

“EVIDENCE...some things to think about”

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1. Solicitors who practice Family Law are required, as a practical matter, to have a greater degree of familiarity with, and competence in, the rules of Evidence, than is required in many other areas of practice.
2. This circumstance derives from the fact that they practice in affidavit jurisdictions, and indeed conduct a large amount of advocacy work themselves, especially at interlocutory, or interim, level.
3. In fact the ability of solicitors to properly prepare admissible affidavit evidence can be of critical importance to their client’s success at both interim and final hearings.
4. Against this background it may be instructive to revisit a few practical issues, chosen with no particular theme in mind, that arise fairly commonly and consider some recent developments in respect of them.
5. It is proposed to look at the following issues;
 - Relevance and conclusions, the basics
 - First hand Hearsay, when and how does it ever become admissible
 - Business records, a particular exception to the hearsay rule
 - Admissibility of privileged communication, and other “inadmissible” material in children’s cases
6. The focus of this paper is hopefully less technical and more practical. It is designed to assist, primarily, those involved in the preparation of evidence, and less experienced advocates.

Relevance and Conclusions...the basics

7. We all need reminding from time to time that the fundamental rule of admissibility is relevance. Reminders do come regularly from those on the bench, whose focus is on refining the material to be dealt with at trial, in contrast to the parties, who often want to maximise it.
8. The statutory basis for this old rule is now to be found in ss 55 and 56 of the Evidence Act which is in the following terms

SECT 55

Relevant evidence

- (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.*

SECT 56

Relevant evidence to be admissible

- (1) *Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.*
- (2) *Evidence that is not relevant in the proceeding is not admissible.*

9. There is a tendency to forget about the basics in the fairly common situation of affidavits being hurriedly prepared, on poor and very subjective instructions, and in particular where pushy clients are insisting on the material which they consider is important being included in the affidavit.
10. Whilst it may be important in some cases to allow clients to “have their say”, practitioners must bear in mind their overriding duty to the Court which includes, in my view, a duty to attempt to adduce evidence conscientiously and in accordance with the law.
11. A common example of irrelevance is the expression of a deponent’s opinion or view as to a particular circumstance or person, for example;

“I believe it is in Epponnee Rae’s best interests for her to continue to live with me and go to Fountain Lake’s school with all her friends.”

“I am concerned that if Brett has contact each alternate weekend there will be large periods when he is not there with Epponnee Rae during contact”

“I believe his new partner who is about 27 is a user of illegal drugs”

12. Apart from being self serving, and ultimately going to matters which the Court has to decide, the belief held by a parent, or other significant adult about something which the Court must determine is seldom relevant, let alone persuasive. What might be relevant is the factual basis for the belief. Thus time in affidavits is better spent deposing to the facts and circumstances which might be probative of the factual issue, particularly as to the future arrangements for children, and which might ultimately lead the Court to the same view as the hopeful deponent.
13. From a strategic point of view also a lot of vented spleen may not be a good idea. My own experience is that much material and inspiration for effective cross examination is to be found in subjective and colourful (and ultimately inadmissible) material.

14. A useful question for a solicitor to ask, perhaps to themselves, with respect to material being considered for inclusion in an affidavit is "so what?" Obviously that question can only be effectively answered if one has a firm objective view of the issues in the case, as distinct from the political or personal agenda of the client.
15. Errors can, and often do, occur in the expression of conclusions which are technically inadmissible and susceptible to objection.
16. Words such as "arranged, liaised, agreed, organized, contributed" and even "cared" should be avoided. Although judicial approaches to such material varies expressions such as this are strictly inadmissible and often give rise to the need to seek leave to adduce evidence in the proper form in chief; always a less desirable option than having it nicely parceled up in an affidavit.
17. However possibly the worst problem with such expressions is that they cause valuable information that generally goes to providing a more comprehensive and impressive picture of contribution, to be left out. If one accepts the discipline imposed by the rules of evidence, of setting out what a deponent actually did the overall result is not only more likely to be admissible, but is often more impressive. It is also a good test for the veracity of the deponent's evidence before cross examination, and can sometimes lead to other enquiries that will assist in the case.

Eg. Instead of "I arranged for the design and construction of the former matrimonial home"...Try... *"I prepared a four page design brief (Copy annexed) and then forwarded it to the plan drawer, along with a construction budget that I had prepared (copy annexed) , and a survey of the land which I obtained from the solicitors who acted for us on the purchase. I met the plan drawer at least five times in meetings which took up to an hour each on average over a period of six weeks. On those occasions I examined drafts or working drawings and discussed with and instructed the plan drawer as to the changes required. I also went to the site with the plan drawer on two occasions and assisted him in the taking of measurements. When the plans were complete, and after I had shown them to the Husband I personally completed a Development application and lodged it at the Council after discussing the requirements with an officer in the town planning department. At about the same time I contacted three builders who had been recommended to me and delivered a copy of the plans to them and discussed with each of them our general requirements, seeking a quote for the construction work. Subsequently, at their request I met two of the builders on site and had a number of meetings with one in particular at his office to clarify some aspects of the proposed construction..." ETC ETC*

18. Conclusions can be unhelpful in children's cases also; for example

"I felt it was necessary for Epponnee Rae and me to move from Fountian Lakes because of the continual abuse upon myself from the father over the years and because the father was always placing Epponnee Rae in a dangerous or unsafe environment or position . I moved Epponnee Rae and myself to Sylvania Waters to escape from the violence and abuse of the father."

19. What may be probative, and thus admissible, is actual evidence of the violence and abuse. Evidence set out in this concluded fashion is not only inadmissible but it is unimpressive and I would have thought, unpersuasive.

First Hand Hearsay

20. Hearsay is arguably one of the most difficult concepts in evidence which is why the section, probably uniquely, is followed not only by notes, but by examples! Again it is instructive to revisit the legislative source.

SECT 59

The hearsay rule—exclusion of hearsay evidence

- (1) *Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.*
- (2) *Such a fact is in this Part referred to as an asserted fact.*
- (3) *Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.*

Note: Specific exceptions to the hearsay rule are as follows:

** evidence relevant for a non-hearsay purpose (section 60);*

** first-hand hearsay:*

- civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64);

- criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66);

** business records (section 69);*

** tags and labels (section 70);*

** telecommunications (section 71);*

** contemporaneous statements about a person's health etc. (section 72);*

** marriage, family history or family relationships (section 73);*

** public or general rights (section 74);*

** use of evidence in interlocutory proceedings (section 75);*

** admissions (section 81);*

** representations about employment or authority (subsection 87(2));*

** exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));*

** character of and expert opinion about accused persons (sections 110 and 111).*

Other provisions of this Act, or of other laws, may operate as further exceptions.

