

SECTION 3 – Matters Preceding Litigation

1. JURISDICTION

- a. **Which Court?** – before commencing proceedings, determine which court is the most appropriate based on the size of the claim and the subject matter of the dispute as well as tactical considerations.
- b. **Which Jurisdiction?** – if a single dispute involves matters to be determined in multiple jurisdictions, proceeding is referred to most appropriate court under *Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)*.

2. LIMITATION PERIOD – time restriction on when a claim of a certain kind can be brought.

- a. **Personal Injury Limitation Period** – for causes of injury accrued after 2/12/02, the limitation period is whichever of the below is first to expire: - **s 50C(1), Limitation Act 1969**
 - i. **Discoverability: 3 Years** – 3 years running from when cause of action is discoverable by plaintiff – **s 50C(1)(a)**
 - ii. **Long Stop: 12 Years** – 12 years running from time of act/omission causing injury – **s 50C(1)(b)**
- b. **Discoverability** – applying an **objective test**, determine whether the plaintiff knew or ought to have known certain facts to see when discoverability period starts running – *Baker-Morrison v NSW*
 - i. **Discoverable** – cause of action discoverable from when person knew or ought to have known all of the following things: - **s 50D(1)**
 1. **Fact of Injury** – that the injury/death has actually occurred, AND – **s 50D(1)(a)**
 2. **Fault by Defendant Caused Injury** – that the injury/death was caused by a fault of the defendant, AND – **s 50D(1)(b)**
 - a. **‘Fault’** – injury/death must have been caused by act/omission within the **legal meaning of fault**. This means that often a person cannot be considered to be reasonably aware that a legal fault has occurred until they obtain legal advice – *Baker-Morrison v NSW*
 - i. **Obvious Fault** – if fault is so obvious that even a non-lawyer would be reasonably expected to recognise it, then legal advice is not necessary – *Frizelle v Bauer*
 - b. **‘Caused by Defendant’** – legal definition of liability and attribution also applies here. Therefore, a person cannot be reasonably expected to know if defendant legally caused the injury until consultation with lawyer – *State of NSW v Gillett*
 - i. **Obvious Liability** – if defendant’s liability is so obvious that even non-lawyer would be reasonably recognise it, then legal advice unnecessary – *Frizelle v Bauer*
 3. **Injury Sufficiently Serious** – that injury was sufficiently serious to justify bringing an action against the defendant – **s 50D(1)(c)**
 - a. **‘Seriousness’** – whether an injury is serious enough to engage legal liability may only be able to be determined after medical/legal advice – *Baker-Morrison v NSW; Frizelle*
 - i. **Obvious Injury** – if the injury is obviously serious enough to justify an action without medical/legal advice, then it is unnecessary – *Frizelle v Bauer*
 - ii. **Reasonable Steps** – a person is taken to have ought to have known a fact if it would have been ascertained by the person if they had taken reasonable steps – **s 50D(2)**

