in requiring them to enter into AWAs as condition of employment. On an application to summarily dismiss the proceedings against the second respondent the FM Court held that there was sufficient evidence that the second respondent was “involved in” the alleged contravention of s.400(5). In dealing with the question of what constituted duress for the purposes of s.400(5) the FM Court said as follows:

⁹³ *WR Act*, ss.496-497.

⁹⁴ *WR Act*, ss.659 and 847(4). See generally Lucev, *Unfair Dismissals and Unlawful Terminations*, pp.18-24.

⁹⁵ *WR Act*, ss.718-721 and 727-728.

⁹⁶ *WR Act*, Part 15, ss.767-769.

⁹⁷ *WR Act*, s.807.

⁹⁸ *WR Act*, ss.848 and 849; *Nylex Industrial Products Pty Ltd v TCFUA* [2007] FMCA 79.

⁹⁹ (2007) 162 IR 17; [2007] FMCA 145 (“*Balding (No. 1)*”).

“Law concerning duress

Duress involves the illegitimate application of pressure likely and intended to have the effect of denying the exercise of a person’s free will, and in relation to the circumstances of this case, irrespective of whether an AWA is entered into or otherwise: Schanka v Employment National (Administration) Pty Ltd (1999) 166 ALR 663 at 680-681 per Moore J (“Schanka 1999”); [1999] FCA 1334 at paras 40-43; Maritime Union of Australia v Geraldton Port Authority (1999) 165 ALR 67 at 125 per Nicholson J; (“Geraldton Port Authority”) [1999] FCA 899 at para 367 per Nicholson J; Canturi v Sita Coaches Pty Ltd (2002) 116 FCR 276 at 287-289 per Ryan J; [2002] FCA 349 at paras 38-43 per Ryan J (“Canturi”); Bishop v Ropolo Services Pty Ltd (2006) 153 FCR 357 at 361-362 per Madgwick J; [2006] FCA 592 at paras 17-21 per Madgwick J (“Bishop”).

Illegitimate pressure may include unlawful threats, unconscionable pressure, and, in relevant circumstances, lawful conduct: Geraldton Port Authority, ALR at 125 per Nicholson J; FCA at 367 per Nicholson J.

Illegitimate pressure does not exist merely because an offer of employment is contingent upon entry into an Australian Workplace Agreement (“AWA”): WR Act, s.400(6); Bishop, FCR at 362 per Madgwick J; FCA at para 22 per Madgwick J. Whether there is illegitimate pressure is a question of fact determinable in the circumstances of each particular case: Canturi, FCR at 289 per Ryan J; FCA at para 43 per Ryan J. Pressure is not enough: for pressure to amount to duress it must, during the process of offer and negotiation leading to acceptance or non acceptance of an AWA, cross the boundary from normal pressure exerted by a party in the process of offer and negotiation and enter the territory of illegitimate pressure. A range of factors have been identified by courts in determining whether a party has been subject to duress.

Duress – Consideration of factors

Employment in the same job has been identified as the single most important factor in relation to the application of illegitimate pressure in claims of this type: Schanka & Ors v Employment National (Administration) Pty Ltd (2001) 112 FCR 101 at 139 per Moore J; [2001] FCA 579 at para 102 per

Moore J (“Schanka 2001”). There it was reasoned that employees have a reasonable expectation that positions with a new employer (in this case the First Respondent) entering (to use a neutral term) into an existing business will not be on terms and conditions materially inferior to those under their previous employment (in this case with Action, who are not a party to these proceedings), and that the employee’s “relative position in the market place was ... threatened” if “they were threatened with loss of such existing expectations unless they entered into AWA’s”: Bishop, FCR at 363 per Madgwick J; FCA at para 26 per Madgwick J.

Conduct which puts an employee in the position of “it’s the AWA or your job” has been held to be unconscionable conduct giving rise to a serious issue to be tried as to whether it is duress in relation to the employees concerned (under the provisions of the former section 170WG (1) of the WR Act): Australian Services Union v Electrix Pty Ltd (1999) 53 IR 43 at 45 per Marshall J; [1999] FCA 211 at paras 15-16 per Marshall J (“Electrix”).

In this case:

a) employment at the Hilton Supermarket was only available under an AWA;

b) there was no alternative to enable employment on the terms of a any other form of industrial instrument (for example, the Action Supermarkets Agreement);

c) if the employee did not agree to enter into an AWA the employee continued to be employed by the previous employer (Action), but not in their previous position nor at the Hilton Supermarket; and

d) it was put to both Franklin and King that “it’s the AWA or your job” or words to that effect, by representatives of the Second Respondent who were, on the evidence of Correia, acting for the First Respondent.

In this case neither Franklin nor King had the option of keeping their existing position at the Hilton Supermarket on terms other than the AWA. If they could not keep their existing position on those terms, they did not keep their existing position at all, or at least not at the Hilton Supermarket. If Franklin or King did

accept the offer of an AWA, they would have to change the location of their workplace because Action no longer had employment for them at the Hilton Supermarket, and in Franklin's case this was what happened.

A change of workplace might arguably constitute termination of an employment contract in certain circumstances: see Macken & Ors, The Law of Employment (5th ed) (Sydney: Law Book Company, 2002) pages 251-252; Webber, Batt's The Law of Master and Servant (5th ed) (London: Pitman & Sons, 1967) page 116. It is arguable that the offer of AWA's only might have effectively amounted to "its the AWA or your job", both as a matter of law, and as matter of practicality.

The prospect of having to work elsewhere, or relocate, or not having a job if relocation was not a possibility, might all be the result of a course of conduct which constitutes a pressure bordering on the illegitimate, dependant on the circumstances.

On the present evidence neither Franklin nor King:

- a) had the option of continuing on in their existing position at the Hilton Supermarket if they did not sign the AWA; and*
- b) were probably faced with a change in the location of their workplace.*

These facts were not present in Bishop, a case heavily relied upon the Second Respondent. Bishop is distinguishable on that basis (at least as to the ultimate outcome). However, Bishop also supports the proposition that there may be duress in the conduct (particularly during the September 2006 interviews of Franklin and King) of the Second Respondent's officers or representatives, because that conduct does threaten "the pre-existing status quo": Bishop, FCR 371-372 per Madgwick J; FCA at para 64, by threatening to remove Franklin and King from their respective and specific positions at the Hilton Supermarket.

The Second Respondent argued that there was no evidence of duress, particularly because the pre-existing status quo was unchanged in that Franklin and King would still be employed and paid by Action. This approach is too simplistic, and contrary to authority which makes it clear that the focus is on

any conduct which threatens the actual position in which the employee is employed, and the actual terms and conditions (including, for example, the location of the workplace) on which the employee is employed: Bishop, FCR 371-372 per Madgwick J; FCA at para.64.

The present evidence (taken at its highest for present purposes) can, if reasonably believed, suggest that:

a) Franklin and King might have had a reasonable expectation of employment in their pre-existing positions on similar terms and conditions (and even, possibly – albeit faintly suggested – the same terms and conditions); and

b) the conduct of the Second Respondent (acting on behalf of the First Respondent), through its officers or representatives, did, and was intended to, threaten that reasonable expectation, which was essentially of the maintenance of the pre-existing status quo.

The evidence in relation to this factor can not be said to be one way against a prospect of successful prosecution of the claim. There is sufficient evidence to give rise to the possibility of a real and not fanciful prospect of the claim succeeding, either alone or in combination with other factors.

Any prior relationship between the Second Respondent and Franklin and King (such as and including that arising from the process of offering AWA's and conducting interviews in relation to those offers) may be significant, and may warrant examination of the circumstances of the conduct said to constitute duress: Maritime Union of Australia v Burnie Port Corporation Pty Ltd (2000) 101 IR 435 at 451 per Ryan J; [2000] FCA 1189 at para 71 per Ryan J (and see also para.72); Bishop, FCR at 362 per Madgwick J; FCA at para 23 per Madgwick J.

The relationship between offeror (the Second Respondent) and proposed employee (Franklin and King) may also be a factor to be assessed in relation to duress. Absent acceptance of an AWA, the provisions of Part 11 of the WR Act provide that where there are existing industrial instruments in place, and the employees at the time of transmission are entitled to benefits of the industrial instruments, those industrial instruments transmit

from the old employer to the new employer on employment by the new employer of the employees of the old employer.

It is arguable that the transmission of business provisions in the WR Act might be said to be such as to create a special relationship between an offeror and potential new employee, particularly where the relevant industrial instrument would ordinarily apply to the potential new employee, absent the offer and acceptance of employment on the terms of an AWA only, and where, as here, Franklin and King arguably had a reasonable expectation of ongoing employment in their pre-existing positions.