21. Hearsay often finds its way into affidavits. It is usually quite easily recognized and draws objection. The fact that something is hearsay may dissuade cautious practitioners from including evidence which may in fact be of some probative value.
22. However quite often the previous representation is in fact admissible pursuant to one of the exceptions referred to in the Act itself.
23. In particular an expression which is otherwise first hand hearsay may be admissible as proof that something was said, as opposed to the truth of what was said, for example;

"The Wife's mother Kath, then yelled Brett as he was placing Epponnee Rae in the Barina, "You are nothing but a child molesting scum!"

22. The statement can never be admissible to prove the truth of the allegation, which indeed is probably an issue in the case, but it may well be relevant to the issue of the relationships between the adults, and the ability of some of the adults to behave properly in the presence of the child.
23. Once a previous representation is admitted for a non-hearsay purpose it is, without any judicial limitation, admissible for all purposes;

SECT 60

Exception: evidence relevant for a non-hearsay purpose

The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

24. Under this section, evidence of a representation which offends against the hearsay rule becomes admissible as evidence of the truth of the representation once admitted for a non-hearsay purpose. This effect, in the context of the history given to an expert, is explained, in paragraph [60.4] of the Commentary on [the Act](#) contained in the publication Commonwealth Evidence Law, published by the Attorney-General's Department, as follows:-

Section 60 also has the effect of excluding from the hearsay rule statements made directly or indirectly by persons to the expert about the facts of the particular case. The evidence of the expert thus becomes evidence of those facts. However, it should be expected that little weight would be given to the evidence in so far as it relates to representations about the facts of the case, unless those facts are not seriously in dispute. As a practical matter one would expect the persons who made the statements to the experts to be called as witnesses.

25. Indeed if those persons were not called as witnesses and thus the facts not proven, the expert opinion would likely be inadmissible.

26. As against the potential for hearsay evidence to assume unwarranted importance are the provisions of ss135 and 136 of the Evidence Act, which are very widely used in common law courts in this state, in the following terms;

SECT 135

General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) *be unfairly prejudicial to a [party](#); or*
- (b) *be misleading or confusing; or*
- (c) *cause or result in undue waste of time.*

SECT 136

General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) *be unfairly prejudicial to a [party](#); or*
- (b) *be misleading or confusing.*

27. In **VJ v CJ** (1997) FLC 92-772 the Full Court of the Family Court¹ lamented that material which, if tendered for a non-hearsay purpose would have become admissible for all purposes by the operation of s60, had not been subjected to the discretionary exclusion available under s135;

What do we then conclude in relation to the admissibility of the children's statements? It seems to us that consideration ought to have been given at trial to excluding the statements of each of the three children involved as they were likely to be extremely prejudicial yet were incapable of being properly tested.

28. Further reference to the practical application of ss135 and 136 will be made later in this paper when considering the admissibility of business records.
29. No discussion of first hand hearsay in the context of Family Law is complete without a reminder of s 75;

SECT 75

Exception: interlocutory proceedings

¹ A decision reversed, but not on this point, by High Court in **CDJ v VAJ** [1998] HCA 67 (22 October 1998)

In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.

30. Subject to the application of s135, and to the issue of weight, which the court can reduce in the exercise of its discretion under s136, much relevant evidence in the form of first hand hearsay can be adduced in interim applications by this means.
31. For the first hand hearsay to be strictly admissible the deponent should depose to the precise out of court representation, the identity of the maker of the representation, as well as the date time and place at which it was conveyed to them.
32. Look at the following example of how otherwise potentially admissible hearsay is rendered in admissible by not being adduced in the correct fashion;

"I believe in the last school holidays the girl was at the home of the father and his partner when the children arrived for contact they saw and were told that she had been bashed by a man with a knife"

32. It should be noted that evidence adduced properly is generally far more persuasive.

Business Records

33. Particularly in property cases, documentary records are prominent and often of critical importance. Documents, or at least their contents, are hearsay. However if a document qualifies as a business record it may be admitted into evidence as an exception to the hearsay rule.

SECT 69

Exception: business records

- (1) *This section applies to a document that:*

- (a) *either:*

- (i) *is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or*
- (ii) *at any time was or formed part of such a record; and*

- (b) *contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.*

- (2) *The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:*

- (a) *by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or*

- (b) *on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.*
- (3) *Subsection (2) does not apply if the representation:*
- (a) *was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or*
 - (b) *was made in connection with an investigation relating or leading to a criminal proceeding.*
- (4) *If:*
- (a) *the occurrence of an event of a particular kind is in question; and*
 - (b) *in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind;*

the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.

- (5) *For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).*

Note 1: Sections 48, 49, 50, 146, 147 and subsection 150(1) are relevant to the mode of proof, and authentication, of business records.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.

34. Some judges have been known to reject a tender of an otherwise admissible business record on the basis that it has not been brought to Court under a subpoena. Production under subpoena however is not the only way of establishing the authenticity of a document and practitioners should always keep in mind the provisions of ss 58 and 183 Evidence Act, which enable a Court, in invoking the facilitative purpose of s69 to draw inferences from a document itself as to its authenticity.

SECT 58

Inferences as to relevance

- (1) *If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable **inference** from it, including an **inference** as to its authenticity or identity.*
- (2) *Subsection (1) does not limit the matters from which **inferences** may properly be drawn.*

SECT 183

Inferences If a question arises about the application of a provision of [this Act](#) in relation to a document or thing, the court may:

- (a) examine the document or thing; and
- (b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.

Note: Section 182 gives this section a wider application in relation to Commonwealth records and certain Commonwealth documents.

