

**LAW5013 –  
PRINCIPLES OF LITIGATION &  
DISPUTE RESOLUTION**

**CHECKLIST  
STREAM 3**

**T3 2017**

# JURISDICTION

To hear a case, the court must have subject matter and territorial jurisdiction (*Laurie*)

## Subject Matter Jurisdiction

### Federal Courts

- Original jurisdiction “as it is invested with by parliament” (s 19 *Fed Court of Aus Act*)
- Cannot exercise state jurisdiction under cross-vesting scheme (*Re Wakim*)
  - But they can under accrued jurisdiction (s 22 *FCA*)
- If the Federal Claim is untenable, no jurisdiction to hear the ‘state’ matter will accrue (*Johnson Tiles v Esso*)
  - Discretionary → Must appear to the Court that the ‘State’ claim arises from the same facts / transaction (*Fencott*)
- No inherent jurisdiction – it has incidental jurisdiction based on principles of statutory interpretation
  - Has associated jurisdiction to adjudicate all matters arising out of Federal Acts (even if not specifically allowed for under the particular Federal Act).
  - *S 39B Judiciary Act*: Gives the FC power to adjudicate all issues under Federal legislation
- Has accrued jurisdiction — relevant to adjudicate all issues which are ‘part of the dispute’. This is more an issue under ‘cross-vesting’.
- Federal Circuit Court: Broad (appellate)
- Family Court: Broad
- Federal Court: Broad (no inherent)
- High Court (Established by s 71 *Constitution*)

### Victorian Courts

- Magistrates’ Court: Claims under \$100,000 (s 100 *Magistrates’ Court Act*)
  - Can abandon the excess just to bring it down a court
- County Court: Any claim, dispute or civil proceeding (s 37(1)(a) *County Court Act*)
  - No monetary limit
- Supreme Court: “Superior court of Victoria with unlimited jurisdiction” (s 85(1) *Constitution Act 1975*)
  - Go to SC over CC if: Want to include federal claim, complex case, or SC has particular experience
    - CC is cheaper and quicker
  - SC can exercise federal jurisdiction (s 4 *Cth Cross Vesting Act*) and jurisdiction of other State courts (s 9 *State Cross Vesting Act*)
- Court of Appeal: Requires leave (s 14A *SCA*)
  - Test – ‘real prospect of success’ (s 14C; *Kennedy v Shire of Campaspe*)
  - Procedures: O 64 SCR

→ If party chooses the wrong court, there are consequences (last page of checklist)

# PARTIES

*To commence proceedings, the P must have capacity to sue, and the D must have the capacity to be sued*

## Capacity

- P must have capacity to sue and D must have capacity to be sued
  - Minors, mental incapacity, bankruptcy, corporations, partnerships
- Underlying approach is to ensure the party has legal personality and the ability to make decisions about the litigation

## Standing

- The P must have standing to sue (*ACF*)
  - Requires a private right

## Joinder of Parties – Only by P

*If D is trying to join – use third party procedure*

- Joinder: Separate causes of action within a proceeding or the joinder of more than one P/D within the proceeding
  - **SCR r 9.02, 9.03**: Joinder occurs before commencing proceedings
  - **SCR r 9.06**: Addition of parties occurs after proceedings have commenced
    - Can also remove/substitute a party under this rule
- This avoids the cost of having separate proceedings brought over different aspects of the dispute, with those involved having to participate in more than one case

## Summary – Joinder of Parties

- **R 9.03**: **P must** join other Ps (who are jointly entitled)
- **R 9.03**: **P must** join certain Ds (jointly liable, but not severally liable)
  - Eg. Mortgagees are jointly liable
- **R 9.02**: **P may** join other P's or D's (traditional joinder)

## Necessary Joinder (Mandatory/Compulsory)

- Of P → **r 9.03(1)**: Where the P claims relief to which someone else is *jointly entitled*, all persons jointly entitled **must** be joined
  - Eg. The P and X together have made a loan to the D, and the D has not paid up
    - The P must join X because X is jointly entitled to relief from D
- Of D → **r 9.03(3)**: Where the D is **jointly liable** under a contract with someone else, the P should claim against all persons jointly liable
  - Otherwise the court can stay proceedings until those persons are joined
    - Eg. Mortgagees who are jointly liable
  - C.f with **r 9.03(2)**: Where the D is **jointly and severally** liable with someone else, the other person need *not* be joined
    - Eg. Utility bills – usually joint and several liability

# DEFINING THE ISSUES (PLEADINGS)

*The process of pleadings assists to define the issues which is essential (Weinberg J speech)*

## The Pleadings Process

### Service of Pleadings

- **SCR O 14:** Service of pleadings
  - **SCR r 14.02:** Must be filed within 30 days
  - **SCR r 14.05:** P has 30 days after the service of defence to file their reply
  - **R 14.07:** If D counterclaims, P must file and serve Defence to Counterclaim within 30 days

## Content of Pleadings

- **R 13.02(1):** Every pleading shall:
  - (a) Contain in a summary form a statement of all the material facts on which the party relies, but not the evidence by which those facts are to be proved (**statement of claim**)
    - Material fact: All facts necessary to prove a cause of action
      - Fact: A truth that can be proven ('I bought a TV')
      - Evidence (not needed): The receipt for the TV
    - Eg. Negligence: Duty, breach, causation, loss, remoteness
    - Eg. Breach of K: Offer, acceptance, intention, consideration, terms, breach
  - (b) Where any claim, defence or answer of the party arises by or under any Act, identify the specific provision relied on; and
  - (c) State specifically any relief or remedy claimed

### Formal Requirements: r 13.01

- Heading with description of the pleading and the date on which it is served
- Divided into numbered paragraphs, with each allegation in a separate one
- Signed by the barrister/solicitor who drafted it

### Statement of Claim

- The first pleading - must disclose cause of action
- Three parts – introductory statements (who are the parties), the body (substantive allegations), and remedy sought

*Particulars – next page*

## Particulars

- Used to narrow issues and avoid parties incurring unnecessary costs with non-issues
- Facts within the pleadings must have 'sufficient particularity' (Bongiorno J, *Gunns*)
  - Helps narrow the issues and avoid parties incurring costs dealing with non-issues
- **R 13.10: Particulars**
  - (1) Every pleading shall contain the necessary particulars of any fact or matter pleaded
  - (2) Particulars shall be given if they are necessary to enable the opposite party to plead or to define the questions for trial or to avoid surprise at trial
- Must include particulars of any:
  - **R 13.10(3)(a):** Misrepresentation, fraud, etc
  - **R 13.10(3)(b):** Mental element or impairment
  - **R 13.10(4):** Specific details for personal injury
  - **R 13.10(5):** Identify publication for libel
- **R 13.11:** If particulars are inadequate, the court can order for further and better particulars → If necessary or desirable:
  - To enable the other party to plead, or
  - For some other special reason
- **R 24.02:** Where a party fails to comply with an order to give particulars/order for discovery, their pleadings may be struck out

*Furthermore, D has an OO to minimise delay (s 25 CPA) and to co-operate (s 20)*

**→ Maybe should disclose how much financial loss suffered as an indicator of damages sought**