

TOPIC 2: JURISDICTION

"To hear [plaintiff]'s case, [Court] must have both **subject matter** and **territorial** jurisdiction (*Laurie v Carroll, Dixon CJ*) - "

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is generally conferred by the **legislation establishing the Court** (eg. *Constitution, Ch 3 creates the High Court, Federal Court and State/Territory court vested with Federal judicial power i.e. Supreme Courts*).

Supreme Courts: Have been given a **general civil jurisdiction** enabling them to determine almost all civil disputes, except for those matters falling within exclusive federal jurisdiction (i.e. Federal Court and High Court).

STATE COURTS

Victorian Civil and Administrative Tribunal (VCAT): Hears - Jurisdiction is derived from multiple pieces of legislation, including the *Fair Trading Act, Residential Tenancies Act, Equal Opportunity Act and Planning and Environment Act*. Has civil, administrative and human rights divisions.

Magistrates Court: Hears - Any claim for damages or equitable relief within the jurisdictional limit (up to \$100,000) (**s. 100, Magistrates Court Act**), but no jurisdiction over prerogative writs (**s. 100(2), Magistrates Court Act**). General Civil Jurisdiction covers matters relating to claims for debts, damages for breach of contract, damage to property or for injury (eg. motor car collisions) and limited neighbourhood matters. **Appeals:** To the Supreme Court.

County Court Hears - All applications, claims, disputes and civil proceedings regardless of the type of relief sought (*County Court Act, s. 37(1)(a)*). The Court no longer has a jurisdictional monetary limit of \$200,000 (abolished with *Courts Legislation (Jurisdiction) Act*). **Appeals:** Victorian Court of Appeal (or Supreme/Federal Court if federal claim).

Supreme Court - the superior court of Victoria with unlimited jurisdiction in Victoria (*Constitution Act, s. 85(1)*).

The Court has **2 parts:** (1) **Trial Division:** Which has 3 divisions - (a) Commercial Court, (b) Common Law Division, and (c) Criminal Law Division. Matters are generally commenced here if they (i) include a federal claim, (ii) it is a complex case, or (c) the Supreme Court has particular experience (NOTE: County Court is cheaper and quicker). (2) **Appeals Division - Court of Appeal:** Hears appeals, including interlocutory, from (a) County Court civil trials, (b) Supreme Court civil trials, and (c) VCAT hearings.

FEDERAL COURTS

High Court - the judicial power of the Commonwealth is vested in the High Court, and such other Federal Courts as Parliament creates or vests with federal jurisdiction (*Cth Const, s. 71*). **Original jurisdiction:** The High Court has original jurisdiction in (a) all matters arising under the Constitution or involving its interpretation, and (b) trials of indictable offences against the laws of the Commonwealth (*Judiciary Act, s. 30*), (c) matters arising under a treaty, (d) matters between States, or between persons and States, (e) matters between the Commonwealth and the States/a State, (f) matters affecting representatives of different countries, (g) matters in which a writ of mandamus, mandamus or injunction is sought against an officer of the Commonwealth (*Judiciary Act, s. 38*).

Appeals: Special leave is required to appeal. In considering whether to grant leave for an appeal, the High Court shall consider (a) whether the proceedings are a matter of public importance, or (b) whether a decision is required to resolve differences of opinion between different courts, and (c) whether the administration of justice requires High Court consideration (*Judiciary Act, s. 35A*).

Federal Circuit Court - established by *Federal Magistrates' Court Act 1999* to provide a simple and accessible alternative to litigation in the Federal and Family Courts, and relieve the workload of those courts. The Court shares jurisdiction with these courts. **Hears** - family law, child support, administrative law, admiralty law, bankruptcy, copyright, human rights, industrial law, privacy and trade practices matters. **Appeals:** To the Family Court.

Family Court - established under the *Family Court Act 1975*. **Hears** - divorce, children's issues, property and maintenance matters.