- iii. **Special Period for Minors** – when act/omission was against a minor and committed by a family member or close associate, then cause of action is discoverable from when the victim turns 25 or when the cause of action was actually discoverable, OR 12 years (long stop) from 25yo, whichever is sooner – s 50E
- iv. **Effect of Disability** – limitation periods are suspended for period person is under disability/incapacitation (does not apply to minors with guardian – s 50F(1))
 - 1. **Under Guardianship** – if person is under guardianship, then discoverability relates to when the guardian ought to have known the relevant facts – s 50F(2); *Baker-Morrison v NSW*
- v. **Survivor Actions (Dead Plaintiff)** – in a survivor action, 3 year discoverability starts: - s 50C(2)
 - 1. Date on which the cause of action is discoverable by the deceased if the cause of action is discoverable by the deceased more than 3 years before the death of the deceased, OR – s 50C(2)(a)
 - 2. Appointment of plaintiff as the deceased's personal representative if the cause of action is discoverable by the plaintiff at or before the time of that appointment, OR – s 50C(2)(b)
 - 3. Date on which cause of action is discoverable by plaintiff if cause of action is discoverable by the plaintiff after the appointment of the plaintiff as the deceased's personal representative – s 50C(2)(c)
- c. **Extensions to Limitation Period** – court has power to extend limitation period for max 5 years after hearing from those affected by application if it believes it is just and reasonable to do so – s 60C(2)
 - i. **Determining Extension** – in determining whether to grant extension and for how long, court should consider the circumstances of the case, AND: - s 60E(1)
 - 1. Length of and reasons for delay – s 60E(1)(a)
 - 2. Extent of prejudice to the defendant due to a lack to evidence – s 60E(1)(b)
 - 3. Time at which injury became known to plaintiff – s 60E(1)(c)
 - 4. time at which nature/extent of injury became known to plaintiff– s 60E(1)(d)
 - 5. Time when plaintiff knew of connection between injury and defendant – s 60E(1)(e)
 - 6. If any conduct by defendant induced plaintiff's delay in bringing case – s 60E(1)(f)
 - 7. Steps taken by plaintiff to get medical, legal, etc. advice – s 60E(1)(g)
 - 8. Extent of plaintiff's injury/loss – s 60E(1)(h)
- d. **Suspension of Limitation Period** – limitation periods may be suspended/postponed for these reasons:
 - i. **Mistake** – cause of action in mistake does not include time before mistake in LP – s 56(1)
 - ii. **Disability** – limitation period is suspended for period that a person is disabled – s 52(1)
- e. **Confirmation** – if the defendant confirms a cause of action filed before the expiry of the limitation period, then the period before confirmation does not count towards the limitation period – s 54(1)
- f. **When Various Periods Apply** – when different limitation periods apply to a statement of claim because there are several causes of action, then the earliest date applies – s 13, *Limitation Act 1969*
- g. **Limitation Periods as Substantive Law** – if a case in tort was brought in NSW but the tort was committed in the NT, then the limitation periods of the NT would

apply as the case would be determined substantively by the law of the NT – *John Pfeiffer v Rogerson*

3. **PRELIMINARY DISCOVERY** - purpose of preliminary discovery is to allow plaintiff to determine identity of defendant, while also gaining information to assist a party in determining whether they should commence an action.

a. Discovery for Defendant's Identity or Whereabouts – r 5.2 UCPR

i. Power to Make Order – court may make order when: - r 5.2(1)

1. The applicant, **having made sufficient inquiries**, is unable to sufficiently ascertain the identity or whereabouts of a person for the **purpose of commencing proceedings** against the person, AND – **r 5.2(1)(a)**

a. 'Sufficient Inquiries' – what other inquiries are sufficient is a question of fact. Total exhaustion of all possible methods not necessary – depends on cost, delay, and uncertainty – *RTA v Australian Car Parks*

b. 'Purpose of Commencing' – implied intention that applicant wishes to sue the person. Demonstration of this favours application, but intention does not have to be concrete – *RTA v Australian Car Parks*

i. Threshold Desire – must meet threshold of desire to sue – less than fixed intention or purpose, intent may be conditional – 'genuine' – *RTA v CarePark*

2. Some other person may have information or possession of a document/thing that **tends to assist** in ascertaining the identity/whereabouts of the person – **r 5.2(1)(b)**

a. 'Tends to Assist' – no requirement to establish in advance that info will necessarily reveal ID/whereabouts, must just definitely contribute to purpose – *RTA v Aus Car Parks*

ii. Effect of Order – order for info regarding ID/whereabouts can be: - r 5.2(2)

1. **Court Examination** – order that person attend court for examination (including producing a document/thing on examination), OR – **r 5.2(2)(a)**

2. **Documents** – order that person give discovery of all documents that have been in the person's possession and relate to ID/whereabouts of person – **r 5.2(2)(b)**

iii. Corporations – order under r 5.2 should be addressed to appropriate officer of corp – r 5.2(4)

iv. Affidavit Requirement – application for PD under r 5.2 must be supported by an affidavit stating facts relied on by applicant and specifying information sought, AND copy of order and affidavit must be personally served on other person – r 5.2(7)

