

**LAW SOCIETY OF THE  
NORTHERN TERRITORY**

**THE FEDERAL MAGISTRATES COURT:  
GENERAL FEDERAL AND FAIR WORK  
JURISDICTION, PRACTICE AND  
PROCEDURE**

**Federal Magistrate Toni Lucev\***

**28 June 2010**

**(\*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.)**

## CONTENTS

Introduction.....	1
Establishment & Federal Magistrates .....	1
Hierarchy.....	2
Restructure of Federal Courts .....	4
Establishment of Divisions .....	4
Purpose.....	5
Object.....	6
Jurisdiction – general federal law .....	6
Jurisdiction – transfer from Federal Court and to Federal Court.....	7
Mandatory considerations .....	7
A question of general importance .....	8
The interests of the administration of justice .....	12
Pending .....	14
Same matter .....	15
Complexity.....	16
Jurisdiction – associated .....	18
Administrative law .....	21
Admiralty .....	24
Bankruptcy .....	24
Consumer protection (trade practices).....	26
Copyright .....	29
Industrial relations law.....	30
Migration.....	40
National Security .....	43
Privacy .....	43
Unlawful discrimination (human rights).....	45
Practice and Procedure.....	47
Generally .....	47
Applications and Responses .....	49
First court date .....	52
Mediation .....	53
Summary judgment.....	54
Discovery .....	54
Interrogatories .....	55
Particulars .....	56
Evidence.....	58
Subpoenas .....	59
Change of venue .....	61
Rules – compliance with and waiver of.....	62
Costs.....	62
Adjournment .....	64
Representation.....	65
Video and telephone hearings .....	65
Appeals .....	66
Appendix A .....	67
Appendix B .....	68

## Introduction

1. This paper provides an overview of the general federal law and fair work jurisdiction, practice and procedure of the Federal Magistrates Court.<sup>1</sup>

## 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).<sup>2</sup>
3. Federal Magistrates are justices under s.72 of the Constitution, appointed under s.9 and Schedule 1 of the *FM Act*. The qualifications for office are the same as those of the justices of other federal courts.
4. The FM Court commenced sitting on 3 July 2000. There were originally twelve Federal Magistrates appointed.
5. Chief Justice Gleeson speaking 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.”*<sup>3</sup>

6. Today there are more than 60 Federal Magistrates sitting in every State and mainland Territory of the Commonwealth. By number of judicial officers the Federal Magistrates Court is now the largest federal court in the country.

---

<sup>1</sup> “FM Court”. The FM Court has two broad areas of jurisdiction: a) family law (in all states except Western Australia); and b) general federal law and fair work.

<sup>2</sup> “*FM Act*”.

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

## Hierarchy

7. 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,<sup>4</sup> but unlike the Federal Court and the Family Court is not expressly said to be a 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;<sup>5</sup>*
- b) a court with such original jurisdiction as is vested in it by laws made by the Federal Parliament,<sup>6</sup>*

*and this Court like the Federal Court is a court of law and equity.<sup>7</sup>*

*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,*

---

<sup>4</sup> *FM Act*, s.8(3).

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

<sup>6</sup> *FM Act*, 1999, s.10(1) & (2); *FC Act*, 1976 (Cth), s.19; *FL Act*, 1975 (Cth) s.31.

<sup>7</sup> *FM Act*, 1999, s.8(3); *FC Act*, 1976 (Cth), s.5(2).

*have concurrent jurisdiction in many areas, and concurrent, but sometimes limited, jurisdiction in other areas.<sup>8</sup> 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, 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.<sup>9</sup>*

*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.<sup>10</sup> 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.<sup>11</sup> Ultimately however the exercise of the implied incidental power of a federal statutory court is always subject to relevant statutory provisions.<sup>12</sup> 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.”<sup>13</sup> <sup>14</sup>*

## 8. The FM Court is not a court of summary jurisdiction.

---

<sup>8</sup> 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 industrial law (with the Federal Court); and (b) family law and child support (with the Family Court).

<sup>9</sup> *FM Act*, s.18; *FC Act*, s.32; *FL Act*, s.33.

<sup>10</sup> 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).

<sup>11</sup> 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* (3<sup>rd</sup> 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.”

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

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

<sup>14</sup> *Skipworth v State of Western Australia & Ors (No. 2)* (2008) 218 FLR 16 at 27-28 per Lucev FM; 6 ABC(NS) 252 at 263-264 per Lucev FM; [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).

## **Restructure of Federal Courts**

9. On 24 May 2010 the Commonwealth Attorney-General and the Minister for Defence announced an intention to restructure the federal courts system by creating the Military Court of Australia<sup>15</sup> and merging the family law jurisdiction of the FM Court into the Family Court.<sup>16</sup> The proposed merger would require the establishment of two divisions in the Family Court, the Appellate and Superior Division, and the General Division. On 24 June 2010, the Attorney-General and the Minister for Defence introduced legislation to establish the new Military Court and reshape the federal court system.<sup>17</sup>
10. Under the Government's proposal the FM Court will be retained to hear general federal law matters and will continue to exercise general federal law jurisdiction. Judicial officers of the FM Court with the requisite military background may be offered dual commissions to the lower division of the new Military Court. From 1 January 2010 Government funding for the FM Court was transferred to the Federal Court and Family Court. Under the proposed restructure, the Federal Court will be responsible for the administration of the new Military Court and the FM Court.
11. The federal courts will continue as separate entities pending the passage of any legislation through Parliament.

## **Establishment of Divisions**

12. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* included amendments to the *FM Act* to establish two divisions within the FM Court. From 1 July 2009 the general federal law work of the FM Court was separated into two divisions: the General Division and the Fair Work Division.

---

<sup>15</sup> "Military Court".

<sup>16</sup> Attorney-General's Department, *Establishment of the Military Court of Australia*, 24 May 2010, Canberra.

<sup>17</sup> *Military Court of Australia Bill 2010*. The proposed re-structured federal court system is set out in the *Access to Justice (Family Court restructure and other measures) Bill 2010*.

13. Matters arising under the *Fair Work Act 2009*, and under the continuing operation of the pre-July 2009 *Workplace Relations Act 1996*, the *Building and Construction Industry Improvement Act 2005* and the *Independent Contractors Act 2006* are heard in the Fair Work Division of the FM Court.
14. Otherwise, all general federal law matters which are not required to be dealt with in the Fair Work Division are heard in the General Division.

### **Purpose**

15. 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.
16. Complexity is however a comparative thing and not necessarily determined by length or size of case. The FM Court now exercises (with very minor exceptions) the bankruptcy jurisdiction previously exercised by the Federal Court, and before it the Federal Bankruptcy Court. 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.<sup>18</sup> Some of the cases now heard by the FM Court, particularly in its industrial, 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.<sup>19</sup>

---

<sup>18</sup> See footnote 8 above.

<sup>19</sup> See the discussion at paras.22-38 below concerning transfer of proceedings from the FM Court to the Federal Court.

## **Object**

17. 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.<sup>20</sup> Proceedings in the FM Court are generally less procedural, less formal and more flexible than those in the superior federal courts.

## **Jurisdiction – general federal law**

18. The remainder of this paper deals with the FM Court’s general federal law and fair work jurisdiction.
19. 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;
  - e) human rights law;
  - f) intellectual property law;
  - g) migration;
  - h) national security law;
  - i) privacy law;
  - j) water law; and
  - k) communications law,

---

<sup>20</sup> *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)*”).



as well as workplace relations law jurisdiction under the *Fair Work Act 2009* (Cth) and its associated Acts.

20. 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**

21. Sections 39-41 of the *FM Act* deal with the transfer of matters from the FM Court to the Federal Court.

### **Mandatory considerations**

22. In determining whether to transfer a matter to the Federal Court the FM Court has to have regard to the factors set out in the *FM Act*. In *Genovese v BGC Construction Pty Ltd*<sup>21</sup> 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*
- (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*

---

<sup>21</sup> [2006] FMCA 1507 (“*Genovese*”).

(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.*<sup>22</sup>

### **A question of general importance**

23. 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 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);*

---

<sup>22</sup> *Genovese* at paras.8-9 per Lucev FM. For some 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; *Smith v Marapikurrinya Pty Ltd* [2010] FMCA 5 (“*Smith*”).

- (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.*<sup>23</sup>

24. In *Mason & Anor v Methodist Ladies College*<sup>24</sup> the proceedings were transferred from the FM Court to the Federal Court,

*"principally by reason of the fact that the matter raises a question of significant general importance and of some complexity",*<sup>25</sup>

which was described as follows:

- 7. *A question of general importance might arise where, for example, 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. In this case, it appears to be, and the Court accepts counsel for the applicants' contention, which is not disputed by counsel for the respondent, that there are no relevant cases in relation to disability discrimination in education which*

<sup>23</sup> *Genovese* at para.13 per Lucev FM. Considered in *Van Efferen v CMA Corporation Ltd* (2008) 173 IR 456 at 459 per O'Sullivan FM; [2008] FMCA 875 at para.14 per O'Sullivan FM.

<sup>24</sup> [2009] FMCA 570 ("*Mason*").

<sup>25</sup> *Mason* at para.23 per Lucev FM.

*go to the application of the Disability Standards for Education 2005 (Cth), which were published for the first time in August of 2005.*

8. *Those Standards obviously are important in the context of the obligations of educational institutions to students with disabilities. The question of general importance which therefore arises in relation to that matter is in relation to that class of students with disabilities to whom the Standards apply, and it may be that there is, in fact, a subclass of children with the particular disability that the first applicant has, to which that issue of general importance might apply.*
  9. *The issue of general importance includes the alleged right of disabled persons and disabled students to be educated in accordance with those Standards, in both the State and private school systems. The Court is therefore satisfied that, in the circumstances of this case, there is an issue of general importance to be determined in relation to a class of persons, namely students with disabilities, or a class or classes of students with disabilities, and particularly with autism, in relation to the application of the Standards.<sup>26</sup>*
25. The FM Court also found that there were significant human rights issues at stake and that complex issues as to the proper construction of legislation might arise:
11. *In relation to whether significant human rights issues are at stake in this particular matter, the Court accepts that it is a matter in relation to which there are applicable International Conventions annexed to the Human Rights and Equal Opportunities Commission Act 1986 (Cth), and which may be called in aid to interpret both the HREOC Act and the DD Act, read in conjunction with the applicable Standards. In general terms it is manifest that there are here significant human rights issues at stake in relation to disability discrimination in education and the rights of students with disabilities to be afforded the services of educational institutions.*

---

<sup>26</sup> *Mason* at paras.7-9 per Lucev FM, footnote omitted.