35. Of the wide application to be given to section 58, and dealing with a body of authority which suggested a narrower scope for the section, the Full Court of the Federal Court in *Lee v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 305 (4 October 2002) said;

*25 There is controversial NSW authority which supports the appellant: **National Australia Bank Ltd v Rusu** (1999) 47 NSWLR 309 (Bryson J), approved by Heydon JA in **Daw v Toyworld** (NSW) Pty Ltd [2001] NSWCA 25; see also **Kingham v Sutton (No 3)** [2001] FCA 1117, c.f. Odgers "Uniform Evidence Law" 5th ed. at p140. In **Rusu**, his Honour may have meant no more than that there may be cases in which, as a matter of fact, no inference as to authenticity of a document may be properly drawn from the document itself. If he meant to say more than that, it is by no means clear to me that the way is open for a court to read some unexpressed limitation into a grant of power to courts: such grants are generally very liberally construed - see **PMT Partners (in liq) v Australia National Parks and Wildlife Service** (1995) 184 CLR 301 at 303 and 316; **FAI General Insurance Co Ltd v Southern Cross Exploration NL** (1988) 165 CLR 268 at 290; **Knight v FP Special Assets Ltd** (1992) 174 CLR 178 at 185, 195 and 202-3. Such an approach may be particularly apt where, as here, the provision aims at putting another nail into the coffin of unmeritorious technicality in litigation and s 135 provides ample safeguards against possible abuse of the section.*

Practical Guidance to s69

36. To provide assistance to practitioners in determining the admissibility of business records I recommend an examination of three interlocutory judgments, outside the Family Court, in which experienced judges at first instance have dealt with objections to the tender of documents under s69.
37. In ruling on the admissibility of the documents the judges have considered the application of each of the requirements of the section, in circumstances similar to those which often arise in property cases in the Family Court. The reasoning process adopted in each case is instructive of the principles involved in applying s 69.
38. Each of the judgments is short, concise, available on AustLii, and worth taking a few minutes to read to help the seemingly complicated sink in a bit better.
39. The first is a decision of Hely J in the Federal Court in **Ringrow Pty Limited v BP Australia** [2003] FCA 933 (4 September 2003), in which His Honour ruled on the

admissibility of valuations that had been prepared for a bank lending on a property which was the subject of the action, and which had been prepared well before the proceedings had even been dreamed of.

40. After finding, with no difficulty, in spite of a complete absence of direct evidence as to the authenticity, or even the source of the documents, that the valuations were business records of the Bank and also of the Valuers who had compiled them, His Honour had then to decide whether the representations they contained were made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact within the meaning of [s 69\(5\)](#); [s 69\(2\)\(a\)](#).

41. The answer to that question in turn depended on whether an opinion as to value could be an "asserted fact", in the absence of any specific provision of the Evidence Act, making it so.

42. His Honour, in holding that it was, said

*16 The distinction between a fact and an opinion is not clear cut: see **Quick v Stoland** (1998) 87 FCR 371 at 375 (Branson J). The author of *Cross on Evidence* (supra) at [35050] states that there is no doubt that the word 'fact' is wide enough to cover opinion, and cites **Morley v National Insurance Co** [1967] VR 566 in support of that conclusion. At p 567, McInerney J held that 'fact' where used in the [Evidence Act](#) there under consideration included a statement of opinion by an expert. The Victorian Act at the time did not allow evidence of opinion but only of facts.*

*17 Provisions such as [s 69](#) of the [Evidence Act](#) are meant to have a facilitative effect and are to be construed broadly: **Supetina Pty Ltd v Lombok Pty Ltd** (1984) 5 FCR 439, 442 (Spender J). I asked to be referred to anything in the Australian Law Reform Commission ('the ALRC') report on Evidence which would throw any light on the reason [s 69](#) takes a different form in relation to opinion evidence from its precursors, but was informed by counsel that they were unable to find any such reference. My attention has not been drawn to anything in the ALRC report which would suggest that the apparent change was deliberate.*

*18 [Section 111](#) of the [Evidence Act](#) assumes that the hearsay rule is capable of applying to opinion evidence: *Cross on Evidence* (supra) at [35555]. If that is so, then one would expect that the exceptions to the hearsay rule would also apply to opinion evidence. Given that [s 69](#) is to be construed broadly, and that at least in some contexts 'fact' may include an opinion (without statutory extension), in my view [s 69](#) of the Act is capable of operation even if the asserted fact is an opinion in relation to a matter of fact.*

19 Section 69(2) requires that the person who made the representation must have personal knowledge of the asserted fact. The valuers had personal knowledge of the asserted fact, because the asserted fact consists of opinions which they themselves had formed and expressed.

20 The language of s 69(5) is similar to that used in s 78(a) in connection with the exception to the hearsay rule for lay opinions, except that s 78(a) refers to a matter or event, rather than to a fact. But there is no reason to assume that the legislature intended that a lay opinion rendered admissible by s 78 of the Act could be proven by the use of the business records provisions, but that an expert opinion rendered admissible by s 79 could not.

42. Having ruled that the valuations were admissible Hely J went on to consider whether nonetheless he should exclude them under s135.
43. His Honour exercised his discretion under the section to exclude the reports. He based this decision on what the reports did not contain and expressed his reasons in a way which is instructive, even without knowing the facts;

27 Whilst inability to cross-examine ordinarily goes to weight, rather than to admissibility, in my view each of pars [a], [b] and [c] of s 135 would be enlivened if the valuation reports were admitted into evidence. That is principally because the reports do not squarely address the issue raised in these proceedings and because one is left to infer or deduce from a report prepared for a different purpose whether the report has anything to say about whether or not valuable goodwill attached to the service station business at a relevant date, and if so for what reasons. Whether the figure adopted for the leasehold value of goodwill is germane to that question depends upon assertion from the bar table, rather than demonstration by a reasoning process contained in the valuation report.

28 A debate as to whether the valuation report conveys anything of relevance to these proceedings is not one which can be fairly, satisfactorily or efficiently conducted in the absence of the valuer. In the exercise of my discretion under s 135 I refuse to admit the valuation reports. In coming to that conclusion, I have taken into account the fact that the valuations were supplied to the respondent's solicitor on 23 May 2003 and that a valuer from Alcorn, Corbin Nicholson inspected the service station sites on behalf of the respondents on 23 July 2003, but that no report flowing from that inspection has been tendered.

44. In ***Vitali v Stachnik*** [2001] NSWSC 303 (20 April 2001) Barrett J, in the Supreme Court of New South Wales, was required to rule on the admissibility of documents that were said to evidence indebtedness of a company that was the corporate alter ego of one of the parties to a dispute under the Property Relationship Act 1994.
45. After holding that they were business records of the company His Honour was required to consider whether the documents should be excluded under s69 (3)(a) given that the evidence of the party seeking to tender them, given on the voir dire, was that one of them (MFI 2) had been created for the dual purposes of

"establishing the case" and also because there was "a concern in the company that needed to be followed through".

