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Commencing Proceedings

Originating documents

- The purpose of originating documents is to notify the other side that a claim has been made against them.
- Proceedings commenced in one of three ways:
 1. Writ – r4.01 (Form 5A).
 - Most common.
 - One or more Ds
 - Dispute as to fact
 - r5.04 - Must contain an indorsement of claim (can either be an outline of particulars of case, or a statement of claim that outlines the nature of the case and the relief sought)
 2. Originating motion – r4.05 (Form 5B, 5C, 5D, 5E).
 - Filed when there is no D
 - dispute as to legal issue
 3. Summons – r4.02
 - Interlocutory application

Service

Types of service

- Personal service – r6.03 – Leaving copy of document with person or putting the copy down in their presence and telling them the nature of the document.
- Ordinary service – r6.07 – Leaving the document at the proper address on a business day, posting or faxing, serving on solicitor acting for person.
- Substituted service – r6.10 – If personal or ordinary service not practicable, court can order document is taken to have been served on the occurrence of an event, or at the expiration of a particular time period.

Requirements

- r6.02 - Originating documents must be served personally.
- r6.17 – Affidavit of service must be filed to show who docs have been served on, time, place, and manner of service.

Appearances

- r8.02 – Once served with originating process, D must file an appearance (Form 8A)
- r8.04 – Must be filed according to time stated on originating process
 - In Vic – not less than 10 days after service ('not less than' times allow seeking of legal advice, postage times, etc.)
 - Outside Vic but in Aust – 21 days after service
 - PNG – 28 days
 - NZ – 30 days
 - Other – not less than 42 days

- **r5.03** – If no appearance is filed, default judgment can be made against them
- **r8.08** – Can file a conditional appearance (Form 8B) if they oppose the claim (e.g. proceeding out of time) but don't wish to have judgment made against them.

Joining parties to the dispute

Joinder

- Process of joining cases of a similar nature to improve efficiency by avoiding multiplicity of proceedings. Join parties to avoid multiple cases.
- Can be joined where:
 - **r9.02** – (Permissive joinder) Same question of law or fact, or where issue arises from same transaction or series of transactions
 - **r9.03** – (mandatory joinder) Unless Court order otherwise, if another person is entitled to relief as P, they should be joined as Ps to the dispute.
 - **r9.06** – Necessary to ensure all questions in dispute are answered, and it is 'just and convenient' to determine the question with parties present.
- **r9.01** – Joinder of claims against D
- **r9.04** – Parties cannot be joined if to do so would embarrass or delay the trial of the proceeding, or cause prejudice to any party, or is otherwise inconvenient.

Anshun Estoppel

[Port of Melbourne v Anshun](#)

A party is prevented (or estopped) from bringing an action that arises from an issue that was the subject of earlier litigation. They are barred from raising issues that should have been covered previously. Stands for '*res judicata*' – the thing decided [cannot be pursued further].

This is a good reason to consider all parties that can be joined at the beginning of the proceeding, as it could be the first and last opportunity to do so.

Counterclaim

- **r10.02** – If D has claim against P, may make a counterclaim.
- **r10.05** – D becomes P and P becomes D. Both claims generally determined together.
- **r10.03** – D may join other parties in counterclaim pursuant to normal joinder rules.
- **r10.04** – Counterclaim follows same procedure as new claim (pleadings, etc.).
- **r10.06** – Claim can be struck out if it embarrasses or delays the trial of the proceeding, or causes prejudice to any party, or is otherwise inconvenient

Third party claim

- D seeking to deflect liability or cost
- **r11.01** – D can join a party as a third party to a proceeding if claiming indemnity, contribution, or relief. Or if a question relating to the original proceeding should be determined with them involved.
- **r11.05** – May only file within 30 days of defence being filed (Form 11A).
- **r11.16** – Third party can add fourth party and so on.

Costs

The losing party generally compensates the successful party for the inconvenience of having to go to court. Can deter frivolous claims due to the expense of a failed claim.