Federal Court - Original jurisdiction: All matters as invested with it by Parliament (*Federal Court of Australia Act, s. 19*) i.e. covering all civil matters arising under Australian federal law, as well as any matter arising under the Constitution. **Appeals:** Over (a) single judgments of the Federal Court, (b) appeals from the Federal Circuit Court, (c) judgments of State Courts exercising Federal Jurisdiction (*Federal Court of Australia, s. 24(1)*).

CROSS-VESTING JURISDICTION

Matters of cross-vesting jurisdiction arise when a plaintiff seeks to bring one action for a State claim (eg. breach of contract, negligence) and Federal claim (eg. misleading and deceptive conduct under the ACL). Matters of cross-vesting jurisdiction can be heard by the *Federal Court or Supreme Court*.

FEDERAL COURT - Accrued jurisdiction & cross-vesting scheme - State matters: The Federal Court can hear 'all matters in the controversy' (*Federal Court of Australia Act, s. 22*). 'Matters' is given a broad definition, and can include any action arising from the *same facts or transaction*. As long as the 'State' part of the action is non-severable from the Federal part of the action, the Federal Court can hear it (*Fencott*); (*Re Wakim*). *Fencott*: The Court has jurisdiction to determine the *whole of the controversy* between the parties.

However, the Federal part of the dispute needs to be *tenable* for the Federal Court to have jurisdiction to hear the 'State' part of the matter (cf. *Johnson Tiles*) NOTE: Exercise of accrued jurisdiction is discretionary. It must appear to the Court that the 'State' claim arises from the same facts/transaction (*Stack*).

SUPREME COURT - The Court can exercise federal jurisdiction (*Commonwealth Cross Vesting Act, s. 4*) and the jurisdiction of other State Courts (*State Cross Vesting Act, s. 9*).

FEDERAL COURTS

The Federal courts initially got State Supreme Court jurisdiction, but this was knocked down in *Re Wakim*.

LIFE AFTER WAKIM:

1. **State Courts may exercise federal jurisdiction** - cross-vesting survives.
2. **The Federal Court has accrued jurisdiction** - i.e. can still exercise State jurisdiction if the State issues arise from the same matter.
3. **Federal Courts are not otherwise able to exercise State jurisdiction** - cross-vesting is unconstitutional in other federal courts.

TERRITORIAL JURISDICTION

Territorial jurisdiction can be acquired in a number of circumstances:

1. **The defendant's presence within the jurisdiction** (*Laurie v Carroll*).
 2. **The defendant submits to the jurisdiction** (*Slater & Gordon v Rose Porteous*).
 3. **Valid service outside the jurisdiction** - interstate via the *Service and Execution of Process Act 1992* (Cth) ("SEPA"), and overseas via the *Supreme Court Rules 1992* - **SEPA, s. 15:** "An initiating process issued in a State may be served in another State." EG: Vic Supreme Court has jurisdiction over NSW person as long as the NSW person has been validly served with the correct SEPA form attached to the writ. But NSW person can object to coming to Vic to defend the action by applying to have the action *transferred to the NSW Supreme Court*.
- Transferring Cross-Vesting Actions (Australia) - Jurisdiction of Courts (Cross Vesting Act, s. 5(2)(b):** Where there is a single proceeding pending in Victoria, if it would be more appropriate for the matter to be determined in another court, or where it is otherwise in the interests of justice that there be a transfer, the Court must order the transfer.

The court where proceedings are instituted doesn't only have to be *inappropriate* for a matter to be transferred out of it. Courts may still order transfers after considering the following factors: (1) **Where would the case have been heard before the cross-vesting legislation?** (2) **The extent to which the matters involve the application of the law of another jurisdiction.** (3) **The interests of justice** - 'interests of justice' are wider than the interests of either party. Includes consideration of (a) the location of the defendant, (b) the plaintiff's home state, (c) the speed with which a court/tribunal can deal with the case (especially where the plaintiff is dying, (d) where the injury occurred, (e) where the law would apply, (f) the location of witnesses and evidence, (g) costs and expense, (h) inconvenience (*BHP Billiton v Schultz*; *applied in Slater & Gordon v Rose Porteous* - factors: (1) *exclusive jurisdiction clause* - indicated the parties turned their minds to the question of where litigation should occur; agreed to litigate in Victoria (overwhelming factor) (2) *conduct and transactions have close connection with W.A.* - in favour of case transfer to W.A; (3) *convenience to the parties and witnesses* - Victoria more appropriate: trial in W.A inconvenient to Slater & Gordon, whose practice is in Victoria; trial in Vic would have some inconvenience to Mrs Porteous, but significant that she is in the process of moving to Vic, and had substantial investments in Vic; not greatly inconvenienced).