46. On the way to determining that issue His Honour reflected on the purpose of the exclusion in s69(3), and upon a judicial qualification that had been suggested in another case that he had to get around;

12 The purpose of the exclusion is, as I see it, to prevent the introduction through this exception to the hearsay rule of hearsay material which is prepared in an atmosphere or context which may cause it to be self-serving in the sense of possibly being prepared to assist the proof of something known or at least apprehended to be relevant to the outcome of identifiable legal proceedings.

*13 I must refer to the observation of Rolfe J in **Sellers Fabrics Pty Ltd v Hapag-Lloyd AG** [1998] NSWSC 644 that the s.69(3)(a) exclusion only operates in relation to a proceeding to which the person entitled to the document in question is a party.*

*14 In the present case, the person entitled to MFI 2 and MFI 3 is, on the face of things, Campaign Nursing but that company itself is not a party to these proceedings. I note, however, the characterisation of Rolfe J's decision in this respect as "surprising" in Mr Odgers' work **Uniform Evidence Law** - added to which is the practical reality that Campaign Nursing is, as I have said, the alter ego of the defendant who is its sole director and shareholder. I therefore do not see the observation of Rolfe J as an obstacle to the operation of s.69(3)(a) in this case.*

47. His Honour ruled that one of the documents was excluded, but the other was not, the difference being based upon the circumstances surrounding their creation;

18 The fact that this litigation had begun when the content of MFI 2 was prepared and that its preparation was recognised by the defendant at the time as bearing a relevance to and as potentially playing a part in that litigation must mean, as I see it, that the "in contemplation of" aspect or the "in connection with" aspect (or each of them) is satisfied. I hold, therefore, that s.69(3)(a) precludes the operation of s.69(2) in relation to MFI 2 so that the hearsay rule applies to make that document inadmissible.

19 For MFI 3, however, the position is different. The defendant said that that document was prepared by the plaintiff or Monique Piwonka, so far as she could make out. It was therefore prepared at a time when these proceedings could not have been in contemplation. The basis on which I have rejected MFI 2, therefore, does not apply in relation to MFI 3.

48. After reaching that point His Honour made the following remarks in dealing with the application of s135.

22 The trend of recent authority is, I think, against my exercising my discretion under s.135(a) to reject MFI 3 in this case. That authority lays particular

*emphasis on the adverb "unfairly" in the phrase "unfairly prejudicial". I refer in particular to the judgment of McHugh J in **Papakosmas v The Queen** (1999) 196 CLR 297 and the judgment of Sheller JA (in which Meagher JA concurred) in **Ordukaya v Hicks** [2000] NSWCA 180. In the latter case, as in **ACCC v Australian Safeway Stores Pty Ltd** [1999] FCA 1269, there was approval of the notion that inability to cross-examine on material sought to be introduced is not of itself unfairly prejudicial, at least in civil proceedings where there is no jury, even though that inability may well be a very relevant consideration in the Court's decision as to the weight it should ultimately afford to the evidence (see also **R v Toki** [2000] NSWSC 999).*

49. In the Supreme Court of NSW Santow J in **Edmunds-Jones Pty Limited & 1 Ors v Australian Women's Hockey Association Inc** [1999] NSWSC 285 (19 March 1999) was required to rule on the admissibility of an affidavit annexing a list of payments that had been compiled and produced by Telstra in response to a subpoena. Often institutions served with subpoenas respond by creating a document which is hearsay, and thus inadmissible, unless regarded as a business record. The problem with s 69(3) is obvious.
50. His Honour approached the tricky task in the following way, taking into account the provisions of s48 (1) (d) and (e) which facilitate the adducing of evidence which is not in a written form or which form only a part of, or a summary of a larger set of records:

12 Resolving whether or not Annexure A was prepared for the purpose of the present proceeding is not without difficulty on the present state of the evidence before me. Clearly enough Annexure A constitutes a report prepared in order to answer the subpoena of the Plaintiffs. However, that does not of itself preclude Annexure A from coming within the relevant exception. This is provided that the representations constituted by it were representations in business records that were previously made and not in contemplation of, or in connection with the proceeding. In the present case, they have simply been reproduced from existing computer records but with formatting changes and/or other deletions of irrelevant material. This is said to be as contemplated by the provisions facilitating proof of documents in s48(1)(d) and (e) of the Act.

13 There is some tension between s69(3) and the various gateways contained in s48(1) of the Evidence Act 1995. (It is not disputed that the gateway contained in s48(4) would not appear to be applicable in the circumstances, having regard to the definition of the expression "not available to a party" contained in clause 5 of the Dictionary in Part 1 to the Act.) In particular s48(1) could not override s69(3), in specifically precluding the exception to the hearsay rule applying where s69(3) in its terms are made out. Retrieval to meet a subpoena with no change save from electronic to printed form could not cause s69(3) to apply. Likewise, mere omission of items which do not alter the effect of what is sought to be admitted should not cause s69(3)

to apply. But when adjustments go further than that, in order to meet the requirements of litigation, the position may well be different and requires to be tested.

14 These earlier gateways permit the proof of contents of documents by a device that reproduces such contents. Thus s48(1)(d) contemplates that a device to reproduce information in electronic storage may, in the process of rendering it available for use by the court, both retrieve the electronic information and collate it so it is thus useable.

51. His Honour held that evidence before him that the information had been “formatted” did not enable him to find that the party seeking to tender that material had proven that the exception under s69(3) did not apply, or that the formatting did no more than satisfy s 48 (1) (d), in which case it would have been admissible.
52. That was not the end of the matter however, as His Honour decided to waive the requirements of the rules pursuant to s 190 (3), an approach seldom taken, and even more seldom considered by advocates.
53. The way in which His Honour applied s 190 (3) is instructive and worth setting out in full;

16 In all the circumstances, I consider that the proper course is rather to deal with the matter by way of a waiver of the relevant rules of evidence under s190(3) of the Evidence Act. This is in the following terms.

“(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence of:

(a) the matter to which the evidence relates is not genuinely in dispute; or

(b) the application of those provisions would cause or involve unnecessary expense or delay.”

17 The matters a court may take into account in deciding whether to exercise that power of waiver are set out more exhaustively in s190(4), which I quote below

“(4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:

(a) the importance of the evidence in the proceeding; and

(b) the nature of the cause of action or defence and the nature of the subject matter of the proceeding; and

(c) the probative value of the evidence; and

(d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence."

