

Introduction

What is the civil justice system?



The civil justice system constitutes the institutions, personnel and procedures for ensuring observance of behavioural norms:

- by individuals
- by organisations and corporations
- by government and State apparatus

Why is the existence of the civil justice system so important?

Rationale that without it, citizens who feel as if they have been wronged will resort to violence to make amends.- Aka resort to their own form of justice.

Murray Gleeson, 'The purpose of litigation' (2009) 83 Australian Law Journal 601, 602:

'[T]he method by which the state – the government - enforces the legal rights and obligations of citizens. The law, whether enacted by Parliament or declared by judges, defines those rights and obligations.'

'Justice has a civilizing effect upon power, whether that power be formal or informal, official or unofficial, public or private. To most people, a lawsuit is a last resort; one never likely to be used. But they understand that, without that possibility, the unchecked power of bureaucracy, or private forces, would subject them to intolerable stress.'

Central Asbestos Co Ltd v Dodd [1972] 2 All ER 1135,1153 (per Lord Simon of Glaisdale):

Litigation is the resolution of civil contention by methods preferable to violence.

What is the general process of civil litigation?

- Pre-action procedures
- Commencing proceedings
- Defining the issues
- Interlocutory applications
- Gathering information
- Interlocutory applications
- Settling cases
- Trial
- Costs
- Enforcement and execution
- Appeals

What are the sources of procedure?

Processes provided by the State whereby civil disputes are resolved

- Acts of parliament
- Cases
- Rules of the court
- Practice directions/supplementary rules
- *Supreme Court Rules*
- *Supreme Court supplementary Rules*
- *Supreme Court Fast-Track Rules*

Emerging Concept: Case Management

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175

- Case established concept
- Court control of the cause of action to prevent inappropriate conduct of parties and prevent avoidable delays

Where do courts vest their power?

<i>Supreme Court Act 1935</i>	Section 17	Comprehensive list of powers and courts
<i>District Court Act 1991</i>	Section 8	Comprehensive list of powers and courts. Most matters go here.
<i>Magistrates Court Act 1991</i>	Section 8	Can award any monetary value up to \$100,000 (plus minor civil claims up to \$12,000)

What federal courts exist?

Federal Circuit Court	Exercises the jurisdiction of both Federal and Family Court for lower level matters <i>Federal Circuit Court of Australia Act 1999 (Cth)</i>
Family Court of Australia	Family law matters see <i>Family Law Act 1975 (Cth) s 31</i>
Federal Court of Australia	Any (civil) matters arising under a federal law <i>Judiciary Act 1903 (Cth), s 39B</i>

Commencing Proceedings

Jurisdiction - Where can we go?

I. Territorial - What state/country can the dispute be initiated?

Current Rules:

Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)

Service and Execution of Process Act 1992 (Cth)

Can go to any Supreme Court in any state.

Jurisdiction of Courts (Cross-vesting) - Section 5

Court has power to refer matters to another court as it finds appropriate.

Voth v Manildra Flour Mills (1990) 171 CLR 538

Defending party can challenge where the case is heard. Based on the 'clearly inappropriate forum' test.

EXCEPTION!

Federal Court cannot hear Supreme Court matters (re HCA ruling)

Service outside Australia



Hague Convention RR 41A-41L

Can serve any signatory to the convention.

Voth

When serving outside Australia the court will consider if the Australian court is clearly an inappropriate forum to hear the matter

Supreme Court Civil Rules

R 40A

When incident occurs under specific matters - usually breach of contract and committing tortious act.

R 40B

Court can grant leave to serve someone outside Australia. But needs to be some nexus to Australia.

Originally under Common Law:

About ability to physically serve a writ within territorial boundaries:

Laurie v Carrol (1948) 98 CLR 310, 322

- common law ... writ does not run beyond limits of state'
- 'amenability [of D] depends upon nothing but presence within the jurisdiction'
- 'where a writ cannot legally be served ... the court can exercise no jurisdiction'

II. Subject Matter - What matter of law does this dispute concern?

Supreme Court Act 1935	Section 17	Can here almost any dispute. Apart from federal matters which go to the Supreme court. ANYTHING
District Court Act 1991	Section 8	(1) Has the same jurisdiction as the Supreme Court! Most matters go here. (a) Cannot here matters relating to <u>probate</u> or <u>admiralty (proving a will)</u> . (4) Can hear anything that an act confers upon it. ANYTHING EXCEPT PROBATE (WILLS)
Magistrates Court Act	Section 8(1)	(1) Can hear any matter where the amount claim does not exceed \$100,000. (plus minor civil claims up to \$12,000) (2) Unless parties agree to waive that limit. ANYTHING UP TO \$100,000

Cost Implications - How much do I need to get awarded in order to have the defendant pay for legal fees?

Strategy – The District Court is the most strategic court to file in because you can be awarded more than in the Magistrates, without a costs waiver, which is limited to ... but you do not run the risk of failing to reach \$120 as an award and thus having an adverse costs award made against you.

** For the purpose of answering this question, assume the case will be in the Supreme Court, thus the SCCR applies.**

Supreme Court Civil Rules	R263(2)(g)	Must get at least <u>\$120,000</u>
District Court Civil Rules	R263(2)(g)	Must get at least <u>\$60,000</u>

S 5 Jurisdiction of Courts (Cross-vesting) Act	Court will transfer the case to the most appropriate court to deal with the matter. <i>BHP Billiton</i> The plaintiff's preferred court is not a relevant factor in deciding which is the most appropriate court
S 8 Jurisdiction of Courts (Cross-vesting) Act	Supreme Court can transfer a case into its jurisdiction from a lower court if there are grounds to

Parties - Can the plaintiff/defendant be sued/sue?