In the circumstances, there is sufficient evidence that a claim of duress might succeed on the basis of this factor, if not alone, then perhaps in combination with other evidence.

Actual, or threatened, reduction in employee entitlements, or opportunities which might be afforded an employee in their employment, might be a relevant factor in a consideration of duress: ALHMWU & Ors v Cranbourne RSL Sub-Branch Inc (1999) FCA 1425 at paras 33-34 per Ryan J (“Cranbourne RSL”). Although Cranbourne RSL dealt with existing employees being offered AWA’s by their existing employer, the principle with respect to a consideration of duress in the context of entitlement reduction is applicable in other circumstances where AWA’s are offered, including to the existing employees of a business being purchased by a new employer.

Both Franklin and King gave evidence of possible reductions or loss of opportunities under the AWA being offered by the Second Respondent on behalf of the First Respondent. There is also the evidence concerning change of workplace location to be considered.

The evidence on this factor is not all one way, and does not support there being no real prospect of success in prosecuting the claim on the basis of this factor, either alone, or in combination of other factors. Furthermore, there appeared in argument a possible dispute about whether or not there was a reduction in entitlements or opportunities (and specifically as to pay rates) such as to make it inappropriate for the Court to summarily dispose of the proceedings.

Another factor which must be considered is whether or not there was an opportunity to negotiate, either in relation to an alternative form of industrial instrument (other than an AWA) or to negotiate in a particular manner or form: Schanka 2001 FCR at 139-140 per Moore J; FCA at paras 104-105 per Moore J. There is evidence that Franklin and/or King:

a) wished to continue employment with the First Respondent on the terms of the Action Supermarkets Agreement;

b) considered that there was no opportunity to negotiate with the First Respondent (represented by officers of the Second Respondent); and

c) felt unable to negotiate alone, and unequal in bargaining ability.

Once again the evidence available might support the successful prosecution of the claim, based on this factor, or at least this factor in combination with other factors.

*Power disparity and the use of any power disparity, is a factor in assessing whether or not there has been duress: Bishop, FCR at 363 per Madgwick J; FCA at paras 24-25 per Madgwick J; Canturi, FCR at 300 per Ryan J; FCA at para 88 per Ryan J; and includes the potential for illegitimate economic pressure, which ought not be found lightly: Bishop, FCR at 363 per Madgwick J; FCA at para 25 per Madgwick J, citing the observation of Finn J in *Australasian Meat Industry Employees Union v Peerless Holdings Pty Ltd* (2000) 103 FCR 577 at 589; [2000] FCA 1047 at para 54.*

*Rightly or wrongly (and it is not presently necessary for the Court to determine which), there is a view that the employer-employee relationship entails a power [...] disparity, or as it is often put, an inequality of bargaining power. It has long been thus. Blackstone considered the master-servant relationship to be one of status: William Blackstone, *Commentaries on the Laws of England* (1765) vol 1, pages 410-420. 245 years ago Lord Henley LC spoke of necessitous men not truly free (to exercise their will), but open to submission to any terms the crafty may impose: *Vernon v Bethel* (1762) 2 Eden 110 at 113. Modern Australian labour law academics and eminent legal writers have adverted to the inequality of employee bargaining*

power: Creighton & Stewart, *Labour Law An Introduction* (3rd ed) (Sydney: Federation Pres, 2000) pages 4-5; Macken, *The Employment Revolution* (Sydney: Federation Press, 1992) chapter 7; Ludeke, *The Line in the Sand. The long road to staff employment in Comalco* (Melbourne: Wilkinson Books, 1996) pages 1-2. That background simply reinforces the appropriateness of the consideration of power disparity as a possible factor in conduct allegedly causing duress.

There is evidence of indicators of a power disparity and the possible use of that power disparity by the officers and representatives of the Second Respondent (acting on behalf of the First Respondent) in relation to the offer and negotiations concerning entry into an AWA. They include:

- a) the nature of the possible employer/employee relationship (as discussed above) but particularly in circumstances where there is a sale and purchase of a business, and Franklin and King were having to make decisions concerning employment arrangements for the future;*
- b) the fact that seemingly the only choice for Franklin and King was between employment on an AWA at the Hilton Supermarket and a continuation of employment with Action in another location somewhere else;*
- c) the circumstances of the September interviews, and the possibility that duress might have been applied or existed by reason of the time frames imposed (which were various – sometimes days, at other times hours and minutes) in which Franklin and King had to decide whether to accept the offer of entry into an AWA, without which acceptance there would be no employment at the Hilton Supermarket;*
- d) the possibility that there was pressure exerted during the course of the interviews and pre-sale period and that employees were, or felt, intimidated;*
- e) the failure to provide information, particularly where that information was relevant to an employee's desire to know and understand what the employment being offered under the AWA involved; and*

f) assurances by officers of the Second Respondent that certain express written conditions of the AWA would not be enforced (namely the probationary period, time off in lieu and not having to clock off for tea breaks), and the refusal to confirm the oral assurances in writing.

In relation to this factor it can not be said the evidence is all one way in favour of summary dismissal of the proceedings. Nor can it be said that the prospects of success in relation to this factor are merely fanciful. This factor does not favour summary dismissal of the proceedings against the Second Respondent.

Second Respondent involved in conduct

For the purposes of s.728 of the WR Act there is sufficient evidence, for present purposes, to establish that the Second Respondent was “involved in” the alleged contravention of s.400(5). In particular this relates to the evidence of Correia, and Franklin and King concerning the conduct of the officers and representatives of the Second Respondent (acting on behalf of the First Respondent) in relation to the offer and negotiations for entry into an AWA, including the actual arrangement and conduct of the September interviews.”¹⁰⁰

53. In *Balding v Ten Talents Pty Ltd (No.3)*¹⁰¹ the FM Court found that duress had been applied to one of the employees concerned, but dismissed the application with respect to a second employee. In relation to the latter employee the FM Court came to the view that the evidence established that he had decided to pursue an alternative career and therefore did not intend to sign any AWA, or undertake any employment, that was offered to him by the first respondent, and the FM Court therefore did not consider that as a matter of fact any duress could have been applied to him by the respondents.¹⁰² The FM Court found in respect of the former employee that duress had been applied to her, and observed as follows:

¹⁰⁰ *Balding (No.1)* IR at 27-31 per Lucev FM; FMCA at paras. 33-59 per Lucev FM. Referred to in *Smith v Granada Tavern (No.2)* [2007] FMCA 904 at para. 29 per Burchardt FM.

¹⁰¹ [2008] FMCA 255 (“*Balding (No.3)*”).

¹⁰² *Balding (No.3)* at paras. 21-22 per Lucev FM.

“Merely offering AWAs is not the application of duress. However, in this case there was a plan to offer only AWAs. The AWA to be offered had set terms and conditions which were not negotiable. Franklin had concerns over some of those terms and conditions but was not able to negotiate any of them including even small matters such as the provision of paid tea breaks. Although there was an ability to adjust the overall rate of pay this was not a matter truly to be negotiated. Rather it was a matter in respect of which the First Respondent had a contractual obligation to pay a rate of pay no less favourable than that previously being paid, and if a query arose with respect to that issue, it was an accounting exercise to determine the appropriate rate of pay.

In order to continue to be employed in the same job at the same place Franklin had to agree to the standard not negotiable terms of the AWA, and was not able to be employed on or negotiate any other form of industrial instrument in relation to that employment. Further, after the probationary period she might be terminated from the job she had been doing if she did not perform. That, and the refusal to negotiate a different industrial instrument and terms and conditions demonstrated, and were an exercise of, the power disparity between Franklin and the Respondents. In the circumstances that constituted the application of duress in relation to her as an employee in connection with an AWA.

In this case, there was a sufficient relationship between the First and Second Respondents by reason of the arrangements made for the Second Respondent to act as the First Respondent’s agents in dealing with the employees and offering them AWAs, the terms of the Sale Agreement between the First Respondent and Action the employer of the employees, and by reason of the making of the offers in accordance with that Sale Agreement to the employees, to facilitate a finding of duress in respect of Franklin.

In this case the actual application of duress was by the officers of the Second Respondents in the course of their dealings with Franklin in relation to the offer of an AWA to her.