18 The present evidence is clearly important. Without it, the Plaintiffs cannot quantify the amount of commission claimed and the evidence is clearly only obtainable for practical purposes in any comprehensive sense from Telstra. Its probative value is subject to further testing. But on the material before me is likely to be of considerable importance in relation to damages, were liability established. Finally, adjourning the hearing is not likely to give scope for a direction which would yield any more reliable -- and non hearsay -- version of this material.

*19 There is no doubt that the power to dispense with the rules in exceptional cases is desirable, where this can fairly be done to both parties. Thus situations may arise which are not dealt with in the rules of evidence, requiring flexibility to meet such situations; see ALRC report 38 "Evidence" at para 1025 citing Moffitt J in the **Pacific Acceptance Corporation Ltd v Forsyth** (1970) 92 WN(NSW) 29. Thus, for example, the Federal Court exercised power of waiver to facilitate survey evidence; **McDonald System of Australia Pty Ltd v McWilliam's Wines Pty Limited** (1979) ATPR 40-136. Prima facie, electronically recorded accounting data collated to provide only the relevant material in answer to a subpoena, but not so as to render misleading or inaccurate what is represented, falls into a similar category, where strict application of the hearsay rule would otherwise work injustice. The question is whether the conditions for s190(3) are made out, such that my discretion to admit can then be exercised, with such considerations in mind.*

20 The evidence given by Mr Bryce was to the effect that while recourse to the primary records to attempt to reconstruct or verify the position between 1 January 1995 and 30 June 1996 in relation to sponsorship payments would be a difficult and expensive task, for the period after 30 June 1996 the position becomes relatively straightforward. It would involve perhaps some two days of work to identify the primary records from which Annexure A was compiled.

21 Mr Bryce explained in his evidence that Annexure A depends upon identifying sponsorship payments by reference to a particular project, here sponsorship of the Defendant. That identification involves allocation of a job number, as occurred in the present case after 30 June 1996. That job number was then used so that an invoice was identified as belonging to that job number, and was thus allocated to the relevant sponsorship.

22 His evidence was that such allocation when originally made was unlikely to be erroneous. He also said that reference to the relevant primary material to-day would be unlikely to show an allocation error, though he did not exclude that possibility in a particular case. But he also said that such verification would in many cases not be possible.

23 I have some doubt as to whether therefore that exercise of correlating the primary documents with the Annexure is capable of demonstrating error though it conceivably could. That does not preclude the Defendant having the opportunity to essay that task if it wishes. Accordingly, in making the orders that I do, I will

include that the relevant primary material in the possession of Telstra from which Annexure A has been compiled, should be made available to both parties.

24 The critical matter to determine under s190(3) is whether either the matter to which the evidence relates "is not genuinely in dispute" or whether application of the relevant provisions, in this case of the hearsay rule, "would cause or involve unnecessary expense or delay," such as otherwise to justify the discretionary admission of this evidence.

25 So far as the latter is concerned, I am satisfied that the application of the hearsay rule in the present circumstances to exclude the admissibility of Annexure A would cause or involve unnecessary expense or delay. It may indeed not only do that, but be fundamentally prejudicial to the Plaintiffs' proper opportunity to establish, if it can, the damage that it has suffered. This is in circumstances where, concededly, payments totaling \$570,000, according to the Defendant's acknowledgment, were made in 1995 and 1996. The Defendant asserts that these constitute "the total sponsorship between the Defendant and Telstra (see PXVD4) whilst the Plaintiffs say the total is much higher, and rely on Annexure A to establish that case.

26 The dispute accordingly relates to an amount above that figure. It would be certainly productive of unnecessary expense or delay to require the Plaintiffs somehow to prove their case by reference to the primary material, when that primary material has already been collated in the form of Annexure A by a party, namely Telstra, which could certainly not be said to be in the Plaintiffs' camp.

27 Whether it could be said that the matter to which the evidence relates is not genuinely in dispute is perhaps more arguable. The Defendant contends that it does genuinely dispute not only the name of the payee being in truth the payee, where the payee is not identified as the Defendant, but also whether the correct allocation has been carried out. As against that, the PXVD4 in conjunction with PXVD2 indicates that the point had not been taken by way of dispute earlier than the present hearing before me, in relation to material of a similar character but terminating at an earlier date.

*28 The expression "the matter to which the evidence relates", appearing in s190(3) was paraphrased by Sperling J in **Cheryl Joan Roma v H J Wilson Carriers Pty Ltd** (Sperling J, 9 August 1996, unreported) as "the matters of fact contained in the materials in question". Here the matters of fact contained in the materials in question are recorded in Annexure A to the affidavit of Mr Bryce. When one reads PXVD4, the Defendant's disputation of the overall amount is not expressed to be by reference to the unreliability of such a schedule but is more generally expressed. Thus it is said by the Defendant's solicitors, "Your letter does not identify the nature of the claim nor the legal justification for the amount claimed".*

54. Before leaving this point, and in deference to the audience I should briefly return to the Family Court.
55. In ***VJ v CJ*** (1997) FLC 92-772 ² the full Court of the Family Court agreed with the ruling of Baker J that statements in a police brief compiled for the purpose of a coronial enquiry were business records. The point of possible disagreement however was the ruling by the trial judge that even though the exclusion under s69(3) applied, on the basis that a coronial enquiry was an Australian proceeding, nonetheless, the statements could be admitted into evidence because it was in the best interests of the children that that material be before the Court.
56. Quite correctly, with respect, the Full Court observed;

B's statement could not have been introduced into evidence by reason of the business records exception already discussed because it was clearly prepared for the purpose of conducting "an Australian proceeding" namely, the Apprehended Violence Order proceedings. Whilst the statement did not offend the rule against hearsay because of the general exception in s 100A, in our view, his Honour ought to have given consideration to the provision of ss135 and 136 of the Evidence Act which provide that the court may refuse to admit evidence, or limit the use to be made of the evidence because its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party. However he was not asked to do so.

57. The reference to the advocate's duty to request a limitation on the use to which evidence should be put, and the possible consequence of the failure to do so, is instructive.

58. Finally, and on the subject of business records, I note that there is an interesting unreported decision of O'Keefe J in the Supreme Court in which it was held that the transcript of a Royal Commission is a business record which does not fall foul of the "proceedings" exception in s69(3)(b).³ The decision is premised upon a restrictive reading of the expression "in connection with" and upon the distinction between a curial proceeding such as a Royal Commission, and an investigation for prosecution. In my view this reasoning may also attach to a coronial or other statutory enquiry, although the proposition is untested as far as I am aware.