Transferring Cross-Vesting Actions (Overseas) - SCR 07: "Originating processes may be served out of Australia provided there is **some nexus** between the defendant and Victoria, and the defendant is validly served with the nexus factors endorsed on the writ" (i.e. the cause of action arose in Victoria; the land the subject of the action is in Victoria; the contract was made and entered into in Victoria). If an overseas individual/company **objects** to coming to Victoria to defend the action, they may apply for a **stay of proceedings** on the basis that the Victorian Court is clearly an inappropriate court to hear the matter - '**forum non conveniens**' (FNC) It is not enough that another court is *more appropriate*, no stay will be granted unless the Victorian court is *inappropriate* (*Oceanic Sun Line*; *applied in Voth - Facts: P commenced proceedings in NSW against an accountant from Missouri, claiming professional negligence in failing to advise on P's liability to account to the IRS; R sought to stay proceedings based on FNC; Held: Factors to consider (Spiliada):* 1. Expense and convenience; 2. Where the cause of action arose (*relevant acts and omissions took place predominantly in Missouri*); 3. Where the parties reside or carry on their business (*Ps are residents of NSW and "may therefore reasonably point to the advantages to them in practical terms of bringing actions in the local courts"*); 4. Where the majority of witnesses reside and evidence is held (*the greater part of the evidence would be found in Missouri*); 5. Which law will apply (*substantial connection to Missouri; damage which P alleged was referable to US tax law*); 6. Other parties involved amenable to a particular jurisdiction. **Finding:** "We have little doubt that Missouri is the more appropriate forum, but it does not necessarily follow that NSW is a clearly inappropriate forum. **High Court:** "A stay should be granted if continuation of the proceedings would be (a) **oppressive** (i.e. seriously and unfairly burdensome, prejudicial or damaging), (b) **vexatious** (would produce serious and unjustified trouble and harassment), or (c) **an abuse of process** - High Court factors applied and found in *Rowe v Grunenthal: proceeding against German manufacturer of product causing P to be born without limbs; Vic not inappropriate forum*).

4. **By responding to the action** - i.e. by entering an 'appearance'.
5. **A nexus between the dispute and the State** - *Constitution Act, s. 85(1)*.

Transferring Cases within Victoria - Courts can shift cases in Victoria where another court has (a) the jurisdiction, (b) the appropriate skill, experience and authority to hear and determine the matter, and (c) it is just and convenient that the case be transferred (*Courts (Case Transfer Act) 1991, s. 16(1)* - eg. P sues in MC, D counterclaims for \$100,000+ = transfer to CC). Cannot be transferred to MC if jury elected (**s. 16(2)**).

SERVICE

Issue 1: Personal Service

The originating process (eg. writ) must be personally served on the defendant, except where otherwise provided (SCR 6.02(1)). To effect personal service, the plaintiff must either (a) leave a copy of the document with the person to be served (SCR 6.03(1)(a)), or (b) put the copy down in the person's presence and disclose the nature of the document (SCR 6.03(1)(b)) (eg. *Ainsworth v Redd* - the Process Server held out the writ and said, "these documents are for you"; the defendant looked at the documents but did not take them; the defendant's lawyer, standing next to him, took them; the defendant said, "we'd better take a look at those"). The **address for service** of a plaintiff shall be (a) *where suing by a solicitor* - the business address of the solicitor indorsed on the originating process, or (b) *where suing by an agent* - the business address of the agent, or (c) *where suing in person* - the plaintiff's address in Victoria indorsed on the originating process (SCR 6.06).