The First Respondent has also contravened s.400(5) of the WR Act. It was involved in the contravention by reasons of the plans which were put in place by it and the Second Respondent for the

making of offers of non negotiable AWAs, the arrangements for the Second Respondents to act on behalf of the First Respondents in offering those AWAs, and the action of the First Respondent in approving the standard terms of the AWA. By reason of s.728(2)(a) and (c) the First Respondent was involved in the contravention, and therefore by reason of s.728(1) has contravened s.400(5) of the WR Act.”¹⁰³

54. In *Olsen v Wellard Feeds Pty Ltd*¹⁰⁴ the FM Court dealt with an alleged breach of Award relating to an alleged underpayment to a person employed as a mill manager. The application was dismissed the FM Court finding that the employee concerned was a managerial employee, and that the principle purpose of his employment was to manage the mill. As such he was not an employee under the relevant Award and the Award did not apply to him.¹⁰⁵
55. The FM Court has been involved in numerous cases in relation to the application of civil penalties in relation to breaches of the *WR Act* (and the *BCII Act*).
56. The factors usually relevant to the amount of penalty have been summarised as follows:
- a) the nature and extent of the conduct which led to the breaches;
 - b) the circumstances in which that conduct took place;
 - c) the nature and extent of any loss or damage sustained as a result of the breaches;
 - d) whether there had been similar previous conduct by the respondent;
 - e) whether the breaches were properly distinct or arose out of the one course of conduct;
 - f) the size of the business enterprise involved;

¹⁰³ *Balding (No.3)* at paras. 26-29 and 31 per Lucev FM.

¹⁰⁴ [2008] FMCA 320 (“*Wellard Feeds*”).

¹⁰⁵ *Wellard Feeds* at para. 18 per Lucev FM.

- g) whether or not the breaches were deliberate;
- h) whether senior management was involved in the breaches;
- i) whether the party committing the breach had exhibited contrition;
- j) whether the party committing the breach had taken corrective action;
- k) whether the party committing the breach had cooperated with the enforcement authorities;
- l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- m) the need for specific and general deterrence.¹⁰⁶

57. The above factors were applied in determining penalty in *Jones v Hanssen Pty Ltd*¹⁰⁷ in relation to admitted contraventions of the *WR Act* in respect of the lodgement of unapproved AWAs, failing to lodge employees' AWAs within the requisite time for approval, failure to take reasonable steps to ensure that each employee had ready access to an AWA prior to it being approved, and failure to take steps to ensure that employees were given an information statement within the requisite time. Total penalties of \$174,000.00 were imposed for twenty one admitted breaches of the *WR Act*.

58. In *Carr v CEPU & Anor*¹⁰⁸ the FM Court had to consider the appropriate principles to be adopted when an agreed penalty was

¹⁰⁶ *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702 at para.13 per Gordon J; *Kelly v Fitzpatrick* (2007) 166 IR 14 at 18 per Tracey J; [2007] FCA 1080 at para. 14 per Tracey J (“Kelly”). In *Kelly* Tracey J adopted the range of considerations as to penalty identified in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 by Mowbray FM.

¹⁰⁷ [2008] FMCA 291 (penalty under appeal).

¹⁰⁸ [2007] FMCA 1526.

proposed in relation to unlawful industrial action under the *BCII Act*, and in so doing had regard to the factors outlined above.¹⁰⁹

Migration

59. Under the *Migration Act 1958*¹¹⁰ the FM Court can review decisions made by the Minister for Immigration and Citizenship and decisions of the Refugee Review Tribunal and the Migration Review Tribunal.
60. The *Migration Litigation Reform Act, 2005* (Cth)¹¹¹ came into effect on 1 December 2005. Schedule 1 of that Act effectively provides that migration matters are now to be dealt with by the FM Court at first instance, save for some limited Federal Court jurisdiction. The *MLR Act* also permits direct remitter from the High Court to the FM Court. The FM Court's jurisdiction as a result of the *MLR Act* and the amendments made thereunder is the same as the original jurisdiction of the High Court under s.75(v) of the *Constitution*.
61. For prerogative relief to be ordered, the Applicant must establish that the Tribunal committed jurisdictional error in its decision, so that the decision is not a privative clause decision under s.474 of the *Migration Act*.¹¹²
62. In *S157* the High Court defined the role of a court in determining whether a decision involved jurisdictional error, saying it was necessary to examine the limitations and restraints found in the *Migration Act*, and attempt, through statutory construction, to reconcile the limitations and restrictions with s.474 to ascertain whether failure to observe procedural or other requirements in the *Migration Act* constituted an error resulting in the decision-maker (the Tribunal) failing to exercise or exceeding its jurisdiction.¹¹³

¹⁰⁹ *Carr* at para. 7 per Lucev FM.

¹¹⁰ "*Migration Act*".

¹¹¹ "*MLR Act*".

¹¹² *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476; [2003] HCA 2 ("*S157*").

¹¹³ *S157*, CLR at 506-507 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; HCA at paras. 76-78 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

63. Judicial review of refugee review determinations by the Refugee Review Tribunal involve the FM Court in determining whether the Tribunal has made jurisdictional error most often in relation to:
- a) whether the review applicant has a well founded fear of persecution for a Convention reason;¹¹⁴
 - b) whether there was bias on the part of the Tribunal;¹¹⁵
 - c) whether there was a denial of procedural fairness or natural justice by the Tribunal.¹¹⁶
64. In applications for judicial review of determinations of the Migration Review Tribunal the circumstances are much more diverse, but jurisdictional error must still be established before an application can succeed.¹¹⁷

National Security

65. One of the more controversial areas of jurisdiction of the FM Court is the ability to issue control orders under the *Anti-Terrorism Act (No. 2) 2005 (Cth)*.¹¹⁸ The effect of a control order, depending on the specific orders made, is to limit a person's movement, association or

¹¹⁴ *WAMN v Minister for Immigration and Citizenship and Anor* [2008] FMCA 520; *SZJAO v Minister for Immigration* [2007] FMCA 1102.

¹¹⁵ *WAMI v Minister for Immigration & Anor* [2007] FMCA 579; *SZIQT v Minister for Immigration & Anor* [2007] FMCA 762.

¹¹⁶ *WAME v Minister for Immigration & Anor* [2007] FMCA 569; *SZIRS & Anor v Minister for Immigration* [2007] FMCA 214 (in which jurisdictional error was established by reason of a failure to invite the applicant to a hearing).

¹¹⁷ See for example *Ndungu v Minister for Immigration & Anor* [2007] 213 FLR 123; [2007] FMCA 217 (calculation of period of employment to determine if criteria for grant of a Skilled Independent Overseas Student (Residence) Visa met); *Ong & Anor v Minister for Immigration & Anor* [2007] FMCA 2120 (unsuccessful application for review in relation to remaining relative visa); *Bachir & Anor v Minister for Immigration & Anor* [2007] FMCA 115 (jurisdictional error established in relation to family residence visa, but relief denied on the basis of delay); *Jiang v Minister for Immigration & Anor* [2007] FMCA 215 (no jurisdictional error established in relation to student visa); *Bunnag v Minister for Immigration & Anor* [2007] FMCA 1843 (no jurisdictional error established in relation to married husband failing to satisfy mutual commitment to a shared life, genuine and continuing relationship, and live together factors; appeal dismissed in *Bunnag v Minister for Immigration and Citizenship* [2008] FCA 357).

¹¹⁸ See for example, Amnesty International Australia – Factsheet: Anti-Terrorism Bill 2005, http://www.amnesty.org.au/data/assets/pdf_file/10583/factsheets.pdf.

activities if the FM Court decides the restraint will substantially assist in preventing a terror attack.¹¹⁹

66. In *Thomas v Mowbray*¹²⁰ the constitutional validity of provisions of the *Criminal Code* (Cth) were upheld, confirming the capacity of the FM Court to issue control orders.
67. In *Jabbour v Hicks*¹²¹ the FM Court granted an application to issue control orders in respect of former Guantanamo Bay detainee David Hicks.

Privacy

68. The FM Court shares concurrent jurisdiction with the Federal Court to enforce determinations of the [Privacy Commissioner](#), and private sector adjudicators, under s.55 of the *Privacy Act, 1988* (Cth).
69. Determinations of the Privacy Commissioner may also be reviewed by the FM Court under the *ADJR Act*.
70. The key features of the FM Court's jurisdiction are:
 - a) where there is no relevant privacy code in place the National Privacy Principles will apply;
 - b) where someone is not satisfied with the way in which an organisation is handling his or her personal information, they can take up their concern with the relevant organisation in the first instance;
 - c) privacy codes will normally contain complaints handling procedures for the organisation. These will involve the use of private adjudicators to resolve complaints;

¹¹⁹ Section 104.5(3) of the *Anti-Terrorism Act (No. 2) 2005* establishes the types of obligations, prohibitions and restrictions which can be included in a control order.

