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# TOPIC 1: Personal Jurisdiction

## Is defendant present in the jurisdiction at time of service? (*Laurie*)

- In the same state (*Gosper*). If YES → Ct has personal jurisdiction

## 1. Service in AU

- Personal service- originating process in all cts (except local cts) must be personally served
  - **UCPR r10.20:** Leave a copy of document with person; put copy down in person's presence and explain nature of document if person does not accept; if person being served is violent/threatening violence, leave it as near as practicable to person.
  - Doesn't matter if short visit –can't strike out unless vexatious, oppressive, abuse of process (*HRH*).
  - Purpose of visit irrelevant, unless D tricked/fraudulently coerced into J by P to be served (*Perrett*)
- Substituted service – INSTEAD of personal service (**UCPR r 10.14**).
  - D had knowledge of issue but left before issue occurred → NO (*Laurie*)
  - D was present but left with knowledge of summons → YES (*Joye*)
  - D present but left with no knowledge of summons → probably NO (*HRH*)
- Corporations
  - Registered in AU
    - **UCPR r 10.22:** Personal service by serving document on principal officer of corp. OR serving document in any manner which may, by law, constitute service
    - **S 109X CA** (For Co.s generally): Leaving at/posting to registered office (or at liquidator's office) OR personal service on director who resides in AU.
    - **S 601CX CA** (For foreign Co): Leaving at/posting to registered office or local agent
      - Personally delivering copy to 2 directors if 2 or more live in AU
      - Personally delivering to sole director of foreign prop. Co who resides in Aus
  - Not registered in AU
    - Unregistered foreign Co needs to be present in jurisdiction. I.e. "carrying on business in the territory" (*Wimbourne*)
      - Agent: Does agent in carrying on foreign Co's business make a contract for the foreign Co (YES "CoB") or does the agent in carrying on the agent's own business, sell a contract with foreign Co (NO "CoB"? (*Adams*)
        - i. **Adams:** foreign Co. maintains at own expense a fixed place of its own OR representative carrying on business for a minimal period of time in jurisdiction. Consider purpose of acquiring fixed place, cost of staff, remuneration of representative, degree of control
      - Place: business carried on at fixed and definite place in State
      - Time: business has continued for a sufficiently substantial period of time.
- Jurisdiction based on D's submission – having submitted, precluded from objecting to jurisdiction.
  - Submission by agreement:
    - **Express agreement/contract (UCPR r10.6):** Any document may be served by a party on another (whether in NSW or elsewhere), in accordance with any agreement by which party to be served is bound.
      - **Howard:** Jurisdiction-selection clause ('We agree to litigate in NSWSC'). If parties fail to specify in contract a method by which foreign respondent will be served, leave to serve out of jurisdiction will be needed for Ct to get authority over respondent.
    - **UCPR r10.13:** Instructing lawyers to accept service
  - Submission inferred by procedural conduct
    - Summary dismissal: filing notice of motion for summary dismissal i.e. not withdrawing appearance (*Garsec*)
    - Counterclaims on same subject matter as P's claims (**Wimborne**)
      - Plaintiff not otherwise subject to jurisdiction of the Ct, submits himself to every matter of counter-claim that would operate as a defence to his action or that would set-off or cross-claim arising out of the same subject matter
    - Amended claim (**Marlborough**): Filing appearance is voluntary submission to any amendment of original claim based on same subject matter as original claim.
    - Waiver (**Winborne, Vertzyas**): Voluntary act unequivocally evincing an intention to abandon or not to assert a right to object to jurisdiction. Intention may be express or imputed.
    - Arguing the merits (**Vertzyas**): Not every act which seeks to raise the merits of the other party's case will be regarded as inconsistent but only those which manifest an unequivocal intention to contest those merits. Inconsistency amounts to waiver.

- Objection to jurisdiction
  - D can refuse to enter an appearance
  - **NSW:** D can apply to have originating process or service set aside without having entered appearance (**UCPR r12.11**). Will not be taken as submission to J unless start arguing merits.
  - In most other J's, D can make conditional appearance, in which D challenges J.

## 2. Service elsewhere in Aus:

- Ct of one state does not have J over a person in another state unless that person submits. HCA/FCA has J as long as person is in AU (**s18 FCA**)
- **SEPA 1992 (Cth)** → enabled all cts in Aus to hear and determine interstate cases
  - **S12:** Process served interstate has the same effect and may give rise to same proceedings as if the process had been served in the place of issue.
  - **S15:** (1) Initiating process issued in a State may be served in another State
    - (2) Service on individual must be effected in same way as service of such initiating process in the place of issue.
  - **S18:** (1) & (2) An appearance entered after service of the initiating process is only valid if it states an address within AU as an address for service
    - (3) Ct of issue must set aside appearance if, on application by the party whom the process was served, the address for service is false/misleading.
- D wishing to bring the case home to the ct in State of D needs to apply under Jurisdiction of Cts (Cross Vesting) Act 1987 in the State in which proceedings were commenced.
  - Test to be applied by that ct in deciding whether it will cross vest the action to a ct in another State is whether it is in the interest of justice to do so (**McEntee v Connor**)

