

## Alternate Dispute Resolution and Jurisdiction Summary

### Alternate Dispute Resolution:

#### *Civil Procedure:*

- The law which governs the conduct of Court proceedings
- The way in which a right is enforced
- The process of resolution of civil disputes
- The method by which rights and obligations are enforced or challenged or tested

#### *Dispute Resolution:*

- Dispute: A disagreement or argument.
- Dispute Resolution: The method by which disputes may be resolved.
  - o ADR is compulsory for all non-criminal cases.
  - o Types:

#### 1. Litigation (Civil Procedure)

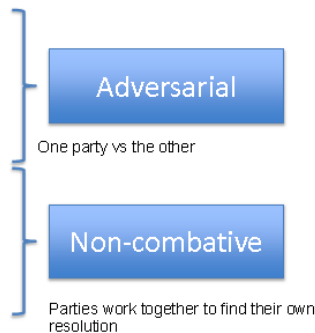
#### 2. Arbitration

#### 3. Expert Appraisal

#### 4. Negotiation

#### 5. Mediation

#### 6. Conciliation



#### *Sources of Civil Procedure Law:*

- Statutory jurisdiction
  - o Supreme Court Act 1986 (Vic)
  - o Civil Procedure Act 2010 (Vic)
  - o Other legislation
  - o Establishes the Court, its composition, administrative and statutory powers
  - o Allows for procedural rules to be made by delegated legislation
- Inherent jurisdiction
  - o Allows Courts to regulate their process and prevent abuse of process

#### *Litigation:*

- The process of taking legal action against another person or to have their legal right recognised.
- The process of taking a case through Court
- An action brought in Court to enforce a particular right.
- Rules and practices involved in resolving a dispute in the legal system.
  - o Practice Directions: Guidelines on how to run a particular matter in that court.
- Doesn't work for everyone:
  - o Financial costs are often high.
  - o Rarely easy.
  - o Only deals with the legal issues. Often other issues have to do with the nature of the parties' relationship rather than the legal issue.
  - o Time consuming.
  - o Not quick.

#### *Starting a Proceeding:*

- Cost vs Benefit,
- Jurisdiction: Where to sue.

- Court or tribunal must have jurisdiction to determine the matter.
  - Subject matter jurisdiction – nature of the dispute.
  - Territorial jurisdiction – person or bodies over whom the court or tribunal may exercise jurisdiction.
  - Monetary amount of the claim.

#### *Commencing a Proceeding:*

- Originative Process an Affidavit vs Writ and Statement of Claim.
- Service:
  - Personal
  - Company
  - Substituted Service
- Default Judgement:
  - When there is no defence given or no response.
  - If no appearance.
  - If no defence.
- Defence:
  - Defines what is in dispute.
  - Responds to every part of the Statement of Claim.
- Reply to Defence.
- Counterclaim.
- Defence to Counterclaim.
- Joinder of other parties.

#### *Litigation Tools:*

- Ambition is to identify strengths and weaknesses as early as possible to make an assessment on prospects.
- Employ the following tools:
  - Further and better particulars.
  - Notice to admit
    - Facts
    - Documents
  - Interrogatories.
  - Discovery.
  - Mediation (witness assessment).

#### *Evidence:*

- Witness Statement: The witness will swear up in the witness box and be cross examined on the contents of their statement.
- Preservation of evidence and property:
  - Interlocutory Injunctions (ex parte):
    - Anton Pillar Orders:
      - ❖ Civil search warrant.
      - ❖ Must be strong grounds for thinking that the defendant will remove or destroy evidence.
    - Mareva Orders:
      - ❖ Assets, money.
      - ❖ Bank can freeze money awaiting the decision of the court.
      - ❖ Designed to prevent a defendant from disposing of assets or removing them from the jurisdiction to defeat potential judgement.