Alternatives to Personal Service: The **defendant's solicitor** may accept service on a client's behalf if they have instructions to do so (SCR 6.09). If service is improper, but the document comes to the defendant's notice regardless, it is taken to have been served at the time of notice (SCR 6.11).

Personal service and Special Parties:

Corporations - can leave the writ with the head officer or treasurer, manager or secretary (SCR 6.04(a)). Can also leave the writ at, or post it to the, the corporation's registered office, or personally deliver to a direction who lives in Australia. If the company is in liquidation or administration, the writ may be left at or posted to the liquidator's or administrator's address (*Corporations Act*, s. 109X). For foreign corporations, can leave the writ at, or post it to, the address of the local agent of the foreign company (CA, s. 601CX).

Commonwealth Government - the writ may be served on the Secretary to the Attorney-General's Department or the Australian Government Solicitor (SCR 6.04(d)). **Victorian Government** - the writ may be served on the Victorian Government Solicitor (SCR 6.04(e)).

Minors - personal service on a person under 18 years of age is effected by (a) serving a parent of guardian of the minor, or (b) where there is none, serving the person with whom the minor resides or whose care they are in (SCR 6.04(b)).

Handicapped persons - personal service is effected by (a) serving on the litigation guardian or person with whom the defendant resides or whose care they are in (SCR 6.04(c)).

Partnerships - personal service is effected by serving personally on any partner (SCR 17.03(1)(a)), or any person at a Victorian principal place of business who appears to have control (SCR 17.03(1)(b)). Suing may be done in the firm name, or each individual partner may be sued (SCR 17.01).

Motor vehicle injuries - personal service is effected by serving the writ on the TAC's office as well as the defendant (SCR 6.05).

Issue 2: Substituted Service

Where for any reason it is impracticable to serve the defendant in the required manner, the applicant must seek a substituted service order by making an ex parte application to the Court, supported by an affidavit setting out the circumstances justifying the application, the extensive efforts and attempts made to serve, and the proposed method substituted service (*Amos v Small*). The Court may then order that other steps may be taken to bring the document to the defendant's notice (SCR 6.10(1)). Methods of substituted service commonly include (a) post, (b) newspaper notices, (c) service on someone closely connected with the defendant (eg. an insurer), (d) service the defendant's agent in jurisdiction (*Porter v Freudenberg*), and (e) email and social media (eg. Facebook). However, the plaintiff needs to prove that the email/Facebook page is the defendant's page and is likely to bring the matter to the defendant's attention (*Flo Rida v Mothership Music - evidence did not establish, other than by mere assertion, that the Facebook page was in fact Flo Rida's Facebook page, and did not prove that posting on it was likely to come to his attention*).

Issue 3: Proof of Service

After an originating process is served, or if the defendant disputes/ignores personal service, the plaintiff must submit an affidavit of service disclosing who was served, the hour of the day, the day of the week, the date, the place where it was served, the time of service, and the manner of identification of the person served (SCR 6.16(1), SCR 6.17(1)). For other types of service, only the date and how service was conducted need to be specified (SCR 6.17(2)).

Issue 4: Ordinary Service

Where personal service is not required i.e. when the document is not an originating process (eg. interlocutory processes), more relaxed rules apply. Service can be made ordinarily by (a) leaving it at the 'proper address' on the writ, (b) posting to the relevant person at their proper address, (c) serving in accordance with the *Corporations Act*, (d) leaving the document in document exchange, (e) sending a fax, or (f) by email (SCR 6.07(1)). The 'proper address' is the address for service provided on the writ, unless it is unknown (SCR 6.07(2)).

Issue 5: Service Outside the Jurisdiction (Service ex juris)

1. Service outside Victoria, but within Australia - service may be made under the *Service and Execution of Process Act* ('SEPA'): The originating process can served in any State without the Court's leave. SEPA form must be attached to serve (SEPA, s. 15(1)). Service is to be effected in the same way as in the State of issue i.e. personal service (SEPA, s. 15(2)). Service interstate has the same effect as intrastate service (SEPA, s. 12). Service on companies is effected by leaving the document at or sending it to the company's registered office (SEPA, s. 9(1)). If the defendant objects to the matter being heard in Victoria, they may make a case transfer application under the cross-vesting regime.

