

# Evidence – order sought that rules not to apply

***Harrington-Smith v Western Australia (No 8)* [2004] FCA 338**

Lindgren J, 26 March 2004

## **Issue**

Essentially, the issue here was whether the court should make an order dispensing with the application of rules of evidence under s. 82(1) of the NTA or otherwise allow challenged evidence to be admitted.

## **Background**

This case concerned the admissibility of evidence. The documents at issue were primarily those where the author or the source of asserted facts was deceased. The applicant sought either to have the documents admitted into evidence under exceptions to the hearsay rule or for a direction to be made under s. 82 that the rules of evidence did not apply to the documents.

## **The Evidence Act**

His Honour Justice Lindgren reviewed the hearsay rules in s. 63 (first-hand hearsay) and s. 69 (business records) of *the Evidence Act 1995* (Cwlth) (the Evidence Act). The documents in dispute included, among other things, records of Mt Margaret Mission prepared by Mrs Schenk, diaries of her husband Reverend Schenk, genealogies prepared by Margaret Morgan (the Schenks' daughter), letters and a consultant's report. The mission records were found to be business records and were admitted, subject to certain limitations, under that exception—at [29] to [48].

The application of s. 63(2) to the affidavit of a deceased person, applying the test of whether the asserted facts which are the subject of the representations in the affidavit were within the personal knowledge of the late deponent, is also of interest—at [105] to [109].

## **Section 82**

In relation to s. 82 of the NTA, his Honour found that:

- there must be some factor present calling for the making of such an order, referring to *Daniel v Western Australia* (2000) 178 ALR 542; [2000] FCA 858 at [4];
- there was no set procedure for applying for a s. 82 direction;
- it was not a sufficient reason that the rules of evidence render certain evidence inadmissible—at [81] to [82].

**Decision**

It was held that no order under s. 82 NTA would be made and the application was declined. Therefore, rulings were made on the admissibility or inadmissibility of the various documents under the Evidence Act.