### *Alternative Dispute Resolution:*

- ADR processes such as mediation, conciliation, expert referral and arbitration are designed to provide disputants with procedural options that are appropriate to the dispute.
- ADR may be faster, cheaper, less adversarial and more flexible than litigation. EG: Retail leases and Small Business Commission.
- ADR aspires to provide a broad framework for resolving disputes in ways that are accessible, effective, psychologically satisfactory and procedurally fair to the disputants.
- Growth in ADR:
  - Every state and the federal government has statutory provisions for judicial referral of matters to ADR processes, whereby:
    - The statutes provide a judge discretion in determining which cases are appropriate for referral to ADR processes; and
    - Some legislative provisions require people to attend some form of ADR as a pre-condition to litigation.
- Determinative Processes: Involve a third party making a decision or determination on the dispute, usually after hearing arguments and evidence.
  - Adjudication
  - Arbitration
  - Expert Determination
  - Private Judging
  - Fact-finding
  - Early Neutral Evaluation
  - Case Appraisal
  - Mini-trial
- Facilitative Processes: Involves a third party providing assistance in the management of the process of dispute resolution.
  - Facilitation
  - Conciliation
  - Mediation
  - Ombudsman

### Jurisdiction:

#### *Subject Matter Jurisdiction (Cth)*

- Commonwealth of Australia Constitution Act (ss 71–80) sets out the framework through which courts are or may be invested with the judicial power of the Commonwealth to enforce its laws.
- Commonwealth judicial power may only be exercised by Courts listed in s 71, namely:
  - The High Court of Australia
    - Original jurisdiction (s 75)
    - Appellate jurisdiction
  - Federal Court created by:
    - Original jurisdiction – s19 Federal Court of Australia Act 1976 (Cth)
    - Appellate jurisdiction – s25 Federal Court of Australia Act 1976 (Cth)
    - Reference jurisdiction – s25(6) Federal Court of Australia Act 1976 (Cth)
    - Associated jurisdiction - s32 Federal Court of Australia Act 1976 (Cth)
    - Accrued jurisdiction; and
    - Incidental jurisdiction.
  - State and Territory Courts vested with Cth jurisdiction

- Federal Circuit Court

### **Fencott v Muller (1983) 152 CLR 570**

#### **High Court of Australia**

##### **FACTS:**

- The case involved alleged false representations concerning the profitability of a business subsequently purchased by one of the parties
- Damages were claimed based upon breaches of s52 of the Trade Practices Act 1974 (Cth) and, alternatively, for fraud, negligence or breach of contract
- There was an objection as to the jurisdiction of the court by the appellants, which was allowed in part but otherwise dismissed. The appellants appealed, contending that the proceedings were entirely outside the jurisdiction of the Federal Court.

##### **ISSUE:**

- Were the proceedings outside the jurisdiction of the Federal Court (which had statutory jurisdiction to hear the s52 case but not necessarily the alternate causes of action?)

##### **HELD:**

- The High Court affirmed the decision of the Federal Court and held that the proceedings were within the jurisdiction of the Federal Court
- The Court held that it is a matter of impression and of practical judgement whether a non-federal claim and a federal claim joined in a proceeding within the scope of one controversy and thus within the realm of the matter.

### **Re Wakim; Ex parte McNally (1999) 198 CLR 511**

#### **High Court of Australia**

##### **FACTS:**

- The appellant was employed by husband and wife, Tedros Nader and Nawal Nader. In 1985, the Supreme Court awarded damages against Tedros. The appellant did not see damages from Nawal.
- Following judgement, Tedros was declared bankrupt. The trustee in bankruptcy, represented by a firm of solicitors (McNally), brought proceedings against Nawal.
- In 1990 the parties settled and it was agreed that the appellant be paid a sum of \$10,000.
- Subsequently, the appellant brought proceedings in the Federal Court for, among other things, breach of duty by the trustee under s176 of the Bankruptcy Act 1966 (Cth) and negligence on the part of the solicitors. The solicitors contended that the Federal Court had no jurisdiction to hear the negligence action.

