



**MARTIN TAYLOR, BARRISTER**



**AFFIDAVIT  
ESSENTIALS**



# When?

- Originating Applications
- Interlocutory Applications & Summary Judgment
  - may be based on knowledge, information and belief, but must provide source – UCPR 295, 430(2); Evidence Act (Cth) ss 75 & 172
- At trial where appropriate (whether affidavit or witness statement):
  - Primary Rule in both jurisdictions is for oral evidence at trial [UCPR 390, s 47(6) *Federal Court of Australia Act*]
  - Considerations justifying written evidence at trial: length, complexity, significant issues of credit involved.

# Basic Rules

- Supreme Court Rules 430 – 441
- Federal Court Rules 29.01 – 29.09
- Overview:
  - Approved Forms [UCPR F 46, FCR F 59]
  - State name, occupation and residential or business address [UCPR 431(4), FCR 29.02(2)]
  - Made in first person [UCPR 431(3), FCR 29.02(1)]
  - Number Pages of Affidavit [UCPR 431(6), FCR 29.02(6)]
  - If unsure re swearing, see eg Commissioners for Declarations handbook (DJAG)
  - Important in swearing that you ensure the deponent understands the nature and content of their affidavit.

- Documents, Supreme Court:
  - documents exhibited to affidavit
  - exhibit can be 1 document or a group. If a group, or more than 1 exhibit, index, paginate & bind [UCPR 435]
  - don't re-exhibit materials already filed – other party's exhibits, docs on Court file [UCPR 435(12)]
  - Rules for deponent attending Court / being required for xam [UCPR 439]

- Documents, Federal Court:
  - Documents annexed or exhibited [FCR 29.02(4) & (5)]
  - Annex unless large documents, or volume of documents, which may justify exhibiting.
  - Index and paginate right through including annexures [and exhibits] – index must note paragraph of affidavit where document introduced
  - helpful instruction on back of Affidavit Form 59 incl as to markings “MAT1” for exhibits and affidavits

# Key questions: Why, and What?

- What evidence required to prove elements of client's pleaded case / application, or to rebut opponent's evidence?
- Do I need an affidavit for this? If so, from who?
- Detail & extent of evidence varies – application for security v ex parte interim injunction v interlocutory injunction or trial
- Consider risk of cross examination in selecting deponent, but also issues of weight if proper deponent not called
- Must be relevant and admissible. Avoid all the usual pitfalls – opinion, hearsay, submissions or conclusions, speculation
- Interlocutory matters – care in reliance on information and belief, and its source. Does not allow evidence founded on conjecture, deduction, or observations of others, & should exhibit source documents: *DCT v Ahern (No 2)* [1988] 2 Qd R 158.
- Documents essential, and usually speak for themselves. Summarising their content is generally secondary evidence

# Body of Affidavit

- Substantive content necessary where little documentation exists, or to fill in gaps (eg no reply to correspondence)
- Report speech or observed action, including eg meetings – when, where, who was present, what they said
- Contextualise, and qualify documents as business records, books of account or otherwise establish their admissibility
- Qualified person (eg company accountant) may summarise effect of books and records, but also exhibit records
- Possibly undertake some mechanical analysis to show totals or display trends – if not matter of specialised knowledge.

# Tips and Tricks

- Starts with witness statements and getting whole story
- Use headings, keep simple, chronological, narrative
- Deponent must own the evidence: use their words and language, and don't overstate their evidence
- Never have two witnesses using same language or one adopting another's affidavit
- Don't omit relevant matters
- Use direct speech where possible. Indirect speech can become summary, impression or conclusion
- Interlocutory matters: If appropriate, consider using solicitor's affidavit to avoid premature sworn statements from client, or unwanted cross-examination.
- Get the documents in!
- Where appropriate use other tools such as notice to admit facts to narrow dispute and reduce evidential burden



# Simple Case Study

- *Hanson Construction Materials P/L* [2010] QCA 246 (re summary judgment, obiter):
  - credit manager exhibited invoices - admissible as books of account or books under Corps Act [ss83 & 84 Evidence Act 1977 / ss9 & 1305 Corporations Act 2001]
  - able to depose to invoices representing supply of goods & services on credit (effect of records)
  - Respondent's evidence that material not delivered, absent reasonable inquiry or direct evidence of those involved in ordering materials was "mere assertion"
  - Statement that invoices remain unpaid was inadmissible - failed to give source for belief, or to describe / exhibit records showing that balance outstanding.

# Book of Account & Business Record

## Examples

- Emails, correspondence, memos, diaries, software programmes
- Extracts from project management software:
  - Proper officer to put into evidence and speak to their effect
  - Work out how it is used (eg email variation orders), and its reporting capabilities.
- Or, records of small subbie:
  - diary note if quote / work order habitually recorded therein

# Well, so what?

- Irrelevant evidence is discouraged – extended preparation, exam & trial, distraction from real issues, time and delay
- Often goes unchallenged, and Court will not necessarily do your job for you if you don't object
- But, if there is a challenge and you're caught short by inadmissible evidence, you may bear costs of adjournment, or fail to secure relief including at trial.