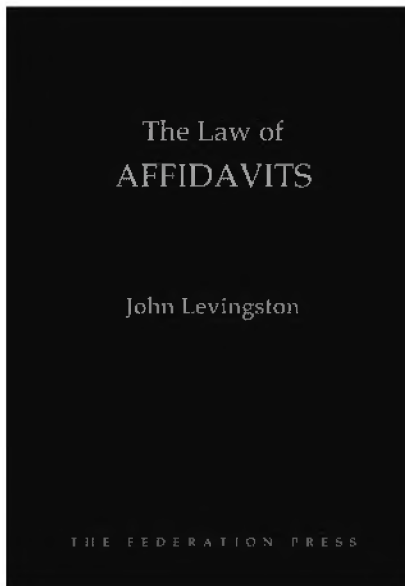


The Law of Affidavits

By John Levingston | The Federation Press | 2013



The Law of Affidavits states that its object is to 'draw together the sources of the law of affidavits and to identify the many elements which together should result in an affidavit of an acceptable standard, and assist the inexperienced practitioner in reaching an appropriate standard'.¹

The poorly prepared affidavit is an all too common phenomenon and the aim of improving standards is admirable. However, it is an ambitious task for a book, considering that it is often a lack of care and adequate preparation, rather than a lack of knowledge or experience, that causes the most egregious problems with affidavits. A practitioner sufficiently assiduous to consult

The poorly prepared affidavit is an all too common phenomenon and the aim of improving standards is admirable.

a book on the law of affidavits is unlikely to be among the worst culprits when it comes to these abuses.

The challenge of raising standards is heightened by the ease with which one can set out the principles of good affidavit drafting, which stands in stark contrast to the difficulty of putting those principles in practice. It is straightforward to advise practitioners to avoid problems such as a story that is 'too long and complicated' or prose that is 'obscure and obtuse'.² However, even the most experienced practitioner will find themselves falling foul of such rules, albeit unintentionally.

Nonetheless, the book goes some way to pulling together the various tips, advice, rules and principles that provide a framework for drafting a good affidavit.

The book has three parts. The first part is an eclectic discourse on the history, law and practice of affidavits, covering everything from the earliest uses of affidavits (some 800 years ago) to whether a requirement in the rules for clear, sharp and legible contents implies a font of not less than 12-point. The topics range from the basics (Chapter 2, What is an affidavit?) and a range of practicalities (use, form, oaths),

Of the three sections, the second is basic but comprehensive and is by far the most useful aspect of the book.

to the treatment of an affidavit in court (cross examination, objections). Those topics are dealt with at varying levels of detail – to illustrate, the chapters range from half a page in length (Chapter 23, False statements and contempt) to some fourteen pages setting out how an affidavit is used (Chapter 6, Use of an affidavit).

The second part is entitled 'Jurisdiction Summaries'. It sets out the rules, and detailed requirements, that apply in each of the High Court, Federal Court, Federal Circuit Court, each of the state supreme courts and New Zealand.

The third part consists of precedents, listed in alphabetical order, starting with 'Abbreviations' ('In this affidavit I will refer to [long form] as [abbreviation].') and ending with 'Statement of truth' ('I believe that the facts stated in this witness statement are true'.) As is evident from those two examples, not all of the examples are 'precedents' per se but rather provide illustrative examples of language or phrasing to use in particular contexts.

Unfortunately, the tome does not have an index. While the book is sufficiently short to flick through

quickly, a short index would have made the book significantly more usable for a practitioner, who may wish to look specifically for topics of concern (for instance dealing with bankruptcy rules or interlocutory matters).

Of the three sections, the second is basic but comprehensive and is by far the most useful aspect of the book. It sets out in comprehensive lists all of the relevant sources of rules in each of the different states, the Commonwealth and New Zealand. It also sets out the detailed requirements for form, style, content etc. Thus, a practitioner drafting an urgent affidavit in a new or different jurisdiction can look quickly at this part to determine details ranging from the correct spacing or font to whether amendments or alterations are permitted (for instance, in South Australia, alterations are not permitted after the affidavit is certified,³ whereas in Queensland an alteration is permitted where the witness initials it.⁴) It may be that this section is, on its own, of sufficient practical value to justify its acquisition, at least for the interstate practitioner.

In contrast, the precedents in the third section are of limited usefulness. Some of the precedents are extremely basic (for instance, a 'footer' precedent advises that the words 'Deponent:

.....' and 'Witness:

can be added to the foot of each page of the affidavit by using a word processing program).⁵ Other precedents are so specific as to be of no or very limited utility (for instance, a precedent setting out the words that can be used to verify a photograph taken by a photographer).⁶ Affidavits for default judgment and security for costs are generally helpful in setting out the basic information that should be present in such documents, and may serve as useful reference points for the sole practitioner or small firm that does not have ready access to more sophisticated precedents.

However, the first part of the book suffers from a number of difficulties, not the least of which is the disjunct discussed above between, on the one hand, a focus on rules and, on the other, the very practical problems that plague the affidavit drafter (or reader). Little thought appears to have been given to the actual audience – thus, for instance, the book explains to the reader that there are 'two types of pleading'⁷ and that '[k]nowledge of the relevant law includes the law and cases concerning the cause of action, issues in dispute, and general common law rules...'⁸ Neither gives any insight into the actual challenges of drafting affidavits – the former because it is too basic,

The book is not an essential text, and suffers from the very practical nature of the subject matter.

and the latter because it is too high level. Of course, one must know the substantive and procedural rules. Yet knowing that does not bring a practitioner a step closer to applying that substance or procedure correctly.

The book is not an essential text, and suffers from the very practical nature of the subject matter. However, there are aspects of this book – particularly the second section – that are educative or useful for a ready point of reference.

Reviewed by Natalie Zerial

Endnotes

1. Levingston, J., *The Law of Affidavits* (Sydney, The Federation Press, 2013), p.2.
2. *Ibid.*, p.28.
3. *Ibid.*, p.240.
4. *Ibid.*, p.233.
5. *Ibid.*, p.289.
6. *Ibid.*, p.299.
7. *Ibid.*, p.10.
8. *Ibid.*, p.69.