12. *In relation to the proper construction of the legislation, the Court, as indicated earlier, accepts the contention from counsel for the applicants that there is no law reported in relation to the application of the relevant Standards, and that in conjunction with the provisions of the HREOC Act and DD Act, that an issue as to the proper construction of the legislation might arise.*
13. *It is clear also that this is an area of law, as counsel for the applicants put it with an air of understatement, that is not without its complexities. That is likely to apply also in relation to the question of the application of the Standards in relation to the question of indirect discrimination in this case.<sup>27</sup>*
26. Further added to the complexities of the case were alleged contraventions of s.52 of the *TP Act* and a contractual claim alleging breach of contract, of which the Court said as follows:
15. *Those matters might, without more, have been matters which, had they stood alone and without the disability discrimination claim, have remained in this Court, but given that they are probably intertwined, if not inextricably, certainly to a considerable extent with the claim made on behalf of the first applicant, they do add to the complexity of the matter overall.<sup>28</sup>*
27. In *Smith*, this Court transferred a native title matter to the Federal Court. The Court found that the matter involved questions of general importance, which was one of the factors favouring a transfer to the Federal Court, as follows:
98. *In the Court's view this matter:*
- a) *will involve issues associated with the proper construction and interaction of the NT Act<sup>29</sup> and the AH Act<sup>30</sup>; and*

---

<sup>27</sup> *Mason* at paras.11-13 per Lucev FM, footnote omitted.

<sup>28</sup> *Mason* at para.15 per Lucev FM.

<sup>29</sup> *Native Title Act 1993* (Cth).

<sup>30</sup> *Aboriginal Heritage Act 1972* (WA).

*b) by reason of (a), but also by reason of the issues associated with the determination of whether each of the applicants and respondents are Kariyarra People, involve particular issues of “some complexity”, with which this Court is, unlike the Federal Court in native title related matters, not used to dealing with.*

*This factor favours a transfer of the matter to the Federal Court.<sup>31</sup>*

### **The interests of the administration of justice**

28. In *Genovese* 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:

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

*25. 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].*

*26. 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).*

---

<sup>31</sup> *Smith* at para.98 per Lucev FM.

....

28. *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, 7<sup>th</sup> 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.*

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

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

31. *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.*

32. *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.*

33. *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.”<sup>32</sup>*

## **Pending**

29. 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*<sup>33</sup> where the FM Court said:

*“The etymology of “pending” is discussed in *Franklins v Richards*<sup>34</sup>, 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] original cognisance of it can make an order on the matters in issue or to be dealt with, therein.”<sup>35</sup>*

and agreed with the judgment of the District Court of Western Australia in *Proposch v Anne French Investments Pty Ltd*<sup>36</sup> 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*

---

<sup>32</sup> *Genovese* at paras.24-26 and 28-33 per Lucev FM.

<sup>33</sup> (2007) 207 FLR 141; [2007] FMCA 71 (“*Genovese 2007*”). This judgment was appealed to the Federal Court. The Federal Court summarily dismissed the appeal: *Genovese v BGC Construction Pty Ltd* [2007] FCA 923 (“*Genovese 2007 Appeal*”).

<sup>34</sup> [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.)

<sup>35</sup> *Genovese 2007* FLR at 148 per Lucev FM; FMCA at para.39 per Lucev FM.

<sup>36</sup> [2006] WADC 47 (“*Proposch*”).



*taken to be a case in the Magistrates Court and is to be heard and determined under the Civil Proceedings Act.”*<sup>37</sup>

30. On appeal the Federal Court agreed with the reasoning of the FM Court that the relevant case was still a case pending<sup>38</sup> 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).”*<sup>39</sup>

### **Same matter**

31. In *Deputy Commissioner of Taxation v Cumins*<sup>40</sup> 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 associated matter” for the purposes of s.19(1) of the *FM Act*, and that the Federal Court appeal was pending.<sup>41</sup>
32. 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”.<sup>42</sup> The creditor’s petition

---

<sup>37</sup> *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.

<sup>38</sup> *Genovese 2007 Appeal* at para.37 per Gilmour J.

<sup>39</sup> *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.

<sup>40</sup> [2007] *FMCA* 1841 (“*Cumins*”).

<sup>41</sup> *Cumins* at paras.15 and 24 per Lucev FM.

<sup>42</sup> *Cumins* at para.47, see also para.46 per Lucev FM.

related to a judgment debt obtained by the Deputy Commissioner of Taxation against Cumins in an amount of \$38,051,066.24.<sup>43</sup>

### **Complexity**

33. *Verge v Devere Holdings Pty Ltd (No. 4)*<sup>44</sup> was transferred from the FM Court to the Federal Court. The reasons for the transfer relied heavily on the circumstances and complexity of the matter.
34. The FM Court had previously indicated that the proceedings were “relatively complex”, having regard to the following factors:
  - a) the interest (an undivided one third interest) in rural land held by two former bankrupts;
  - b) the existence of three respondents, two of whom were alleged to have been involved in multiple transactions affecting the interests in the land, and a third who had more recently purchased the land;
  - c) the dispute was in relation to at least five transactions involving:
    - i) transfer of the former bankrupts’ interest in the land to the first respondent in May 2001;
    - ii) the issuance of shares in, and the transfer of shares from, the first respondent between May 2001 and January 2004; and

---

<sup>43</sup> *Cumins* at para.4 per Lucev FM. With hindsight the matter might equally have been transferred on the basis of complexity as the transfer of proceedings spawned an unsuccessful swamp of litigation by Cumins in the Federal Court: see *Deputy Commissioner of Taxation v Cumins* (2008) 70 ATR 855; (2008) 6 ABC(NS) 12; (2008) 181 ALD 78; [2008] FCA 353 (adjournment and stay of petition; whether appeal or new trial pending); *Deputy Commissioner of Taxation v Cumins (No. 2)* (2008) 70 ATR 868; [2008] FCA 354 (discovery and inspection, discovery not necessary, oppressive to grant discovery); *Deputy Commissioner of Taxation v Cumins (No. 3)* (2008) 71 ATR 129; [2008] FCA 407 (adjournment and stay of petition, whether appeal or new trial pending); *Deputy Commissioner of Taxation v Cumins (No. 4)* (2008) 72 ATR 73; (2008) 6 ABC(NS) 61; [2008] FCA 558 (form and contents of bankruptcy notice, amount in respect of which notice issued); *Deputy Commissioner of Taxation v Cumins (No. 5)* (2008) 72 ATR 398; (2008) 6 ABC(NS) 82; [2008] FCA 794 (form and contents of bankruptcy notice, amount in respect of which notice issued).

<sup>44</sup> [2008] FMCA 1421 (“*Verge (No. 4)*”).

- iii) the transfer of the land from the first respondent to the third respondent in July 2007.
  - d) valuation of the land, and especially an undivided one-third share in that land; and
  - e) valuation of the shares at the relevant times, and identifying and valuing the consideration provided for the issue and transfer of the shares.<sup>45</sup>
35. The remedies sought in the matter also added to the complexity of the matter. Some of the remedies sought included:
- a) declarations against the first respondent that the relevant transfer of land is void against the Trustees;
  - b) up to six declarations against the second respondent concerning the issuance of shares and transfer of land being void against the Trustees;
  - c) nine declarations and three orders against the first and second respondents in relation to the bankrupts' interests in shares held in the first respondent. These included declarations that the shares vested in the Trustees and orders to change share registers to reflect these interests (which also gave rise to a question as to whether the FM Court can make such orders).<sup>46</sup>
36. A rather novel issue also arose in relation to a claim that the issue of shares in the first respondent to the second respondent constituted a transfer of property (under s.120(7)(b) of the *Bankruptcy Act*). The FM Court held that, given the apparent lack of authority in this regard and the importance of the issue, it should be considered by the Federal Court.<sup>47</sup>

---

<sup>45</sup> *Verge (No.4)* at paras.107-108 per Lucev FM.

<sup>46</sup> *Verge (No.4)* at para.109 per Lucev FM.

<sup>47</sup> *Verge (No.4)* at para.110 per Lucev FM.

37. Overall, the FM Court found that the legal and factual subject matter of this case was complex and far removed from the general run of s.120 *Bankruptcy Act* cases dealt with by the FM Court, and therefore decided to transfer the proceedings to the Federal Court.<sup>48</sup>
38. Section 32AB of the *FC Act* 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*.
39. 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.<sup>49</sup>

#### **Jurisdiction – associated**

40. 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 associated with the matter within federal jurisdiction.<sup>50</sup> If there is no matter within the primary jurisdiction associated jurisdiction under s.18 of the *FM Act* cannot be invoked.<sup>51</sup>

---

<sup>48</sup> *Verge (No.4)* at paras.112 and 137 per Lucev FM. The Federal Court judgment, handed down after 11 days of hearing, runs to 432 paragraphs: see *Verge v Devere Holdings Pty Ltd (No. 4)* [2010] FCA 653.

<sup>49</sup> See *Cumins* at paras.16-17 and 23-30 per Lucev FM.

<sup>50</sup> 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, (an updated version is available on the Federal Court website at [www.fedcourt.gov.au/pdfsrfts\\_a/admiralty\\_papersandpublications16.pdf](http://www.fedcourt.gov.au/pdfsrfts_a/admiralty_papersandpublications16.pdf)) and Justice Allsop “An Introduction to the Jurisdiction of the Federal Court of Australia”, [www.fedcourt.gov.au/aboutct/judges\\_papers/speeches\\_allsop.html](http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_allsop.html) (October 2007).