##### **ISSUE:**

- Whether the Federal Court had the jurisdiction to hear the negligence action as it had the jurisdiction to hear the breach of duty action under the federal legislation?

##### **HELD:**

- The High Court dismissed the application to prohibit the Federal Court from hearing the negligence action.
- The majority expressed doubt as to whether there was a single controversy in the matter but regarded the application for prohibition as premature.
- Test in Fencott v Muller did not apply.

#### ***Subject Matter Jurisdiction – State:***

- Supreme Courts:
  - Original – **s85 Constitution Act 1975 (Vic)**
  - Appellate jurisdiction
  - Federal jurisdiction - **s39 Judiciary Act 1903 (Cth)**
  - Inherent jurisdiction.
- County Court
- Magistrates' Court – claims of up to \$100,000
- VCAT

### *Territorial Jurisdiction:*

- Court must have jurisdiction over the defendant and the subject matter.
- Presence of a Defendant in the Jurisdiction:

#### **Laurie v Carroll (1958) 98 CLR 310**

#### **High Court of Australia**

##### **FACTS:**

- The respondent commenced proceedings, by way of a writ of summons, in the Supreme Court of Victoria the day after the appellant had left Victoria having no intention of returning.
- The respondent obtained an order from the Supreme Court for substituted service which allowed service of the writ upon a firm of solicitors that had acted for the appellant rather than the appellant in person.
- The respondent filed a conditional appearance in the Supreme Court, thereby not submitting to its jurisdiction, and applied for substituted service. The application failed and the respondent appealed to the high court.

##### **ISSUE:**

- Should the order for substituted service have been made when the respondent was not in the jurisdiction and did not intend to return?

##### **HELD:**

- The order for substituted service should not have been made. The action is in personam and is transitional.
- The jurisdiction of the Supreme Court of Victoria depends not in the least on subject matter but upon the respondent being amenable or answerable to the jurisdiction of the court. The former depends upon the respondent's presence within the jurisdiction.
- The common law doctrine is that the writ does not run beyond the limits of the state, although the Service and Execution of Process Act 1992 (Cth) permits service elsewhere within the Commonwealth and its territories. The service of the writ, or something equivalent, is absolutely essential as the foundation of the court's jurisdiction.
- The appellant did not, by history, present domicile, residence or course of business, have any connection with the State of Victoria which could prima facie make him subject to the jurisdiction of courts of the state.

- Submission to the Jurisdiction:
  - A court will also gain jurisdiction where a defendant, though not present in the jurisdiction, voluntarily submits to the jurisdiction.
  - A party will be taken to have submitted to the jurisdiction of the court if the party's conduct is inconsistent with the maintenance of an objection to the court's jurisdiction.
- Statutory Extension of Territorial Jurisdiction:
  - The court may have in personum jurisdiction over a defendant who is outside the jurisdiction and validly served with the proceeding.

### *Victorian Supreme Court:*

- Subject Matter
  - Original
    - **s85 Constitution Act (Vic)** – unlimited jurisdiction Vic (but costs penalty if lower court appropriate).
  - Appellate
    - **s10 Supreme Court Act** (appeals to Court of Appeal).
  - Federal
    - **s77(iii) Constitution Act (Vic)** and **s39A Judiciary Act** (invest state courts with federal jurisdiction regarding matters in which High Court has jurisdiction under **ss75-6 Constitution Act** except matters within exclusive jurisdiction of High Court under **s38 Judiciary Act** or where legislation restricts state jurisdiction. EG: Australian Consumer Law)
    - **S44 Judiciary Act** (matters remitted by High Court to Federal Court)
  - Inherent
    - To enable Supreme Court to control its own proceedings and prevent abuse of process

- In Personam:
  - o Service and Execution of Process Act – confers Australia-wide ‘in personam’ jurisdiction on State and Territory courts