- [s24\(1\) CPA](#) – Court has discretion over costs incidental to the proceeding.
- [o63 Rules](#) – Powers under s24 exercised according to this order.

Costs arrangements

- Generally, costs follow the event. This means that whoever wins will have their costs paid by the losing party, unless there are special circumstances
- It is not a presumption that loser pays for winner's costs – still up to court's discretion.
 1. [r63.30](#) – Party-Party costs (standard basis) = costs reasonably incurred and of a reasonable amount. Costs usually paid on this basis. Exact costs to be determined by the parties.
 2. [r63.30.1](#) – Solicitor-Party costs (indemnity basis) = All costs except those incurred unreasonably or of an unreasonable amount. This is what the winning party has to pay their solicitor. Party-Party costs generally less, so even a successful party paid on standard basis will not recover full amount. Ordered on indemnity basis when there is something unusual (e.g. public interest, or abuse of process by intentional delay, breach of OO, etc.).
- Lawyers can be subjected to costs orders if they cause undue delay, act improperly, breach OO, etc. Usually called 'wasted costs orders' and can include reimbursing client and other side.

[Yara Australia Pty Ltd v Oswal \(2013 VSCA\)](#)

Facts: In a security for costs application, there were 11 counsel and 5 firms, six lever arch folders filed including unnecessary affidavits. The application sought only \$20-80k in security.

Issue: Breach of OO to keep costs down?

Held: [s28\(2\)](#) allows court to consider breach of OO when ordering costs. [s29](#) allows court to sanction for breach. Applicant to pay respondent's costs, solicitor to indemnify.

- Court rarely determines amounts. Costs to be agreed by parties or 'taxed' (assessed) by court officer.

Other costs orders

- Bullock Order – [Bullock v London General Omnibus \(1907 English\)](#). If there are multiple Ds in a claim and some are successful but others are not. P must pay the costs of the successful Ds, but unsuccessful costs must pay P's costs, including those required to pay costs of successful D.
 - If D was unnecessarily joined, P will be responsible for all costs.
- Security for Costs – [r62.02](#) – P gives D security amount to show they can pay any adverse costs orders.
 - Pre-trial application/order
 - Checks on weak claims – ensure D can recover costs of defending action.
 - Potential justice issue. P with meritorious claim may not be able to afford order for security, and cannot prosecute case.

Interlocutory Orders

Interlocutory proceedings can help protect a client's position while awaiting trial. Intervening acts can alter the positions of the parties, potentially affecting court's ability to provide justice (death of witness, destruction of evidence, events forgotten, etc.).

Injunctions

- **Order 38 of Rules.**
- Court order to do something (mandatory injunction) or refrain from doing something (prohibitive injunction)
- **r38.01** – Can be granted at any stage in the proceeding
- **r4.08** – Can be granted before proceedings initiated
- **s37 CPA** – Can make injunction if it is just and convenient to do so.
- **r38.03** – the price of injunction before trial – a party seeking an injunction may be asked to provide security to pay the costs of the application if they are successful at trial. This can be waived for public interest cases – [Blue Wedges Inc v Port of Melbourne Corporation \(2005\)](#).

Granted at two stages:

1. Interim injunction
 - Usually made in urgent applications (e.g. publication of defamatory material)
 - **r38.02** - Without appearances (ex parte)
 - Usually for a short period of time, to be extended once all parties can appear
2. Interlocutory injunction
 - Made during proceeding but before judgment
 - Court may decide duration

Test:

Set out in [Castlemaine Tooheys v South Australia \(1986 HCA\)](#)

1. Serious question to be tried
 - Test set out in [ABC v O'Neill](#).
 - Based on merits of the case
 - Competing criteria of what is a serious question:
 - [Beecham Group Ltd v Bristol Laboratories Pty Ltd](#): Held there must be a prima facie case with a >50% chance that the P will win.
 - [American Cyanamid v Ethicon Ltd](#): Held as long as the case is not vexatious there is a serious question to be tried
2. Damages are not an adequate remedy
 - If injunction not given, harm will be done that cannot be reversed. E.g. environmental or reputational damage.
 - If money would be sufficient to compensate harm, no point in granting injunction.
3. Balance of convenience favours injunction being granted
 - Judge's discretion to weigh up competing interests.
 - Consequences for applicant if injunction not granted vs consequences for respondent if it is.