<sup>51</sup> *Taylor v CGU Insurance Limited* [2005] FMCA 1073; followed in *Fernando v Minister for Immigration* [2007] FMCA 724 at para.41 per Lucev FM.

41. Lawyers 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 *FW Act 2009* (Cth)<sup>52</sup> for under-payment under an Award or agreement, there may also be an associated breach of contract claim;<sup>53</sup>
  - b) in a claim for unlawful termination under the *FW 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);<sup>54</sup>
  - c) in a claim for breach of the civil penalty provisions with respect to industrial action under the *FW Act* there may also be a claim in relation to various of the so called “industrial” torts;<sup>55</sup>
  - 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, and negligent misrepresentation or negligent misstatement claims, as well as claims under the equivalent sections of the *Fair Trading Act* (WA);

---

<sup>52</sup> “*FW Act*”.

<sup>53</sup> 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.”

<sup>54</sup> 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.

<sup>55</sup> 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: C. Sappideen, et al, Macken’s Law of Employment (6<sup>th</sup> Ed) (Sydney: Lawbook Co, 2009), Ch.13 “Industrial Torts”.

- f) in *Goodall v Nationwide News Pty Ltd (No. 2)*<sup>56</sup> an ultimately successful 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*)<sup>57</sup> and defamation (which was also dismissed).<sup>58</sup>
42. The combination of statutory jurisdiction and associated jurisdiction provides lawyers giving advice on initiating applications an interesting "box of toys" with which much litigious "mischief" might be made.<sup>59</sup>
43. The introduction of the Fair Work Division into the FM Court has raised interesting questions in relation to which Division of the Court any associated jurisdiction should be exercised. The Court recently grappled with the question of whether matters so found to be within associated jurisdiction of the Court, in relation to a claim instituted in the Fair Work Division of the Court, were associated matters that should be exercised in the Fair Work Division, even if the associated matters themselves would ordinarily be heard in the General Division. The Court found as follows:

*44. In this case each of the claims is an associated matter as described in s.18 of the FM Act; associated with a claim made within the Fair Work Division jurisdiction of this Court, and therefore associated with the Court's jurisdiction under the Fair Work Division. By way of contrast, for example, if a claim of misleading and deceptive conduct in employment had been made under the TP Act,<sup>60</sup> or of discrimination in employment under the Australian Human Rights Commission Act 1986 (Cth),<sup>61</sup> and the matters the subject of the cross-claim in this*

---

<sup>56</sup> (2007) AIPC 92-249; [2007] FMCA 1427 ("*Goodall (No.2)*").

<sup>57</sup> *Goodall (No. 2)* AIPC at 41,047 per Lucev FM; FMCA at paras.39-42 per Lucev FM.

<sup>58</sup> *Goodall (No. 2)* AIPC at 41,051 per Lucev FM; FMCA at paras.69-75 per Lucev FM.

<sup>59</sup> 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".

<sup>60</sup> "*TP Act*"; *TP Act*, ss.52 and 53B.

<sup>61</sup> "*AHRC Act*"; *AHRC Act*, ss.46PO.

*matter had been raised in proceedings of that kind, the associated matter would be within the jurisdiction of the General Division of the Court.*

45. *In this matter, which was commenced and is proceeding in the Fair Work Division jurisdiction of the Court, and in respect of which associated matters have been raised by way of cross-claim, the matter remains one within the Fair Work Division of the Court, as the matters the subject of the cross-claim are associated matters within the Fair Work Division jurisdiction of this Court. Therefore, this matter, properly instituted and thus far heard and determined within the Fair Work Division of this Court, remains a matter within the Fair Work Division of this Court.*

46. *Consistent with the legislative intention, the Fair Work Division of this Court has been created to deal specifically with industrial law jurisdiction, but that does not impede the ability of this Court to exercise its associated jurisdiction in the Fair Work Division, as it did generally prior to the FW (Transitional) Act amendments, and as the Federal Court did in its former Industrial Division under almost identical statutory provisions, with respect to the full range of associated matters.*<sup>62</sup>

### **Administrative law**

44. The FM Court has jurisdiction to hear applications under the *Administrative Decisions (Judicial Review) Act 1977*.<sup>63</sup>
45. 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;

---

<sup>62</sup> *Welsh v Allblend Holdings Pty Ltd (No. 2)* [2010] FMCA 377 at paras.44-46 per Lucev FM.

<sup>63</sup> “ADJR Act”.

- 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;
- 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.<sup>64</sup>

46. In *Ivanovic v Chief Executive Officer of the Australian Customs Service*<sup>65</sup> 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.<sup>66</sup>

47. *Broadley v Inspector-General in Bankruptcy*<sup>67</sup> related to an appeal filed with the Federal Court and transferred to the FM Court against a decision of the Administrative Appeals Tribunal<sup>68</sup> upholding the Inspector-General's objection to Broadley's discharge from bankruptcy.<sup>69</sup> The Trustee in Bankruptcy had objected to Broadley's

---

<sup>64</sup> *ADJR Act*, ss.5-6.

<sup>65</sup> (2007) 210 FLR 149; (2007) 162 IR 104; [2007] FMCA 503 ("*Ivanovic*").

<sup>66</sup> *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.

<sup>67</sup> (2007) 97 ALD 797; [2007] FMCA 1714 ("*Broadley*").

<sup>68</sup> "AAT".

<sup>69</sup> *Re Broadley and Inspector General in Bankruptcy* [2006] AATA 914.



automatic discharge from bankruptcy on the basis that he had failed under s.149D of the *Bankruptcy Act, 1966* (Cth)<sup>70</sup> 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 failure by Broadley was unintentional. Before the FM Court Broadley referred to the Federal Court judgment in *Wharton v Official Receiver in Bankruptcy*<sup>71</sup> 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.

48. Appeals from decisions of the AAT to the Federal Court may only be made on questions of law.<sup>72</sup> Section 44AA of the *AAT Act* 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. 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 FM 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.<sup>73</sup>

---

<sup>70</sup> "*Bankruptcy Act*".

<sup>71</sup> (2001) 107 FCR 28; [2001] FCA 96 ("*Wharton*").

<sup>72</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s.44(1) ("*AAT Act*").

<sup>73</sup> See generally *Broadley and Duncan v Chief Executive Officer Centrelink* [2008] FMCA 810.

## Admiralty

49. The FM Court has jurisdiction under ss.9, 27 and 28 of the *Admiralty Act 1988* (Cth) and in any matters referred to it by the Federal Court.<sup>74</sup> 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 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.<sup>75</sup>

## Bankruptcy

50. 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*.
51. 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;<sup>76</sup>
  - b) applications to extend time for compliance with bankruptcy notices;<sup>77</sup>

---

<sup>74</sup> See generally, T. Lucev, "Jurisdiction of the Federal Magistrates Court of Australia in maritime matters" paper delivered at the Maritime Law Association of Australian and New Zealand 35<sup>th</sup> Annual Conference 2008, 13 November 2008, a copy is available at: <http://www.mlaanz.org/www/index.cfm?itemID=103>. See also *Stoker v Picken* [2009] FMCA 839.

<sup>75</sup> *Admiralty Act, 1988* (Cth), s.28(1)(aa).

<sup>76</sup> *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 an 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*); See also *Croft v Becton Investments Management Ltd* [2010] FMCA 419 in which an application to set aside a sequestration order made by a Registrar was upheld on the basis that service of the originating process upon which a default judgment was founded, which judgment in turn was the basis for a creditor's petition, could not be proven.

- c) sequestration order applications;<sup>78</sup>
- d) applications to set aside bankruptcy notices;<sup>79</sup>
- e) applications to annul bankruptcy;<sup>80</sup>
- f) applications for extension of time in which to hold creditors meetings;<sup>81</sup>
- g) applications for payment of after acquired property;<sup>82</sup>
- h) applications for leave to commence or take fresh steps in proceedings involving the bankrupt in another court;<sup>83</sup>
- i) applications for distribution of a dividend to creditors upon failure to file a statement of financial affairs;<sup>84</sup>
- j) objections to discharge from bankruptcy;<sup>85</sup>
- k) appointment of a Trustee to take control of debtors property;<sup>86</sup>

---

<sup>77</sup> *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 (“Tetlow”).

<sup>78</sup> *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.

<sup>79</sup> *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; Swarbrick v Burge* (2009) 236 FLR 311; [2009] FMCA 985 (whether an application was actually made before time for compliance had expired).

<sup>80</sup> *Bankruptcy Act*, s.153B(1); *Bradley-Meerwald v National Exchange Pty Ltd* [2007] FMCA 1876; *See v Granich & Associates* [2008] FMCA 27.

<sup>81</sup> *Bankruptcy Act*, ss.33 and 194(1); *Application of Melvyn Malcolm Posner* [2007] FMCA 610; *Application by Benjamin Peter Piggott* [2009] FMCA 1061; *Application by Benjamin Peter Piggott* [2010] FMCA 23.

<sup>82</sup> *Bankruptcy Act*, ss.30, 58(1)(b) and 116; *Official Receiver v Prince* [2006] FMCA 1917.

<sup>83</sup> *Bankruptcy Act*, s.58(3)(b); *Singh v Official Trustee in Bankruptcy & Anor* (2007) 214 FLR 84; 5 ABC(NS) 607; [2007] FMCA 1367; *Koblynski v Walker* [2008] FMCA 89.

<sup>84</sup> *Bankruptcy Act*, s.146; *Official Trustee in Bankruptcy v Thor* [2006] FMCA 1637; *Official Receiver v Howard & Anor* [2007] FMCA 786.

<sup>85</sup> *Bankruptcy Act*, ss.149C, 149D, 149N and 149Q; *Broadley*.

<sup>86</sup> *Bankruptcy Act*, s50(1A) and (1B); *Klages (WA) Pty Ltd v Walker* [2008] FMCA 348.