## 3. Service in NZ of initiating documents issued by Aus Cts:

- **TTPA 2010 (Cth)**
  - **S8(1):** Civil proceedings commenced in AU ct and tribunals.
  - **S9(2):** Must be served in way that is required/permitted to be served in place of issue.
    - No need for ct or tribunal to give leave or to be satisfied that there is a connection between proceeding and AU.
  - **S10:** Has same effect and gives rise to the same proceeding as if the initiative document had been served in the place of issue.
  - **S17:** D may apply to AU ct to stay proceeding on basis that NZ ct is "more appropriate ct"
  - to determine matters in issue.

## 4. Service Outside AU

- Only relevant when no service inside J possible, parties haven't agreed on service, D hasn't submitted to J and service not interstate or NZ. For service outside AU, each state has different rules: NSW = UCPR
- For NSWSC to have personal J over D outside of AU & NZ, there must be sufficient connection between the claim and AU.

### 1. Service

- Service without leave – must be in Schedule 6**
  - **r11.4: Service** (1) Originating process may be served outside Aus in circs referred to in Schedule 6.
- Service with leave – if not in Schedule 6**
  - **r11.5:** where service not allowed under S6, OP may be served with leave of ct if satisfied that:
    - (5)(a) claim has a real and substantial connection with AU, and
    - (b) AU is an appropriate forum for the trial, and
    - (c) In all the circumstances the ct should assume J.
- **r11.8AC Mode of service:** need not be personally served as long as follows law of country where served
  - **r11.7:** Person must be served with notice in the approved form informing the person of the scope of the J of the ct, the grounds to found J and the person's right to challenge the service of the OP.
  - **r11.8A:** applies to convention agreements between AU & other countries but not applicable if to be served in a country which is party to Hague Convention.
    - Filing of requisite documents (11.10)
    - Procedure on filing and lodgement (11.11)
    - Recovery of unpaid expenses (11.12)

- **r11A.2: Hague Convention** where it applies, procedures under Convention must be used
  - Each state to appoint Central Authority to serve or arrange to serve documents
  - State cannot refuse to serve unless it deems compliance would infringe sovereignty or security
  - **Art.8:** In most cases can serve through diplomatic channels if party to be served doesn't object
  - Can in some cases post documents although most states have objected to this.

## 2. Does D appear after service?

- D does not appear
  - **r11.8:** a D who has been served outside of AU must file appearance with 42 days from date of service
  - **r11.8AA:** If OP served & no appearance by D, P may not proceed except by leave of ct
  - Assess the strength of P's claim? No, as long as the cause of action arising in the State (**Agar**)
- D appears
  - **r11.6 Stay Proceedings:**
    - (1) On application by D, ct may dismiss or stay the proceeding or set aside service of the OP
      - Ct may consider the strength of P's claim when setting aside service
    - (2) Without limiting (1), the ct may make an order under this rule if satisfied: (**Agar**):
      - (a) service of the OP is not authorised by these rules (schedule 6), or
      - (b) the ct is an inappropriate forum for the trial, or
        - i. Inappropriate forum = clearly inappropriate (**Renault**)
      - (c) claim has insufficient prospects of success to warrant putting the person served outside AU to the time, expense and trouble of defending the claim.
        - i. High degree of certainty – not sufficient if P's failure is likely/probable.
        - ii. Same test as in local proceedings for summary dismissal
  - Burden of proof on the party seeking to set aside proceedings (i.e. D).
  - **r12.11 Set aside OP:** D may object and apply to (1) set aside OP or (2) set aside service of OP

## 3. Contract

- Paragraphs authorising service outside of J must be read separately and disjunctively but in NSW, partial claims possible as long as they are all encompassed within Schedule 6.
- **Schedule 6:**
  - (b) Breach in AU
  - (c)(i) Contract made in NSW, (ii) made on behalf of person to be served through an agent carrying on business or residing in NSW, (iii) Is governed by the law of NSW, or (iv) breach committed in NSW.
- 1. Was contract made or entered into in AU?
  - Agreement made when acceptance reaches offeree (**Showtime**). If by post, then acceptance is at the place of postage.
  - The word "made" does not require in existence a contract to which the proceeding relates. One party alleges its existence is sufficient (**Geoscience**)
- 2. Breach of contract committed in AU
  - Action "in respect of" a valid contract (i.e. not necessarily an action in contract)
  - Breach of that contract – Schedule 6 (b) and (c)(iv):
    - Repudiation: If takes place by letter/phone, breach occurs where message was sent (**Showtime**)
    - Non-feasance: If non-feasance, the place of breach is where the obligation in question was due to be performed (**Showtime**)
- 3. Is there Forum non Conveniens for the local ct? Rule: oppressive, vexatious or an abuse of process.
  - Test: Local proceedings "productive of serious and unjustified trouble and harassment" or "seriously and unfairly burdensome, prejudicial or damaging"
    - Technical breach occurring in NSW based on a tenuous basis – inappropriate forum (**Kim**)