Pre-trial termination

Summary Judgment

Court has assessed the relative strengths of both sides' argument and terminates it if there is a clear imbalance.

- Final decision, can only be appealed to a higher court
- Based on substantive failing
- Wide discretion, can terminate all or part of claim
- Only used when absolutely necessary
 - "no chance of success" – [Drummond-Jackson v British Medical Association \(1970\)](#)
 - "manifestly groundless" – [General Steel Industries Inc v Commissioner for Railways \(1964 NSW\)](#)
- s63 – Statutory test the same for both parties. "no real prospect of success". Made on application by either party or court's own motion
- s64 – Even if no prospect of success, court may allow it to continue to trial if not in the interests of justice to terminate.

Application by P

r22.03 – P can apply for summary judgment once D files defence if it does not contain a valid defence.

r22.05 – D must show cause as to why summary judgment should not be given.

Application by D

r22.17 – D makes application by summons

r22.19 – P must show cause as to why summary judgment should not be given.

Default Judgment

Dismissal of the case without adjudication of its merits as a result of procedural failing by either side.

- r21.07 – Non-final decision, can be set aside if not in the interests of justice to dismiss, or not obtained regularly.
- r24.02(2) – Judge can strike out defence if D fails to comply with order. P can then apply for default judgment because no defence is filed.
- r11.11 – Third party in default will be bound by any judgment given. D can then enter judgment against them for any claim or contribution, or any other remedy with leave of the court.

Application by P

r21.01 and 21.02 – Application by P for judgment against D if appearance or defence not filed within time

Gathering Evidence

Discovery

Part 4.3 CPA; o29 Rules

Process to gather evidence for the purposes of litigation

- **r29.01(1)** – Any party can order discovery
- Discovery cannot be refused by a party, even if it detrimental to their case. The exception to this is Legal Professional Privilege (privilege).
- Documents obtained by discovery carry an implied undertaking that they will not be used for any purpose other than litigation – **Hearne v Street (2008 HCA)**.

What can be discovered?

Relevant documents in the possession of the other party.

r29.01.1 – Limited to documents on which the party will rely, including those that help or harm own or other party's case.

1. Relevant
 - New test is documents that relate “to any question raised by the pleadings”. Broader test.
 - Replaces common law test set out by **Peruvian Guano**. That case said a document is discoverable if it directly affects the case or would lead to a ‘train of inquiry’ that would yield information directly relevant.
2. Document
 - **Interpretation of Legislation Act 1984, s38** – document in writing, book, map, photograph, label, disc, film, etc. Broad definition.
3. Possession
 - **r29.01(2)** – Possession refers to possession, custody, or power
 - Possession = ownership, custody = physical holding, power = right to obtain possession

Purpose of discovery

- Ensure all relevant information is before the court, so the decision is based on truth
- **Air Canada v Secretary of State for Trade (1983 House of Lords)** – Bingham J: “...ensure that the truth is elicited, not caring whether the truth favours one party or another by anxious that the final decision should be grounded on a sure foundation of fact.”
- Quality and completeness of the information reduced delay of the trial, and encourages settlement
- Equal access to relevant information
- Reduces need for court to intervene in dispute
- No surprises or ambushes means fair trial
- Narrow the issues in dispute

Process

1. **Notice** – **r29.02** – Notice for Discovery (Form 29A) served once pleadings closed, requiring other parties to make disclosure of all relevant documents in their possession.