2. Service outside Australia - 3 methods of service:

(1) Via the Hague Convention - Australia acceded to the Convention in 2010. 62 parties signed, including most of Europe, the Americas and China. If serving under the Convention, the standard form of service provided must be used (SCR 80);

(2) Pursuant to a bilateral convention: The document must be filed with the Prothonotary, after which it will be sent to the AG and then transmitted to the country via diplomatic channels (SCR 7.09-7.15).

(3) Under the Rules, generally: To serve outside Australia, there must be some nexus between the case and the jurisdiction i.e. relief is sought against a person domiciled or ordinary resident in Australia, the cause of action arose in Victoria, the land the subject of the action is in Victoria, or the contract was made in Victoria (SCR 7.01(1)). The originating process must include an indorsement indicating which of these nexus grounds is covered, giving the defendant a basis to argue about the legitimacy of the nexus (SCR 7.02). The defendant must be served personally or in accordance with the laws of the relevant country (SCR 7.03).

APPEARANCE

After a defendant is served with a writ, they must enter appearance before taking procedural steps (SCR 8.02). This informs the plaintiff that the action will be defended, and gives the plaintiff details of the defendant's solicitor and address for service. It also prevents the plaintiff from obtaining a default judgment pursuant to SCR 21.02. Normally, only a defendant or their solicitor may enter an appearance (SCR 8.03). Time limits apply for an appearance (SCR 8.04):

1. *Where the originating process is served in Victoria* - not less than 10 days after service;
2. *Where the originating process is served out of Victoria but in Australia* - within 21 days;
3. *Where the originating process is served in PNG* - not less than 28 days after service;
4. *Where the originating process is served in NZ* - within 30 working days;
5. *Anywhere else overseas* - not less than 42 days after service.

Issue 1: Procedure for Entering Appearance

To enter an appearance, the defendant or their solicitor must state their name, address and contact details (SCR 8.06), using the required form (Form 8A/8B, depending on whether they are conditional or unconditional - see below) (SCR 8.05(1) or 8.08). A notice of appearance must also be filed and served ordinarily on every plaintiff on the same day (SCR 8.05(2)(3)).

Issue 2: Types of Appearance

If served with a writ, the defendant may (a) do nothing (and risk default judgment), (b) enter an unconditional appearance, or (c) enter a conditional appearance:

1. Unconditional appearance - this is the usual form of appearance (SCR 8.05(1)). Form 8A must be used. This waives any objections to service irregularities, submits the defendant to the jurisdiction, informs the plaintiff the action will be defended, and gives the address for ordinary service of all future documents in the litigation.

2. Conditional appearance - this objects to the Court's jurisdiction, but prevents default judgment. It preserves the defendant's right to object to service irregularities, and protects them from judgment in default of appearance (SCR 8.08). Form 8B must be used.

Victoria: Appearance must be entered within 10 days (SCR 8.04(a)).

Interstate: Appearance must be entered within 21 days (SEPA, s. 17; SCR 8.04(b)). Also allows the defendant to apply for a transfer under Cross Vesting legislation.

Overseas: Appearance must be entered -

3. *Where the originating process is served in PNG* - not less than 28 days after service (8.04(c));
4. *Where the originating process is served in NZ* - within 30 working days (8.04(d));
5. *Anywhere else overseas* - not less than 42 days after service (8.04(e)).

NOTE: Conditional appearance is useful where (a) there has been service interstate but the plaintiff did not comply with SEPA; writ was served on the defendant's solicitor, but the solicitor had no instructions to accept service on the defendant's behalf.

Alternatives to Conditional Appearance: The Court may exercise discretion under SCR 8.09 to set aside the writ or its service, or stay proceedings to determine jurisdictional issues upon application by the defendant before filing appearance. The Court may do so on the grounds that service was undertaken improperly, or Victoria is a clearly inappropriate forum for the matter to be heard.