¹²⁰ (2007) 81 ALJR 1414; [2007] HCA 33.

¹²¹ [2007] FMCA 2139.

- d) where there is no complaints handling procedure in place the Privacy Commissioner will adjudicate;
 - e) the emphasis is intended to be on mediation or conciliation of complaints but where this is not possible the private adjudicator or the Privacy Commissioner will be required to make a determination on the complaint.
 - f) determinations may be reviewed under the *ADJR Act*;
 - g) determinations are not self executing but may be enforced by application to the FM Court or the Federal Court;
 - h) enforcement proceedings may be instituted by a complainant, the Commissioner or the private adjudicator;
 - i) proceedings are by way of hearing de novo but evidence received by the Commissioner or adjudicator is available to the Court, as well as their reasons;
 - j) the Commissioner or adjudicator can issue a certificate which is prima facie evidence of a breach of the relevant privacy code or National Privacy Principles;
 - k) if an interference with privacy is established the FM Court can make such orders as it sees fit, including a declaration of right or an injunction;
 - l) the old regime for the enforcement of determinations by the Commissioner of breaches of the old Information Privacy Principles by Commonwealth public sector agencies continues to apply, but with the FM Court having concurrent jurisdiction to enforce determinations made after the amendment of the Act.
71. Proceedings are by way of hearing de novo, but evidence received by the Privacy Commissioner or a private adjudicator, and their reasons, are available to the FM Court at hearing.

Unlawful discrimination (human rights)

72. The FM Court has jurisdiction to hear civil applications under Part IIB or IIC of the *Human Rights and Equal Opportunity Commission Act 1986* relating to complaints under the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*. The FM Court can determine a complaint which has been terminated by the President of the *Human Rights and Equal Opportunity Commission* where the President has given notice under sub-section 46PH(2) of the termination. This jurisdiction is conferred by section 46PE or 46PH of the *Human Rights and Equal Opportunity Commission Act 1986*. No monetary limits are placed on the FM Court in awarding relief in proceedings under the *HREOC Act*.
73. Under s.46PO(4) of the *HREOC Act* the Federal Magistrates Court can make:
- a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
 - b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
 - c) an order requiring a respondent to employ or re-employ an applicant;
 - d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
 - e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;
 - f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

74. In *Webb v Child Support Agency & Anor*¹²² a mobility impaired person who used a wheelchair was unsuccessful in a claim relating to access to premises in the Perth central business district. The FM Court found that the applicant had not been discriminated against with respect to accessible parking for the premises in that he had not been less favourably treated than a person without a disability in relation to access to the premises. The FM Court also held that he was not discriminated against in relation to access to the premises per se because there was appropriate disabled access to the premises. The applicant also failed to establish discrimination in relation to allegedly inappropriate evacuation procedures during a fire alarm, because there was no other means of evacuation other than his being carried down the fire stairs by the fire officers, and that means of evacuation was reasonable in all of the circumstances, and it was therefore also reasonable that the applicant wait in the well of the fire stairs and be evacuated down the fire stairs by fire officers.¹²³

Practice and Procedure

Generally

75. Section 43(1) of the *FM Act* expressly provides that the practice and procedure of the FM Court “is to be in accordance with [the *FMC Rules*] made under [the *FM Act*]...subject to any provision made by or under [the *FM Act*] or any other Act with respect to practice and procedure.” Insofar as the *FMC Rules* made under s.43(1) of the *FM Act* are insufficient, s.43(2) of the *FM Act* provides for the Rules of Court made under the *FL Act* or *FC Act* (as appropriate) to apply with necessary modifications so far as they are capable of application and subject to any direction of the FM Court.
76. The FM Court’s practice and procedure “includes all matters in relation to which Rules of Court may be made under” the *FM Act*.¹²⁴

¹²² [2007] FMCA 1678 (“*Webb*”).

¹²³ *Webb* at para. 29 per Lucev FM.

¹²⁴ *FM Act*, s.43(3).

77. Section 81 of the *FM Act* provides that the Federal Magistrates, or a majority of them, may make Rules of Court for or in relation to the practice and procedure to be followed in the FM Court, and all matters and things incidental to any such practice and procedure or necessary or convenient to be prescribed for the conduct of any business of the FM Court.¹²⁵
78. The *FMC Rules* may also prescribe matters required or permitted by another provision of the *FM Act*, or any other law of the Commonwealth, to be prescribed by the Rules of Court.¹²⁶
79. The *FMC Rules* have effect “subject to any provision made by another Act, or by rules or regulations under another Act, with respect to the practice and procedure in particular matters.”¹²⁷
80. Section 86 of the *FM Act* provides that the *FMC Rules* may make provision for or in relation to the cost of proceedings in the FM Court.¹²⁸
81. The *FMC Rules* may also prescribe matters “incidental” to matters required or permitted to be prescribed by the *FMC Rules* under any other provision of the *FM Act* or any other law of the Commonwealth.¹²⁹
82. It is intended that the practice and procedure of the FM Court be governed principally by the *FMC Rules*, and where they are insufficient or inappropriate that the *Federal Court Rules* or the *Family Law Rules 1984* may apply.¹³⁰

¹²⁵ *FM Act*, s.81(1)(a) and (b).

¹²⁶ *FM Act*, s.81(1)(c).

¹²⁷ *FM Act*, s.81(2).

¹²⁸ *FM Act*, s.86(b).

¹²⁹ *FM Act*, s.88.

¹³⁰ *FMC Rules*, r.1.05(1) & (2).

Applications and Responses

83. Ordinarily proceedings are commenced by an application supported by affidavit, and responded to by a response supported by affidavit.¹³¹
84. The application must precisely and briefly state the orders sought and the basis on which those orders are sought.¹³²
85. The response may:
- a) consent to an order sought by the applicant; or
 - b) ask the FM Court to make another order; or
 - c) ask the FM Court to dismiss the application; or
 - d) seek orders in a matter other than the matter set out in the application; or
 - e) make a cross-claim against the applicant, or another party, and must precisely and briefly state any orders sought and the basis on which those orders are sought.¹³³
86. If the response to an application or cross-claim seeks orders other than those set out in the application the applicant may file and serve a reply to the response.¹³⁴
87. A response must be filed within 14 days of service of the application to which it relates, so too a reply.¹³⁵
88. Essentially the same rules apply with respect to an application in a case (an interim or interlocutory application) with respect to the

¹³¹ *FMC Rules*, rr.4.01, 4.03 and 4.05.

¹³² *FMC Rules*, r.4.02.

¹³³ *FMC Rules*, r.4.04.

¹³⁴ *FMC Rules*, r.4.07(1).

¹³⁵ *FMC Rules*, rr.4.03(2) and 4.07(2).

application itself, with the application in a case usually heard on the basis of the affidavit without a response necessarily being filed.¹³⁶

89. Traditionally, the FM Court was not a court of pleadings.¹³⁷ The rules were however amended in 2007 to provide that no affidavit was required where a person commences an application by filing a statement of claim or points of claim, and if that occurs a respondent may file a defence or points of defence instead of an affidavit and may file a cross-claim.¹³⁸
90. In respect of some forms of proceedings there are special forms for applications, responses and the filing of certain documents:
- a) an approved form for both the application and response in human rights proceedings;¹³⁹
 - b) *ADJR Act* applications for an order of review must be made in accordance with Form 56 of the *Federal Court Rules*, and if the application includes an allegation of fraud or bad faith particulars must be provided.¹⁴⁰ Certain statements relating to the decision sought to be reviewed must be filed with the application, or as soon as possible afterwards.¹⁴¹ If a respondent objects to the competency of an application the objection and a brief statement of the grounds of objection must be included in the response;¹⁴²
 - c) specific provisions for application for a stay, notice of appeal, notice of cross-appeal and contention, directions and the

¹³⁶ *FMC Rules*, r.4.08.

¹³⁷ *Rana v University of South Australia* (2004) 136 FCR 344 at 355 per Lander J; [2004] FCA 559 at para. 75 per Lander J.

¹³⁸ *FMC Rules*, r.4.05(2) and (3).

¹³⁹ *FMC Rules*, rr.41.02A and 41.04, and note that a sealed copy of the application showing the date, time and place of the first court date and a copy of any other document filed must be given to the Human Rights and Equal Opportunity Commission at least 5 days before the date fixed for the first court date: *FMC Rules*, r.41.03.

¹⁴⁰ *FMC Rules*, r.42.02.