- l) vesting orders with respect to the bankrupt's property disclaimed by the Trustee;<sup>87</sup>
  - m) applications by the Official Receiver for the sale of property and to vacate land;<sup>88</sup>
  - n) applications to recover property transferred at an undervalue.<sup>89</sup>
52. *Segler v Child Support Registrar*<sup>90</sup> involved an application to discharge a child support debt. The applicant had been bankrupt but at the time of the application had been discharged from bankruptcy.
53. The question for the FM Court was whether it had jurisdiction to discharge the child support debt.
54. The FM Court declared that it does have jurisdiction to discharge a child support debt, limited to debts provable in bankruptcy up until the date of sequestration.
55. The Court held that in deciding whether or not to discharge the child support debt, the FM Court is entitled to take into account the following considerations in relation to the applicant:
- a) income, expenses, liabilities and assets; and
  - b) conduct prior to the date of bankruptcy, during the period of bankruptcy and since the discharge from bankruptcy.

### **Consumer protection (trade practices)**

56. The FM Court has jurisdiction under the *TP Act* in relation to claims under:
- a) Section 46 – misuse of market power;

---

<sup>87</sup> *Bankruptcy Act*, s.133; *Skipworth v State of WA & Ors (No. 1)* [2007] FMCA 1370.

<sup>88</sup> *Bankruptcy Act*, ss.19, 30, 77(1)(e) & (g); *Official Receiver v Tregaskis* [2006] FMCA 1915; *Official Receiver v Fall & Anor* (2008) 5 ABC(NS) 772; [2008] FMCA 489.

<sup>89</sup> *Bankruptcy Act*, ss.120 and 121; *Official Receiver v Huen* [2007] FMCA 304 (overturned on appeal in *Sui Mei Huen v Official Receiver* (2008) 248 ALR 1); *Posner v Chen* [2007] FMCA 394.

<sup>90</sup> (2009) 223 FLR 191; [2009] FMCA 41.

- b) Part IVA – unconscionable conduct;
- c) Part IVB – breach of industry codes;
- d) 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
- e) Part VA – liability of manufacturers and importers of defective goods.

57. 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.

58. In *Coolstar Holdings Pty Ltd v Cleary & Ors*<sup>91</sup> the FM Court held that it had power to make Mareva type orders<sup>92</sup> in the course of trade practices proceedings, and set out the principles for determining whether a Mareva type order ought issue,<sup>93</sup> 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.<sup>94</sup> 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:

---

<sup>91</sup> [2006] FMCA 1442 (“*Coolstar*”).

<sup>92</sup> *Coolstar* at para.3 per Lucev FM.

<sup>93</sup> *Coolstar* at para.4 per Lucev FM.

<sup>94</sup> *Coolstar* at paras.52 and 56 per Lucev FM.

### ***“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 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.”<sup>95</sup>*

59. In *Goodall (No. 2)*<sup>96</sup> 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

---

<sup>95</sup> *Coolstar* at paras.3-4 per Lucev FM

<sup>96</sup> (2007) AIPC 92-249; [2007] FMCA 1427.

by reason of the exemption under the prescribed information provider provisions of s.65A of the *TP Act*.

60. In *Klages & Ors v Walker & Anor*<sup>97</sup> 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 caused by contraventions of ss.51A and 52 of the *TP Act*.<sup>98</sup> In *Klages (WA) Pty Ltd & Ors v Walker & Anor (No. 2)*<sup>99</sup> damages of more than \$150,000.00 were awarded to the applicants.

### Copyright

61. 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).<sup>100</sup> This limited jurisdiction, which is concurrent with the Federal Court was conferred in 2003 by the *Copyright Amendment (Parallel Importation) Act 2003* (Cth).
62. 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.<sup>101</sup> The orders were later discharged.<sup>102</sup>
63. 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.<sup>103</sup>

---

<sup>97</sup> [2007] FMCA 2056 (“*Klages (No. 1)*”).

<sup>98</sup> *Klages (No. 1)* at para.41 per Lucev FM.

<sup>99</sup> [2007] FMCA 2138.

<sup>100</sup> “*Copyright Act*”.

<sup>101</sup> [2005] FMCA 500.

<sup>102</sup> *MG Distribution & Ors v Khan & Anor* (2006) 230 ALR 352; [2006] FMCA 666.

<sup>103</sup> (2003) 59 IPR 204; [2003] FMCA 373.

64. In *Goodall (No. 2)*<sup>104</sup> 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 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.<sup>105</sup>
65. In *APRA v Cougars Tavern & Ors*<sup>106</sup> 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.<sup>107</sup> The judgment contains a useful list of recent awards of additional damages under s.115(4) of the *Copyright Act*.<sup>108</sup>

### **Industrial relations law**

66. From 1 July 2009, the Fair Work Division of the Federal Magistrates Court has the power to exercise jurisdiction in relation to:
- a) any civil matter arising under the *Fair Work Act 2009*;
  - b) any civil matter arising under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*;
  - c) any matter arising under the *Workplace Relations Act 1996* that is pending before the Court as at 1 July 2009;

---

<sup>104</sup> (2007) AIPC 92-249; [2007] FMCA 1427.

<sup>105</sup> *Goodall (No. 2)* AIPC at 41,047-41,051; FMCA at paras.43-68 per Lucev FM.

<sup>106</sup> [2008] FMCA 369 ("*Cougars Tavern*").

<sup>107</sup> *Cougars Tavern* at para.27 per Raphael FM.

<sup>108</sup> *Cougars Tavern* at para.27 per Raphael FM.



- d) any civil matter arising under the *Workplace Relations Act* as it continues to apply because of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, including any matters relating to conduct that took place prior to 1 July 2009;
  - e) matters arising under the *Building and Construction Industry Improvement Act 2005* with respect to unfair contracts for services with respect to building work and certain types of industrial action;<sup>109</sup>
  - f) matters arising under the *Independent Contractors Act 2006*.<sup>110</sup>
67. Certain proceedings may be commenced using the small claims procedure,<sup>111</sup> if the claim is for less than \$20,000 and the compensation is for an entitlement under s.548(1A) of the *FW Act*. Parties to a small claim proceeding may not be represented by a lawyer without the leave of the Court.<sup>112</sup> The Court is not bound by the rules of evidence but may inform itself of any matter, in any manner as it thinks fit. The small claims procedure is aimed at making the Court process less formal.
68. Chapter 7 of the *FM Rules* provides the rules in relation to conduct of proceedings in the Fair Work Division.
69. The jurisdiction conferred on the FM Court by the *FW Act* includes:
- a) applications requiring observance of employee entitlements under the National Employment Standards;<sup>113</sup>
  - b) applications for civil penalties for breach of Awards and Agreements;<sup>114</sup>

---

<sup>109</sup> *Cozadinis v CFMEU & Anor* [2009] FMCA 272; *Cruse v CFMEU & Anor* [2009] FMCA 236.

<sup>110</sup> *Keldote v Riteway Transport* [2009] FMCA 319; *Fabsert Pty Ltd v ABB Warehousing (NSW) Pty Ltd* [2008] FMCA 1198.

<sup>111</sup> *FW Act*, s.548.

<sup>112</sup> *Hughes v Mainrange Corporation Pty Ltd* [2009] FMCA 1025, in which the factors to be considered in determining whether leave ought be granted for a lawyer to appear are discussed.

<sup>113</sup> *FW Act*, ss.44 and 539.

- c) applications for injunctions against industrial action;<sup>115</sup>
- d) unlawful termination of employment claims;<sup>116</sup>
- e) underpayment claims in relation to industrial instruments (including AWAs, Awards, Collective Agreements, etc.);<sup>117</sup>
- f) applications for civil penalties arising from breach of union right of entry provisions;<sup>118</sup>
- g) applications for civil penalties and compensation in relation to the freedom of association provisions;<sup>119</sup>
- h) applications for interpretation of an Award or Certified Agreement.<sup>120</sup>

70. In *Balding v Ten Talents Pty Ltd*<sup>121</sup> 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 discussed the following issues:

- a) duress involves the illegitimate application of pressure likely and intended to have the effect of denying the exercise of a

---

<sup>114</sup> *FW Act*, ss.50 and 539.

<sup>115</sup> *FW Act*, ss.421 and 422.

<sup>116</sup> *FW Act*, s.772.

<sup>117</sup> *WR Act*, ss.718-721 and 727-728.

<sup>118</sup> *WR Act*, Part 15, ss.767-769.

<sup>119</sup> *WR Act*, s.807.

<sup>120</sup> *WR Act*, ss.848 and 849; *Nylex Industrial Products Pty Ltd v TCFUA* [2007] FMCA 79.

<sup>121</sup> (2007) 162 IR 17; [2007] FMCA 145 (“*Balding (No. 1)*”).

person's free will, and in relation to the circumstances of this case, irrespective of whether an AWA is entered into or otherwise;

- b) illegitimate pressure may include unlawful threats, unconscionable pressure, and, in relevant circumstances, lawful conduct;
- c) illegitimate pressure does not exist merely because an offer of employment is contingent upon entry into an Australian Workplace Agreement (“AWA”);
- d) whether there is illegitimate pressure is a question of fact determinable in the circumstances of each particular case;
- e) 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.<sup>122</sup>

71. The factors to be considered in assessing whether there has been duress were as follows:

- a) 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;
- b) 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 s.170WG (1) of the *WR Act*);

---

<sup>122</sup> *Balding (No.1)* IR at 27 per Lucev FM; FMCA at paras.33-35 per Lucev FM; applied in *Smith v Granada Tavern (No. 2)* [2007] FMCA 904 at para.29 per Burchardt FM.

- c) a change of workplace might arguably constitute termination of an employment contract in certain circumstances;
- d) 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;
- e) 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;
- f) 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;
- g) power disparity and the use of any power disparity, is a factor in assessing whether or not there has been duress; and includes the potential for illegitimate economic pressure, which ought not be found lightly.<sup>123</sup>

72. In *Balding v Ten Talents Pty Ltd (No.3)*<sup>124</sup> 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.<sup>125</sup> The FM Court found in respect of the former employee that duress had been applied to her because in order to continue to work in her job she had

---

<sup>123</sup> *Balding (No.1)* IR at 27-31 per Lucev FM; FMCA at paras.33-59 per Lucev FM.