SECTION 1 – Police Powers and Discretion

ARREST

Arrest without Warrant (by Police) - police officer can arrest a person without a warrant under these circumstances: - s 99 LEPRA

i. Police officer may arrest without warrant if: - s 99(1)

1. Suspects on Reasonable Grounds - the police officer suspects on reasonable grounds that the person is committing or has committed an offence, **AND - s 99(1)(a)**

1. What is 'reasonable grounds'? - *less than reasonable belief, more than a possibility - less than proof on balance of probabilities - some factual basis for suspicion must be shown.*

2. Inadmissible Evidence - suspicion may be formed on basis of otherwise inadmissible evidence at trial - e.g. hearsay - ***George v Rockett***

3. Information in Mind of Officer - key factor is what is in the mind of the police officer arresting person **at the time of the arrest**, and whether that suspicion is on reasonable grounds:

- ***R v Rondo*** - police stopped car and found drugs after suspecting so. Arrest NOT justified as there were no reasonable grounds at time of arrest.
- ***Hyder v Commonwealth*** - officer entitled to rely on affidavit of ATO officer for arrest even though it was factually incorrect. Fault with ATO officer, not police.

2. Reasonably Necessary - the police officer is satisfied the arrest is reasonably necessary for one or more of the following reasons: - s 99(1)(b)

1. Lowering Burden of Proof - the new s 99 of LEPRA now says that a justifiable arrest need only be 'reasonably necessary', whereas before it was just 'necessary' - this lowers the burden of proof for police from previous standard.

2. Alternatives? - think about whether there is a more viable/appropriate alternative to arrest in situation that will achieve the same outcome – e.g. **court attendance notice**

1. Preventative - stop person repeating offence, or committing another offence - s 99(1)(b)(i)

2. Fleeing - to stop person fleeing officer or site of the offence - s 99(1)(b)(ii)

3. Identity Enquiries - to enable enquiries to be made to establish the person's identity - s 99(1)(b)(iii)

4. Court Appearance - to ensure that the person attends court - s 99(1)(b)(iv)

5. Property - to obtain property in possession of person that is connected with offence - s 99(1)(b)(v)

6. Preserve Evidence - to preserve evidence or prevent fabrication of evidence by person - s 99(1)(b)(vi)

7. Prevent Harassment - to prevent harassment/interference with any person who may give evidence in relation to the offence - s 99(1)(b)(vii)

8. Safety/Welfare - to protect the safety or welfare of any person - s 99(1)(b)(viii)

9. Nature of Offence - because of the seriousness of the offence - s 99(1)(b)(ix)

ii. Officer directed by another Officer to Arrest - officer may arrest a person without a warrant if directed to by another police officer. The other officer may not give the order unless the arrest would be lawful - s 99(2)

iii. Conditions of Arrest:

1. According to Law - as soon as practicable, arresting officer must take person before an authorised officer to be dealt with according to law - s 99(3)

2. Discontinue Arrest - an officer may discontinue an arrest at any time - s 99(3)

3. Previously Tried Offence - s 99 does not justify an officer arresting a person for offence they have already been tried of - s 99(5)

Arrest with Warrant (by Police) - police officer acting in accordance with a warrant may arrest or deal with person named in warrant in accordance with the warrant - **s 101(1)**

i. Possession of Warrant - officer may act irrespective of whether the warrant is in their possession - **s 101(2)**

ii. Issuing of Warrant - in determining whether to issue an arrest warrant, officer must take into account these matters - **r 7.3(2) Local Court Rules**

1. Seriousness of Offence and any likely punishment - **r 7.3(2)(a)**

2. Risk - whether there is any risk to a victim/witness or other person if warrant not granted - **r 7.3(2)(b)**

3. Other Offences - whether person is subject of any other warrants or arrests - **r 7.3(2)(c)**

4. Attendance Notice not Served - if warrant is sought because notice has not been served: - **s 7.3(2)(d)**

1. Whether reasonable attempts at service have been made, AND - **r 7.3(2)(d)(i)**

2. Whether an order for substituted service would be a better option - **r 7.3(2)(d)(ii)**