¹⁴¹ *FMC Rules*, r.42.03.

¹⁴² *FMC Rules*, r.42.04.

preparation of appeal papers for appeals from the AAT transferred to the FM Court from the Federal Court;¹⁴³

- d) applications for remedies to be granted in the exercise of the FM Court's jurisdiction under s.476 of the *Migration Act* must be in accordance with the approved form, and the grounds on which a respondent may oppose an application are set out in the *FMC Rules*.¹⁴⁴

First court date

- 91. Once an application has been filed and the time for filing of a response has passed the matter will be listed for a first court date.
- 92. It is the usual practice of the FM Court at the first court date to make all necessary orders to enable the matter to be listed for hearing, and to list the matter for hearing.
- 93. Attached as appendix A is a usual order made at a first court date for matters other than migration matters in the Perth Registry for a 2–3 day matter. Attached as appendix B is the usual order made at a first court date for migration matter in the Perth Registry.¹⁴⁵
- 94. The making of orders and listing of the matter through to hearing is the principle difference between the FM Court and the procedure adopted in other courts. Do not assume that because there is consent to more limited orders that the FM Court will not make orders different to or in addition to those consented to so that the matter is programmed through to a listed hearing.

Mediation

- 95. The FM Court is required to consider whether or not to advise the parties to proceedings before it about dispute resolution processes

¹⁴³ *FMC Rules*, r.43.01 – 43.06.

¹⁴⁴ *FMC Rules*, rr.44.05 and 44.06.

¹⁴⁵ At the time of writing a 2-3 day matter would be listed in about 4 months from the date of the first court date, and ½ -1 day matters within 3 months.

that could be used to resolve any matter in dispute.¹⁴⁶ Dispute resolution processes are widely defined (but so as to exclude dispute resolution from the judicial power of the Commonwealth), and include:

- a) counselling;
- b) mediation; and
- c) arbitration; and
- d) neutral evaluation; and
- e) case appraisal; and
- f) conciliation.¹⁴⁷

96. As a matter of practice almost all general federal law matters in the areas of trade practices and human rights are referred for mediation before a Registrar of the FM Court. Bankruptcy applications may be referred for conciliation.¹⁴⁸ Workplace relations matters may be referred for mediation, but if the claim has already been the subject of extensive conciliation or arbitration under relevant workplace relations legislation then mediation is sometimes not ordered.

Summary judgment

97. The FM Court may give summary judgment for one party against another in relation to the whole or any part of a proceeding if the FM Court is satisfied that there is no reasonable prospect of successfully defending or prosecuting the proceeding, or part of the proceeding.¹⁴⁹ The proceeding need not be hopeless or bound to fail for it to have no reasonable prospect of success.¹⁵⁰

¹⁴⁶ *FM Act*, s.22.

¹⁴⁷ *FM Act*, s.21.

¹⁴⁸ *FM Act*, s.26.

¹⁴⁹ *FM Act*, s.17A(1) and (2).

¹⁵⁰ *FM Act*, s.17A(3).

98. The FM Court dealt with the summary judgment provisions in *Balding (No.1)* where it said:

“In a summary judgment context similar provisions appear in s.17A(1)(b) and (2)(b) of the Federal Magistrates Act 1999 (“FM Act”) and s.31A(1)(b) and (2)(b) of the Federal Court of Australia Act 1976 (“FCA Act”).

The summary dismissal provisions in s.17A of the FM Act were specifically considered (and rule 13.10(a) of the FMC Rules also mentioned) in MG Distributions Pty Ltd & Ors v Khan & Anor (2006) 230 ALR 352; [2006] FMCA 666 (“MG Distribution”). In MG Distribution McInnis FM held that s.17A of the FM Act appears to lower the satisfaction threshold entitling this Court to dismiss a claim, but did not necessarily detract from well settled principles concerning summary dismissal. Thus, it was still appropriate to consider those principles in relation to the question of the no reasonable prospect of success test under s.17A of the FM Act, if there is a real question of fact or law to be determined upon which the rights of the parties depended. See MG Distribution, ALR at 360-361 and 361-262 per McInnis FM; FMCA at paras 37-39 and 42-44. The Court went on to observe that:

“summary dismissal ... remains a matter for careful consideration. There is a primary obligation on courts to permit parties to be heard even though there may appear to be strong arguments which have the potential to effectively defeat a claim or a defence.” ALR at 363 per McInnis FM; FMCA at para 45 per McInnis FM.

Similarly, and having regard to the nature of this Court, its rules (albeit preceding r.13.10(a) of the FMC Rules in its current form), functions and “philosophy”, Lander J has observed that this Court ought be cautious, and not summarily dismiss a claim unless the matter be “clear, beyond any doubt”: Rana v University of South Australia (2004) 136 FCR 344 at 355; [2004] FCA 559 at para 75 (“Rana”).

In Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd: (2006) 70 IPR 146; [2006] FCA 1352 (“Boston Commercial”) Rares J gave detailed consideration to the phrase “no reasonable prospect of successfully prosecuting

the proceeding” (in that case for the purposes of s. 31A of the FCA Act). Rares J noted that conceptually the test had “some similarity to the test at common law for determining whether a jury properly instructed could reach a verdict for the plaintiff.”: Boston Commercial IPR at 156 per Rares J; FCA at para 43 per Rares J. Reference was made to the decision of the Judicial Committee of the Privy Council: Hocking v Bell [(1947) 75 CLR 125 at 130-131 per Viscount Simon and Lords Porter, Uthwatt, De Parcq and Oaksey; approving of Latham CJ’s dissenting statement in the High Court in Hocking v Bell (1945) 71 CLR 430 at 441-42 per Latham CJ (“Hocking (HC)”)], where Latham CJ said:

“But there must be a real issue of fact to be decided, and if the evidence is all one way, so that only one conclusion can be said to be reasonable, there is no function left for the jury to perform, so that the court may properly take the matter into its own hands as being a matter of law.” Hocking (HC) at 441-442 per Latham CJ.

Rares J went on to say that in s.31A cases

“where there is a real issue of fact to be decided in the sense identified in the above principle, (that is by Latham CJ in Hocking HC at 441-442) and, possibly where there is a real issue of law of a similar kind, it is obviously appropriate that the matter goes to trial.”: Boston Commercial IPR at 157 per Rares J; FCA at para 44 per Rares J.

In Boston Commercial Rares J said that if there was, “contested evidence [which] might reasonably be believed one way or the other so as to enable one side or the other to succeed” then “the Court must be very cautious not to do a party an injustice by summarily dismissing”: IPR at 158 per Rares J, FCA at para 45 per Rares J. The purpose of the enactment was said by Rares J to be “to enable the Court to deal with matters which should not be litigated because there is no reasonable prospect of any outcome but one”: Boston Commercial IPR at 158 per Rares J; FCA at para 47 per Rares J. Thus the discretion to summarily dispose of the proceedings was not enlivened “[u]nless only one conclusion can be said to be reasonable”: Boston Commercial IPR at 157 per Rares J; FCA at para 45 per Rares J.

In Boston Commercial Rares J also discussed a court's ultimate aim as being the attainment of justice: Boston Commercial IPR at 158 per Rares J; FCA at para 46 per Rares J; citing Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146 at 154 per Dawson, Gaudron and McHugh JJ, and "a key feature of the judicial power under Ch III of the Constitution" being that "the Court be in a position to, and in fact does, quell a controversy": Boston Commercial IPR at 158 per Rares J; FCA at para 47 per Rares J.

The summary dismissal of proceedings power might defeat, not advance, the attainment of justice, if used to prevent the substantive agitation of a controversy in which each side has a reasonable prospect of success: Boston Commercial IPR at 158 per Rares J; FCA at para 47 per Rares J.

In Australian and International Pilots Association v Qantas Airways [2006] FCA 1441 ("Pilots Association") Tracey J in the Federal Court considered Boston Commercial, and summarised Rares J's conclusion as being that section 31A of the FC Act had lowered the barrier somewhat but that: "it nonetheless constituted a difficult obstacle for a respondent to surmount": Pilots Association at para 23 per Tracey J. Tracey J specifically agreed with the principles set out by Rares J in Boston Commercial, and determined to act consistently with those principles in the application of section 31A: Pilots Association at para 23 per Tracey J.