²A decision reversed, but on different grounds, by the High Court ***CDJ v VAJ*** [1998] HCA 67 (22 October 1998)

³ *Nye -v- State of New South Wales* [2002] NSWSC 1268 (27 September 2002)

Admissibility of Privileged Communications and Other Inadmissible Material in Children's Cases

59. There is a somewhat wavy line of authority⁴ for the proposition that the Family Court can in Children's cases, and relying on the paramountcy principle, properly allow the tender of material such as
- communications between the parties made in an attempt to settle proceedings, and thus "without prejudice"
 - Hearsay, and
 - Confidential counseling material (other than expressly confidential under the Family Law Act eg s 62F(8))
60. The line, which has not always followed smooth or consistent course, arguably commences with ***Hutchings v Clarke*** (1993) FLC 92-373 in which the Full Court upheld the trial judge's decision to allow into evidence communication between the parties concerning a possible resolution of the custody/access dispute then before the court, which was claimed to be privileged.
61. In effect the father of the child, the subject of the dispute, and with whom the child then lived, said to the mother, that his only interest in obtaining custody orders in respect of the child was financial, and that it was his full intention to return the child to the mother after he had succeeded in obtaining custody orders.
62. I suspect that such motivations are not uncommon, and nor are such conversations. The evidence of the conversation was critically important to the trial judge's decision. The trial judge had acknowledged that communication was 'without prejudice' and would normally be privileged. His Honour also acknowledged the considerable public interest in encouraging parties to settle their differences which underpinned the privilege attaching to such negotiations. However His Honour took the view that there was a greater public interest embodied in s.64(1)(a) of the Family Law Act 1975 and on a weighing of the harm which might be done to the child in that case, against the detriment attaching to the invasion of a without prejudice privilege, admitted the material into evidence.
63. The Full Court upheld this approach. It considered that the point was a novel one and there was no authority to illustrate the conflict between the privilege arising out of negotiations of settlement of a custody dispute and the requirement of the welfare of the child as the paramount consideration. It held that the trial judge was right in concluding that the requirement of s.64(1)(a) is not confined to the actual determination of custody, but extends to issues of admissibility of evidence. It held that the principle that concern for the welfare and interest of the child may modify the rules of evidence, such as the rule against hearsay, was well-established.

⁴ Not all that wavy according to Cross on Evidence which simply asserts

"There is an exception to the privilege where a statement is made indicating that the maker has in the past caused or is likely to cause serious harm to the wellbeing of a child (Re D (Minors) [1993] Fam 231; 2 ALLER 693(CA)) The privilege does not apply where the non-disclosure of the evidence would have an adverse impact on a child's welfare." (Cites *Hutchings and Clarke* and *Day*)

64. The Court cautioned that in cases of competing public interests the Court should be reluctant to override the privilege of parties engaged in such discussions but it must nonetheless give priority to considerations of the welfare of the child in a situation where non-disclosure of the relevant evidence might have the result that the child remained in conditions detrimental to his or her welfare.
65. I would also caution that this analysis, and weighing process must take place on a case to case basis.
66. The Full Court drew support from the prior authorities of **S & P** (1990) FLC 92-159 (the case which was the precursor for s.100A of the Family Law Act), **M v M** (1988) 166 CLR 69 (in which the High Court acknowledged that proceedings for custody or access are not disputes inter partes in the ordinary sense of that expression) and **The Queen v Bell; ex parte Lees** (1980) 146 CLR 141 (in which the High Court overruled the privilege of the client to require a solicitor to withhold disclosure of his or her present whereabouts given to that solicitor in confidence in a case where that client was concealing a child contrary to the orders of the Family Court).
67. Five weeks after the decision in **Hutchings** the Full Court decided in the matter of **P (a child)** (1993) FLC 92-376. The Full Court in that case commented upon the nature of the Family Court's jurisdiction and the inherent conflict between upholding the traditional principles of advocasarial conflict and the Court's duty to treat the welfare of children, who are not parties to proceedings (although in this case represented) as paramount.
68. The Full Court distinguished the High Court's decision in **Re: Watson ; ex parte Armstrong** (1976) 136 CLR 248;(1976) FLC 90-059 , widely regarded as early an important admonition to the Family Court that it must conduct itself judicially in applying the new Family Law Act, and that it was not entitled to do what the High Court described as 'palm tree justice'.
69. The point of distinction of the Full Court in **Re: P (a child)** was that the High Court's remarks were confined to property and maintenance cases and were not strictly applicable to children's cases.
70. **Hutchings –v- Clarke** was distinguished in **In the Marriage of Day** [1994] FLC 81,251. It was there held that comments made by a party in response to specific questioning by the other party's legal representative at a Legal Aid funding conference, should not, as a matter of fairness, be admitted.
71. The admissibility of matters raised in confidential counseling was considered by the Full Court in **Wakely –v- Hanns; Director of Court Counselling (Intevener)** [1993] FLC 80,459.
72. That case involved the admissibility of statements made at a conference under what was then s 62(1) of [the Act](#) in proceedings relating to child access. The mother argued that the statements, alleged to have been made by the father, made her fear for her safety. McGovern J held that s 62(5), the confidentiality principle, was clear and unequivocal in its terms, and made absolutely inadmissible in any court evidence of anything said or any admission made at a conference that takes place in pursuance of an order made under s 62(1). His Honour distinguished **Hutchings v**

Clarke and **Re Bell**,²² saying that while the principle that concern for the welfare of a child may modify the rules of evidence was well established, there was no such principle applicable to the modification of a statutory provision. The intention of the Parliament, whatever the apprehended difficulty, was to be found only by reference to the recognised canons of construction of the same. He said that s 62(5) was not repugnant to the provisions for the paramountcy of the welfare of the child in [ss 43\(c\)](#) and [64\(1\)\(a\)](#).

73. In **G v M** (1995) FLC 92-641 which was an appeal from a trial judge who had admitted into evidence material, relevant to the question of whether or not the father had sexually abused a child some time before the proceedings, which in turn was probative of the father's propensity to sexually abuse the child the subject of the proceedings.

74. The Full Court found that although the trial judge was right to consider hearsay material at one level, the judge fell into error in relying upon hearsay material as proof of the truth of the allegation.

75. In so doing the Full Court said, after referring extensively to **M & M**,

'although the decision to be made in children's cases requires the Court to have regard to the provisions of s.64 of the Act, with the welfare of the children being the paramount consideration, courts exercising jurisdiction under the Family Law Act must have regard to the provisions of the Evidence Act (1995) and also the rules of evidence, if appropriate.

