

Key points - *leading up to, during, and after* - litigation

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Overview

- ▶ *Before the battle begins:*
 - ▶ Pleadings
 - ▶ Affidavits
- ▶ *As the battle progresses:*
 - ▶ Important evidentiary rules
 - ▶ Procedural considerations
- ▶ *Once the battle has ended:*
 - ▶ Costs implications
 - ▶ Debrief to consider the issues

Before the battle begins: Pleadings

▶ Pleadings

- ▶ Set out in summary form the material facts relied on for claims or defence, but not the evidence by which facts are to be proven
- ▶ Primary purpose is to define the issues
- ▶ It has important implications for the hearing
- ▶ Use headings, sub-headings, sections to present allegations and responses clearly
- ▶ Distinction between particulars and pleadings
- ▶ Note Rule 16.07 of the Fed Court Rules

(Banque v Commerciale SA v Akhil Holdings Ltd (1990) 169 CLR 279, Mason CJ and Guadron J at [286])

Before the battle begins: Affidavits

- ▶ Witness statements similar to affidavits except:
 - ▶ Contents not sworn or affirmed
 - ▶ Statement tendered whereas affidavit is read
- ▶ Important to consider evidence with reference to issues defined in pleadings - what evidence is required?
- ▶ Consider rules of evidence in drafting affidavits
- ▶ For expert affidavits - *Makita (Australia) Pty Limited v Sprowles* (2001) 52 NSWLR 705. The affidavit must comply with applicable Code of Conduct
- ▶ Use headings, chronological order etc
- ▶ Use witness's vocabulary and verbatim recollection on discussions, especially on contested matters

As the battle progresses: Important evidentiary rules

- ▶ *Jones v Dunkel* inferences
 - ▶ Unexplained failure by a party to call a witness may support an inference that the uncalled evidence **would not have assisted** the party's case
 - ▶ Does not create any admission; does not permit inference that the untested evidence would in fact have been damaging (*Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [64])
 - ▶ Only applies as regards a non-party witness where the party would be reasonably expected to call the witness

As the battle progresses: Important evidentiary rules

- ▶ Rule in *Browne v Dunn*
 - ▶ A cross examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction
 - ▶ A party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit (*MWJ v R* (2005) 80 ALJR 329 [18])
 - ▶ Being put on notice may come from pleadings, a pre-trial document, evidence, opening submissions, the general manner in which the case is conducted

As the battle progresses: Important evidentiary rules

- ▶ The *Briginshaw* Principle
 - ▶ Gloss on the standard of proof in civil proceedings ie BOP, where the strength of the evidence necessary to establish a fact in issue will vary according to the seriousness and consequences of allegations. Where serious allegations are involved, the tribunal must be reasonably satisfied that the allegation is made out. *Inexact proofs, indefinite testimony, or indirect inferences are not sufficient*
 - ▶ *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336
 - ▶ Note s.140 of the *Evidence Act*

As the battle progresses: Important evidentiary rules

- ▶ Other provisions/principles to note (*Evidence Act*):
 - ▶ s.50 - Proof of voluminous or complex documents
 - ▶ s.59 - Exclusion of hearsay evidence
 - ▶ s.77 - Exclusion of opinion evidence
 - ▶ s.79 - Exception of expert evidence
 - ▶ Part 3.10 - Client legal privilege
- ▶ Applications for injunctive relief
 - ▶ s.75 - In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source
 - ▶ But note full duty of candour to court in *ex parte* applications

As the battle progresses: Fair Work matters

- ▶ *Fair Work Act:*
 - ▶ ss.360 - 361 - Reverse onus of proof
 - ▶ s.591 - FWC not bound by rules of evidence
- ▶ But rules of evidence applied as a general practice:
 - ▶ ... Nor can there be any doubt that members of that Commission under the Act are bound to act in a judicial manner or that the common law principles of natural justice are applicable to the Commission and its members in relation to such hearings ... (*R v Commonwealth Conciliation & Arbitration Commission* (1969) 122 CLR 546, 552-553)
 - ▶ There is no doubt that members of FWA are (as were members of its statutory predecessors, the Commonwealth Conciliation and Arbitration Commission and the Australian Industrial Relations Commission (the AIRC)) bound to act “judicially” in the sense that they are obliged to respect and apply traditional notions of procedural fairness and impartiality. ... (*Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78)

As the battle progresses: Procedural considerations

- ▶ Fair Work Commission:
 - ▶ s.596 - Legal representation by permission
 - ▶ *XPT Principle*: Commission should not to interfere with the right of an employer to manage business unless it is seeking from the employees something which is unjust or unreasonable
- ▶ Federal Court:
 - ▶ Individual docket system
 - ▶ Employment and Industrial Relations Practice Note
 - ▶ Trend towards *vice voce* evidence
 - ▶ Fed Court Rule 20.2: Discovery is permitted only with the Court's leave

Once the battle has ended: Costs Implications

- ▶ Fair Work Commission proceedings:
 - ▶ ss.375B - 377 - Costs orders against parties, legal representatives (adverse action disputes)
 - ▶ ss.400A - 403: Costs orders against parties, legal representatives
 - ▶ s.404 - security for costs
 - ▶ s.611 - vexatious application
- ▶ Court proceedings
 - ▶ s.570
 - ▶ *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20
 - ▶ *Ryan v Primesafe* [2015] FCA 8

Once the battle has ended: The Debrief

- ▶ Debrief:
 - ▶ Lessons for client
 - ▶ Implications for client
 - ▶ Issues relevant to any appeal
 - ▶ Settlement prospects
 - ▶ Learnings as to strategic approach

Questions/Back to the Quiz

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