In Pilots Association Tracey J found that the applicant had no reasonable prospect of success and indicated that ordinarily that would justify the dismissal of the proceedings: Pilots Association at para 34 per Tracey J. However, because it was the first time the pleadings had been "subjected to curial scrutiny" Tracey J determined that the "preferable course" was to strike out the further amended Statement of Claim, and grant leave to file a further amended Statement of Claim: Pilots Association at para 34 per Tracey J. Whilst neither the reasons for judgment nor the order make it plain it seems that those orders must have been made under O.11r16 of the Federal Court Rules which Tracey J had adverted to when considering section 31A: Pilots Association at paras 23 and 34 per Tracey J.

In the Federal Court in Commonwealth Bank of Australia v ACN 000 247 601 Pty Limited (In Liq) (formerly Stanley

Thompson Valuers Pty Limited) [2006] FCA 1416 Jacobson J said at para 30:

“The authorities relating to the proper construction and effect of s.31A of the Federal Court of Australia Act were exhaustively reviewed by Rares J in Boston Commercial Services Pty Ltd v GE Capital Finance Australia Pty Ltd [2006] FCA 1352 at [31]-[48]. His Honour stated the relevant principles at [45] and they may be summarised as follows:

In assessing whether there are reasonable prospects of success, the Court must be cautious not to do an injustice by summary dismissal.

There will be reasonable prospects of success if there is evidence which may be reasonably believed so as to enable the party against whom summary judgment is sought to succeed at the final hearing.

Evidence of an ambivalent character will usually be sufficient to amount to reasonable prospects.

Unless only one conclusion can be said to be reasonable, the discretion under s.31A cannot be enlivened.”

In Duncan v Lipscombe Child Care Services Inc (2006) 150 IR 471; [2006] FCA 458 (“Duncan”) Heerey J in the Federal Court said:

“a fundamental change to the standard to be applied in strikeout applications has been introduced by s. 31A [of the FCA Act]”: Duncan IR at 473 per Heerey J; FCA at para 5 per Heerey J.

Heerey J went on to say:

“Plainly s 31A was introduced to establish a lower standard for strikeouts (either of claims or defences) than that previously laid down by the High Court’s decision in Dey v Victorian Railways Commissioners (1949 78 CLR 62 and General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 at 130, namely that the allegations are “so clearly untenable that [they] cannot possibly succeed””: Duncan IR at 473 per Heerey J; FCA at para 6 per Heerey J.

Heerey J went on to speak of the “former strikeout standard” and to describe s.31A of the FCA Act as “a clear, and different command” in the course of ordering that various paragraphs of the statement of claim be struck out.

In the Federal Court in Fortron Automotive Treatments Pty Ltd v Jones (No. 2) [2006] FCA 1401 (“Fortron (No. 2)”) French J respectfully disagreed with the approach to s.31A of the FCA Act adopted by Heery J in Duncan. In Fortron (No. 2) at para 21 French J said:

“Section 31A is not a vehicle for simply striking out parts of pleadings that are deficient. Sections 31A allows for “judgment” or nothing. Alternative remedies with respect to deficient pleadings must be found in the rules of the Court.”

*This Court respectfully agrees with the views of French J cited above, and adopts them as applicable to summary dismissal applications under r.13.10(a) of the FMC Rules. This judgment or nothing approach must of course be appropriately exercised having regard to the principles established in Boston Commercial Services, and in the manner prescribed in MG Distribution and Rana.”*¹⁵¹

Discovery

99. Discovery is not allowed in relation to proceedings in the FM Court unless the FM Court declares that it is appropriate, in the interests of the administration of justice, to allow discovery.¹⁵²
100. In deciding whether to make a declaration the FM Court must have regard to whether discovery would be likely to contribute to the fair and expeditious conduct of the proceedings and such other matters as the FM Court considers relevant.¹⁵³

¹⁵¹ *Balding (No.1)* IR at 24-26 per Lucev FM; FMCA at paras. 17-32 per Lucev FM.

¹⁵² *FM Act*, s.45(1).

¹⁵³ *FM Act*, s.45(2).

101. The meaning of “the interests of the administration of justice” is dealt with above.¹⁵⁴
102. In relation to discovery the FM Court has summarised the position as follows:

“In summary, it appears that in order to obtain an order for discovery in this Court the Court must determine on the available evidence that it is in the interests of the administration of justice to do so, and in making that determination must have regard to whether allowing discovery would be likely to contribute to the fair and expeditious conduct of the proceedings, and such other matters as the Court considers relevant. Those other matters might include:

- (a) the relevance of any documents sought to be discovered;¹⁵⁵*
- (b) the volume of documents sought to be discovered;¹⁵⁶*
- (c) whether there is a court book containing relevant documents, and the extent to which relevant documents are included in the court book;¹⁵⁷*
- (d) whether discovery would narrow the issues;¹⁵⁸*
- (e) whether both parties seek discovery;¹⁵⁹*
- (f) whether there is consent to discovery;¹⁶⁰*
- (g) whether discovery is “of benefit” in the litigation;¹⁶¹ and*
- (h) the effect of discovery on litigants, especially, vulnerable litigants¹⁶²”,*

*in Abrahams v Qantas Airways Ltd (No 2).*¹⁶³

¹⁵⁴ See para. 18 above; *FM Act*, s.45.

¹⁵⁵ *Tran* at para 13 per McInnis FM; *Taylor* at paras 8-9 per McInnis FM.

¹⁵⁶ *Tran* at paras 3 and 8 per McInnis FM.

¹⁵⁷ *NAQR* at para 15 per Driver FM.

¹⁵⁸ *Ingui* (No.2) at para 15 per Brown FM.

¹⁵⁹ *Ingui* (No.2) at para 15 per Brown FM.

¹⁶⁰ *Ingui* (No.2) at para 15 per Brown FM.

¹⁶¹ *SZBHT* at para 47 per Scarlett FM.

¹⁶² *Lee* at paras 11-12 per Coker FM

103. Whether discovery might be circumvented by a subpoena is discussed below.¹⁶⁴

Interrogatories

104. The same principles that apply to discovery apply to interrogatories.¹⁶⁵

Particulars

105. The *FMC Rules* make provision for particulars.¹⁶⁶ They are however rarely ordered. In *Olsen v Wellard Feeds Pty Ltd*¹⁶⁷ the Court observed as follows:

“It is in that context that the power to order particulars in rule 10.01(3)(m) of the FMC Rules is required to be exercised and considered. Ordinarily, in this Court, proceedings are commenced, as they were here, by application supported by affidavit, and no more, and in that regard the affidavits provide the particulars and the evidence.

In this case a statement of claim and a defence were ordered, but it is nevertheless the case that the matter requires to be considered against the background of the statement of claim and defence and the initiating process and such affidavits as have been filed.

*Determining the necessity for particulars by having regard to the totality of the pleadings and the evidence that has already been filed, is a proper course to adopt. It is not inconsistent with modern principles of case management.*¹⁶⁸

¹⁶³ [2007] 210 FLR 314 at 321 per Lucev FM; [2007] FMCA 639 at para. 25 per Lucev FM (the footnotes to the above quote are the footnotes in the original Judgment).

¹⁶⁴ See para. 111 below.

¹⁶⁵ *FM Act*, s.45(1).

¹⁶⁶ *FMC Rules*, r.10.01(3)(m).

¹⁶⁷ [2007] FMCA 1885 (“*Wellard-Particulars*”).

¹⁶⁸ See for example, *Bailey & Ors v Beagle Management Pty Ltd & Ors* (2001) 182 ALR 264 at 272 per Heerey, Branson and Merkel JJ; [2001] FCA 60 at para 34 per Heerey, Branson and Merkel JJ: “modern techniques of case management suggest a more pragmatic and flexible approach than the structured, rule-laden regime proposed by the applicants.”: *Woodroffe & Anor v National Crime Authority & Ors* (1999) 168 ALR 585 at 590-591 per Drummond, Sundberg and Marshall JJ; [1999] FCA 1689 at para 23 per Drummond, Sundberg and Marshall JJ.

There is provision in the rules for particulars, as there is, for example, for discovery and interrogatories. Unlike the latter two, particulars orders do not require the Court to make a declaration that it is in the interest of the administration of justice to do so.¹⁶⁹ Nevertheless, particulars are very rarely ordered and probably more rarely than discovery and interrogatories which require the declaration. It is fair to say that generally it is only in the most complex cases before this Court that particulars are ordered.