In the present case the trial judge made a positive finding that C was sexually abused by the appellant as a child. In doing so he relied upon the evidence of statements made to T and P by C, which, in our view, were clearly not admissible as proof of the truth of C's evidence'.

76. Less than one year later the Full Court decided **re: Z** (1996) FLC 92-694. Surprisingly the Full Court took quite a different approach to that reflected in **G v M** and did not make any reference to **G v M**.

77. In **re: Z** the central issue was, once again, the question of sexual abuse of a child the subject of the proceedings. Subpoenas had been issued to a government department for production of records which were statutorily protected from production by Northern Territory legislation. There was therefore a conflict between the Northern Territory legislation providing confidentiality, the provisions of the Evidence Act as to compellability, and the paramountcy principle under the Family Law Act.

78. The majority (Nicholson CJ and Frederico J) based their decision upon s.8(1) of the Evidence Act which is in the following terms

'Operation of Other Acts etc

8(1) This Act does not affect the operation of the provisions of any other Act, other than s.68, 79, 80 and 80(a) of the Judiciary Act 1903'.

79. Whilst that section would normally be regarded as preserving specific legislative provisions in respect of evidence found in other Acts, the majority gave it a wider interpretation suggesting in effect that the obligation upon the Family Court to safeguard the best interests of the children as the paramount consideration overrides the express provisions of the Evidence Act. In particular they said;

'We think it follows, from our view of the effect of the principle that the best interests of the child be regarded as paramount by the Family Law Act, that any provision of the Evidence Act, which impinges upon the effective operation of the principle in Family Law proceedings, can have no effect by reason of the opening words of s.8(1) because the operation of the Family Law Act, is specifically preserved by that provision.'

80. Justice Fogarty, in the minority, preferred the view that the Family Court should be bound by the principles of the Evidence Act notwithstanding that children's cases were different from other litigation in the adversarial context. His Honour observed that there were very few cases where the rules of evidence had been departed from notwithstanding the fact that very many cases had been decided in respect of children's issues.
81. He referred approvingly to the statements made by Chisholm J in **Benson & Hughes** that there was significance to be attached to the fact that the Family Law Act did not have an express provision placing the court outside the operation of the Evidence Act, in contrast to other legislation which made such specific provision.
82. In response to Fogarty J's comment that the adoption of the paramountcy principle should not be regarded as "a loose cannon destroying all around it" the majority said

'We do not agree that the situation so described is a satisfactory one and we would suggest that this is particularly so in cases of suspected child abuse, where the strict application of the rules of evidence in particular, may do more to mask the extent of the risk to the child than to reveal it. In particular we do not regard the practice as justification for its continuance given the very clear acceptance by the legislature of the principles contained in the United Nations Conventions on the rights of the child in the Family Law Reform Act...'

*'Legal history and indeed Australian constitutional history abound with instances of a successful argument being advanced against what has hitherto been regarded as the law, of which the case of **Mabo**...is a good example.'*

83. Of some significance the majority said, albeit obiter, at [30]

'The concept of the best interests of a child being paramount, is absolutely crucial to the functioning of the system of family law in so far as it relates to children and its importance cannot be over emphasised.'

84. Special leave to appeal to the High Court was granted in **Re: Z** but I have not been able to find any record of an appeal having been heard.

85. In **Monticelli & McTiernan** (1995) 19 FamLR 108 the Full Court examined the issue of whether the granting of an injunction concerning a child (choice of forum in custody proceedings) was controlled by the paramountcy principle.
86. During the course of his judgment in that case Chisholm J provided a helpful and useful summary of the cases concerning the conflict between the paramountcy principle and the rules of evidence and in so doing, and after referring to what His Honour described as a leading case of **Hutchings & Clarke** His Honour said

*'For reasons given in more detail in **Benson and Hughes** (1994) 17 Fam LR 761 at 770-776; [1994] FLC 92-483, I consider that the authorities hold that in such matters the child's welfare may not be the paramount consideration, but rather a consideration which should be weighed against other considerations. The court engages in what has been called a "balancing exercise", in which the child's welfare is considered together with other interests and policies. In the context of decisions about the applicability of rules of evidence, the welfare of the child before the court is likely to be advanced by the admission of the evidence, but this must be balanced against the policies underlying the exclusionary rule of evidence involved, which policies might serve other important public interests, such as allowing parties to negotiate towards a settlement without the fear that their offers and counter-offers will be used as evidence against them. The interests protected by such policies may include the interests of children generally (as distinct from the welfare of the child before the court), for their welfare is likely to be promoted by a legal system which facilitates the settlement of disputes about their welfare. A similar approach has been taken in England: **Re E (SA) (A Minor)** [1984] 1 WLR 156 (HL); **Re R (A Minor) (Disclosure of privileged material)** [1993] 4 All ER 702. In the light of the authorities on the meaning of the paramount consideration principle, I think these decisions on evidence must be explained on the basis that that principle does not strictly apply; instead, the court is exercising a discretion in which it has regard to the child's welfare, and indeed to the fact that the child's welfare is paramount in the determination of final orders (and the decision whether to exercise jurisdiction - see **ZP v PS**), but does not consider itself bound by the paramount consideration principle. ...'*

87. In **Relationships Australia v Pasternak** (1996) 20 FamLR 604 at 613 the Full Court (Lindemayer Kay and Smithers JJ) when dealing with the admissibility of statements made to a marriage counselor said

'Prima facie there appears to be a distinction between the two sections [s64 pre amendment and s 65E post amendment] as to precisely what is covered by the paramountcy principle. Although the pre-amendment paramountcy principle covered the whole of the proceedings, it would appear, at first blush, that the post-amendment principle covers only the ultimate decision making process and not every step of the route by which one arrives at the decision. However, this is not a matter which was argued before us, and the issue is further confused by s 68E which now provides:

"This subdivision applies to any proceedings under this part in which the best interests of a child are the paramount consideration."

*In our view, whether the paramountcy principle applies to the entire proceedings, or only to the ultimate decision making process, it is not dominant in this context. It must yield to express statutory limitations, and also to principles which are fundamental to the judicial process. As Gibbs CJ observed in **Re JRL** (1986) 161 CLR 342 66 ALR 239 10 Fam LR 917 at 921 [1986] FLC 91-738 at 75,377 the paramountcy principle did not allow for departure from fundamental rules of judicial procedure so as to permit a private conversation between a judge and a court counselor about a case the judge was hearing.*

In our view, it must also give way to other competing public interests which the court considers more fundamental or more compelling..'