<sup>124</sup> [2008] FMCA 255 (“*Balding (No.3)*”).

<sup>125</sup> *Balding (No.3)* at paras.21-22 per Lucev FM.

to agree to standard not negotiable terms of the AWA, and was not able to negotiate any other form of industrial instrument, and might be dismissed following a probationary period under the AWA, all of which were an exercise of the power disparity between her and her employer.<sup>126</sup>

73. In *Fair Work Ombudsman v RHD Pty Ltd*,<sup>127</sup> the respondents admitted that giving instruction to the payroll officer to withhold the employee's pay until she signed a variation to her AWA was an application of duress in connection with an AWA, in breach of s.400(5) of the *WR Act*.<sup>128</sup> The first respondent company, RHD, admitted that the conduct engaged in by officers of RHD (the second and third respondents) was also conduct within the scope of the actual or apparent authority of each of them on behalf of RHD and within the meaning of s.826 of the *WR Act*.
74. In *Olsen v Wellard Feeds Pty Ltd*<sup>129</sup> the FM Court dealt with an alleged breach of Award relating to an alleged underpayment to a person employed as a feed mill manager. The application was dismissed, the FM Court finding that the employee concerned was a managerial employee, and that the principal 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.<sup>130</sup>
75. In *Rogers v Millennium Inorganic Chemicals Ltd & Anor*,<sup>131</sup> the FM Court examined the implied term of mutual trust and confidence and whether it applied in Australian law. It was the first time the FM Court had looked at this issue.

---

<sup>126</sup> *Balding (No.3)* at para.27 per Lucev FM.

<sup>127</sup> [2009] FMCA 1139 ("*RHD*").

<sup>128</sup> *RHD* at para.29 per Terry FM (Darwin).

<sup>129</sup> [2008] FMCA 320 ("*Wellard Feeds*").

<sup>130</sup> *Wellard Feeds* at para.18 per Lucev FM.

<sup>131</sup> (2009) 178 IR 297;(2009) 229 FLR 198; [2009] FMCA 1 ("*Rogers*").

76. The implied term of mutual trust and confidence had been recognised in some United Kingdom and Australian superior courts.<sup>132</sup>
77. The FM Court held that an implied term of mutual trust and confidence is part of Australian law in relation to contracts of employment and should be implied into contracts of employment, unless expressly excluded by the parties.<sup>133</sup>
78. The FM Court also held that the implied term of mutual trust and confidence applies to events leading up to the decision to terminate employment, but not the decision to terminate itself, or its implementation.<sup>134</sup>
79. In *Rogers* there were four bases on which the applicant alleged a breach of the implied term of mutual trust and confidence:
- a) by reason of the first respondent giving consideration to terminating his employment before conducting any investigation into the events on the night when it was alleged by the first respondent that the applicant had walked away from his place of work, causing a shut down.

The FM Court held there was no breach on this basis and found that the first respondent had reasonable and proper cause to indicate to the applicant that termination of employment was being considered.<sup>135</sup>

- b) by reason of the first respondent refusing to tell the applicant the identity of the persons who had provided the account of the events of the night in question and in what way those accounts differed from his.

---

<sup>132</sup> *Rogers* IR at 314-321 per Lucev FM; FLR at 214-222 per Lucev FM; FMCA at paras.88-119 per Lucev FM.

<sup>133</sup> *Rogers* IR at 321 per Lucev FM; FLR at 222 per Lucev FM; FMCA at para.119 per Lucev FM.

<sup>134</sup> *Rogers* IR at 321 per Lucev FM; FLR at 222 per Lucev FM; FMCA at para.120 per Lucev FM.

<sup>135</sup> *Rogers* IR at 321-322 per Lucev FM; FLR at 222-224 per Lucev FM; FMCA at paras.122-125 per Lucev FM.

The FM Court held that denial of the allegation by the applicant was a complete answer to the allegation made. There was no breach of the implied term of mutual trust and confidence.<sup>136</sup>

- c) by reason of the first respondent unlawfully deducting alleged sick leave entitlement for 1 day's work from the applicant's salary and allowances.

The entitlement to sick leave was prescribed by the terms of the sick leave policy, which formed part of the AWA and the contract of employment. Therefore, whether or not there was an entitlement was subject to the terms of the sick leave policy, and there was no room for the operation of the implied term of mutual trust and confidence.

The FM Court held that it was open to the first respondent to decide, and they had reasonable and proper cause to conclude, that it was not a case of genuine sick leave, and there was no breach of the implied term of mutual trust and confidence on this basis.<sup>137</sup>

- d) by reason of the first respondent failing to pay the applicant all of his entitlements on termination of employment.

The FM Court held that this was not part of the implied term of mutual trust and confidence because it was a matter after the decision to terminate and it related to the termination itself.<sup>138</sup>

80. While the FM Court looked at the implied term and held that it did apply to contracts of employment in Australia, it was not found to have been breached in this case.

81. 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*,

---

<sup>136</sup> *Rogers IR* at 322-323 per Lucev FM; *FLR* at 224 per Lucev FM; *FMCA* at paras.126-128 per Lucev FM.

<sup>137</sup> *Rogers IR* at 323 per Lucev FM; *FLR* at 224-225 per Lucev FM; *FMCA* at paras.129-133 per Lucev FM.

<sup>138</sup> *Rogers IR* at 323-324 per Lucev FM; *FLR* at 225 per Lucev FM; *FMCA* at para.134 per Lucev FM.

which will now come under the terms of the *FW Act*, and the *BCII Act*.

82. 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;
  - g) whether or not the breaches were deliberate;
  - h) whether senior management or officials were 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.<sup>139</sup>
83. The above factors were applied in determining penalty in *Jones v Hanssen Pty Ltd*<sup>140</sup> 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*. *Hanssen* was successfully appealed, and the penalty reduced to \$85,000.00, because this Court placed too much emphasis on the vulnerability of the employees to exploitation, rather than making findings of exploitation and articulating the actual detriment, which in the circumstances, was no greater than, and no different to that of, non-vulnerable employees. However the ordinary principles used to assess penalty were not criticised.<sup>141</sup>
84. In *Carr v CEPU & Anor*<sup>142</sup> the FM Court had to consider the appropriate principles to be adopted when an agreed penalty was proposed in relation to unlawful industrial action under the *BCII Act*, and in so doing had regard to the factors outlined above.<sup>143</sup>

---

<sup>139</sup> *Sterling Commerce (Australia) Pty Ltd v Iliff* (2008) 173 IR 378 at 383 per Gordon J; [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; See also *Fair Work Ombudsman v Fortcrest Investments Pty Ltd* [2010] FMCA 18 (NT case) per FM Terry.

<sup>140</sup> [2008] FMCA 291.

<sup>141</sup> *Hanssen Pty Ltd v Jones* (2009) 179 IR 57 at 68 and 74 per Siopis J; [2009] FCA 192 at paras.61 and 99 per Siopis J, and in any event are uncontroversial: see, for example, *Olsen v Sterling Crown Pty Ltd* (2008) 177 IR 337; [2008] FMCA 1392 (“*Sterling Crown*”); *CFMEU v Austral Bricks (Qld) Pty Ltd* (2009) 178 IR 470; [2009] FMCA 143; *Workplace Ombudsman v Golden Maple* (2009) 186 IR 211; [2009] FMCA 664.

<sup>142</sup> [2007] FMCA 1526 (“*Carr*”).

<sup>143</sup> *Carr* at para.7 per Lucev FM.

## Migration

85. Under the *Migration Act 1958* (Cth)<sup>144</sup> the FM Court can judicially review decisions made by the Refugee Review Tribunal and the Migration Review Tribunal.<sup>145</sup>
86. The *Migration Litigation Reform Act, 2005* (Cth)<sup>146</sup> came into effect on 1 December 2005. Schedule 1 of that Act 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*.
87. The *Migration Legislation Amendment Act 2009 (No. 1)* included amendments to extend the time period for applying for review of a migration decision to the FM Court to "within 35 days of the date of the migration decision" and to confer on the FM Court a broad discretion to extend the time for applying for review of a migration decision, where it considers an extension is necessary in the interests of the administration of justice.<sup>147</sup>
88. For prerogative relief to be ordered, it must be established that a Tribunal committed jurisdictional error in its decision, so that the decision is not a privative clause decision under s.474 of the *Migration Act*.<sup>148</sup>
89. In *S157* the High Court defined the role of a court in determining whether a decision of a Tribunal 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

---

<sup>144</sup> "*Migration Act*".

<sup>145</sup> Collectively "the Tribunals", individually "Refugee Review Tribunal" and "Migration Review Tribunal" respectively.

<sup>146</sup> "*MLR Act*".

<sup>147</sup> *Migration Act*, s.477.

<sup>148</sup> *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476; [2003] HCA 2 ("*S157*").

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.<sup>149</sup>

90. A decision of a Tribunal is only liable to be set aside upon review if it involves jurisdictional error.<sup>150</sup> An error by an administrative tribunal, such as the Tribunals, will only constitute jurisdictional error if a Tribunal:

- a) identifies a wrong issue;
- b) asks the wrong question;
- c) ignores relevant material; or
- d) relies on irrelevant material,

in such a way that a Tribunal's exercise or purported exercise of power is thereby affected resulting in a decision exceeding or failing to exercise the authority or powers given under the relevant statute.<sup>151</sup>

91. 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;<sup>152</sup>
- b) whether there was bias on the part of the Tribunal,<sup>153</sup>

---

<sup>149</sup> *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.

<sup>150</sup> *S157* CLR at 506 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; HCA at para.76 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

<sup>151</sup> *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 per McHugh, Gummow and Hayne JJ; [2001] HCA 30 at para.82 per McHugh, Gummow and Hayne JJ.

<sup>152</sup> *WAMN v Minister for Immigration and Citizenship and Anor* [2008] FMCA 520; *SZJAO v Minister for Immigration* [2007] FMCA 1102.

<sup>153</sup> *WAMI v Minister for Immigration & Anor* [2007] FMCA 579; *SZIQT v Minister for Immigration & Anor* [2007] FMCA 762.

