



FEDERAL COURT OF AUSTRALIA

Submission No. 6

Date Received 5/4/05

Phone: 61 2 9230 8455  
Fax: 61 2 9230 8881  
Email: pa.lindgrenj@fedcourt.gov.au

The Hon. Justice Kevin E. Lindgren  
Law Courts Building  
Queen's Square  
Sydney NSW 2000  
DX 613 SYDNEY  
AUSTRALIA

5 April 2005



BY: LACA

11/4  
The Secretary  
House of Representatives Legal and  
Constitutional Affairs Committee  
House of Representatives  
Canberra ACT 2600

Dear Sir/Madam,

**re: Inquiry into Harmonisation of Legal Systems**

I am writing to ensure that you are aware of the work that has been done, and continues to be done, by various committees appointed by the Council of Chief Justices of Australia and New Zealand, in relation to the harmonisation of rules of court.

As a convenient way of informing you, I am enclosing a copy of my notes for an address which I gave on 19 September 2004 at the 22<sup>nd</sup> Annual Conference of the Australian Institute of Judicial Administration. Those notes indicate in outline form what has happened to date by way of harmonisation of the rules of the superior courts (in addition, intrastate harmonisation of court rules has taken place in Queensland and New South Wales, but not, of course, as a result of the work of the national committees appointed by the Council of Chief Justices).

Since the attached notes were written, the Committee Investigating the Harmonisation of Rules of Court Relating to Discovery met here in Sydney for a full day's working session on Saturday 12 March 2005. That Committee is also investigating the harmonisation of rules of court relating to *Mareva* orders (also known as freezing orders or asset preservation orders) and *Anton Piller* orders (also known as search orders). As a result, we are in the process of producing a first draft of harmonised rules of court, practice notes and forms of order, in relation to those two areas. Work on the draft is now substantially advanced.

Since the attached notes were written, the Committee Investigating the Harmonisation of Rules of Court Relating to Discovery met here in Sydney for a full day's working session on Saturday 12 March 2005. That Committee is also investigating the harmonisation of rules of court relating to *Mareva* orders (also known as freezing orders or asset preservation orders) and *Anton Piller* orders (also known as search orders). As a result, we are in the process of producing a first draft of harmonised rules of court, practice notes and forms of order, in relation to those two areas. Work on the draft is now substantially advanced.

There are other areas covered by rules of court which might well be harmonised. An example is the rules dealing with service outside the jurisdiction. I understand that the Council of Chief Justices will refer this area to a harmonisation committee for investigation, once the projects already in hand are completed.

Please feel free to contact my chambers if you would like to have any further information.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Kevin Lindgren", with a long horizontal flourish extending to the right.

**Justice Kevin Lindgren**

Chairman

Committees on Harmonisation of Rules of Court relating to  
Corporations, Subpoenas, Discovery, and Freezing and  
Search Orders

**22<sup>nd</sup> AIJA Annual Conference**  
**‘Proportionality – cost-effective justice?’**  
**17 to 19 September 2004**  
**Westin Hotel, Sydney**

## **Harmonisation of Rules of Court in Australia**

### **1. History**

- 1.1 Justice Lockhart of the Federal Court of Australia and Justice McLelland of the Supreme Court of New South Wales produced harmonised rules of court and forms relating to the winding up of companies.
- 1.2 The Council of Chief Justices appointed a committee of judges, one from the Federal Court and one from each Supreme Court, to explore the possibility of producing harmonised rules of court governing proceedings under the *Corporations Law* generally.

### **Law**

- 1.3 Over the period from 1996 to 1999, that Committee produced such rules. They are found in sets of rules bearing the following titles:

Federal Court of Australia	<i>Federal Court (Corporations) Rules 2000</i>
New South Wales	<i>Supreme Court (Corporations) Rules 1999</i>
Victoria	<i>Supreme Court (Corporations) Rules 2003</i> (constituting Chapter V of the Rules of the Supreme Court)
Queensland	<i>Corporations Law Rules</i> (constituting Chapter 23 and Schedules 1A and 1B of the <i>Uniform Civil Procedure Rules 1999</i> )
Western Australia	<i>Supreme Court (Corporations) (WA) Rules</i>
South Australia	<i>Corporations Rules 2003</i>
Tasmania	<i>Rules of the Supreme Court (Corporations Law) 2000</i>
Australian Capital Territory	<i>Supreme Court (Corporations) Rules 2003</i>
Northern Territory	<i>Corporations Law Rules</i>

- 1.4 On 20 May 2000 a Conference on the harmonisation of rules of court generally was held at the Federal Court in Sydney. Those attending:
- agreed to recommend to the Council of Chief Justices that harmonisation of court rules in other subject areas be explored; and
  - nominated several subject areas for consideration.
- 1.5 In October 2000, the Council of Chief Justices decided that, in the first instance, harmonisation of the rules relating to subpoenas, discovery and service outside the jurisdiction be explored. The Council appointed a committee of judges to work on, first, the rules and forms relating to subpoenas.
- 1.6 While all State Supreme Courts participated in the corporations rules exercise, the Supreme Court of Queensland did not, for local reasons, participate in the subpoena rules exercise, although a judge of that Court continued to participate as a member of the Committee.
- 1.7 Over a period from February 2001 to September 2003 that committee produced a set of harmonised subpoena rules (a judge of the Family Court of Australia was also a member of this Committee). The various courts have been making the harmonised subpoena rules at various times, as local exigencies have permitted, with various commencement dates in this year (2004).
- 1.8 In both cases (corporations and subpoenas), the Council of Chief Justices has appointed a 'monitoring committee' to monitor the operation of the harmonised rules, and, it is hoped, to generate any amendments to them on a harmonised basis.
- 1.9 The first meeting of the Committee appointed to investigate the question of the harmonisation of the rules relating to Discovery was held on 5 August 2004.
- 1.10 All of the Committees referred to were, and are, supported by Mr Philip Kellow, Deputy Registrar of the Federal Court of Australia; Professor Greg Reinhardt of the AIJA; and Ms Claire Parkhill of the Commonwealth Office of Legislative Drafting.

## **2. Some matters of current interest to be discussed at the conference**

- 2.1 The current project: harmonisation of the rules relating to discovery.
- 2.2 A possible project to harmonise court rules and practice relating to *Mareva* orders ('freezing orders' or 'asset preservation orders') and *Anton Piller* orders ('disclosure orders').

## **3. Advantages and disadvantages of harmonisation, to be elaborated upon at the conference**

### **Advantages**

- 3.1 Production of a 'model' set of rules based on the pooled experience of all Australian jurisdictions.
- 3.2 Common language ensures that the same text will fall to be construed in all participating courts, with the consequence of a larger corpus of interpretative decisions.
- 3.3 Greater certainty and predictability as a result of 3.2.
- 3.4 It does little to enhance the administration of justice that the same issue is addressed differently in the rules of the various courts, where the difference cannot be supported by reference to local considerations.
- 3.5 Harmonisation of rules militates against forum shopping based on rule differences.
- 3.6 Interjurisdictional practice and a 'national profession'.
- 3.7 Training programs within 'national' firms.

### **Disadvantages**

- 3.8 Slowing of pace of change because of the strong desirability of a court's taking up amendments proposed by it through the relevant harmonised rules monitoring committee, rather than unilaterally amending the harmonised rules it has adopted.

- 3.9 Perceived interference with local autonomy.
- 3.10 Discouragement of 'trials' of diverse solutions resulting in the emergence of 'the best' one; instead, a tendency to compromise and to adopt the 'lowest common denominator' factor.

**K E Lindgren**

19 September 2004