88. In **VJ & CJ** (1997) FLC 92-772 the Full Court once again had to consider conflict between paramountcy principle, and rules of evidence, which would have precluded the admission into evidence of material contained in the police brief prepared for the purposes of a coronial enquiry. The Full Court was faced with what it regarded, quite rightly, as a conflict between the views expressed previously by the Full Court and said

*'The conflict between **G v M, Pasternak** and the majority dicta in **Re Z**, would seem to indicate that it is not yet settled as to whether a general "best interests" discretion, as was relied upon by Baker J, exists. The High Court has granted special leave to appeal in **Re Z**.*

*In our opinion the preferable view is that expressed by the Full Court in **Pasternak**, namely that whilst the interests of the child are significant, competing considerations, including the express provisions of the **Evidence Act**, need to be taken into account before deciding whether to admit evidence in any particular case.*

*The **Evidence Act** itself provides for a discretion to refuse to admit evidence (Part 3.11) but no general discretion appears to exist which would otherwise render as admissible that which is inadmissible'.*

89. The High Court reversed the decision of the Full Court on the basis that it believed, by majority, that the Full Court of the Family Court erred in the exercise of its discretion to allow further evidence on the hearing of the appeal.
90. In doing so however the High Court was all but unanimous⁵ in its view that the Full Court of the Family Court in exercising its discretion to allow further evidence on appeal, was required to place high importance on the effect that this would have on the welfare of the child in question.
91. Addressing the paramountcy principle, although not in the context of the present discussion, the majority (McHugh, Gummow and Callinan JJ) said

⁵ With the exception of Gaudron J

87. *An order admitting or rejecting further evidence is not a parenting order within the terms of [s 64B](#) and therefore does not directly invoke the application of the paramountcy principle. Nevertheless, their Honours were plainly right in concluding that that principle was relevant to the questions whether further evidence should be admitted by the Full Court and whether the orders made by Baker J should be set aside. In an appeal in which the upholding, varying or setting aside of a parenting order is the ultimate matter in issue, the principles which govern the resolution of that issue are the same for the Full Court as they are for the judge at first instance. Consequently, the Full Court is bound to have regard to the best interests of the child as the paramount consideration when determining the appeal. It necessarily follows that, in exercising its discretion to hear further evidence in respect of an appeal concerning a parenting order, the Full Court must have regard to the effect that the further evidence may have in determining whether the best interests of the child require the upholding, varying or setting aside of the parenting order.*
88. *It is not to the point that the Full Court in this case was not asked to make a parenting order as such. An order admitting or rejecting further evidence is part of the appeal process in which the best interests of the child are the paramount consideration. In determining whether or not to admit that evidence, the effect that it may have in determining what are the best interests of the child is a factor of great weight. It will be one of the most important discretionary considerations to which the Full Court must have regard.*
92. Whilst the appeal to the High Court was pending in **VJ and CJ**, the Full Court of the Family Court in **Centacare Central Queensland and Downing and "G" and "K" and Attorney-General of the Commonwealth** [1998] FamCA 109 (7 August 1998) upheld the confidentiality of matters raised in counseling, following the **Wakely –v- Hanns** line. In doing so the court embarked upon an interesting analysis of what was argued to be, but ultimately held not to be, an inconsistency in approach between **Re Z** and **Pasternak**.
93. In a decision in which the Court was required to weigh up competing interests, the interests of parties, in particular children, in the preservation of the confidentiality of counseling clearly won out

In our view it should not be assumed that extending the operation of the principle that the best interests of the child are the paramount consideration to a wider category of matters will necessarily benefit children. The provisions of [the Act](#), given their ordinary meaning, indicate that the legislature has determined that its objectives, including the object of advancing the interests of children, would be best achieved by making provision for confidential counseling, even though this might have the effect of excluding evidence which would have assisted the court in some particular cases. While there are no doubt policy arguments to the contrary, expressed forcefully by his Honour, we are not satisfied that there is adequate reason to justify what would in effect be a judicial reversal of what appears to be an unambiguous legislative answer to a long recognised policy issue.

94. In **CW v CW** (1998) FLC 92-802 the wife appealed against interim orders that the two children of the marriage should reside with the husband pending the final hearing and which constituted a change in their residence, which had been made on the basis of evidence of violence upon the wife by her former defacto such as would have exposed the children to the unacceptable risk of violence.
95. The evidence of this violence came from Ms L, the wife's sister-in-law, who deposed to accompanying the wife to the wife's solicitor where the wife made statements to her solicitor concerning violence against her which had been witnessed by the children.
96. The wife denied violence in her evidence.
97. The trial judge refused an objection to the evidence of Ms L and found the evidence admissible on the basis that it was not a confidential communication in s.118 of the Evidence Act and would in any event be admissible by application of *Hutchings & Clarke*.
98. As to the *Hutchings & Clarke* point the Full Court inferentially upheld the trial judge's decision that the material would have been admissible because the child's best interests would override issues of privilege.
99. Nicholson CJ, with whom the others agreed without qualification, said

*I propose to briefly deal with the issue of the alleged privileged communication. Her Honour in arriving at the decision that she did relied upon decisions of this Court, and particularly **Hutchings v Clarke** (1993) FLC 92-373 which stands for the proposition that where the best interests of the child are concerned, issues of legal professional privilege do not operate to exclude evidence if in the discretion of the trial judge, the interests of the child require that the evidence be admitted.*

It is not necessary for the purpose of these proceedings to consider that matter further. Even if I were to accept, which I do not, that her Honour was not entitled to take the evidence of Ms L as to the discussion in the lawyer's office into account, I would be of the view that the other evidence before her Honour made it inevitable that her Honour would have made the order that she did.

100. Ultimately the question as to whether certain otherwise inadmissible material may nonetheless be admitted under the paramountcy principle remains a matter for argument in the context of each case, and further a matter for the Court to weigh up the competing interests in that context.
101. The privilege is contained in s 131 of the Evidence Act. I wonder if the exception to the privilege set out in s131 (2) (g) might arguably apply if facts such as in *Hutchings and Clarke* were being considered now.

SECT 131

Exclusion of evidence of settlement negotiations

(1) Evidence is not to be adduced of:

- (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third [party](#), in connection with an attempt to negotiate a settlement of the dispute; or*
- (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.*

- (2) Subsection (1) does not apply if:*
 - (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or*

Dated 2nd November
Newcastle Chambers