This is not a complex case, as Mr Jackson for the Applicant-Respondent properly conceded. It is, as the Court observed in the course of argument, a case which is at the simple end of the simple-complex spectrum of cases which come before this Court. Substantially, the case involves a simple issue as to whether the Applicant was or was not paid unused accrued sick leave.”¹⁷⁰

106. Having determined that it was not appropriate to order particulars the FM Court observed that:

“The Court notes that the time and effort of the parties, the cost that the parties have clearly incurred, and the Court resources that have been expended in the determination of this issue, are completely disproportionate to any benefit which might be gained by either the parties or the Court. This is a classic but small example – or example on a small scale – of the sort of litigious and procedural one-upmanship which this Court was set up to, and should avoid, and which has been much criticised, particularly in recent times, both judicially and extra-judicially, by various courts and judges.”¹⁷¹

107. In *Verge & Anor v Devere Holdings Pty Ltd & Ors*¹⁷² the FM Court considered an application for particulars in a case under the *Bankruptcy Act* alleging transfer of land by debtors at an undervalue. Because s.120(1) of the *Bankruptcy Act* required that “the Court is required to assess the value of the consideration”, and because

¹⁶⁹ *FM Act*, s.45(1).

¹⁷⁰ *Wellard-Particulars* at paras. 5-9 per Lucev FM (the footnotes to the quote are the footnotes in the Judgment).

¹⁷¹ *Wellard-Particulars* at para. 17 per Lucev FM.

¹⁷² [2008] FMCA 591 (“*Verge*”).

actions in bankruptcy are not necessarily strictly inter partes, but often actions for the benefit of creditors as a whole, and in that regard actions with an element of public and community benefit and interest, it was those considerations which set the legislative context against which the application for particulars had to be assessed.¹⁷³ Regard was also had, in a case management context, to the fact that the proceedings were in respect of “a relatively complex” matter.¹⁷⁴ The FM Court found that particulars were required “because it is of the essence of this section of the *Bankruptcy Act* for the Court to be put in a position to assess the value of the transaction.”¹⁷⁵

Evidence

108. Division 15 of the *FMC Rules* deals with evidence. It sets out rules relating to:
- a) the FM Court’s power to give directions concerning the order of evidence and addresses, and the general conduct of the hearing;¹⁷⁶
 - b) with the consent of the parties, the making of a decision without an oral hearing;¹⁷⁷
 - c) the power of the FM Court to call a witness of its own motion;¹⁷⁸
 - d) hearsay evidence, and the giving of notices of previous representation;¹⁷⁹
 - e) the receipt of transcript as evidence.¹⁸⁰
109. Division 15 also deals with expert evidence,¹⁸¹ subpoenas and notices to produce,¹⁸² affidavits¹⁸³ and admissions.¹⁸⁴

¹⁷³ *Verge* at paras. 15-16 per Lucev FM.

¹⁷⁴ *Verge* at para. 17 per Lucev FM.

¹⁷⁵ *Verge* at para. 24 per Lucev FM.

¹⁷⁶ *FMC Rules*, r.15.01.

¹⁷⁷ *FMC Rules*, r.15.03.

¹⁷⁸ *FMC Rules*, r.15.04.

¹⁷⁹ *FMC Rules*, r.15.05 and *Evidence Act, 1995* (Cth), s.67(1).

¹⁸⁰ *FMC Rules*, r.15.06.

110. In *Balding v Ten Talents Pty Ltd (No.2)*¹⁸⁵ the Court dealt with an application to set aside part of a subpoena on the grounds of relevance. The substantive application was an application alleging duress in relation to AWAs for the purposes of s.400(5) of the *WR Act*. In that context, the FM Court said as follows:

“Section 55 of the Evidence Act 1995 (Cth) (“the Evidence Act”) deals with relevant evidence, and provides as follows:

- “(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.*
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to:*
- (a) the credibility of a witness; or*
 - (b) the admissibility of other evidence; or*
 - (c) a failure to adduce evidence.”*

If evidence is not relevant, it is not admissible in a proceeding: Evidence Act s.56(2). Relevant evidence is admissible, except as otherwise provided by the Evidence Act: Evidence Act, s.56(1).

It has been said that, “one fact is relevant to another if it bears on the probability that another fact, the one to be proved, does or does not exist”: Roberts, Evidence. Proof and Practice (Sydney: Law Book Company, 1998). A broad interpretation of relevance is dictated by the words used in s. 55(1) of the Evidence Act. It includes evidence which “could ... indirectly” affect an assessment of probability, provided that there is a rational connection between the evidence and facts in issue: Odgers, Uniform Evidence Law (7th ed) (Sydney: Law Book Company, 2006) pp 168-170. Whether a rational connection exists requires an objective assessment, having regard to basic

¹⁸¹ *FMC Rules*, r.15.06A-15.12.

¹⁸² *FMC Rules*, r.15.13A-15.24.

¹⁸³ *FMC Rules*, r.15.25-15.29A.

¹⁸⁴ *FMC Rules*, r.15.30-15.31.

¹⁸⁵ (2007) 160 IR 115; [2007] FMCA 161.

human experience: Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No.7) [2003] FCA 893 at para 11 per Lindgren J, or “the common course of events” or “common course of human affairs” as it was put respectively by Stephen and Dixon J: see Stephen, Digest to the Law of Evidence (4th ed) (MacMillan & Co: London, 1893) p.2 and Martin v Osborne (1936) 55 CLR 367 at 375 per Dixon J.

Ultimately therefore evidence will be relevant for the purposes of the proceedings in this matter when, if accepted, it could directly or indirectly rationally affect the assessment of the probability of the existence of duress, or the application of duress, for the purposes of section 400(5) of the WR Act. Evidence might also be relevant if it were accepted and could directly or indirectly rationally affect the assessment of the probability of the existence of the “involvement” of the Second Respondent in a contravention of s.400(5) of the WR Act, see s.728(1) of the WR Act.”¹⁸⁶

111. In *Balding (No.2)* the FM Court also addressed the issue of subpoenas circumventing discovery. In that case the Court did not consider the subpoena the equivalent of an application for discovery, and for that reason the application failed.¹⁸⁷ The Court went on to indicate that traditional rules with respect to the setting aside of subpoenas to circumvent discovery might however have little application in the context of the particular provisions of the *FM Act* and *FMC Rules* aiming to help the Court use streamlined processes and to avoid undue delay, expense and technicality, and where there was a subpoena for production specifically provided for, and where discovery was very much the exception.¹⁸⁸

Change of venue

112. Rule 8.01 deals with change of venue and provides for an application to be made to have the proceeding heard in another registry of the FM Court. In considering such an application the FM Court must have regard to:

¹⁸⁶ *Balding (No.2)* IR at 117-118 per Lucev FM; FMCA at paras. 13-16 per Lucev FM.

¹⁸⁷ *Balding (No.2)* IR at 120 per Lucev FM; FMCA at para. 26 per Lucev FM.

¹⁸⁸ *Balding (No.2)* IR at 120-121 per Lucev FM; FMCA at para. 27 per Lucev FM.

- a) the convenience of the parties;
 - b) the limiting of expense and the cost of the proceeding; and
 - c) whether the matter has been listed for final hearing; and
 - d) any other relevant matter.
113. *Sherwood Overseas Co Pty Ltd v Jaymac International Pty Ltd*¹⁸⁹ is a recent example of a case where this Court reviewed the relevant authorities, both in the Federal Court and this Court, applied the relevant considerations set out in r.8.02 of the *FMC Rules*, and refused an application for change of venue from the Western Australian Registry to the Queensland Registry of the FM Court.

Rules – compliance with and waiver of

114. The FM Court has the power to dispense with compliance with the *FMC Rules*, either in whole or in part, at any time.¹⁹⁰ If the FM Court gives a direction or makes an order inconsistent with its rules, the direction or order of the FM Court prevails in that proceeding.¹⁹¹
115. It has been suggested that dispensing with compliance with the *FMC Rules* is a power which might only be exercised in exceptional circumstances.¹⁹² That may place the test too high, because the test prescribed by the relevant rule itself is “in the interests of justice”.¹⁹³

Costs

116. The FM Court operates on a prescribed events based costs schedule, with certain exceptions.
117. Schedule 1 of the *FMC Rules* set out the FM Court’s events based cost schedule. Costs are determined on the basis of the events which have occurred (for example, first court date, interim or summary

¹⁸⁹ [2008] FMCA 495.

¹⁹⁰ *FMC Rules*, r.1.06(1).

¹⁹¹ *FMC Rules*, r.1.06(2).

¹⁹² *M174 of 2003 v Minister for Immigration & Anor* [2007] FMCA 45 at para. 41 per McInnis FM.

