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MEMORANDUM

MATTER: **LCA/FCA Tax Workshop**

DATE: **23 May 2022**

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1. At the first meeting of counsel, I identified some material which may be of use in discussing some of the points.
2. Documents mentioned are linked from this memo to my Dropbox, except the documents mentioned in footnotes 3 & 4.

1 Oral Evidence as Opposed to Affidavit Evidence

3. The old article by Loretta Re, "Oral v Written Evidence: The Myth of the 'Impressive Witness'" (1983) 57 ALJ 679 was recently referred to again by Weinberg JA in *Pell v R* [2019] VSCA 186. The relevant passage begins at [917] and see footnotes 214-220.[1]
4. Loretta Re says a number of things against attempting to judge credibility of oral evidence from facial or body movements.
5. She also presents (page 682 and following) a number of reasons to favour written presentation of evidence, largely being increased accuracy and alleged lower cost.
6. She discounts the possibility of collusion in preparation of a written report of evidence as being no greater than exists with oral evidence.
7. She also deals with tape recorded presentation of evidence, which is not the subject of our discussion, but is also quite interesting.
8. Also linked is a case note by Francis Carnovale concerning a direction given in 1986 in the New South Wales Supreme Court in a "bottom of the harbour scheme" tax matter, that the hearing "should be conducted only upon oral evidence if the Commissioner objects to the use of affidavits". Mr Carnovale refers to the then recent paper by Lorette Re, and also to the practice of the New South Wales Supreme Court that income

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[1] The treatment by the High Court is briefer. See *Pell v R* (2020) 268 CLR 123 at [49]

tax appeals usually proceeded on affidavit evidence with the deponents being available for cross-examination if required.[2]

9. The fundamental case in New Zealand is *Taniwha v R* [2017] 1 NZLR 116 where the Court's reasons are given by Arnold J, starting at paragraph 1 as follows:

> *In New Zealand, as in other jurisdictions from a common law tradition, criminal trials are conducted orally, in open court. The principle of orality … recognises the fundamental importance of transparency in the administration of just justice through the courts. The principle also rests upon the assumption that a fact-finder, whether a judge sitting alone or a jury, is likely to benefit from seeing and hearing witnesses give their evidence. There is, however, research which indicates that a person's demeanour when giving evidence in court generally provides little or no assistance to a fact-finder charged with determining whether or not the witness is telling the truth.*[3] *A witness who presents as confident, articulate and honest may be mistaken or dishonest; a witness who presents as diffident, hesitant or awkward may be telling the truth and their evidence may be accurate. Not only can appearances be deceptive, but fact-finders may overestimate their ability to recognise those who are truthful from those who are not, by, for example, relying on unreliable behaviours such as fidgeting or looking away.*[4] *In this appeal, the Court is asked to consider how a judge instructing a jury in a criminal trial should deal with the question of demeanour.*

10. The New Zealand Supreme Court said at pages 137-138 that submissions (and note that this was a criminal case) before juries amounting to "an outright appeal to a demeanour-based assessment" was "better not made", certainly in an unqualified way. But the New Zealand Supreme Court rejected a submission that judges "must sum up to juries on the basis that they can derive no benefit from demeanour in assessing truthfulness": at paragraph [41]. And the New Zealand Supreme Court correctly said, in my view, that some matters which "could be described as demeanour – gestures or tone of voice, for example – may affect meaning and so cannot be ignored": at paragraph [42].

11. In short, there is plenty to discuss under this point in the about 10 minutes allotted.

2 Pleading Substitutes

12. I have provided you with a copy of *Rio Tinto Ltd v Federal Commissioner of Taxation* (2004) 55 ATR 321 (Sundberg J) (29 March 2004). Some care must be taken as this was decided under the former Order 52B(5).

13. The critical thing – the table of issues and contentions - is reproduced from page 326 of the judgment, setting out the perceived issues with one word responses.

14. The various complaints made are at [17], including complaints about the statement of facts, as well as the contentions and issues.

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2 (1986) 60 ALJ 684. Note that the case is referred to by Mr Carnovale, and by the Federal Law Reports reporter as "Greghan" but is otherwise universally reported, including on appeal, as "Gregrhon".

3 See, for example, Aldert Vrij, *Detecting Lies and Deceit, Pitfalls and Opportunities* (2nd Edition) John Wiley & Sons, Chichester (England), 2008.

4 See, for example, Eiten Elaad, "Effects of Feedback on the Overestimated Capacity to Detect Lies and Underestimated Ability to Tell Lies" (2003) 17 Applied Cognitive Psychology, 349.

15. Sundberg J found at [58] that the Commissioner's document "falls seriously short of the statement contemplated" by the then Rule.

> *The most important deficiency is the absence of any stated basis for the contentions in the table of issues and contentions. The issues are sufficiently stated, save for the omission of clear identification of alternative cases. But more is required than a "Yes" or "No" answer to the question posed by each issue.*

16. Sundberg J agreed with a paper given by Beaumont J (also in the Dropbox folder) that "the statement of contentions 'must propound all the necessary ingredients of the claim for which, as a matter of legal substance, that party contends'".[5]

17. That said, the rules have significantly changed. The three-page notice of appeal prescribed at an earlier point in history has been replaced by an approved form requiring the taxpayer to set out the facts as well as the grounds of appeal.

18. Further, the perception (as I understand it from others in our discussion) is that the statement of facts, issues and contentions (or appeal statement nowadays) is becoming a mini-submission.

19. My experience is that the pleading substitute is abandoned almost immediately, and the principal document then becomes the respective party's submissions, which seems wasteful.

20. See also the decision of the Full Federal Court, *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341, [66].

David W Marks QC

23 May 2022

[5] Beaumont, "Anatomy of a Federal Court Tax Case" (2000) 23(2) UNSW LJ 237

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MEMORANDUM

TO: **Logan J, A Wheatley QC and F Chen**

FROM: **David Marks QC**

MATTER: **Declaratory Relief**

DATE: **24 May 2022**

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1. As this is a matter of developing law and there are matters before the Federal Court at present, I restrict this note to some references.
2. This year we have seen *Aurizon* 2022 ATC 25-824 and *Hyder* 2022 ATC 20-820.
3. Historically in Queensland we had *Totalisator* [1989] 1 QdR 215 in which Logan J appeared.
4. There have been a number of cases in between, but it is important not to confuse cases involving applications for advice under section 96 of the *Trusts Act* with cases involving applications for declarations.
5. There have been a couple of papers for The Tax Institute over the years, this year by Redenbach of the Victorian Bar, and seven years ago by Batrouney QC, also of the Victorian Bar. My paper on the private ruling system, at AIAL National conference, is in the AIAL Forum.
6. Cases are linked from my Dropbox.

David W Marks QC

24 May 2022

Cases references – debt collecting

Huang (2021) 96 ALJR 43

Commissioner of Taxation v Bosanac [2021] FCAFC 158

DCT v State Grid [2022] FCA 139