I. Does the person have legal capacity?

<p>Important questions:</p> <ul style="list-style-type: none"> • Who are the potential parties? • Which parties have the money? <p>o No point suing a party who will not be able to satisfy the judgment</p> <ul style="list-style-type: none"> • Which parties are easiest to establish liability against?
<ul style="list-style-type: none"> • Disability (needs litigation guardian) - RR 78-79
<ul style="list-style-type: none"> • Bankrupt companies/Companies in liquidation - probably not best to sue as will end up as creditor. <ul style="list-style-type: none"> • Proceedings cannot be commenced against a bankrupt without leave from the court (<i>Bankruptcy Act</i>) • Provisions exist under the <i>Corporations Act (Cth)</i> limiting the capacity to sue or continue proceedings against companies in liquidation without leave from the court
<ul style="list-style-type: none"> • Government can be sued
<ul style="list-style-type: none"> • Partnerships and unincorporated bodies can be sued in group's name (RR 85-88)
<ul style="list-style-type: none"> • Business names, partnerships and unincorporated associations sued under their business name (personal details provided later) - rr 85-88

Intervenens and Amicus Curiae - What if a third party is interested in the outcome?

<p>Supreme Court Civil Rules r 89(1)</p>	<p>Can be made a party upon application to the court. Very rarely occurs. Must have substantial impact on party.</p>
	<p>R 89(2) In making an application to intervene it must include: the nature of the potential intervener's interests, the motivation for seeking permission to intervene, and the extent of the intended intervention</p>
	<p><i>Levy v Victoria</i> Party will be allowed to join if court of opinion that it will assist in proceedings.</p>

Representative Actions/Class Actions

<p>Supreme Court Civil Rules r.80-81</p>	<p>If a group has a common interest in a case, representative may join defence.</p>
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Secondary Actions

<p>Supreme Court Civil Rules r 35.</p>	<p>Cross-Action/Contribution Notice Defendant 1 can put a claim against defendant 2, to decide who is liable to pay for costs,</p>
<p>Supreme Court Civil Rules r 36.</p>	<p>Third-party Action Where a defendant sues someone else (ie. An insurance company)</p>

	<p>The defendant issues a third-party notice to the third party, notifying the third party that the defendant is claiming from the third party whatever relief may be ordered against the defendant by a successful plaintiff in the initial action</p> <ul style="list-style-type: none"> • Court can allow third party to contest the claim by the original plaintiff but generally their position is to contest the claim made by the defendant against them • Court can order a separate proceeding if there is not sufficient nexus between the third-party action and original case or the differences are such it would extend or complicate the original action • This means the primary action is between P V D and the secondary is D1 V D2.
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Joinder of Actions - Can certain claims be joined?

Supreme Court Act s 27.	For the efficiency of the court process the bringing of multiple separate actions between parties is avoided
Supreme Court Civil Rules r 30(4)	Instead there can be multiple causes of action in one claim
Supreme Court Civil Rules r 31(1)	Multiple actions can be consolidated into one either by the court's own initiative or on the application of a party (

Joinder of Parties - Can certain parties be joined?

Supreme Court Civil Rules r 74.	<p>Court can order that a party must join if satisfied that:</p> <p>(a) The party has an interest in the dispute</p> <p>(b) Cooperation is required to enforce the judgement</p> <p>(d) It is needed to ensure that all issues are dealt with.</p> <p>(e) to avoid multiple proceedings.</p>
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Practicalities

I. Limitation of Actions - Does this action fall outside a time limit?

Contract and Torts - 6 years	Limitations of Actions Act s 35
Personal Injury - 3 years	Limitations of Actions Act s 36
Can have time limit extended upon application, if new and significant information has appeared within 12 months of expiration.	Limitations of Actions Act s 48(3)(b)

II. Pre-action notice and settlement - Time to let the defendant know!

<p>Supreme Court Rules r 33.</p> <p>1. Defendant must be informed of action:</p> <table border="1" style="width: 100%;"> <tr> <td style="background-color: #ffe0b2;"><u>90 days</u> for personal injury.</td> <td style="background-color: #ffe0b2;"><u>21 days</u> for other matters</td> </tr> </table> <p>This notice must substantiate the claim and costs involved.</p> <p>2. Defendant has this amount of time to respond:</p>		<u>90 days</u> for personal injury.	<u>21 days</u> for other matters
<u>90 days</u> for personal injury.	<u>21 days</u> for other matters		

CHECKLIST

COMMENCING PROCEEDINGS

CASE MANAGEMENT

CLARRIFYING ISSUES/TOOLS

- PLEADINGS
- INTERLOCTARY PROCEEDINGS
- NOTICE TO ADMIT
- PRE-TIAL EXMINATION BY QUESTION
- MEDICAL EXAMINATION

PRE-TRIAL DETRIMINATION

- AUTOMATIC DEFAULT JUDGEMENT
- SUMMARY JUDGEMENT
- TERMINATION BY PARTY

PRE-TRIAL TOOLS

- PRESERVATION ORDER
- SEARCH AND SEIZURE
- FREEZING ORDER
- RECIEVER
- SECURITY FOR COSTS
- INJUNCTION

GATHERING INFORMATION (DISCLOSURE)

PROMOTING SETTLEMENT

- PRE-TRIAL OFFER
- FORMAL OFFER
- INFORMAL OFFER

ADR

- MEDIATION
- ARBITRATION

COSTS

APPEALS

- ERROR OF LAW
- ERROR OF DISCRETION
- INCORRECT INFERENCE FROM FACT
- INCORRECT FINDING OF FACT

ENFORCEMENT AND EXECUTION

- SALE, SEARCH AND SIZURE
- GARNISH ORDER
- CHARGING ORDER
- APPOINTMENT OF RECIEVER
- SEQUESTRIAN
- CONTEMPT OF COURT