3. Failure to Enter an Appearance - where a defendant does not file an appearance within the time limit specified, the plaintiff may apply for judgment against the defendant (SCR 21.01(2)).

Issue 3: Overturning Judgment in Default

The Court may set aside or vary any default judgment entered (SCR 21.07). Where the defendant seeks to set aside or vary a default judgment, they should address the following 3 elements -

1. *A satisfactory explanation for failing to appear*
2. *Establish no unreasonable delay in making the application* (*NAB v Singh* - "the court will not often refuse the opportunity of defending to a defendant who has an apparently good ground of defence when irreparable prejudice would be done to the plaintiff").
3. *Demonstrate a prima facie defence on the merits* (*Mearns v Willoughby* - for assignment to be effected it must be 'absolute'; because assignment was not absolute, parties could vary the deed of assignment; argument rejected by the Court).

TOPIC 7: SETTLEMENT AND DISPOSITION

95% of cases in Victoria are resolved without trial. Some are resolved by settlement, others when a party fails to comply with the Rules. The Court can also dispose of cases summarily as a form of case management. The following are **6 ways matters are resolved without going to trial** -

1) FACILITATING SETTLEMENT

Settlement is highly desirable. Not only are the rules designed to encourage parties to engage in bona fide settlement negotiations with open and frank discussions (i.e. settlement negotiations are privileged), but there is pressure on parties to accept reasonable offers through costs consequences.

Issue 1: 'Without Prejudice' Communications - 'Without prejudice' communications, such as letters of offer between solicitors as part of negotiation, promote a frank exchange of views and negotiations to settle the case. Such communications are inadmissible as evidence.

Issue 2: Calderbank letters and Offers of Compromise - Calderbank letters are settlement negotiations that are without prejudice save as to costs. They fall under the settlement privilege and cannot be disclosed at trial. HOWEVER, if a 'good' offer is made before trial, and the other party does not accept it and settle, but rather continues to trial and wastes the court's and the parties time and money, the Court can take this account at the costs stage.

Issue 3: Offers to Compromise Generally - **Requirements:** Offers to Compromise must be made by serving a written notice on the OP. They must state that the offer is served in accordance with this Order, and whether the offer is inclusive of costs, or costs are in addition to the offer (SCR 26.02). Unless the notice specifies otherwise, an offer is taken to have been made without prejudice save as to costs (SCR 26.04). **Disclosure to the Court:** An offer of compromise must not be contained in any pleading or affidavit. When an offer of compromise has been accepted, no communication with respect to the offer shall be made to the Court until all questions of liability and the relief to be granted have been determined. **NOTE:** This does not apply where an offer of compromise is not made without prejudice (SCR 26.05). **Time Limit:** An offer to pay a sum of money is taken to be an offer that the sum will be paid within 28 days after acceptance, unless the notice states otherwise. A party who has accepted an offer for payment may withdraw the acceptance if the sum is not paid within the time provided, or within 28 days, and the Court, on the application of the party who accepted the offer, gives leave (SCR 26.07). **Failure to comply with accepted offer:** If a party to the accepted offer defaults in complying with their obligations under the offer, any non-defaulting party may apply to the Court for an order (a) giving effect to the accepted offer, (b) staying or dismissing the proceeding if the plaintiff is in default, (c) striking out the defendant's defence if the defendant is in default, or (d) that a claim which is not the subject of the offer shall proceed (SCR 26.07.1). **Costs consequences of failure to accept offer:** Where an offer of compromise is made by a plaintiff and not accepted by the defendant, and the plaintiff obtains a judgment on the claim to which the offer relates no less favourable to the plaintiff than the terms of the offer, the plaintiff is entitled -

(a) *If the claim is for damages arising out of death or bodily injury* - an order against the defendant for the plaintiff's costs taxed on an indemnity basis; (b) *In any other claim* - an order against the defendant for the plaintiff's costs in respect of the claim before 11am on the second business day after the offer was served, taxed ordinarily, and for the plaintiff's costs, taxed on an indemnity basis (SCR 26.08(2)).