## 4. Tort

- **Schedule 6:**
  - (a)(i) tortious act or omission wholly or partly in AU
    - **Distillers TEST:** if the act on the part of the D which gives the P his cause of complaint occurs within the J then that ct has the J
    - **Dow Jones:** Defamation is located at the place where the damage to reputation occurs
    - **Sigma:** tort occurs where misleading or deceptive statement received
  - (a)(ii) damage from tortious act or omission wholly or partly in AU
    - **Darrell:** Injury = actionable wrong. Damage = means loss/harm occurring in fact, whether actionable as an injury or not. Broader than injury
    - **Sigma followed Darrell:** loss suffered by Sigma in NSW because it was where Sigma was incorporated and carried on business

- **Flaherty:** Damage includes consequential loss (e.g. financial) wholly or partly suffered in NSW
- **Four Seasons:** UK different from AUS. In UK, “damage” = direct damage. Damage to the interest protected is sustained in country A where P has been injured. The pecuniary measure of that damage may be medical costs in B or earnings lost in C.
  - Does not require all damage to be sustained in Eng; enough if “some significant damage” had been sustained or the tort was in substance committed there.
- Recovery of damages (**Pt 10 r1A(1)(e)**)
  - If appellants committed tort of negligence in NSW or abroad, the damages occur in NSW.
  - If no duty to act = no tort of negligence (**Agar**). Rugby union: voluntary participation and assume risks.

## 5. Discretionary non-exercise of jurisdiction. I.e. will a ct that has J, exercise its J?

### 1. Foreign jurisdiction clauses

1. Incorporation: Is there an effective jurisdiction clause?
  - Applicable law: law of the forum (**Oceanic SL, Venter**)
    - Apply law of the forum to see if the clause binds the relevant party (**Oceanic SL**)
    - Does the clause cover the relevant subject matter? (**Global, Telesto, ANZ**)
  - If YES, see 2
2. Interpretation/construction: Does it provide for exclusive or non-exclusive J?
  - Applicable law: proper law of the clause
  - **Fai:** Construction of contract with regard to circs surrounding entry into the contract as is permissible
    - Inclusion/exclusion of word “exclusive” not determinative
    - Mutuality of obligation not conclusive but may be helpful
    - Any language in clause/contract that points to intention for exclusivity.
  - If EXCLUSIVE, ct has discretion to decide whether to stay or not. See 3
3. Ct’s discretion stay/not to stay:
  - **TEST:** If exclusive J exists, is there a “strong ground” for refusing to order stay? (**Akai, Venter**)
  - **Akai:** choice of ct cl indicates intention that law of that country be the proper law of the k. Cts may disregard cl if it contravenes the “policy of the law”, determined by considering the scope & purpose of the statute. Here, no evidence of the principles of law that would be applied by English cts.
  - **Incitec:** Inconvenience (includes financial) to a 3rd party, effect on due administration of justice (**Telesto**), and public policy issues can be considered in weighing up whether there’s a “strong ground”
  - **Global Partners**
    - Subject matter scope: “in connection with” & “whether/not governed by laws of Engl.” = broad.
    - Party scope: non-parties to agreement may still gain rights under agreement – interpretation.
  - **Telesto:**
    - Res judicata: matter has been adjudicated by competent ct – estoppel for proceedings in another ct on the same subject matter
    - Abuse of process: ct’s procedure invoked for illegitimate process or unjustifiably oppressive or brings administration of justice into disrepute
  - **ANZ:** Singapore proceeding for recovery of loan, QLD proceeding for recovery of possession of land
  - **AK:** A real risk that justice will not be obtained in the foreign ct because of corruption
    - Comity requires ct be extremely cautious b4 deciding there’s a risk - requires cogent evidence
  - If NZ ct involved, TTPA Applies:
    - **TTPA s20(1)(a):** If stay is sought, then AU ct must uphold exclusive jurisdiction clause in favour of NZ ct, subject to some exceptions including:
      - a) null and void under NZ law (including its PIL)
      - b) made by party lacking capacity to conclude it under AU law
      - c) would lead to “manifest injustice or manifestly contrary to AU public policy”
      - d) Cannot be performed for exceptional reasons beyond the control of the parties
      - e) The ct designated has decided not to determine the matters in issue

### 2. International cases – “Clearly inappropriate forum”

1. Set the Rule
  - English approach: The foreign ct is a more appropriate forum (**Spiliada**)
    - Ct will consider convenience, expense (e.g. witnesses), law governing the transaction, and where the parties reside or carry on business to determine if other forum is more appropriate.
  - AU approach: reject Spiliada