¹⁹³ And as to the interests of justice see above at para. 18.

hearings as discrete events, preparation for final hearing, and final hearing and hearing fees). The FM Court may certify for advocates, in which case the relevant daily hearing fee is increased by an advocacy loading of 50%. Thus, it ought to be possible for a practitioner on a summary judgment application or attending for final judgment to have calculated the costs under the schedule exactly. There is still a discretion in the FM Court to vary those costs, and the FM Court can fix costs in an amount other than those provided by Schedule 1.¹⁹⁴

118. In migration matters the *FMC Rules* prescribe an amount of \$5,000.00 for costs at a final hearing, \$2,500.00 if the proceeding is concluded at an interlocutory hearing and \$1,000.00 if concluded at or before the first court date.¹⁹⁵ The FM Court does however have discretion to increase the so called “fixed cost” amount of costs for migration, both up and down.¹⁹⁶
119. In bankruptcy matters the usual order for costs is for an order for costs which, unless agreed, are to be assessed by a Registrar of the FM Court under O.62 of the *Federal Court Rules*.¹⁹⁷

Adjournment

120. The FM Court is loath to order adjournments, and if it does order an adjournment it will be to a fixed date, and not sine die, other than in the most exceptional circumstances as it is contrary to the objects of the *FM Act* in s.3 and the *FMC Rules* in r.1.03.¹⁹⁸

Representation

121. Section 44 of the *FM Act* provides that a party to a proceeding before the FM Court is not entitled to be represented by another person unless under the *Judiciary Act, 1903* (Cth) that person is entitled to

¹⁹⁴ *FMC Rules*, r.21.02(a).

¹⁹⁵ *FMC Rules*, Schedule 1, Part 2 Clause 1.

¹⁹⁶ *Bunnag v Minister for Immigration & Anor* (No. 2) [2008] FMCA 430.

¹⁹⁷ Although increasingly there appears to be a tendency to simply award costs under Schedule 1 of the *FMC Rules*.

¹⁹⁸ *Simonsen v Official Trustee in Bankruptcy* [2008] FMCA 617 at para. 7 per Lucev FM.

practice as a barrister or solicitor or both, in a federal court, or under regulations the person is taken to be an authorised representative, or another law of the Commonwealth authorises the other person to represent the party (as, for example, the *WR Act* does).¹⁹⁹

122. Corporations must not start or carry on proceedings otherwise than by a lawyer, except as provided by or under any other Act or regulations made under an Act, or by leave of the Court.²⁰⁰

Video and telephone hearings

123. The *FM Act* makes extensive provision for the use of video or audio links for the giving of testimony and appearance and making of submissions by parties, but subject to certain conditions, including orders as to the expenses related to the use of video or audio links.²⁰¹
124. Section 69 of the *FM Act* sets out conditions related to the quality and availability of video and audio links. In the Perth Registry of the FM Court this is not an issue as the court rooms used by the FM Court are fully equipped for video and audio links suitable to conducting directions hearing, interlocutory hearings and final hearings.
125. In the context of a witness giving evidence from Los Angeles *Goodall (No. 1)*²⁰² gives detailed consideration to the relevant factors and has been described as a case “which provides detailed guidance for any litigant and legal advisors in relation to the matter of video link evidence in the FM Court.”²⁰³

Appeals

126. Appeals from judgments of the FM Court exercising original jurisdiction under a law of the Commonwealth other than:

¹⁹⁹ *WR Act*, ss.684 and 854(10)(b).

²⁰⁰ *FMC Rules*, r.9.04.

²⁰¹ *FM Act*, ss.66-72.

²⁰² [2007] FMCA 218.

²⁰³ *Federal Magistrates Court Guide Book* at para 2.1550.

- a) the *Family Law Act*;
- b) the *Child Support (Assessment) Act 1989*;
- c) the *Child Support (Registration and Collection) Act 1988*; and
- d) regulations under an Act referred to in sub-paragraphs (a)–(c) above,

are heard by the Federal Court.²⁰⁴

127. An appeal may not be brought to the Full Court of the Federal Court from a judgment of the Federal Court constituted by a single judge exercising the appellate jurisdiction of the Court in relation to an appeal from the Federal Magistrates Court.²⁰⁵
128. The appellate jurisdiction of the Federal Court is to be exercised by the Full Court of the Federal Court,²⁰⁶ except:
- a) where the Chief Justice of the Federal Court considers it appropriate to be exercised by a single Judge;²⁰⁷ and
 - b) in migration matters, where the appeal is heard by a single Judge, except where the single Judge considers it to be appropriate to be exercised by the Full Court.²⁰⁸

Cross-vesting applications

129. The FM Court does not have power under the cross-vesting legislation to transfer matters to a State court. If it is sought to transfer matters from the FM Court to a State court the proceedings must first be transferred to the Federal Court which can then, under

²⁰⁴ *FC Act*, s.24(1).

²⁰⁵ *FC Act*, s.24(1AAA). Compare this express exclusion under s.24(1AAA) with *CFMEU v Clarke* (2007) 156 FCR 291; [2007] FCAFC 8 where it was held that the Full Court of the Federal Court had express statutory jurisdiction to hear an appeal from a judgment of a single judge of the Federal Court exercising the Federal Court's appellate jurisdiction on appeal from a State court of summary jurisdiction. Also reported at (2007) 159 IR 450.

²⁰⁶ *FC Act*, s.25(1A).

²⁰⁷ *FC Act*, s.25(1A).

²⁰⁸ *FC Act*, s.25(1AA).

the cross-vesting legislation, transfer the proceedings to a State court.²⁰⁹

²⁰⁹ *CBFC Limited v Skea* [2004] FMCA 377 at para. 4 per McInnis FM; *Yao v Zhang & Anor* [2007] FMCA 1340 at paras. 16-17 per Wilson FM.

APPENDIX

**IN THE FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT PERTH**

FILE NO: (P)PEG OF

APPLICANT

RESPONDENT

ORDER

BEFORE: FEDERAL MAGISTRATE LUCEV

DATE:

MADE AT: PERTH

THE COURT ORDERS THAT:

1. The Respondent file and serve a defence by 4pm on 9 June.
2. The matter be referred to mediation before a Registrar of this Court before 30 June.
3. If mediation is unsuccessful the Applicant to file and serve any further affidavits in support of the application by 4pm on 11 July.
4. The Respondent file and serve any affidavits in support of its defence by 4pm on 25 July.
5. The Applicant file and serve any affidavit in reply by 4pm on 8 August.
6. The Applicant and Respondent to file and serve a list of objections to affidavits by 4pm on 22 August.
7. The Applicant and Respondent to advise each other of any witnesses required to attend at the hearing for cross-examination by 4pm on 29 August.
8. The hearing of the matter be on affidavit except by leave of the Court.
9. The matter be listed for 2 days on 23 and 24 September. at 10.15am.
10. Liberty to apply on 3 days notice.
11. Costs reserved.

FEDERAL MAGISTRATE LUCEV

DATE ENTERED:

APPENDIX B

**IN THE FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT PERTH**

FILE NO: (P)PEG /
Applicant

MINISTER FOR IMMIGRATION &
MULTICULTURAL & INDIGENOUS AFFAIRS
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

ORDER

BEFORE:

DATE:

MADE AT: PERTH

THE COURT ORDERS THAT:

1. The First Respondent shall file two copies and serve one copy of the Court Book on the Applicant on or before 19 April.
2. The Applicant shall file and serve on or before 10 May:
 - 2.1 an amended application for an order to review with proper particulars of the grounds relied upon; and
 - 2.2 any further affidavits upon which he intends to rely at the hearing of this matter.
3. The Applicant shall file and serve written submissions not less than fourteen days before the hearing date.
4. The Respondents shall file and serve written submissions not less than seven days before the hearing.
5. The application be listed for hearing at 10.15am on 27 June.
6. There be liberty to apply.
7. Costs in the cause.

Registrar

Date the entry is stamped:

Note

Subsection 104(2) of the Act provides that a party to proceedings in which a Registrar has exercised any of the powers of the Court under subsection 102 (2), or under a delegation under subsection 103 (1), of the Act may, within the time prescribed by the Rules of Court, or within any further time allowed in accordance with the Rules of Court, apply to the Court to review that exercise of power.

Rule 2.03 provides that, subject to any direction by the Court or a Federal Magistrate to the contrary, an application under subsection 104 (2) of the Act for review of the exercise of a power of the Court by a Registrar under subsection 102 (2), or under a delegation under subsection 103 (1), of the Act must be made by application for review within 21 days after the day on which the power was exercised. An applicant seeking a review can apply to a Federal Magistrate to waive the requirement that the application for review under subsection 104 (2) of the Act for review be made by application for review (see subrule 1.06 (1) of the *Federal Magistrates Court Rules 2001*).