Where an offer of compromise is made by a defendant and not accepted by the plaintiff, and the plaintiff obtains a judgment to which the offer relates no less favourable to the plaintiff than the terms of the offer, the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim before 11am on the second business day after the offer was served, taxed ordinarily, and the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim taxed ordinarily (SCR 26.08(3)).

2) WITHDRAWAL / ABANDONMENT / DISCONTINUANCE

A party who has filed an appearance may withdraw at any time with the Court's leave (SCR 25.01).

Issue 1: Discontinuance by Plaintiff
A plaintiff may discontinue proceedings, or withdraw any part of it, (a) before the close of pleadings, or (b) at any time, with the Court's leave and the consent of other parties (SCR 25.02(2)). This also applies to a counterclaim (SCR 25.02(3)), defences to a counterclaim (SCR 25.02(4)(a)) or a TPN (SCR 25.02(6)). The Court will only give leave if it is satisfied that the discontinuance is not an abuse of process - eg. where plaintiff wants to reissue proceedings in a different jurisdiction to recover more money (*Re Matthews*); where the defendant issues a counterclaim larger than the plaintiff's claim, and the plaintiff regrets bringing an action at all (*EY v Butte Mining*). Where a plaintiff discontinues, they are usually liable for the defendant's costs (SCR 25.05; 63.15); no issue estoppel will arise, but does not preclude plaintiff from bringing fresh proceedings (SCR 25.06).

Issue 2: Discontinuance by Defendant - A defendant may discontinue a claim or withdraw part of it (a) before the close of pleadings, or (b) at any time, with the Court's leave and consent of the other parties (SCR 25.02(3)). This also applies to withdrawal of defences (SCR 25.02(4)(b)). A defendant who has joined a 3rd party may discontinue the claim against the 3rd party with the Court's leave or the 3rd party's consent (SCR 25.02(6)). **NOTE:** A party cannot withdraw an admission without the OP's and Court's consent (SCR 25.02(5)).

Issue 3: Notice of Discontinuance or Withdrawal - A discontinuance or withdrawal without the Court's leave shall be made by filing a notice stating the extent of the discontinuance or withdrawal. When the discontinuance or withdrawal is with the other parties' consent, the notice must be indorsed with their consents. On the day of filing, a copy must be served on each party (SCR 25.04).

3) DEFAULT JUDGMENT

Issue 1: Judgment in Default of Appearance

- Where a defendant does not file an appearance within the time limit (10 days for Victorian writs (SCR 8.04)), the plaintiff may apply for a default judgment against that defendant (SCR 21.01(2)). Judgment will not be entered or given for the plaintiff unless the following is filed: (a) a notice to the Prothonotary requesting the search for an appearance by the defendant, (b) an affidavit providing service of the writ on the defendant, and (c) a Statement of Claim where the plaintiff applies for judgment and the indorsement of claim on the writ does not constitute a Statement of Claim (SCR 21.01(3)).

Issue 2: Judgment in Default of Defence - Where a defendant does not serve a defence within the required time (30 days after the Statement of Claim in Victoria), the plaintiff may apply for a default judgment against the defendant (SCR 21.02(1)). Judgment shall not be entered or given for the plaintiff unless an affidavit proving default is filed (SCR 21.02(2)).

Issue 3: Setting aside Judgment

Default judgments may be set aside or varied (SCR 21.07). If a defendant tries to argue setting aside, they must argue 3 elements (*Cook v DA*):

1. *A satisfactory explanation for failing to appear*
2. *Establish no unreasonable delay in making the application (NAB v Singh* - "the court will not often refuse the opportunity of defending to a defendant who has an apparently good ground of defence when irreparable prejudice would be done to the plaintiff").
3. *Demonstrate a prima facie defence on the merits (Mearns v Willoughby* - for assignment to be effected it must be 'absolute'; because assignment was not absolute, parties could vary the deed of assignment; argument rejected by the Court).