- c) whether there was a denial of procedural fairness or natural justice by the Tribunal.<sup>154</sup>
92. 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.<sup>155</sup>
93. In *Gamage v Minister for Immigration & Anor (No.2)*,<sup>156</sup> an urgent interlocutory application for an injunction to prevent the applicant's deportation was refused by the FM Court. The FM Court found that there was no serious issue to be tried, that the Migration Review Tribunal decision (on which the original application to the FM Court was based) did not disclose any jurisdictional error, and the balance of convenience did not favour the applicant.
94. In addition to the application for an injunction, Mr De Alewis, a former solicitor who has been struck-off the roll of practitioners in Western Australia, sought leave to appear on behalf of the applicant as a McKenzie Friend.<sup>157</sup> The Court denied Mr De Alewis leave to appear and found that it would be inappropriate to allow his appearance in a migration deportation matter, given that he was struck-off the roll of practitioners for misappropriating funds in a similar type of matter.<sup>158</sup> The Court also took the view that it would

---

<sup>154</sup> *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).

<sup>155</sup> See for example *Haidari v Minister for Immigration* [2009] FMCA 1178 where the Court issued writs for the Tribunal to re-hear the matter according to law as the Tribunal failed to take into account material concerning the living arrangements of three boys - the applicant's younger brothers - in Pakistan and because it refused to call the applicant's wife as a witness; *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); *Canete v Minister for Immigration* [2009] FMCA 1215 (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).

<sup>156</sup> [2009] FMCA 1146 ("*Gamage (No.2)*").

<sup>157</sup> See *Gamage v Minister for Immigration & Anor* [2009] FMCA 1145 ("*Gamage (No.1)*").

<sup>158</sup> *Gamage (No.1)* at para.13 per Lucev.

be more likely to be hindered than helped if Mr De Alewis were to appear.<sup>159</sup>

95. An appeal to the Federal Court,<sup>160</sup> and an application for special leave to appeal to the High Court<sup>161</sup> were dismissed.

### **National Security**

96. 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).<sup>162</sup> The effect of a control order, depending on the specific orders made, is to limit a person's movement, association or activities if the FM Court decides the restraint will substantially assist in preventing a terror attack.<sup>163</sup>
97. In *Thomas v Mowbray*<sup>164</sup> the constitutional validity of provisions of the *Criminal Code* (Cth) dealing with control orders were upheld, confirming the capacity of the FM Court to issue control orders.
98. In *Jabbour v Hicks*<sup>165</sup> the FM Court granted an application to issue control orders in respect of former Guantanamo Bay detainee David Hicks.

### **Privacy**

99. 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).
100. Determinations of the Privacy Commissioner may also be reviewed by the FM Court under the *ADJR Act*.

---

<sup>159</sup> *Gamage (No.1)* at para.17 per Lucev.

<sup>160</sup> *Gamage v Minister for Immigration and Citizenship* (2009) 112 ALD 449; [2009] FCA 1373.

<sup>161</sup> *Gamage, In the matter of a proposed application* [2009] HCA Trans 309.

<sup>162</sup> See for example, Amnesty International Australia – Factsheet: Anti-Terrorism Bill 2005, [http://www.amnesty.org.au/data/assets/pdf\\_file/10583/factsheets.pdf](http://www.amnesty.org.au/data/assets/pdf_file/10583/factsheets.pdf).

<sup>163</sup> 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.

<sup>164</sup> (2007) 233 CLR 307; [2007] HCA 33.

<sup>165</sup> [2007] FMCA 2139.

101. The key features of the FM Court's privacy 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;
  - 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 FM Court, as well as the Commissioner's 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.

### **Unlawful discrimination (human rights)**

102. The FM Court has jurisdiction to hear civil applications under Part IIB or IIC of the *Australian Human Rights Commission Act 1986*<sup>166</sup> relating to complaints under the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975*<sup>167</sup> and the *Sex Discrimination Act 1984*. The FM Court can determine a complaint which has been terminated by the President of the *Australian Human Rights 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 *AHRC Act*. No monetary limits are placed on the FM Court in awarding relief in proceedings under the *AHRC Act*.
103. Under s.46PO(4) of the *AHRC 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;

---

<sup>166</sup> “*AHRC Act*”.

<sup>167</sup> “*RD Act*”.

- 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.

104. In *Webb v Child Support Agency & Anor*<sup>168</sup> 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.<sup>169</sup>

105. In *Mansell v Centrelink (No.2)*,<sup>170</sup> a Centrelink employee alleged disability discrimination because of her hearing disability. The FM Court held that various allegations of discrimination (including the

---

<sup>168</sup> (2007) EOC 93-479; [2007] FMCA 1678 (“*Webb*”).

<sup>169</sup> *Webb* EOC at 74,684-74,685 per Lucev FM; FMCA at para.29 per Lucev FM.

<sup>170</sup> [2009] FMCA 640.



playing of a radio in the workplace, speaking to her from across the room, and exclusion from workplace activities – such as a “Secret Santa” draw) were not discrimination or harassment because of the employee’s hearing disability.

106. In *Campbell v Kirstenfeldt*<sup>171</sup> the applicant was an Aboriginal Australian woman living in an outer suburb of Perth. Her neighbour, a white Australian man, abused her and called her (and her children, who were not parties) names, including “niggers”, “coons”, “black mole”, “black bastards” and “lying black mole cunt”, over a period of about two years. The FM Court found that each of the incidents alleged had occurred, and constituted unlawful conduct under the *RD Act* in that they were reasonably likely to offend and were done because of the applicant’s race or colour. The offending neighbour was ordered to make a written apology and pay \$7,500 in damages.
107. In *Kelly-Country v Beers*,<sup>172</sup> the applicant, an Aboriginal activist, submitted that the respondent, a professional comedian whose act was recorded on video and included pretending to be an Aboriginal, breached s.18C of the *RD Act* because it was reasonably likely to offend, insult, humiliate or intimidate. The question for the Court was whether the performance was in good faith and an artistic work pursuant to s.18D of the *RD Act*. The Court dismissed the application and found that the video recordings were not reasonably likely to offend pursuant to s.18C of the *RD Act*, and that the respondent was entitled to protection provided by the exemption in s.18D of the *RD Act*.

## Practice and Procedure

### Generally

108. 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

---

<sup>171</sup> (2008) EOC 93-515; [2008] FMCA 1356.

<sup>172</sup> [2004] FMCA 336.

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.

109. The FM Court’s practice and procedure “includes all matters in relation to which Rules of Court may be made under” the *FM Act*.<sup>173</sup>
110. 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.<sup>174</sup>
111. 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.<sup>175</sup>
112. 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.”<sup>176</sup>
113. 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.<sup>177</sup>
114. The *FMC Rules* may also prescribe matters “incidental” to matters required or permitted to be prescribed by the *FMC Rules* under any

---

<sup>173</sup> *FM Act*, s.43(3).

<sup>174</sup> *FM Act*, s.81(1)(a) and (b).

<sup>175</sup> *FM Act*, s.81(1)(c).

<sup>176</sup> *FM Act*, s.81(2).

<sup>177</sup> *FM Act*, s.86(b).

other provision of the *FM Act* or any other law of the Commonwealth.<sup>178</sup>

115. 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.<sup>179</sup>

## **Applications and Responses**

116. Ordinarily proceedings are commenced by an application supported by affidavit, and responded to by a response supported by affidavit.<sup>180</sup>

117. The application must precisely and briefly state the orders sought and the basis on which those orders are sought.<sup>181</sup>

118. 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.<sup>182</sup>

119. 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.<sup>183</sup>

---

<sup>178</sup> *FM Act*, s.88.

<sup>179</sup> *FMC Rules*, r.1.05(1) & (2).

<sup>180</sup> *FMC Rules*, rr.4.01, 4.03 and 4.05.

<sup>181</sup> *FMC Rules*, r.4.02.

<sup>182</sup> *FMC Rules*, r.4.04.

120. A response must be filed within 14 days of service of the application to which it relates, so too a reply.<sup>184</sup>
121. Essentially the same rules apply with respect to an application in a case (an interim or interlocutory application) with respect to the application itself, with the application in a case usually heard on the basis of the affidavit without a response necessarily being filed.<sup>185</sup>
122. Traditionally, the FM Court was not a court of pleadings.<sup>186</sup> 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 must file a defence or points of defence instead of an affidavit and may file a cross-claim.<sup>187</sup> Consequently, the FM Court has had to adapt its practices and procedures to accommodate pleadings.<sup>188</sup>
123. 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 proceedings alleging unlawful discrimination under the *AHRC Act*;<sup>189</sup>
  - 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.<sup>190</sup> Certain statements relating to the decision sought to be reviewed must be filed with the

---

<sup>183</sup> *FMC Rules*, r.4.07(1).

<sup>184</sup> *FMC Rules*, rr.4.03(2) and 4.07(2).

<sup>185</sup> *FMC Rules*, r.4.08.

<sup>186</sup> *Rana v University of South Australia* (2004) 136 FCR 344 at 355 per Lander J; [2004] FCA 559 at para.75 per Lander J.

<sup>187</sup> *FMC Rules*, r.4.05(2) and (3).

<sup>188</sup> See, for example, *Buckingham v KSN Engineering* (2008) 177 IR 427 at 432-433 per Lucev FM; [2008] FMCA 546 at paras.15-21 per Lucev FM.

<sup>189</sup> *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 Australian Human Rights Commission at least 5 days before the date fixed for the first court date: *FMC Rules*, r.41.03.

<sup>190</sup> *FMC Rules*, r.42.02.

application, or as soon as possible afterwards.<sup>191</sup> 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;<sup>192</sup>

- c) specific provisions for application for a stay, notice of appeal, notice of cross-appeal and contention, directions and the preparation of appeal papers for appeals from the AAT transferred to the FM Court from the Federal Court;<sup>193</sup>
- 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*;<sup>194</sup>
- e) for bankruptcy proceedings there are specific forms for:
  - i) affidavits of search and debt;<sup>195</sup>
  - ii) an application to set aside, and extend time for compliance with, a bankruptcy notice;<sup>196</sup>
  - iii) a creditors petition;<sup>197</sup>
  - iv) an interim application;<sup>198</sup>
  - v) appearance;<sup>199</sup>
  - vi) notice stating grounds of opposition to application, interim application or petition;<sup>200</sup>

---

<sup>191</sup> *FMC Rules*, r.42.03.