*Cross Vesting of Jurisdiction:*

- o In 1987 state and federal legislatures passed a number of Acts, which collectively are referred to as the cross-vesting scheme.
- o Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) and individual state and territory legislation
- o It provides a mechanism to ensure that people continued to bring their actions in the most appropriate courts.
- Purpose of the Cross-Vesting Scheme:
  - o It invests or confers, as the case requires, the original and appellate jurisdiction of each of the participating courts in or on each of the other participating courts.
    - Participating courts:
      - ❖ Federal Court.
      - ❖ Family Court.
      - ❖ Supreme Courts.
    - Not included:
      - ❖ High Court.
      - ❖ Magistrate’s Court.
  - o It provides a mechanism for the transfer of proceedings to the best suited court.
  - o Intended to ensure a proceeding could not fail because of a lack of jurisdiction, but that jurisdictional balance would be maintained between courts through the appropriate exercise by the courts of the power to transfer proceedings.
- Constitutional Invalidity:
  - o Conferring of state jurisdiction on Federal Courts is deemed to be invalid – [Re Wakim](#).
- Nature of Jurisdiction Cross-Vested:
  - o The cross-vesting scheme has the effect of vesting the ‘subject matter jurisdiction’ of a particular court in the scheme in any of the other courts, but there is some doubt as to whether it extends, in effect, to the ‘territorial’ jurisdiction.
- Transfer of Proceedings:
  - o To ensure that the scheme does not foster forum shopping and that, so far as possible the jurisdictional balance between the various courts is maintained, the scheme contains provision for the transfer of proceedings in certain cases to a more appropriate court - [s 5 Jurisdiction of Court \(Cross-vesting\) Acts](#).
  - o Each of the Jurisdiction of Courts (Cross-vesting) Acts of the Commonwealth, states and territories provides that, where a proceeding is transferred, the legal practitioners involved have the same right to practice in the court to which the proceeding is transferred as if that court were a Federal Court exercising federal jurisdiction.

**Amor v Macpac Pty Ltd (1989) 95 FLR 10**

**Supreme Court of NSW**

FACTS:

-

ISSUE:

-

HELD:

-

**BHP Billiton Ltd v Schultz (2004) 221 CLR 400**

**High Court of Australia**

FACTS:

- The first respondent suffered from asbestos-related diseases which he claimed were the result of exposure to asbestos while working for the appellant in South Australia.
- The first respondent brought proceedings against the appellant in the Dust Disease Tribunal in New South Wales, alleging negligence, breach of contract and breach of statutory duty.
- The appellant made an application to remove the action to the Supreme Court of New South Wales and then transferred to the Supreme Court of South Australia. The application was refused and the appellant appealed to the High Court.

ISSUE:

- The cross-vesting legislation confers original and appellate jurisdiction on participating courts. The Dust Diseases Tribunal was not a participating court and the issue was whether or not the proceedings could be transferred.

HELD:

- Under the cross-vesting legislation the criterion for transfer is that it is in the interests of justice that the proceedings be determined in the Supreme Court of South Australia.
- Applicable Law:
  - o The law in force in the state or territory in which the court is sitting is to be applied.
  - o **Section 11 Jurisdiction of Laws (Cross-Vesting) Act 1987 (Cth)** and of the state Acts provides for the appropriate law to be applied in the conduct of proceedings where the court is or is likely to be exercising cross-vested jurisdiction.
- Procedure:
  - o A party intending to rely on any provision of a cross-vesting law must file and serve a notice that identifies both the provision and the claim that relies on it, and that also states the basis on which the reliance is placed on the provision.
- Inferior Courts:
  - o Do not have cross-vested jurisdiction, but they are included in the scheme in a limited way.
    - **S8 and 10 of the state and territory Acts.**

- Limitations on Appeal:
  - The jurisdiction and transfer provisions of the cross-vesting legislation apply to matters within both original and appellate jurisdictions.
  - Section 7 of each of the Cross-vesting Acts therefore imposes limitations which generally require that appeals be brought within the appellate system of the court by which the primary decision was made.