4) JUDGEMENT ON

FAILURE TO PROSECUTE OR OBEY ORDER

Issue 1: Judgment on Failure to Prosecute/on Dismissal

- The Court may order that a proceeding be dismissed for want of prosecution if the plaintiff fails to prove a Statement of Claim within the time limit, or does not within a reasonable time after commencement of proceedings, file and serve a notice for trial or apply to have a date fixed for trial (SCR 24.01). *Nelson v Geary*: Claim was lodged a number of years previous to the Statement of Claim; defendant argued this was an inordinate and inexcusable delay, causing them injustice (SCR 24). **Held:** Mere delay without prejudice is not sufficient; matter not dismissed; plaintiff given leave to file their Statement of Claim, but pay for defendant's costs on indemnity basis.

Issue 2: Judgment on Failure to Obey Order

- if a party fails to comply with an order to give particulars of any pleadings, or with an order for discovery of documents/to answer interrogatories - *if the party is the plaintiff*: proceedings may be dismissed; *if the party is the defendant* - the defence may be struck out (SCR 24.02(1)). SCR 24.02(1) does not affect the inherent power of the Court to dismiss proceedings for want of prosecution or failure of a party to do any act required by the Rules (SCR 24.05).

Issue 3: Failure to comply with Order 29 re Discovery

- an alternative to SCR 24. The Court may order particular (SCR 29.08) or further (SCR 29.11) discovery. Non-compliance results in a default notice being issued. If there is no compliance within 10 days, pleadings may be dismissed (SCR 29.12.1), or a party may be committed for contempt of court (SCR 29.14).

5) STAY OR JUDGMENT IN PROCEEDING

Issue 1:

Stay/Judgment in Proceedings

- where a proceeding, claim or defence (a) does not disclose a cause of action or answer to a CoA, (b) is scandalous, frivolous or vexatious, or (c) is an abuse of Court process, the Court may stay (i.e. pause) the whole proceeding or any claim, or given judgment regarding the whole proceeding or any claim (SCR 23.01).

Issue 2: Striking Out Pleadings

- where an indorsement of claim on a writ or originating motion (a) does not disclose a cause of action or defence, or (b) is scandalous, frivolous or vexatious, or (c) may prejudice, embarrass or delay a fair trial, or (d) is an abuse of process, the Court may order the whole or part of the indorsement be struck out or amended (SCR 23.02).

NOTE: This does not impact on the Court's inherent jurisdiction to dismiss proceedings or strike out defences (SCR 24.05; McCabe v BAT, per Eames J).

6) SUMMARY JUDGMENT

Issue 1: Application by a Plaintiff for Summary Judgment

- a plaintiff may apply to the Court for summary judgment, verifying the facts on which the claim is based and stating a belief that a defendant's defence or part of that defence has no real prospect of success (SCR 22.04; CPA, s. 61). The defendant may dispute the application by affidavit, with a statement of fact showing how the grounds are made out (SCR 22.05). Where the defendant serves such an affidavit, the Court may allow the plaintiff to rely upon an affidavit in reply (SCR 22.06).

Issue 2: Application by a Defendant for Summary Judgment

- a defendant may apply to the court for a summary judgment on the ground that a plaintiff's claim or part of that claim has no real prospect of success (SCR 22.16; CPA, s. 62). The plaintiff may dispute the application by affidavit, with a statement of fact showing how the grounds are made out (SCR 22.19). Where the plaintiff serves such an affidavit, the Court may allow the defendant to rely upon an affidavit in reply (SCR 22.20).

Issue 3: Court's Role in Determining Judgment

- the Court may order a proceeding proceed to trial if the court is satisfied that, despite there being no real prospect of success, the proceeding should not be disposed of summarily because (a) it is not in the interests of justice to do so, or (b) the dispute is of such a nature that only a full hearing on merits is appropriate (CPA, s. 64) i.e. *public interest cases*. Test is 'real' as opposed to 'fanciful' chance of success; more liberal test than 'hopeless' or 'bound to fail'. The power to terminate proceedings summarily should not be exercised unless it is clear there is no real question to be tried because, if granted, it deprives the relevant party of the opportunity to pursue their claim or defence (*Lysaught Building, per Warren CJ, Nettle JA, Neave JA*; applied in *Goldberg v Shenton, Cubillo v Commonwealth*).