<sup>192</sup> *FMC Rules*, r.42.04.

<sup>193</sup> *FMC Rules*, r.43.01 – 43.06.

<sup>194</sup> *FMC Rules*, rr.44.05 and 44.06.

<sup>195</sup> *Federal Magistrates Court (Bankruptcy) Rules*, r.4.06 (“*FMC (Bankruptcy) Rules*”).

<sup>196</sup> *FMC (Bankruptcy) Rules*, r.2.01

<sup>197</sup> *FMC (Bankruptcy) Rules*, r.4.02.

<sup>198</sup> *FMC (Bankruptcy) Rules*, rr.2.01, 2.04, 6.06, 6.12 and 6.17.

<sup>199</sup> *FMC (Bankruptcy) Rules*, rr.2.05 and 2.06.

<sup>200</sup> *FMC (Bankruptcy) Rules*, r.2.06.

- vii) sequestration order.<sup>201</sup>
- f) in industrial law proceedings in the Fair Work Division of the FM Court under the *FW Act* there are forms for:
  - i) an application;
  - ii) a claim for unlawful termination of employment pre 1 July 2009;<sup>202</sup>
  - iii) alleged dismissal in contravention of a general protection;<sup>203</sup>
  - iv) a claim for unlawful termination of employment;<sup>204</sup>
  - v) alleged contravention of a general protection;<sup>205</sup>
  - vi) a small claim.<sup>206</sup>

### **First court date**

124. 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.
125. 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.
126. Attached as appendix A is a typical order made at a first court date for a matter other than a migration matter for a 2–3 day matter. Attached as appendix B is the usual order made at a first court date for a migration matter.<sup>207</sup>

---

<sup>201</sup> *FMC (Bankruptcy) Rules*, r.4.08.

<sup>202</sup> *FMC Rules*, r.45.04(2)(b)(i).

<sup>203</sup> *FMC Rules*, r.45.06(b)(i).

<sup>204</sup> *FMC Rules*, r.45.07(b)(i).

<sup>205</sup> *FMC Rules*, r.45.08(b).

<sup>206</sup> *FMC Rules*, r.45.12(b).

<sup>207</sup> 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.

127. 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**

128. The FM Court is required to consider whether or not to advise the parties to proceedings before it about dispute resolution processes that could be used to resolve any matter in dispute.<sup>208</sup> 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.<sup>209</sup>

129. 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.<sup>210</sup> Industrial law 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.

---

<sup>208</sup> *FM Act*, s.22.

<sup>209</sup> *FM Act*, s.21.

<sup>210</sup> *FM Act*, s.26.

## Summary judgment

130. 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.<sup>211</sup> The proceeding need not be hopeless or bound to fail for it to have no reasonable prospect of success.<sup>212</sup>

## Discovery

131. 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.<sup>213</sup>
132. 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.<sup>214</sup>
133. The meaning of “the interests of the administration of justice” is dealt with above.<sup>215</sup>
134. In *Abrahams v Qantas Airways Ltd (No 2)*, the FM Court summarised the position in relation to discovery 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:*

---

<sup>211</sup> *FM Act*, s.17A(1) and (2).

<sup>212</sup> *FM Act*, s.17A(3). See *Balding (No.1)* IR at 24-26 per Lucev FM; FMCA at paras.15-32 per Lucev FM; applied in *Sibic v Salisbury* [2008] FMCA 715 at para.19 per O’Sullivan FM.

<sup>213</sup> *FM Act*, s.45(1).

<sup>214</sup> *FM Act*, s.45(2).

<sup>215</sup> See para.28 above; *FM Act*, s.45.



- (a) *the relevance of any documents sought to be discovered;*<sup>216</sup>
- (b) *the volume of documents sought to be discovered;*<sup>217</sup>
- (c) *whether there is a court book containing relevant documents, and the extent to which relevant documents are included in the court book;*<sup>218</sup>
- (d) *whether discovery would narrow the issues;*<sup>219</sup>
- (e) *whether both parties seek discovery;*<sup>220</sup>
- (f) *whether there is consent to discovery;*<sup>221</sup>
- (g) *whether discovery is “of benefit” in the litigation;*<sup>222</sup> and
- (h) *the effect of discovery on litigants, especially, vulnerable litigants.*<sup>223,224</sup>

135. The FM Court has power to grant third party discovery, but will only do so in exceptional circumstances.<sup>225</sup>

136. Whether discovery might be circumvented by a subpoena is discussed below.<sup>226</sup>

### **Interrogatories**

137. The same principles that apply to discovery apply to interrogatories.<sup>227</sup>

<sup>216</sup> *Tran* at para.13 per McInnis FM; *Taylor* at paras.8-9 per McInnis FM.

<sup>217</sup> *Tran* at paras.3 and 8 per McInnis FM.

<sup>218</sup> *NAQR* at para.15 per Driver FM.

<sup>219</sup> *Ingui* (No.2) at para.15 per Brown FM.

<sup>220</sup> *Ingui* (No.2) at para.15 per Brown FM.

<sup>221</sup> *Ingui* (No.2) at para.15 per Brown FM.

<sup>222</sup> *SZBHT* at para.47 per Scarlett FM.

<sup>223</sup> *Lee* at paras.11-12 per Coker FM

<sup>224</sup> [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). See also *Doukidis v Williamson* (2008) 6 ABC(NS) 717; [2008] FMCA 1352 (“*Doukidis*”); *Moussalli v Western Power* (2009) 185 IR 241; [2009] FMCA 740; *O’Donoghue v Minister for Immigration* [2010] FMCA 345 (“*O’Donoghue*”).

<sup>225</sup> *Doukidis* ABC(NS) at 727 per Lucev FM; FMCA at paras.42-43 per Lucev FM.

<sup>226</sup> See para.150 below.

<sup>227</sup> *FM Act*, s.45(1). See *Doukidis* ABC(NS) at 728 per Lucev FM; FMCA at paras.47-48 per Lucev FM.

## Particulars

138. The *FMC Rules* make provision for particulars.<sup>228</sup> They are however rarely ordered. In *Olsen v Wellard Feeds Pty Ltd*<sup>229</sup> 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.*<sup>230</sup>

*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.*<sup>231</sup> *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.*

---

<sup>228</sup> *FMC Rules*, r.10.01(3)(m).

<sup>229</sup> [2007] FMCA 1885 (“*Wellard-Particulars*”).

<sup>230</sup> 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.

<sup>231</sup> *FM Act*, s.45(1).

*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.*<sup>232</sup>

139. 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.”*<sup>233</sup>

140. In *Verge & Anor v Devere Holdings Pty Ltd & Ors*<sup>234</sup> 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 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.<sup>235</sup> Regard was also had, in a case management context, to the fact that the proceedings were in respect of “a relatively complex” matter.<sup>236</sup> The FM Court found that particulars were required “because it is of

---

<sup>232</sup> *Wellard-Particulars* at paras.5-9 per Lucev FM (the footnotes to the quote are the footnotes in the Judgment). See also *Doukidis ABC(NS)* at 723-725 per Lucev FM; *FMCA* at paras.31-34 per Lucev FM.

<sup>233</sup> *Wellard-Particulars* at para.17 per Lucev FM.

<sup>234</sup> [2008] *FMCA* 591 (“*Verge*”).

<sup>235</sup> *Verge* at paras.15-16 per Lucev FM.

<sup>236</sup> *Verge* at para.17 per Lucev FM.

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.”<sup>237</sup>

## Evidence

141. 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;<sup>238</sup>
  - b) with the consent of the parties, the making of a decision without an oral hearing;<sup>239</sup>
  - c) the power of the FM Court to call a witness of its own motion;<sup>240</sup>
  - d) hearsay evidence, and the giving of notices of previous representation;<sup>241</sup>
  - e) the receipt of transcript as evidence.<sup>242</sup>
142. Division 15 also deals with expert evidence,<sup>243</sup> subpoenas and notices to produce,<sup>244</sup> affidavits<sup>245</sup> and admissions.<sup>246</sup>
143. This Court has the power to make orders prohibiting the publication of evidence, including the publication of a name of a party or witness, as appears necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth.<sup>247</sup>

---

<sup>237</sup> *Verge* at para.24 per Lucev FM.

<sup>238</sup> *FMC Rules*, r.15.01.

<sup>239</sup> *FMC Rules*, r.15.03.

<sup>240</sup> *FMC Rules*, r.15.04.

<sup>241</sup> *FMC Rules*, r.15.05 and *Evidence Act, 1995* (Cth), s.67(1).

<sup>242</sup> *FMC Rules*, r.15.06.

<sup>243</sup> *FMC Rules*, r.15.06A-15.12.

<sup>244</sup> *FMC Rules*, r.15.13A-15.24.

<sup>245</sup> *FMC Rules*, r.15.25-15.29A.

<sup>246</sup> *FMC Rules*, r.15.30-15.31.

<sup>247</sup> *FM Act*, s.61.

144. In an *ex parte* application for a suppression order of the applicant's name in media publications due to be published the following day, the Court in *CC v DD*,<sup>248</sup> granted the order for a period of two weeks because of the potential prejudice to the applicant if her name was published, as she claimed that it may cause her discomfort and embarrassment and may in fact be a reason why she would not pursue any remedies (and potentially discontinue her action) to which she was entitled under the *Sex Discrimination Act*.
145. When the matter came back before the Court for further consideration, further suppression orders were made forbidding the publishing of details of the applicant in any form of media publication in connection with these proceedings.<sup>249</sup>

### **Subpoenas**

146. A party may issue up to five subpoenas without leave of the Court. Recent changes have been made to the *FMC Rules* in relation to the issue of subpoenas in the FM Court. The recent changes allow for documents produced for inspection and copying to be released without the matter being listed before a judicial officer (unless there is an objection). There is now provision for a person subpoenaed, another party or an interested person to object, which objections will be listed before a Federal Magistrate or Registrar.<sup>250</sup>
147. In *Balding v Ten Talents Pty Ltd (No.2)*<sup>251</sup> 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:*

---

<sup>248</sup> [2002] FMCA 221.

<sup>249</sup> See *CC v Djerrkura* [2002] FMCA 372 at paras.37-53 per Brown FM for a discussion of the principles to be taken into account.

<sup>250</sup> *FMC Rules*, rr.15A.13 and 15A.14.

<sup>251</sup> (2007) 160 IR 115; [2007] FMCA 161 (“*Balding (No.2)*”).

- “(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 (7<sup>th</sup> ed) (Sydney: Law Book Company, 2006) pp 168-170. Whether a rational connection exists requires an objective assessment, having regard to basic 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 (4<sup>th</sup> 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.”*<sup>252</sup>

148. 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.<sup>253</sup> 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.<sup>254</sup>

### **Change of venue**

149. 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:
- a) the convenience of the parties;
  - b) the limiting of expense and the cost of the proceeding;
  - c) whether the matter has been listed for final hearing; and
  - d) any other relevant matter.
150. *Sherwood Overseas Co Pty Ltd v Jaymac International Pty Ltd*<sup>255</sup> is an example of a case where the FM Court reviewed the relevant authorities, both in the Federal Court and the FM Court, applied the relevant considerations set out in r.8.02 of the *FMC Rules*, and

---

<sup>252</sup> *Balding (No.2)* IR at 117-118 per Lucev FM; FMCA at paras.13-16 per Lucev FM.

<sup>253</sup> *Balding (No.2)* IR at 120 per Lucev FM; FMCA at para.26 per Lucev FM.

<sup>254</sup> *Balding (No.2)* IR at 120-121 per Lucev FM; FMCA at para.27 per Lucev FM.

<sup>255</sup> [2008] FMCA 495.

refused an application for change of venue from the Western Australian Registry to the Queensland Registry of the FM Court. *Neil v Reward Property Group Pty Ltd*<sup>256</sup> is an example of where a change of venue application was granted and the proceedings transferred from the Western Australian Registry to the Victorian Registry of the FM Court.

### **Rules – compliance with and waiver of**

151. The FM Court has the power to dispense with compliance with the *FMC Rules*, either in whole or in part, at any time.<sup>257</sup> 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.<sup>258</sup>
152. It has been suggested that dispensing with compliance with the *FMC Rules* is a power which might only be exercised in exceptional circumstances.<sup>259</sup> That may place the test too high, because the test prescribed by the relevant rule itself is “in the interests of justice”.<sup>260</sup>

### **Costs**

153. The FM Court operates on a prescribed events based costs schedule, with certain exceptions.
154. Schedule 1 of the *FMC Rules* sets 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 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 lawyer on a summary judgment application or attending for final judgment to have calculated the costs exactly. There is still a discretion in the

---

<sup>256</sup> [2008] FMCA 1583.

<sup>257</sup> *FMC Rules*, r.1.06(1).

<sup>258</sup> *FMC Rules*, r.1.06(2).

<sup>259</sup> *M174 of 2003 v Minister for Immigration & Anor* [2007] FMCA 45 at para.41 per McInnis FM.

<sup>260</sup> And as to the interests of justice see above at para.28.



FM Court to vary those costs, and the FM Court can fix costs in an amount other than those provided by Schedule 1.<sup>261</sup>

155. In migration matters the *FMC Rules* prescribe an amount of \$5,865.00 for costs at a final hearing, \$2,935.00 if the proceeding is concluded after the first court date and at or before an interlocutory hearing, and \$1,175.00 if concluded at or before the first court date.<sup>262</sup> The FM Court does however have discretion to alter the so called “fixed cost” amount of costs for migration, both up and down.<sup>263</sup>
156. 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*. Increasingly however there is a tendency to simply award costs under Schedule 1 of the *FMC Rules*.
157. This Court observed, in *Pierson’s Pro-Health Pty Ltd v Silvex Nominees Pty Ltd (No. 3)*,<sup>264</sup> the following in relation to the general procedure to follow in fixing costs in this Court:

43. *It is clear from a combined reading of:*

- a) *the FMC Rules;*
- b) *information available on the FMC Website;*
- c) *cases decided by the Court; and*
- d) *other secondary sources,*

*and the Court’s own experience, that it is well established and well known that the primary source used for fixing costs in general federal law proceedings (other than, arguably, in bankruptcy) in this Court is the event-based scale in Schedule 1 of the FMC Rules. Whilst there is discretion to depart from the event-based scale, that is the exception rather than the norm.*

---

<sup>261</sup> *FMC Rules*, r.21.02(2)(a). See *Ibrahim v Highline & Worken Pty Ltd (No.2)* [2008] FMCA 1336.

<sup>262</sup> *FMC Rules*, Schedule 1, Part 2 Clause 1.

<sup>263</sup> *Bunnag v Minister for Immigration & Anor (No. 2)* [2008] FMCA 430.

<sup>264</sup> [2010] FMCA 350 (“*Pierson’s Pro-Health (No. 3)*”).

*The event-based scale under Schedule 1 of the FMC Rules exists to provide simplicity and certainty in determining costs, such that a lawyer attending to take final judgment ought to have been able to calculate the exact costs, in the vast majority of cases.*<sup>265</sup>

158. After re-producing the above paragraph from *Pierson's Pro-Health (No. 3)*, the Court in *Swevenings Pty Ltd v Ferguson Consolidated Holdings Pty Ltd (No. 6)*,<sup>266</sup> found as follows:

*11. Generally speaking, costs follow the event in general federal law proceedings in this Court, and a successful party is entitled to recover their costs according to the event-based scale set out in Schedule 1 to the FMC Rules. Where a party has been successful in part and unsuccessful in part the Court may apportion liability for costs on a percentage basis, and in so doing sets the method by which costs are to be calculated looking at the outcome in substance, rather than attempting to artificially calculate costs on a purely mathematical basis.*<sup>267</sup>

159. In *Swevenings (No. 6)* the Court assessed costs of the entire matter, including the portion of the matter that was conducted in the Federal Court before it was transferred to the FM Court, in accordance with the costs schedule, apportioning the costs at 75% in favour of the applicant reflecting, inter alia, the degree to which the applicant was successful. The Court also found that there was nothing out of the ordinary which led the Court to believe that the costs should be taxed under the Federal Court Scale.

## **Adjournment**

160. 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.<sup>268</sup>

---

<sup>265</sup> *Pierson's Pro-Health (No. 3)* at para.43 per Lucev FM (footnotes omitted).

<sup>266</sup> [2010] FMCA 418 ("*Swevenings (No. 6)*").

<sup>267</sup> *Swevenings (No. 6)* at para.11 per Lucev FM (footnotes omitted).

<sup>268</sup> *Simonsen v Official Trustee in Bankruptcy* [2008] FMCA 617 at para.7 per Lucev FM; *Doukidis ABC(NS)* at 728-730 per Lucev FM; FMCA at paras.50-58 per Lucev FM. See *O'Donoghue* at paras.37-39

## Representation

161. 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 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.
162. 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.<sup>269</sup>

## Video and telephone hearings

163. 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.<sup>270</sup>
164. 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.
165. In the context of a witness giving evidence from Los Angeles, *Goodall (No. 1)* gives detailed consideration to the relevant factors

---

in which the Court sets out the principles to take into account when considering exercising discretion whether or not to grant an adjournment, including the doing of justice between the parties, the modern principles of case management, the avoidance of undue delay, and the wastage of public resources, citing *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at 192 per French CJ and 213-215 per Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2009] HCA 27 at para.30 per French CJ and paras.97-103 per Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Fair Work Ombudsman v Kentwood Industries Pty Ltd* [2010] FCA 98 at para.2 per McKerracher J. An adjournment was not granted in *O'Donoghue*.

<sup>269</sup> *FMC Rules*, r.9.04.

<sup>270</sup> *FM Act*, ss.66-72.

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.”<sup>271</sup>

## Appeals

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

- 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<sup>272</sup> by a single Judge, unless the Judge considers the appeal appropriate to be heard by a Full Court.<sup>273</sup>

---

<sup>271</sup> *Federal Magistrates Court Guide Book* at para.2.1550.

<sup>272</sup> *FC Act*, s.24(1).

<sup>273</sup> *FC Act*, s.25(1AA).

## **APPENDIX A**

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

*FILE NO: (P)PEG OF*

APPLICANT

RESPONDENT

### **ORDER**

**BEFORE: FEDERAL MAGISTRATE LUCEV**

**DATE:**

**MADE AT: DARWIN**

#### **THE COURT ORDERS THAT:**

1. The Respondent file and serve a defence by 4pm on 28 June.
2. The matter be referred to mediation before a Registrar of this Court before 19 July.
3. If mediation is unsuccessful the Applicant to file and serve any further affidavits in support of the application by 4pm on 2 August.
4. The Respondent file and serve any affidavits in support of its defence by 4pm on 16 August.
5. The Applicant file and serve any affidavit in reply by 4pm on 30 August.
6. The Applicant and Respondent to file and serve a list of objections to affidavits by 4pm on 6 September.
7. The Applicant and Respondent to advise each other of any witnesses required to attend at the hearing for cross-examination by 4pm on 13 September.
8. The hearing of the matter be on affidavit except by leave of the Court.
9. The matter be listed for 2 days on 5 and 6 October 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 DARWIN**

FILE NO: (P)PEG /  
Applicant

MINISTER FOR IMMIGRATION &  
MULTICULTURAL & INDIGENOUS AFFAIRS  
First Respondent

MIGRATION REVIEW TRIBUNAL  
Second Respondent

### ORDER

**BEFORE:**

**DATE:**

**MADE AT:       DARWIN**

### 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 28 June.
2. The Applicant shall file and serve on or before 19 July:
  - 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 31 August.
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*).

